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EDITOR
Virender Sharma
Director,
H.P. Judicial Academy,
Distt. Shimla.

ASSISTANT EDITOR
Dr. Abira Basu
Deputy Director,
H.P. Judicial Academy,
Distt. Shimla.

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HIMACHAL SERIES

(July - August, 2018)

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Title: M/s RP Earthmovers & Builders Vs. M/s IL & FS Engineering & Construction Company ltd. Page-281

Arbitration and Conciliation Act, 1996- Section 34- Objections to award regarding grant of interest - Arbitrator granting pre and post pendente lite interest on amount found due to contractor – District Judge relying upon clause 33 of agreement prohibiting grant of any such interest, setting aside award of arbitrator and remitting matter to him for reconsideration – Appeal against – Held, said condition (Clause 33) applies to parties to agreement and not to arbitrator – Clause has relevance with respect to routine transaction during execution of work before arising of dispute and reference thereof to arbitrator – Appeal allowed – Judgment of District Judge set aside – Award of arbitrator upheld.

Title: Kapil Dev Bansal Vs. H.P. Urban Development Authority Page-437

Arbitration and Conciliation Act, 1996- Sections 11 and 16- Appointment of Arbitrator – Neutrality Principle - Whether an employee of a party to dispute, can be an arbitrator? - Held, Arbitrator, who is an employee of one of the party, is ineligible to act as an arbitrator – Therefore, Superintending Engineer Arbitration Circle, HP PWD cannot act as an arbitrator in a dispute between HP PWD and a contractor – High Court appointed an Advocate as an Arbitrator instead of Superintending Engineer and asked him to enter into reference.

Title: Sandeep Negi Vs. State of Himachal Pradesh and another Page-31

Arbitration and Conciliation Act, 1996- Sections 11(6) and 12- Appointment of arbitrator – Neutrality Principle - Applicant seeking appointment of neutral and impartial person as arbitrator in place of person named arbitrator in agreement on ground that named Arbitrator remained architect of respondent – Respondent not disputing that named arbitrator was its architect – Held, in view of Section 12 of Act person having relation with parties or with subject matter of dispute falling in any categories specified in Schedule, is ineligible to be appointed as arbitrator – High Court appointed arbitrator of its own and asked him to enter into reference – Application allowed.

Title: M/s Mani Buildtech Private Limited Vs. Magic Landbase Private Limited Page-406

Arbitration and Conciliation Act, 1996- Sections 11(6), 12(1)&(5), 29(A) and Seventh Schedule – Appointment of arbitrator – Neutrality principle - Petitioner/contractor as per term of contract submitting arbitration claim to Chief Engineer and requesting him for appointment of arbitrator – Chief Engineer appointing Superintending Engineer (Arbitration) as Arbitrator – Appointment opposed by petitioner and Superintending Engineer also intimating Chief Engineer that in view of

amendment in Section 12 of Act, he cannot act as arbitrator - Chief Engineer then appointing another Superintending Engineer, HP PWD as arbitrator – Arbitrator appointed subsequently could not complete proceedings within time as stipulated under Section 29-A of Act and requesting Chief Engineer to appoint another arbitrator – In the meanwhile, Contractor approaching High Court for appointment of arbitrator – Held, main purpose for amending Section 12 of Act by way of Amendment Act, 2015 is to provide for neutrality of arbitrator – Any person who has relationship with parties or counsel or subject matter of dispute falling under any of categories in Seventh Schedule, is ineligible for appointment as arbitrator, notwithstanding existence of any such arbitration clause in the agreement – In such circumstances, High Court can appoint Arbitrator as may be permissible – High Court itself appointed Arbitrator and asked him to enter into reference.

Title: Tilak Raj, Contractor Vs. Chief Engineer (MZ) and another Page-226

Arbitration and Conciliation Act, 1996- Sections 12, 14 & 15- Termination of mandate of arbitrator – Appointment of fresh arbitrator – Circumstances – Failure to act – After setting aside of previous award by High Court and on request of petitioner-contractor, department appointing Chief Engineer (Commercial) as fresh arbitrator – Such arbitrator failed in conducting single hearing in six years since appointment despite requests of petitioner – Contractor approaching High Court and seeking termination of mandate and appointment of fresh arbitrator – Held, Section 14 of Act provides for termination of mandate when there is failure on part of arbitral tribunal to discharge its function either de jure or de facto - Aggrieved party can approach court for termination of mandate – High Court found failure on part of arbitrator to perform his function – Mandate of Chief Engineer (Commercial) ordered to be terminated High Court appointed a Senior Advocate as arbitrator and asked him to enter into reference.

Title: M/s Ranjeet Singh and Company Vs. HP State Electricity Board Ltd. and Anr. Page-441

Arbitration and Conciliation Act, 1996- Sections 14 and 15- Appointment of new arbitrator – Arbitrator not deciding matter and passing award before the date stipulated by High Court – Petitioner-contractor filing petition before High Court and praying for termination of his appointment and replacement by new Arbitrator – However, it was found that Arbitrator could not proceed further because Measurement Books of work in question were with Vigilance and Anti Corruption Bureau, Bilaspur – Petition disposed of with direction to Dy. S.P. Vigilance and Anti Corruption Bureau to produce record before Arbitrator – Arbitrator also directed to decide matter within three months.

Title: Parmod Sood Vs. State of H.P. and others Page-235

'C'

Code of Civil Procedure, 1908- Section 9- Model Standing Orders – Clause 16(g) and (h) – Jurisdiction of Civil Court – Delinquent workman filing suit and challenging findings recorded against him by Inquiry Officer after holding domestic inquiry – Delinquent also seeking temporary injunction - His application for stay dismissed by Trial Court and appeal against that order by First Appellate Court – Petition against – Petitioner/plaintiff submitting that relationship of employer and employee being result of contract, remedy before Civil Court is not barred - Held, delinquent voluntarily participated in domestic inquiry conducted in consonance with Model Standing Orders – He opted to redress his grievances through mechanism contained in Industrial Disputes Act – Hence further, remedy to aggrieved workman, if any, is under the Industrial Dispute Act –Suit for challenging Inquiry report not maintainable – Petition dismissed.

Title: Kitish Kumar Vs. Procter & Gamble Home Products Pvt. Ltd. Page-206

Code of Civil Procedure, 1908- Section 10- **Himachal Pradesh Court Fees Act, 1968–** Section 7(iv)(c)- Stay of subsequent suit – Requirements to be proved – Plaintiffs filing suit in High Court

for declaration claiming succession to estate of 'K' on basis of Will dated 28th December, 2010 – Also seeking decree of permanent prohibitory injunction against defendants – Defendant No. 3 filing application under Section 10 of Code seeking stay of suit on ground that a suit involving same parties and same subject matter was already pending before Civil Judge (Jr. Division) Kangra – Plaintiff admitting pendency of suit interse the parties at Kangra but resisting stay of suit on ground that market value of suit property was beyond the pecuniary jurisdiction of Civil Judge (Jr. Div.), Kangra – Defendant No.3 however submitting that suit filed in High Court was overvalued in order to avoid jurisdiction of Civil Judge – High Court found that suit filed by defendant No.3 in the Court of Civil Judge (Jr. Div.) Kangra was also a suit for declaration and injunction – She was claiming succession to part of estate of 'K' by virtue of Will dated 20th June, 2013 as widow of 'K' – She was seeking relief of prohibitory injunction only – Relief of possession was sought in alternative in event of her dispossession during pendency of suit – Held, both suits fell within Section 7(iv)(c) of Act – Plaintiffs were not required to assess valuation of suit for Court fees and jurisdiction ad valorum – The suit filed by plaintiff in High Court was held to be overvalued and in fact, was maintainable before Civil Judge – Parties and subject matter in both suits were same – In peculiar circumstances, High Court transferred suit pending before it, to Civil Judge (Jr. Div.), Kangra with direction to try and dispose of both suits together in accordance with law.

Title: Raj Kumar Vs. Ashwani Kumar and others Page-174

Code of Civil Procedure, 1908- Section 89- **High Court of Himachal Pradesh Civil Procedure Alternative Dispute Resolution and Mediation Rules, 2005-** Rules 24 and 25- Mediation- Nature of proceedings – Role of Mediator etc. – Held, Mediation is a process by which mediator so appointed mediate in dispute between parties – Role of mediator is to facilitate discussion between parties by whatever mode – He is to assist parties in identifying issues, reduce misunderstandings, clarify priorities and explore areas of compromise – Mediator is not an Arbitrator.

Title: Narinder Kumar Vs. Rohit Madan & others Page-491

Code of Civil Procedure, 1908- Section 89- **High Court of Himachal Pradesh Civil Procedure Alternative Dispute Resolution and Mediation Rules, 2005-** Rules 24 and 25- Rules specifically require that agreement before Mediator if made shall be reduced into writing and signed by parties or their power of attorney holder(s) – If Counsel have represented parties, they shall attest the signatures of their respective clients – Mere statements of parties or counsel made before mediator have no relevance – Proceeding before mediator do not form settlement as an executable decree – Unless and until court passes an order in terms of and as stipulated in Rule 25, compromise recorded by Mediator cannot be said to be binding on parties – On facts, High Court found that Settlement arrived at before Mediator was on account of misunderstanding of instructions conveyed to advocate by client- Held, parties had not amicably settled their dispute and thus settlement was not binding on landlord.

Title: Narinder Kumar Vs. Rohit Madan & others Page-491

Code of Civil Procedure, 1908- Section 100 – Substantial Question of Law, What is? – Held, Misconstruction of a document is a question of law – And if it has material bearing on decision of case, it is substantial question of law and Regular Second Appeal, would be maintainable.

Title: Chimanu Vs. Chamaru and another Page-40

Code of Civil Procedure, 1908- Section 100- Order XLI Rule 4- Second appeal- Whether maintainable at instance of persons who were not parties in First appeal – Appellants did not file any appeal against decree of Trial Court before District Judge – First Appellate Court upholding decree of Trial Court – Appellants filing Regular Second Appeal before High Court against decree of District Judge though they were not parties before him in First appeal – Held, where there are

more than one defendants who are equally aggrieved by decree on ground common to all of them and despite that one of defendants challenged decree in his own right by filing first appeal and other defendants do not challenge decree by first appeal, even then such defendants can maintain Second Appeal – After all, object of Order XLI Rule 4 of Code is to enable one of parties to suit to obtain relief in appeal when decree appealed from proceeds on any ground common to appearing party and other similarly situated parties – Second appeal held maintainable.

Title: Gulab Singh and others Vs. Balbir Singh and others Page-619

Code of Civil Procedure, 1908- Section 148- Extension of time – Decree of specific performance of agreement to sell - Trial Court passed decree in favour of plaintiff/D.H. subject to his paying balance sale price to judgment debtor within one month of decree – Decree assailed by defendant/J.D. by way of first and second Appeal(s) – Second appeal dismissed by High Court on 13.7.2011 – Plaintiff/D.H. not tendering balance sale price nor filing application under Section 148 of Code for extension of time within one month on and w.e.f. 13.7.2011 (when RSA was dismissed) – D.H. filing execution application and during those proceedings filing application under Section 148 of Code and seeking extension of time for tendering balance sale price – Executing Court allowing such application of D.H. – Petition against – Held, D.H. was required to show good and sufficient cause which prevented him to mete compliance with condition precedent or avail mandate of Section 148 of Code earlier - Executing Court went wrong in allowing deposit of balance sale consideration with it – Petition allowed – Order of Executing Court set aside.

Title: Bhajan Vs. Dharam Parkash & Ors. Page-104

Code of Civil Procedure, 1908- Section 151- Enforcement of injunction order - Police assistance – Trial Court temporarily restraining defendants from raising construction over land in possession of plaintiff and also from blocking back door of his office – Plaintiff seeking police assistance for enforcing order – Trial court appointing Local Commissioner for spot investigation – Report of Local Commissioner prima facie also confirming plaintiff's possession and blockade of his entry – Trial Court granting police assistance for enforcing temporary injunction– Challenge thereto – Held, temporary injunction was not challenged by defendants – Allegations of plaintiff prima facie stand corroborated from report of Local Commissioner – Only question of enforcement of order was involved - Therefore, Trial Court was within its ambit to provide police assistance – Petition dismissed – Order upheld.

Title: Rinku Sharma & another Vs. Susheel Kumar Page-287

Code of Civil Procedure, 1908- Section 151- Inherent power – Exercise of – Principles – Adduction of additional evidence – Trial Court allowing adduction of additional evidence on behalf of plaintiff though it had heard arguments – And earlier, evidence of plaintiff was closed by Court itself when he failed to bring evidence despite various opportunities – Petition against – Held, Despite various opportunities no evidence was led by plaintiff and it was closed by Court - Order had attained finality – Exercise of inherent power should be prudent and cautious – Court must consider perspectives of both sides – No reason was given for allowing such application at belated stage – Petition allowed – Order set aside.

Title: Mohan Singh and others Vs. Tilak Raj urf Ang Page-402

Code of Civil Procedure, 1908- Section 151- Order 1 Rule 10- Impleadment of party – When can be made? – Plaintiffs 'S' and 'A' filed suit against defendants – During pendency, 'A' withdrew from suit – 'S' then filing application before Trial Court for impleading 'A' as proforma defendant – Trial Court rejecting this application of 'S' – Petition against – 'S' arguing before High Court that if 'A' is not permitted to be impleaded as defendant, his suit would be rendered defective – Held, when 'S' choose to implead 'A' only as a proforma defendant against whom no relief is claimed then suit

cannot be said to be fatal for sole plaintiff 'S' on account of non-impleadment of 'A' as a proforma defendant – Petition dismissed – Order of Trial Court upheld.

Title: Sunil Kumar Vs. Dina Nath and others Page-262

Code of Civil Procedure, 1908- Sections 151 to 153- Order XXI Rule 66- Correction of sale certificate – On finding that sale certificate issued in favour of Decree Holder did not contain entire particulars of immovable property which was attached and auctioned, Executing Court ordering correction – Petition against – Petitioner, a third party not disputing attachment and subsequent auction of said land in favour of Decree Holder – Disputing correction of Sale Certificate on ground that land was ancestral – Held, it was not open to petitioner to raise objection as to validity of attachment of land, after confirmations of sale – On proclamation of sale issued by Court, land now sought to be incorporated in sale certificate by way of correction, was attached and then sold in auction to Decree Holder – Since, it was not included in Sale Certificate, Executing Court was justified in ordering its correction – Petition dismissed – Order of Executing Court upheld.

Title: Ashok Kumar alias Harbans Lal Vs. Santosh Kumar Sood and another Page-567

Code of Civil Procedure, 1908- Order 1 Rule 10 – Impleadment of party, when can be made- In a suit for permanent prohibitory and mandatory injunction, defendants taking plea that suit was bad for non-joinder of 'B', their brother as suit land was jointly owned by them, 'B' and plaintiff – Plaintiff then filing application for impleading legal representatives of 'B' as co-defendants – Trial Court dismissing application on ground of having filed it belatedly – Petition against- Held, a party can be impleaded to avoid multiplicity of litigation and for ensuring rendition of binding and effective decree upon all litigants concerned.

Title: Sohan Lal Vs. Lekh Ram & others Page-224

Code of Civil Procedure, 1908- Order 1 Rule 10- Impleadment of a party - When can be ordered? – Plaintiffs selling their equity shares in a company to defendants and on the failure of latter to pay balance amount of shares, filing suit for recovery – Defendants refuting their liability – Plaintiffs filing application under Order 1 Rule 10 of Code for impleadment of one 'B' as proforma defendant on ground that 'B' is one of the beneficiary under agreement in question – High Court observed that as per agreement, defendants were to pay certain amount to 'B' and in lieu thereof they had also given post dated cheques to 'B' – Held, amount, if any, was to be paid to 'B' by defendants alone and in event of non-payment thereof, it was 'B' , who was required to take action under law – Plaintiffs cannot hold brief on behalf of 'B' by seeking his impleadment – No relief as such was being prayed against 'B' in the suit – 'B' was not a necessary or proper party to the suit – Application dismissed.

Title: Gajju Ram Vs. Jindu Ram (deceased through LRs and others Page -276

Code of Civil Procedure, 1908- Order 1 Rule 10- Impleadment of party – Recovery suit – Plaintiffs vide agreement sold their equity shares in a company to defendants – On failure of defendants to pay balance sale price, plaintiffs filing suit for recovery and during its pendency seeking impleadment of one 'B' as proforma defendant on ground that 'B' is also one of the 'beneficiary' under agreement in question and requires to be impleaded as proforma defendant – And his exclusion from suit would lead to multiplicity of litigation – Held, no relief whatsoever has been prayed for by plaintiffs against 'B' – 'B' may be a beneficiary under the agreement and that amount is to be paid to him by defendants, but plaintiffs cannot hold brief for 'B' in matter between him and defendants – 'B' not being necessary or proper party to lis – Application for his impleadment dismissed.

Title: Ravinder Kumar Bansal and others Vs. Pankaj Gupta and others Page-299

Code of Civil Procedure, 1908- Order VII Rule 11- Rejection of plaint – Partial partition – Trial Court dismissing defendant's application for rejection of plaint filed on ground that suit was for partition of only part of joint property – Petition against – High Court found that suit, infact was for partial partition yet upheld order of trial court on plaintiff's request of moving appropriate application before Trial Court for incorporating left out property in suit – Petition dismissed.

Title: Om Prakash and others Vs. Saroj & anr. Page-535

Code of Civil Procedure, 1908- Order VIII Rule 1 –Written Statement – Extension of time – When can be ordered? – Defendants were served on 16.9.2017 and sought many opportunities in filing written statement – On 16.1.2018 application was filed for extension of time in filing written statement, which was allowed by Trial Court on same day – Petition against – On facts, it was found that application was neither signed by any of defendants nor supported by an affidavit – No opportunity of filing reply to that application was given to plaintiffs – Order was also unreasoned showing non-application of mind by Trial Court – Petition allowed – Order of Trial Court set aside – Matter remanded with direction to afford opportunity to plaintiffs to file reply to such application and then decide it in accordance with law.

Title: Gurudwara Bei Sehjal Babehar through its President, Capt Mohinder Singh (Retd.) Vs. Gurparkash and others Page-233

Code of Civil Procedure, 1908- Order XXI Rule 11(2)- Execution of decree- Objections thereto – Judgment debtor objecting execution on grounds (i) decree did not specifically grant relief of possession of suit land and (ii) D.H. is non-agriculturist of Himachal Pradesh, and he cannot be put into possession of land in execution of decree in view of Section 118 of H.P. Tenancy and Land Reforms Act (Act) – Objections of judgment debtor dismissed by Executing Court – Petition against - Held, Executing Court though cannot go beyond decree under execution but at the same time its duty is to find out its true effect which can only be done by construing decree – Section 118 of Act is prospective in nature on facts, D.H. was held entitled for possession of land in question – Further, land was found purchased by D.H. in 1966, when Act had not come into operation – Objection of J.D. thus held to have rightly been rejected by Executing Court – Order upheld – Petition dismissed.

Title: Subhash Chand Vs. Bhim Sen Page-51

Code of Civil Procedure, 1908- Order XXI Rule 32- Mandatory injunction, decree of – Execution – Limitation – Computation of – **Limitation Act, 1963-** Article 135- District Judge while allowing appeal of defendants, partly decreeing suit – Directing defendants by way of mandatory injunction to demolish room raise by them over common passage and remove debris from plaintiff's land within three months – District Judge passed decree of mandatory injunction on 12.9.2000 – RSA of defendants and cross-objections of plaintiff dismissed by High Court on 2.11.2006 – Original plaintiff selling land to DH vide sale deed dated 3.11.2006 – DH/vendee filing execution application - Executing Court dismissing execution application on ground that it became enforceable within three months after pronouncement of judgment dated 12.9.2000 and execution application if any ought to have been filed within three years from 12.12.2000 – Revision against – On facts, it was observed that during pendency of RSA, High Court had directed parties to maintain status quo qua nature and possession of property in dispute – And as long as that order was subsisting, Trial Court could not have enforced the decree of mandatory injunction – Regular Second Appeal came to be decided on 2.11.2006 and decree passed by Trial Court/First Appellate Court finally merged with decree of High Court and became executable – Execution application filed on 22.10.2007, thus was within limitation – Petition allowed – Order of Executing Court set aside and it is directed to restore application and execute decree in accordance with law.

Title: Paritosh Chauhan Vs. Anil Mohil and others Page-339

Code of Civil Procedure, 1908- Order XXII Rules 3, 4 and 9 – Substitution of legal representatives of deceased party – Effect of, in not taking such steps – Held, if application for substitution of legal representatives of a deceased party is not filed, within prescribed time, suit/appeal will abate – Abatement is automatic – Question of abatement is to be decided by that Court where the suit or appeal was pending at the time of death of a party – If factum of death went un-noticed and the Court decides the suit/appeal, such decree is a nullity and can be challenged even at the execution stage – As the First Appellate Court had decided appeal without taking note of death of 'S' (D10) which had taken place when appeal was pending before it, the decree of First Appellate Court is held nullity and set aside – Matter remanded to First Appellate Court to allow plaintiffs to file application for substitution etc. and then decide question of abatement of appeal.

Title: Title: Tara Wati & Others Vs. Suman & Others Page-182

Code of Civil Procedure, 1908- Order XXII Rules 4 and 9- Suit for permanent prohibitory injunction – Death of defendants – Substitution of LRs - Whether after death of defendant(s), cause of action survives and substitution of legal representatives of those defendants, can be ordered? – In a suit for permanent prohibitory injunction 'M' (D1) and 'N' (D4) died, during pendency of suit – Trial Court dismissing application for substitution of their legal representatives on ground of delay and that suit was at final stage of arguments – Petition against – Held, if decree of injunction is passed then the same can ultimately be executed even against the legal representatives of deceased judgment debtor – Maxim "actio personalis moritur cum persona" is limited to certain class of cases only – Trial Court went wrong in dismissing application filed for substitution of legal representative on ground of delay or that suit was at the stage of final arguments – Rather it was to decide the question of abatement of suit, if any, or condonation of delay caused in filing such applications – Petition allowed – Order of Trial Court set aside – Matter remanded for decision on application afresh in the light of observations made in the order.

Title: Pavnesh Kumar Vs. Madho Ram now deceased through his LRs and others Page-145

Code of Civil Procedure, 1908- Order XXXIX Rules 1 & 2 – Temporary prohibitory Injunction- Existence of prima facie case, necessity of – Plaintiff filing suit and seeking injunction against defendants from running industry adjoining to his house, in a residential area, which according to plaintiff was causing noise pollution – Trial Court declining temporary injunction but in appeal, Addl. District Judge allowing plaintiff's appeal and granting ad interim injunction – Petition against – On finding that defendants were permitted to shift their industry to that locality by Department of Industries, Electricity connection to run industry was also sanctioned in their favour, High Court held that plaintiff had no prima facie case and balance of convenience in his favour – Further comparative mischief by way of temporary injunction would be more to defendants as industry would be closed – Petition allowed – Order of First Appellate Court set aside and of Trial Court restored.

Title: Vijay Kumar Vs. Subhkaran and another Page-291

Code of Civil Procedure, 1908- Order XXXIX Rules 1 and 2- Temporary injunction – Grant of – Plaintiff claiming possession over suit land by way of shed constructed by him some 40 years before- Defendants claiming their own possession over suit land by averring that it fell in their share during partition – Trial Court dismissing application of plaintiff seeking temporary prohibitory injunction against defendants – Appeal also dismissed by First Appellate Court – Petition against – Rapat Rojnamcha placed on record clearly shows that possession of entire land except the suit land was delivered to defendants in partition proceedings – Rojnamcha clearly demonstrating that shed over suit land was in possession of plaintiff – Held, plaintiff may be a trespasser, but he can be evicted in accordance with law – Petition allowed – Orders of Lower

Courts set aside – Parties directed to maintain status quo qua nature and possession of suit land during pendency of suit.

Title: Brij Lal Vs. Sanjay Kumar & Others Page-139

Code of Civil Procedure, 1908- Order 47 Rule 1- Review – When permissible and at whose instance? – Held, Review will be maintainable (i) on discovery of new and important matter or evidence which after due diligence was not within knowledge of petitioner or could not be produced by him (ii) mistake or error apparent on face of record or (iii) any other sufficient reasons – Minor mistakes of inconsequential import, is not a sufficient reason for review (iv) any person aggrieved from a decree or order can seek review thereof – Further held, A writ Court can exercise power of review on asking of a stranger, if Court finds error committed to be grave and palpable resulting into miscarriage of justice.

Title: Gram Panchayat Thunag Vs. State of Himachal Pradesh & others (D.B.)
Page-120

Code of Criminal Procedure, 1973- Section 173- Closure report – Magistrate accepted closure report and ordered cancellation of FIR by holding that deceased in his dying declaration had admitted of having committed theft from premises of accused and thereafter voluntarily jumping from double storeyed building – Petition against – Dying declaration neither sent to FSL for comparison with admitted writing/signatures of deceased nor the same was bearing fitness certificate of declarant issued by the Medical Officer – No fracture was found on body of deceased yet he jumped from double storeyed building – Held, acceptance of closure report and cancellation of FIR not based on proper appreciation of material on record – Petition allowed – Order set aside – Investigating Officer directed to re-investigate the case.

Title: Meenakshi Sharma Vs. State of H.P. & Others Page-280

Code of Criminal Procedure, 1973- Section 311 – **Negotiable Instruments Act, 1881-** Section 138- Additional Evidence –Adduction of – When can be availed? – Petitioner/accused filing application under Section 311 of Code in order to examine Manager of a bank to show that cheque in question was given by him to complainant bank as a 'security' – Complainant resisting application on ground that accused issued cheque only when complainant started auction process of his mortgaged land – Trial Court dismissing application of accused – Petition against – On facts, it was found that (i) accused had taken loan from complainant bank and prima facie the dishonoured cheque was issued by him towards discharge the said liability (ii) he had taken many opportunities for leading his evidence (iii) no cross-examination was done on banker's witness regarding non-production of loan file – Held, application filed for leading additional evidence was not bonafide and it was filed just to delay the proceedings – Petition dismissed – Order of Trial Court upheld.

Title: Santosh Rana Vs. The Kangra Co-op. Primary Agriculture & Rural Development Bank Ltd.
Page-59

Code of Criminal Procedure, 1973- Section 374- Appeal against conviction- Mode of disposal – Additional Sessions Judge dismissing such appeal of accused 'in default' for want of prosecution – Revision against – Held, Provisions of Code do not empower Additional Sessions Judge to dismiss appeal in default – Order being without jurisdiction set aside – Revision allowed – Additional Sessions Judge directed to restore appeal and decide in accordance with law.

Title: Kishori Lal Vs. Gian Chand & another Page-25

Code of Criminal Procedure, 1973- Section 386(b)(i)– Judgment of acquittal – Benefit of, by co-accused not appealing against judgment of conviction – Held, a co-accused convicted with help of same evidence is also entitled to be acquitted of charges framed against him if other co-accused

convicted on same evidence stands acquitted by higher Court, though he had not filed any appeal against his conviction – Appellant, 'J', 'L', 'S' and 'P' were convicted and sentenced by Trial Court for offences punishable under Sections 147 and 302 and 452 read with 149 of Penal Code – Appeals of 'J', 'L', 'S' and 'P' were allowed by High Court and their convictions were set aside – Appeals of State dismissed by Supreme Court – However, appeal of appellant remained pending in High Court – Held, conviction of appellant was also based on same evidence, and as conviction of other accused was set aside by High Court and their acquittal was upheld by Supreme Court, appellant was entitled for its benefit.

Title: Sukha @ Sawrup Chand Vs. State of H.P. Page-420

Code of Criminal Procedure, 1973- Section 397/401 – Revision – Maintainability – State filing a composite petition challenging order of Trial Court dated 17.9.2016 vide which prosecution evidence was closed and also order dated 15.3.2017 acquitting accused of offence under Section 109 of I.P.C. – Held, Revision against order dated 17.9.2016 was time barred and even no condonation of delay in filing petition was sought – Whereas remedy against judgment of acquittal dated 15.3.2017 was by way of appeal and not in filing revision – Petition dismissed.

Title: State of H.P. Vs. Randhir Singh & Another Page-261

Code of Criminal Procedure, 1973- Section 438 – Pre-arrest Bail- Grant of – Accused alongwith one 'S' allegedly wrongfully restrained and intimidated the complainant and video graphed her in a naked condition – Accused and co-accused 'S' also uploaded video graph on facebook – Accused seeking pre-arrest bail in aforesaid FIR registered for offences under Indian Penal Code and Information Technology Act - Accused taking plea of alibi and filing discharge slip of his mother issued by the Government Hospital – Investigating Officer submitting that discharge slip aforesaid was correct and there was no material so far against accused showing his involvement in the aforesaid offences – Application allowed and accused is admitted on pre-arrest bail subject to his joining investigation and not to tamper with prosecution evidence etc.

Title: Shushil Kumar Vs. State of Himachal Pradesh Page-97

Code of Criminal Procedure, 1973- Section 438 – Pre-arrest Bail- Grant of – Accused apprehending arrest in a case registered against him for assault, criminal intimidation, outraging of modesty of women and indecent behaviour – Accused denying involvement and alleging false implication – High Court found that accused was not named in FIR – Prosecutrix not giving key physical features of the assailants in her FIR – Further, there was no likelihood of accused fleeing away from justice or tampering with the prosecution evidence – Accused admitted on pre-arrest bail.

Title: Jaswinder Singh Vs. State of Himachal Pradesh Page-103

Code of Criminal Procedure, 1973- Section 438- Pre-arrest bail – Grant of – Petitioner apprehending arrest in case registered against him for offences under Sections 13(1)(e) and 13(2) of Prevention of Corruption Act and Section 120-B of I.P.C. – Allegations against him are that he enmassed assets disproportionate to known sources of his income – He allegedly purchased land benami in the name of 'P' and raised Villa over it – Petitioner/accused contending that incriminatory documents have already been taken into possession during search conducted at his residence and he had also joined investigation – State resisting bail on ground of seriousness of offences – Further, investigating agency had to recover some more documents – On finding that petitioner had joined the investigation and incriminatory documents had also been taken into possession, petitioner/accused was ordered to be enlarged on pre-arrest bail subject to conditions.

Title: Chandra Shekhar Singh Vs. State of Himachal Pradesh Page-193

Code of Criminal Procedure, 1973- Section 438- Pre-arrest bail- Grant of- Petitioner allegedly obtained agricultural loan from a bank by furnishing a forged jamabandi showing him owner of land, whereas he was found to be not the owner of said land – Petitioner apprehending arrest for offences punishable under Sections 420, 467, 468 and 471 of I.P.C. and praying for pre-arrest bail – On finding that case was based on documentary evidence and there was no chance of tampering with such evidence and also that petitioner had deposited some amount with bank, High Court granted pre-arrest bail subject to conditions.

Title: Nand Ram Vs. State of H.P. Page-337

Code of Criminal Procedure, 1973- Section 439- Bail- Grant of- Accused allegedly entered in chamber of Judicial Officer and threatened her with dire consequences if his case was not dealt with fairly – Accused also allegedly manhandled police officials and destroyed case property, when taken to police station from chamber of judicial officer - On facts, allegations made out against accused prima facie found to be doubtful – His custody not required for further investigation – Petition allowed – Bail granted subject to conditions.

Title: Mukesh Sharma Vs. State of H.P. Page-527

Code of Criminal Procedure, 1973- Section 439- Regular Bail – Grant of – Accused seeking regular bail in a case registered against him for house trespass and rape on and w.e.f. April, 2017 to August, 2017– Accused, who used to come to give tuitions to children of victim, allegedly recorded video of prosecutrix while taking bath by her and by blackmailing her, raped her – Accused submitting that he and prosecutrix were well known to each other and no case of rape is made out – State opposing bail on ground of seriousness of offences – High Court found that (i) accused and victim were known to each other since long (ii) incident of video-graphing of prosecutrix while taking bath and rape happened in April, 2017, however, FIR lodged in April, 2018 (iii) Cell Phone of accused was not found containing any video relevant to case (iv) investigation was complete – Accused ordered to be released on bail subject to conditions- Application allowed.

Title: Dinender Morya Vs. State of Himachal Pradesh Page-61

Code of Criminal Procedure, 1973- Section 439- Regular Bail – Grant of – Recovery of poppy husk – Accused was enlarged on bail on Court's order during investigation– After filing of charge-sheet, however, accused could not be served and eventually declared as a proclaimed offender – After arrest, accused seeking bail on ground that he was never served during trial of case – Contention of accused found correct - Accused granted regular bail subject to conditions.

Title: Joga Singh @ Mulakh Raj Vs. State of Himachal Pradesh Page-89

Code of Criminal Procedure, 1973- Section 439- Regular Bail – Grant of – Applicants-Accused, 'S' 'K' and 'M' were arrested for house trespass and attempt to murder – Accused seeking regular bail – High Court found that complainant 'AM' was got examined from Medical Officer at Tissa, who reported injuries as simple in nature but referred him to Government Medical College, Chamba and thereafter to Zonal Hospital, Nurpur for C.T. Scan – However, complainant got C.T. Scan done from private hospital, which reported displaced fracture of nasal bone and small subgalead haernating in occiput region – Injury thus was reported to be dangerous to life – Accused submitted that material on record didn't make out a case of attempt to murder - High Court found that there were contradictions in the allegations made in FIR vis-à-vis medical evidence as alleged assault with pickaxe was made on head, whereas grievous injury of nasal bone was detected only in the report of private hospital – No reason was given as why C.T. Scan was not conducted at Chamba or Nurpur – Application allowed – Accused-applicants admitted on regular bail.

Title: Shafi Mohhamad Vs. State of Himachal Pradesh Page-93

Code of Criminal Procedure, 1973- Section 439- Regular bail – Grant of – Petitioner/accused surrendered before High Court and prayed for bail in case registered for offences under Sections 376 and 506 of I.P.C. and Section 3(1)(w)(i) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 – The allegation was that the petitioner developed physical intimacy with prosecutrix on pretext of marriage but then refused to marry her – High Court found that (i) petitioner and prosecutrix were engaged and since then had been frequently meeting (ii) Alleged sexual abuse of prosecutrix took place on 2.11.2017, whereas FIR was registered on 4.6.2018, (iii) Prosecutrix found to be a married lady and thus there is force in argument of petitioner that since factum of prior marriage of prosecutrix came to his notice, he refused to marry her and (iv) Petitioner had joined investigation and his custody was not required – Regular bail granted subject to conditions.

Title: Ishant Kumar Vs. State of Himachal Pradesh Page-209

Code of Criminal Procedure, 1973- Section 439- Regular bail- Grant of – Accused-petitioner alongwith others went to Dhaba and allegedly picked up quarrel with 'P' , its owner regarding quality of food – He allegedly fired pistol shot at 'P' and 'H' leading to death of 'P' and serious injuries to 'H' – High Court found direct involvement of petitioner–accused in case – In view of nature and gravity of accusation, severity of punishment and likelihood of accused to tamper with prosecution evidence, High court refused to grant bail – Petition dismissed.

Title: Nikhil Vs. State of Himachal Pradesh Page-425

Code of Criminal Procedure, 1973- Section 482- Inherent power – Exercise of - Transfer of case – Petitioner seeking transfer of proceedings initiated under Section 125 of Code by his wife and pending before Add. CJM, Theog to the Court of Addl. CJM, Nurpur on ground that he is blind and cannot travel from Nurpur to Theog to attend such proceedings – High Court found that petitioner was in job and he had been attending said proceedings at Theog – Whereas respondent wife was a poor lady with no means of livelihood – Further, petitioner could also avail videoconferencing facilities for recording his statement – Petition dismissed.

Title: Narayan Mishra Vs. The State of Himachal Pradesh & another Page-320

Code of Criminal Procedure, 1973- Section 482- Inherent power – Exercise of - Quashing of FIR – Held, proceedings involving heinous offences cannot be quashed, simply on ground of compromise with victim of crime – High Court dismissed petition seeking quashing of FIR and consequent proceedings involving offence of rape.

Title: Rajesh Singh Vs. State of Himachal Pradesh & anr. Page-538

Code of Criminal Procedure, 1973- Section 482- Inherent powers - Quashing of proceedings - Trial Court convicting accused of offences under Sections 279, 304-A and 338 of I.P.C. – Conviction & sentence upheld by Additional Sessions Judge – Revision against – During proceedings, petitioner seeking quashing of FIR and consequent proceedings pursuant to a compromise – High Court found settlement between parties bonafide – Petition allowed – Judgments of Lower Courts set aside – Petitioner/accused acquitted of offences charged with.

Title: Umardeen Vs. State of Himachal Pradesh Page-312

Code of Criminal Procedure, 1973- Section 482- Inherent Powers – Quashing of FIR – Whether Court be ordered? - Petitioner-accused seeking cancellation of FIR and consequential proceedings initiated against him for offences under Sections 279, 337 of I.P.C. and 187 of M.V. Act on account of compromise with complainant – Held, In exercise of powers under Section 482 of Code, High Court may quash criminal proceedings, even in those cases, which are not compoundable but where parties have settled the matter between themselves – However, this power is to be exercised sparingly and with great caution to prevent the abuse of process of Court

and to meet the ends of justice – Since, compromise was found bonafide, FIR and consequential proceedings quashed – Petition allowed.

Title: Tek Chand Vs. State of H.P. and others Page-53

Code of Criminal Procedure, 1973- Section 482- Inherent Powers – Quashing of FIRs and consequent proceedings, when can be ordered – Complainant, an NRI registering two FIRs against petitioners/accused, husband and wife – Petitioner/accused No.1 being nephew of complainant – In first FIR, complainant alleged theft of motor cycles etc. by accused No.1 in 2012 – In second FIR, he alleged that accused forged his GPA and SPA and got electricity connection installed in premises of complainant, transferred in his name - Petitioners alleging false implication by complainant as he wanted to grab entire ancestral property – Held, power to quash FIR and consequent proceedings should be exercised sparingly to prevent abuse of process of Court or to give effect to an order of Court or to secure ends of justice – While doing so, the High Court is not to appreciate the evidence and its truthfulness or sufficiency – On finding that (i) core dispute was relating to ancestral property which was joint between parties (ii) theft of articles, if any, took place in December, 2012, but no FIR was registered till 2017, (iii) Complainant had executed GPA in favour of accused No.1 to look after the said property on his behalf (iv) cancellation report was filed by Investigating Agency in respect of second FIR – Both the FIRs were held to be abuse of process of Court – And set aside alongwith all consequent proceedings.

Title: Lt. Col. Ran Vijay Singh and another Vs. State of Himachal Pradesh and others Page-252

Code of Criminal Procedure, 1973- Section 482- Inherent Powers – Exercise of - Quashing of FIR(s) – Parties filing two separate petitions for quashing FIRs registered by them against each other, and regarding which chargsheet(s) stood filed in Court of Judicial Magistrate – Held, Filing of cross cases prima facie, reveals that occurrence did take place – Which party was at fault, will surface at an appropriate stage during trial – Both cases at very initial stage before trial court – On facts, quashing of proceedings would not be in interest of justice – Petitions dismissed.

Title: Ashwani Kumar Vs. State of H.P. and another Page-571

Code of Criminal Procedure, 1973- Section 482- Inherent Powers- Exercise of -Fixing of date – Trial Court fixing long dates ranging 7-8 months in cases which are at stage of service of opposite party – Petition against – Trial Judge in his comments justifying order on account of huge pendency in his Court – Held, cases which are at stage of service, filing of pleadings do not consume much time of Court, therefore, cannot be adjourned for such longer dates – High Court directed Trial Court to prepone the said case – Copy of order also ordered to be sent to Sessions Judge concerned for circulation amongst Presiding Judges of his division.

Title: Jagdeep Singh Vs. Lokinder Singh & ors. Page-467

Code of Criminal Procedure, 1973- Sections 125 and 482- Inherent powers – Petitioner-husband seeking setting aside order of Add. CJM directing him to pay maintenance to respondent-wife and stay of recovery proceedings qua arrears of maintenance by filing petition under Section 482 of Code – Petitioner taking plea that he was suffering from schizophrenia and remained hospitalized for treatment, as such could not appear in proceedings under Section 125 of Code and thus was wrongly proceeded against ex-parte – Held, in absence of nature of mental disorder, it would not be sufficient to conclude that he was wrongly proceeded against exparte or he could not join proceedings thereafter – Petition under Section 482 of Code was filed by petitioner himself – He was serving in army whereas his wife was totally unemployed – Order of grant of maintenance, upheld– Petition dismissed.

Title: Parvesh Kumar Vs. Asha Kumari & Anr. Page-236

Code of Criminal Procedure, 1973- Sections 311 and 482- Inherent powers - Adduction of additional evidence - Permissibility – Accused facing trial for offence under Section 20 of N.D.P.S. Act before Special Judge and case at final stage of arguments – He took adjournment for addressing arguments - Accused then moving application under Section 311 of Code for examining P, Managing Director of an institute where he was allegedly doing his Civil Engineering as a defence witness – He wanted to show that he was present in the said institute till 4:00 P.M. on that day making it impossible to be present at place of crime – Trial Court dismissing application of accused – Petition against - High Court observed that no cross-examination on any prosecution witness was done nor accused stated in his own statement under Section 313 of Code that he was pursuing Civil Engineering from said institute and he was present there till 4:00 P.M. on that day – Held, Special Judge was justified in dismissing application of accused for leading additional evidence in defence – Petition dismissed.

Title: Inder Singh Chauhan Vs. State of Himachal Pradesh Page-69

Code of Criminal Procedure, 1973- Sections 372 Proviso 378 (1)(a) and 482– Appeal against acquittal by victim – Forum thereof – On victim's complaint, police filing Kalandra whereupon accused was charged, tried and acquitted by trial court of offence under Section 427 of I.P.C. – Victim filing revision before Court of Additional Sessions Judge, who affirmed judgment of trial court – Petition against – Held, offence being under Section 427 of I.P.C. was bailable as well as non-cognizable, as such, Section 378(1)(a) was not attracted and appeal against acquittal, if any, was required to be filed before High Court with its leave – Revision before ASJ itself was not maintainable – Petition dismissed.

Title: Sain Ram Jhingta Vs. Parwinder Kumar Chopra & another Page-115

Code of Criminal Procedure, 1973- Sections 397 and 401- **Indian Penal Code, 1860-** Section 379 – Revision – Petitioner-accused challenging concurrent findings of Lower Courts holding him guilty of committing theft of angle iron – Petitioner contending that conviction is based on wrong appreciation of evidence – There is no evidence that complainant is owner of angle iron in question – High Court found that complainant was the owner of shop – Accused was caught red handed by complainant while lifting angle iron from his commercial establishment and uploading them on a Rehari – Stolen property was recovered from him – Ownership of complainant qua stolen property was never disputed during trial – Held, accused was rightly convicted of offence of theft – However, in peculiar circumstances, sentence reduced to two months simple imprisonment with fine – Revision partly allowed – Sentence modified.

Title: Bhupinder Kumar Vs. State of H.P. Page-157

Constitution of India, 1950- Article 14- Grant of licence to run liquor vend(s) – Challenge thereto by unsuccessful bidder – State deciding to grant licence(s) to run liquor vends in State and inviting bids – 'Announcement' making it clear that all allotments of vends or renewal of licences shall be subject to confirmation by Excise and Taxation Commissioner – Said Authority was also empowered to sell privileges by any of the modes stipulated therein and considered expedient in the interest of revenue – Held, allocation of licence in respect of liquor vend regarding which petitioner was the highest bidder, in favour of private respondent No.7 alongwith other unallotted vends, cannot be said to be arbitrary – Decision was taken by official respondents in interest of revenue of State.

Title: Gulshan Chauhan Vs. The State of Himachal Pradesh and others (D.B.)

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Constitution of India, 1950- Article 14- Sale of privilege by way of auction – Highest bid – Effect – Held, mere submission of highest bid, does not confer any right on bidder – Authority has right not to accept highest bid and even to prefer a tender other than the highest bid, if there exist good and sufficient reasons – Petitioner was highest bidder in respect of liquor vend 'Gumma' –

His Bid had not yet been accepted by Competent Authority - Many other vends in that area remained unallotted as Contractors did not opt for such vends "exclusively" – Department deciding to club allotted as well unallotted vends in common pool including vend at 'Gumma' in order to generate more revenue – Competent Authority then negotiating with petitioner and respondent No. 7 and allotting liquor vend at 'Gumma' and other unallotted vends to Respondent No. 7, as he out bidded petitioner – Petitioner challenging allotment of licence in respect of 'Gumma' vend, on ground that he was highest bidder – Further held, his highest bid was never accepted by Competent Authority – Allotted and unallotted vends were clubbed in interest of revenue of State – Decision of Competent Authority not shown to be arbitrary – Petition dismissed.

Title: Gulshan Chauhan Vs. The State of Himachal Pradesh and others (D.B.)

Page – 160

Constitution of India, 1950- Article 16- Appointment to public office – Selection made on basis of tampered record – Effect – Petitioner selected for post of Constable against reserved (SC –IRDP) Category – On challenge, Hon'ble Single Judge setting aside appointment of petitioner on ground that on the date of interview, he was not in IRDP Category – LPA by petitioner – On facts, it was found that appellant-petitioner had furnished a photocopy of B.P.L. Certificate, on which there was interpolation as to date of its renewal – He also did not produce original before Competent Authority and took plea that original was lost – Held, when appellant was not in possession of validly issued Schedule Caste (IRDP) Certificate on date of interview, his appointment given on tampered certificate was rightly set aside by Hon'ble Single Judge – LPA dismissed.

Title: Sanju Vs. State of HP and others Page-26

Constitution of India, 1950- Article 226- Admission in MBBS/BDS courses – Counselling - Directions, when can be issued – Petitioner appeared in first round of counseling on 1st July, 2018 and was allotted seat in Govt. Medical College, Ner Chowk vide letter dated "17.7.2018" – He was required to deposit fees upto 21.7.2018 – Meanwhile petitioner appeared for counseling at Govt. Medical College, Chandigarh on 13.7.2018 and was allotted seat, but lateron it was cancelled by Punjab and Haryana, High Court vide judgment dated 24.7.2018 – By then, time to deposit fee (21.7.2018) against State Quota seat allotted to him in Govt. Medical College at Ner Chowk, had expired – Petitioner seeking appearance in second round of counseling at Govt. Medical College, Ner Chowk against State Quota seat – Plea objected by University on ground that he was granted provisional seat in first round of counseling and as he did not deposit fees, petitioner not entitled to participate in second round – Held, petitioner is in merit and was allotted seat in first round of counseling – He is entitled to appear in second round conselling qua which even date has not yet been fixed by University – Petition allowed.

Title: Anshul Kalia Vs. State of Himachal Pradesh & ors. (D.B.) Page-542

Constitution of India, 1950- Article 226- CCS (Pension) Rule (Liberalised Pensionary Award)- Rule 4 – Family pension – Grant of - 'B' son of petitioners employed with Para Military Forces died in 1998 in a terrorist attack – Family pension used to be paid to his widow's ('S') but after sometime, she remarried – Parents of 'B' asserting claim to family pension after remarriage of 'S' but request declined by Govt.- Petition against – State resisting petition on ground that Pension Rules do not entitle, parents for family pension – And 'S' after re-marriage is being paid ordinary family pension as per aforesaid Rules – However, Pension Rules also providing for dependent pension for parents when government servant dies as a bachelor or as widower without reference to their pecuniary circumstances – Held, Family pension is intended to all the dependents of the deceased – When widow is disqualified on re-marriage, other members are eligible for family pension – After re-marriage 'S' may not be in a position to look after parents of deceased – Thereafter, parents are entitled for family pension subject to limits mentioned in Pension Rules – Petition allowed.

Title: Bhagwati Devi and another Vs. Union of India and others Page-152

Constitution of India, 1950- Article 226- **Forest Conservation Act, 1980-** Land, use of - Non-forest purpose – Public interest litigation- High Court took suo motu cognizance on basis of letter alleging non-forest use of Forest Land in and around Hatu Temple – Such use causing inconvenience to devotees visiting temple – Allegations found correct – In the meantime, State authorities removed tents pitched alongside temple road in DPF Hatu and DPF Jhamunda, as also tents raised on private land without permission from Tourism Department – State also decided not to give permission for pitching tents except on recommendations of Gram Panchayat concerned – Matter closed – Petition disposed of.

Title: Court on its own motion Vs. State of H.P and others (D.B.) CWPIL No.: 124 of 2018

Page-458

Constitution of India, 1950- Article 226- **Himachal Pradesh Municipal Corporation Act, 1994 (Act)-** Sections 182 and 261- Right to life – Scope –Water pollution – Public interest Litigation – High Court taking cognizance on letter highlighting illegal dumping of muck and garbage in and around Chadwick Fall, Shimla – High Court constituting a Committee and calling remedial steps from it – Also directing Committee to conduct spot inspection – Report suggesting various actions to be taken by departments – Held, hygeinic environment is an integral facet of healthy life – State is bound to protect and improve as also safeguard environment – Chapter 12 of Act emphasizes on proper use of water, its proper treatment and discharge thereafter – Act also prohibits deposit of rubbish, filth or other polluted and obnoxious matter into or banks of water course – Petition disposed of with direction to Deputy commissioner Shimla to take all measures for implementing suggestions pointed out in inspection report – Also directed to associate Himachal Pradesh State Legal Service Authority and students of law colleges in programme.

Title Court on its own motion Vs. State of H.P. and others CWPIL No. 110 of 2018 (D.B.)

Page-521

Constitution of India, 1950- Article 226- National Eligibility Test- Wrong answers in answer key – Consequences – Petitioner submitting that answers of questions No.29 and 60 of Law Paper as given in answer key, were wrong and reflected in wrong assessment of his paper – University Grants Commission (UGC) denying petitioner's case and relying upon report of Expert Committee which examined petitioner's objections and found them baseless – However, High Court found answers of questions No.29 and 60 given in answer key, actually wrong – Report of Expert Committee was without any reasons – Answers of those questions given by petitioner found correct – Petition allowed – UGC directed to award marks of such questions to petitioner and revise his result accordingly.

Title: Suresh Kumar Vs. University Grants Commission and another Page-514

Constitution of India, 1950- Article 226- Public Interest Litigation - Felling of trees in and around Chaugan of Chamba Town – Petition against – Trees allowed to be felled as they were 'leaning' – No material on record to show that such trees were dangerous to public life or property or any trees were planted by way of compensatory measures – On basis of report of Commissioner and affidavit of DFO, Chamba that Deputy Commissioner had accorded permission to fell trees on recommendations of Tree Committee, petition disposed of with directions that no tree within Municipal limits of Chamba Town is to be lopped or felled except in accordance with law.

Title: Court on its own Motion Vs. State of HP and others (D.B.) CWPIL No. 121 of 2017

Page-271

Constitution of India, 1950- Article 226- Public Interest Litigation – Petitioner alleging unauthorized construction over land shown as 'Green Area' in Development Plan by HIMUDA in New Shimla – Also seeking directions regarding plantation of trees on road side, which were removed by HIMUDA, while raising unauthorized construction as well as removal of other

encroachments – Petitioner also praying for removal of dumper-stand and public toilet constructed unauthorizidely – In view of allegations High Court constituted a High Level Committee headed by Principal Secretary (Town & Country Planning), H.P. for examining issues involved and to make recommendations for appropriate action – Petition disposed of.

Title: Dr. Amar Singh Sankhyan Vs. State of Himachal Pradesh and others

Page-615

Constitution of India, 1950- Article 226- Review of order passed under Article 226– Necessary parties - State Govt. re-organizing areas falling under Thunag and Bali Chowki Tehsil and creating new sub-division (Civil) and Janjehli – Gram Panchayat Thunag (Petitioner) filing writ and that review petitioner (Chet Ram) was added as a party under Order 1 Rule 10 of C.P.C. – Petition disposed of by High Court as per nature - Gram Panchayat Thunag then filing second writ and assailing Notification dated 4.1.2018 – Review petitioner seeking review of judgment dated 4.1.2018 and headquarter of SDO(Civil) at Janjehli on number of grounds – And also that there is error apparent in judgment dated 4.1.2018 as he was a necessary party to aforesaid second writ petition but was not so impleaded– Writ petitioner denying allegation and contending that Thunag was centrally located and best suited for establishment of office of SDO (Civil) – And review petitioner was not a necessary party to second writ as no relief was prayed against him – On facts, held review petitioner was not a necessary party as his no personal right was affected & adjudicated upon in earlier writ - His non-joining as a party to Writ did not give rise to patent error leading to any miscarriage of justice or affected anyone of his rights – Earlier writ was found having been decided on basis of material placed by parties on record and not in abstract – Review Petition dismissed.

Title: Gram Panchayat Thunag Vs. State of Himachal Pradesh & others (D.B.)

Page-120

Constitution of India, 1950- Article 226- Service Matter – Absorption – Policy Guidelines – Court Interference - Taking over of Private College alongwith staff by Government on 20.04.2007- College was previously getting grant from government – Taking over happened after guidelines dated 25.08.1994 – Guidelines specifically providing that person with 25 years experience is to be absorbed as Superintendent Grade-II, and he is to be placed at bottom of seniority list – Petitioner appointed as 'clerk' in private college in 1994 and promoted as Superintendent Grade-II in 1997 – Hon'ble Single Bench directing government to absorb petitioner as Superintendent Grade-II on and w.e.f. 20.04.2007 (date of taking over) and previous services rendered by him be also counted for seniority, further promotion and pensionary benefits – Letters Patent Appeal – Hon'ble Division Bench found that (i) petitioner could not have been promoted as Superintendent Grade-II in 1997 by College in contravention of Grand in Aid Rules – Therefore, any wrong committed by College was not binding on Govt. – (ii) As per R & P Rules, no clerk could have been directly promoted as Superintendent Grade-II rather there should have been placements as Sr. Clerk and Junior Assistant first – (iii) As per guidelines framed by Government, person with 25 years of experience could only be absorbed as Superintendent Grade-II – (iv) These guidelines had come into force before College was taken over by Government in 2007 – Held, Hon'ble Single Judge could not have directed absorption of petitioner as Superintendent Grade-II from date of taking over of College- Judgement of Hon'ble Single Judge set aside – However, petitioner directed to be absorbed as Jr. Assistant on regular basis with all consequential benefits from date of taking over of college – LPA disposed of accordingly.

Title: State of H.P. Vs. Iqbal Singh (D.B.) Page-555

Constitution of India, 1950- Article 226- Service matter - Regularization - Whether automatic ? – No- On finding that daily wager engaged in 1995 by department, had rendered services of 240 days in each year, Administrative Tribunal directed State to regularize him from date when he completed eight years of engagement – State challenging order – Held, as per terms and

conditions of Regularization Policy, entitlement of regularization after completion of eight years is not automatic – He has right to be considered for regularization as per his seniority and subject to availability of vacancy – Continuous service of eight years is only on eligibility criteria – Petition allowed – Order of Administrative Tribunal set aside.

Title: State of H.P. and others Vs. Arjun Singh Page-565

Constitution of India, 1950- Article 226- Stay of transfer – Administrative Tribunal refusing to stay transfer of petitioner, who was working as Principal of a medical college on ad hoc basis to Advisor to Government of Himachal Pradesh– Petition against – High Court refused to stay transfer but directed State Government not to force him to join new assignment – Petitioner was further enabled to avail leave of kind due, if he required so - Petitioner further permitted to join his duties in Department of Surgery in RPGMC, Tanda during the period, his original application is decided by Administrative Tribunal - Application directed to be decided within two months.

Title: Dr. Ramesh Bharti Vs. State of Himachal Pradesh & others Page-101

Constitution of India, 1950- Article 227- **Code of Civil Procedure –** Order XVIII Rule 4- Evidence by way of Affidavit and cross-examination of such witnesses – Procedure explained – Plaintiff's witness tendering his evidence by way of affidavit – Counsel of defendant showing his inability to cross-examine witness on the very same date, affidavit is tendered and seeking time – Trial Court not acceding to this request and closing cross-examination – Petition against – Plaintiff submitting before High Court that as per usual practice adopted by Courts opposite party is to cross-examine witness on day affidavit is tendered and there is no perversity in order of Trial Court – Held, this practice if being followed, is not reasonable – Petition allowed – Order of Trial Court set aside – Matter remanded with direction to it to afford opportunity to defendant to cross-examine witness of plaintiff.

Title: Sarita Devi Vs. Rishi Dhiman Page-180

Constitution of India, 1950- Article 227- Supervisory Jurisdiction of High Court – Extent - Directions for expeditious disposal of case - Whether can be given? – Petitioners who were senior citizens seeking directions of High Court to Rent Controller for expeditious disposal of Rent Suit filed by them – Petitioners claiming that tenants were intentionally delaying matter – Respondents objecting to petition on ground of maintainability - Held, while exercising supervisory jurisdiction, High Court not only acts as a Court of law but also as a Court of equity – It is therefore the power and also the duty of the Court to ensure that Cases of Senior Citizens are to be taken up on priority basis and dealt with promptitude - Power of Superintendence must advance ends of justice and uproot injustice – On finding that Rent Controller had conducted proceedings in very casual manner resulting into gross failure of justice and trial had not commenced for four years, High Court directed Rent Controller to dispose of eviction suit within one year.

Title: Vijay Kumar Sood & another Vs. Amrik Ahuja & others Page-611

Constitution of India, 1950- Articles 14 & 16- Select/waiting list – Purpose of – Held, waiting list prepared in examination conducted by Commission does not furnish a source of recruitment - It is operative only for the contingency that if any of selected candidates does not join, then person from the waiting list may be pushed up and be appointed against vacancy so caused – Petitioners claiming themselves to be in the select/waiting list, challenged order of Board of Directors vide which fresh Advertisement was issued for "additional posts" – Petitioner claiming that they being in the waiting list ought to have been given appointment against those "additional posts" – Administrative Tribunal dismissed their application - Petition against – Writ Petition also dismissed by High Court.

Title: Hoshiar Chand and Ors. Vs. State of HP and Anr. (D.B.) Page-248

Constitution of India, 1950- Articles 14 and 16- Appointment of lecturer on PTA basis – Petitioner challenging appointment of private respondent (R5) as lecturer in History on PTA basis as being contrary to prevailing norms – Petitioner assailing appointment on grounds inter alia (i) R5 was given extra marks for holding NSS certificate, (ii) No such marks were given to petitioner, (iii) R5 was given marks for teaching experience though she had taught political science, whereas appointment was for lecturer in History – Held ; (i) Prevalent norms provided for extra marks for co-curricular activities and grant of marks for NSS Certificate was justified, (ii) In absence of allegation of malafides, it is not believeable that Selection Committee refused to award marks to petitioner despite production of NSS certificate by her (iii) Pharse 'Teaching Experience' being unamenable to any restricted and trammeled significance only appertaining to teaching experience in a subject against which selection is desired – Petition dismissed.

Title: Anita Kumari Vs. State of H.P. & others Page-264

Constitution of India, 1950- Articles 14 and 16- Promotion – Petitioner, a Surveyor with respondents No.1 to 4, challenging promotion of Respondent No.5 as Junior Engineer on ground that petitioner was regularized as Surveyor prior to regularization of Respondent No. 5 as 'draftsman' and he (petitioner) ought to have been promoted first – R & P Rules however stipulating only 'draftsman' as feeder category for promotion to post of Junior Engineer – Petitioner did not fall in the category – Held, Petitioner cannot claim promotion to post of Junior Engineer – Petition dismissed.

Title: Yash Pal Vs. Principal Secretary (Art, Language & Culture) to the Government of Himachal Pradesh & others Page-118

Constitution of India, 1950- Articles 14 and 19(1)(g)- Right to trade - Interference by Courts - Allotment of licences of retail liquor vends – Selection of site of liquor vend(s) – Pursuant to directions of High Court passed in previous writ petition, that allocation should be made keeping in mind viability, successful and fair operation of vends, Financial Commissioner (Excise) (F.C.) Himachal Pradesh directing petitioner to shift existing site of his liquor vend at Mcleodganj with consent of private respondent-another liquor contractor – Challenge thereto - Petitioner assailing the order on ground that it has been passed to favour private R5 – Also submitting that change of site would result in huge financial loss to him – State justifying order on ground that site of liquor vend of petitioner is nearer to site of respondent No.5 on Mcleodganj Bhagsu Road and present set up was not viable for both the liquor vends to survive – High Court found that petitioner of his own had shifted the site of his liquor vend from Mcleodganj Temple Road to Mcleodganj Main Square without approval from Competent Authority – 'Excise Announcements' however required that licencee was to get the premises approved from Addl./Joint/Deputy Excise & Taxation Commissioner of the zone concerned – Decision of Competent Authority regarding shifting of liquor vend of petitioner found to have been taken in view of viability as well as successful and fair operation of vends as liquor vends of petitioner and R5 were found operating within close proximity of each other – Held, No person has a right to stick to particular premises – However, the condition that he is to select new site with consent of R5 is set aside as he cannot be put at the mercy of R5 in matter of selection of land – High Court directed him to shift to his original site i.e. Temple Road Macleodganj or select some other site at a reasonable distance (400 -500 meters) from liquor vend of R5 – Petition disposed of.

Title: Vishal Goswami Vs. State of Himachal Pradesh & ors. (D.B.) Page-367

Constitution of India, 1950- Articles 14 and 226- **Industrial Disputes Act, 1947-** Section 33-C(2)- Recovery of wages - Entitlement – Petitioner remained posted as Chowkidar on daily wage basis at the storage godown of respondents for many years – Petitioner filing application before respondents and claiming holidays with respect to Sundays, second Saturdays, local national and other gazetted holidays on which he had rendered services at the godown – Application rejected by department – Claim of petitioner for payment of wages for such holidays also dismissed by

Labour Court – Writ petition – State submitting before High Court that petitioner being a daily wager was entitled for one holiday on completion of six working days, besides national holidays i.e. 26th January, 15th August and 2nd October – Held, being a daily wager he was not entitled for holidays on second Saturday, Gazetted Holidays & Local holidays – There was no evidence that he was not allowed to avail one holiday after completion of six working days- He was paid wages for full month including Sundays- Petition dismissed.

Title: Roshan Lal Thakur Vs. State of H.P and others Page-336

Constitution of India, 1950- Articles 14, 15 and 226- Admission to Medical Colleges – State quota seats – Regulations requiring that the candidate should have passed atleast two out of four examinations from Schools situated within State of Himachal Pradesh for admission against State quota seats – Petitioner though 'bonafide Himachali' had not passed requisite examinations from Schools in Himachal Pradesh - Petitioner applying for admission to MBBS/BDS courses against State quota seats – Application rejected by the University – Petition against – Petitioner assailing aforesaid regulation as unreasonable and arbitrary – Held, By prescribing condition of having qualified atleast two examinations from 1995-96 onwards, an effort has been made to ensure that students of the State get a chance of seeking admission in such courses – State had taken conscious decision after taking into consideration various aspects like topography of State, social status, financial conditions of the people and educational facilities available in the State – Condition not unreasonable – Petition dismissed - **Shivam Sharma Vs. State of H.P. & ors., CWP No. 1353 of 2018** referred to and relied upon.

Title: Sahil Prashar Vs. State of H.P. & Ors. Page-129

Constitution of India, 1950- Articles 14, 15 and 226- Admission to professional courses – Eligibility criteria of "domicile" – Interference by Courts – Not permissible – Petitioner though a Bonafide Himachali seeking admission in B. Des.(Fashion Communication or Accessories Designing) at NIFT, Kangra against State quota seats – Prospectus however defining 'domicile' of candidate as State from which he/she had completed his/her – Class 12th examination/graduation/qualifying degree – Petitioner however had qualified 12th examination from Meerut – Held, in view of provisions of prospectus, petitioner not 'domicile' of Himachal Pradesh as she qualified 12th examination from Meerut (UP) – Provision cannot be assailed as arbitrary and irrational not being based on any intelligible differentia - It is constitutionally permissible to lay down essential educational requirements and domicile criteria – Petition dismissed leaving it open to respondents to consider petitioner for admission in course in any Institute against seat of category to which petitioner belongs, if lying vacant and she is otherwise qualified for same.

Title: Arpita Singh Vs. Union of India & ors. Page-561

Constitution of India, 1950- Articles 14, 15 and 226- MBBS/BDS Course(s) – Admission against State quota seats – Prospectus issued by respondent(s) stipulating admission(s) to MMS/BDS Courses in Colleges situated in State against State quota seats only to wards of Himachalis who had passed at least two required examinations from schools in the State – Petitioner though passed four such examinations from Schools in Himachal Pradesh but being 'non himachali', seeking admission against State quota seats – Rejection of application by University – Petition against – Held, in view of specific provisions laid in prospectus, petitioner not eligible for admission against State quota seats, when he is neither himachali nor bonafide resident of Himachal Pradesh – Such criterion for admission existing since long, has been held to be constitutionally valid in 'Gagan Deep Vs. State of H.P., 1996 (1) Sim. L.C. 242 – Petition dismissed.

Title: Ravi Shankar Shandil Vs. State of H.P. & Ors. (D.B.) Page-528

Constitution of India, 1950- Articles 14, 15, 16 & 226 – **Public Interest Litigation –** Gender discrimination – Reservation in government jobs for wards of freedom fighters – Government policy providing reservation to unmarried daughters/grand-daughter(s) - Married daughters/grant-daughters not eligible for reservation – However, son(s) and grandson(s) irrespective of marital status eligible as descendant(s) of freedom fighters for benefit of reservation- State justifying policy on ground that married daughter(s), grand-daughter(s) after their marriage don't fall in definition of 'family' as is normally understood – Held, primary object and purpose of policy is not to confer benefits on descendants but to acknowledge sacrifices done by freedom fighter by giving employment to his wards – Law cannot make an assumption that married sons alone continue to be members of family of their parents, and that married daughter ceases to be so- It is constitutionally impermissible because it is an invidious basis to discriminate against married daughters- Identity of woman as a woman continues to subsist even after and notwithstanding her marital relationship – Policy being discriminatory set aside – Petition disposed of.

Title: Court on its own motion Vs. State of H.P. & others (D.B.) CWPIL No. 114 of 2017
Page-547

Constitution of India, 1950- Articles 15 & 226- Admission to MBBS/BDS in ESIC Medical College against Insured Persons (IPs) quota seats – Criterion - Petitioner seeking admission against (IPs) quota seat –Claiming that her mother was an insured person under Employees State Insurance Act, 1948 - However, her mother (P2) not being granted IPs of Group-I Category certificate on ground that she does not satisfy requisite conditions – And record qua deposit of contribution by her from April, 2014 to May, 2017 was prepared only to avail admission against Quota seat – Since, contribution of said period was realized on only 19/20 June, 2017 through supplementary challan – However, on finding that similar provision in admission notice debarring a candidate from obtaining award of IP Certificate for default or delayed deposit of contribution was set aside by Kerla High Court, High Court set aside such condition in admission notice – Respondents directed to issue Grade I Certificate to petitioner as ward of insured person – Also permitted her to participate in dust up round of counseling – Petition disposed of.

Title: Gurjot Kaur & anr. Vs. Director General Employee State Insurance Corporation & ors. (D.B.) Page-544

Constitution of India, 1950- Articles 16 and 226- Service matter - Junior Office Assistants, recruitment of – Challenge thereto – Original petitioner challenging recruitment process of Junior Office Assistants – Administrative Tribunal, as interim relief, directing Commission to keep fifteen posts for petitioners vacant till final outcome of litigation – However, Commission was granted liberty to declare result of process of recruitment for remaining posts – Writ Petitioners assailing this order in High Court – Petitioners contending that Commission was considering ineligible candidates for appointment against such posts on basis of communication dated 19th March, 2018, by ignoring essential qualifications/conditions laid down in R&P Rules – State opposing writ on ground that interest of original petitioners stood protected by interim order of Administrative Tribunal – Held – Field governing appointments to posts of Junior Office Assistant is duly covered by R&P Rules framed under Article 309 of Constitution of India – There was no justification for Government to issue communication dated 19th March, 2018 – Respondents directed to make appointments to such posts strictly in accordance with R&P Rules and not in terms of communication dated 19th March, 2018 – Petition disposed of.

Title: Akshay Sharma and others Vs. State of Himachal Pradesh and others (D.B.)
Page-624

Constitution of India, 1950- Articles 19(1)(f) and 47- Right to trade – Business in liquor – Held, No person has a fundamental right to do business in liquor – State has exclusive privilege in that

regard – But when State decides to sell such privilege, then it must act fairly - It cannot escape rigors of Article 14.

Title: Gulshan Chauhan Vs. The State of Himachal Pradesh and others (D.B.)

Page –160

Contempt of Courts Act, 1971- Apology – Stage and manner of tendering – Held, Apology is an act of contrition – Therefore, must be offered clearly and at the earliest opportunity – Belated apology hardly shows contrition, which is essence of purging of contempt – On facts, contemnor, even after issuance of contempt notices by High Court found to have relentlessly continued in posting adverse comments against Judicial Magistrate, District Judge and even High Court on his Facebook account – Apology tendered by contemnor was conditional – Not offering to purge himself by deleting objectionable comments posted by him – Apology as tendered by contemnor cannot be accepted.

Title: Court on its own motion Vs. Vikas Sanoria (D.B.) Page-583

Contempt of Courts Act, 1971- Section 12- Criminal Contempt – Duty of advocate – Held, lawyer is an officer of Court and is expected to conduct himself in manner that behoves his privileged position in Court – Advocates are required to conduct themselves at all times as gentlemen – It is expected that they would stand to augment process of justice instead of acting in manner which tends to obstruct functioning of Court and administration of justice.

Title: Court on its own motion Vs. Vikas Sanoria (D.B.) Page-583

Contempt of Courts Act, 1971- Section 12- Criminal Contempt – Fair comment, What is? – Held, Fair comments even if outspoken but made without any malice or attempting to impair administration of justice and made in good faith in proper language do not attract any punishment for contempt of court - However, when from criticism deliberate, motivated and calculated attempt is discernible to bring down image of judiciary in estimation of public or to impair administration of justice, Courts must bestir themselves to uphold dignity and majesty of law.

Title: Court on its own motion Vs. Vikas Sanoria (D.B.) Page-583

Contempt of Courts Act, 1971- Section 12- Criminal contempt – What is? – Contemnor, an advocate on failing to get orders to his liking posted scurrilous and indecent comments against Judicial Magistrate on his Facebook account – He continued to do so even after initiation of contempt proceedings against him and despite his undertaking given before High Court that he would not post such comments in future – He even started posting comments against High Court and its Hon'ble Judges – Contemnor not denying having posted such comments on his Facebook account but trying to justify them on ground that act of judicial Magistrate put him under mental stress – In his reply also contemnor trying to portray that judicial officer lacked sensitivity – Held, Facebook posts of contemnor-Advocate were deliberate attempt(s) on his part to interfere with due course of judicial proceedings –Contemnor found guilty of criminal contempt and sentenced to simple imprisonment for one month and fine of Rs.10,000/- - Also directed to purge himself by deleting his Facebook account.

Title: Court on its own motion Vs. Vikas Sanoria (D.B.) Page- 583

'E'

Employees Compensation Act, 1923- Section 3(1)- Accident – "Arising out and in" due course of employment – Meaning – Deceased, a driver, employed by owner of vehicle was found dead in vehicle – Commissioner allowing claim application of legal representatives and directing insurer to indemnify award – Appeal against – Insurer assailing award on ground that deceased was found dead in vehicle and cause of his death was not ascertainable – And it is not case of death arising

out some fortuitous event or mishap, being so, insurer has no liability – Held, in view of innate spirit and intent of legislative expression 'accident arising out and in course of employment cannot be given narrow meaning – It takes within its fold or ambit even fortuitous misfortune of an employee unless there exists no causal connection inter se fortuitous event or mishap vis-à-vis vocation performed by deceased workman – On facts, High Court found that there was causal nexus between death and performance of duties by employee concerned – Appeal dismissed.

Title: Reliance General Insurance Co. Ltd. Vs. Bachittar Singh & others Page-454

'H'

Himachal Pradesh Land Revenue Act, 1954- Section 128- Mode of partition – Objection thereto – Rejection by revenue authorities – Petition against – On objections of petitioner, Assistant Collector himself visiting spot in presence of parties and after hearing them confirming mode of partition – Appeal and revision(s) of petitioner against mode of partition dismissed by Revenue Courts right up to Financial Commissioner (Appeals) - Petitioner feeling aggrieved of fact that area of path (18 marlas) was excessive and land in Khasra No.71/1 was not allotted to him – On facts, found that (i) path was actually 18 marlas on spot and kept joint, between all co-sharers including petitioner and (ii) Khasra No.71/1 was in actual possession of respondents since time of ancestors – Held, orders passed by revenue authorities were just, reasoned and speaking – Findings also borne out from records of case and thus not perverse – Petition dismissed.

Title: Thakur Dass and another Vs. State of Himachal Pradesh and others

Page-517

Himachal Pradesh Panchayati Raj Act, 1994- Section 37 – Return of complaint – Circumstances – After investigation police filing case against accused for offences under Sections 323 and 341 I.P.C. before Panchayat as incident happened in panchayat area – Panchayat referred case to court of Judicial Magistrate on ground that accused 'do not listen' to Panchayat – Held, only in circumstances mentioned in Section 37, Panchayat can transfer case to Judicial Magistrate – None of eventuality existed which warranted transfer of case to Magistrate – Order set aside – Magistrate directed to forward record to Gram Panchayat for trial – Petition allowed.

Title: Anil Kumar and another Vs. State of H.P and others Page-534

Himachal Pradesh Urban Rent Control Act, 1987- General- Mesne Profits – Determination – Demised premises in possession of petitioner situated in heart of Shimla Town – Status of petitioner being of trespasser – High Court determined mesne profit @ 250/- per Sq. feet and directed payment thereof since 30.6.2011, when eviction order was passed by Rent Controller against tenant.

Title: Narinder Kumar Vs. Rohit Madan & others Page-491

Himachal Pradesh Urban Rent Control Act, 1987- Section 11- Cutting off or withholding essential supply or service – Restoration of – Entitlement – Petitioner seeking restoration of electricity to the accommodation in his possession, which the person alleged to be the landlord had snapped without sufficient cause – Rent Controller allowing petition and directing landlord to restore electricity – In appeal, Appellate Authority allowing appeal of landlord and dismissing petition on ground that relationship of landlord and tenant not established by petitioner – Revision against – High Court found that petitioner had not filed any receipt showing payment of rent either to alleged landlord or to his predecessor 'M' – Petitioner simply relying upon letter of 'M' that he (petitioner) was misusing electricity in the premises – Held, existence of relationship of landlord-tenant is a condition precedent for applicability of Section 11 of Act – Only a tenant can seek restoration of essential supply or service under Act – As petitioner failed to establish his possession as a tenant, High Court dismissed revision - Order of Appellate Authority upheld.

Title: M/S Bindal Engineering Works Vs. Som Nath Page-111

Himachal Pradesh Urban Rent Control Act, 1987- Section 14(2)(i), (ii)(a), (ii)(b) & (iii) - Petitioner-landlord seeking eviction of respondents-tenants on grounds of arrears of rent, subletting, change of user, alterations and additions etc. – Rent Controller dismissing eviction petition and his order upheld by Appellate Authority – Petition against – High Court found that (i) vacant land was given by petitioner to respondent No. 1 for construction of building as he himself had no means (ii) respondent No.1 was to arrange entire funds of his own towards construction (iii) respondent No.1 was also permitted to induct tenants over certain portions in built up structure (iv) money spent by respondent No.1 on construction was to be adjusted within a period of about eight years against rent received by respondent No. 1 from tenants inducted by him – High Court upheld findings of Rent Controller/Appellate Authority that it was a 'building contract' inter se petitioner and respondent No.1 – And no relationship of landlord/tenant existed between them – Petition dismissed.

Title: Mohinder Singh (since deceased) through his legal heirs Vs. Gian Chand and others
Page-107

Himachal Pradesh Urban Rent Control Act, 1987- Section 14(2)(i), Proviso III and Section 21(5) – Deposit of 'amount due' with Rent Controller – When permissible ? Held, under Section 21(5) a tenant can deposit 'arrears of rent' with controller under given circumstances only- Section 21(5) does not speak of deposit of 'amount due' as determined by Controller to avoid eviction on ground of non-payment of rent – Therefore, tenant as a rule has to pay or tender 'amount due' to the landlord within 30 days of order to avoid eviction – In exceptional circumstances and on proof of his having made sincere, serious and genuine efforts to make the payment to landlord, deposit of amount with Controller within 30 days from order can be made – **Hans Raj Khimta Vs. Smt. Kanwaljeet Kaur alias Sardami Babli Latest HLJ 2016 (HP) 303** referred to and relied upon – Since, Appellate Authority had merely passed interim stay on execution of eviction order, petition disposed of with direction to it to decide the said issue afresh during final adjudication of appeal.

Title: Yaseen Vs. Mohd. Gulzar Page-185

Himachal Pradesh Urban Rent Control Act, 1987- Section 14(2)(ii)(a)- Eviction suit – Subletting - Date relevant for determination- As on date of notice and not passing of an order, if it stands established that there was unlawful subletting, tenant is liable to be evicted.

Title: Ramesh Malik (deceased) represented through LRs and others Vs. J.S. Sharma and others
Page-572

Himachal Pradesh Urban Rent Control Act, 1987- Section 14(2)(ii)(a)- Subletting – What is? – Held, subletting comes into existence when tenant gives up possession of tenanted accommodation wholly or in part and puts another person totally stranger, in exclusive possession thereof – On facts, original tenants were found living permanently at Delhi and had no connection with Shimla – Exclusive possession of demised premises found with R-6 from 1990 to 1995 – Thereafter, R-6 redelivered possession to tenants in 1995- Eviction petition was filed in 1991 – Held, subletting without consent of landlord stands proved on record – Findings of Rent Controller and Appellate Authority upheld – Revision dismissed.

Title: Ramesh Malik (deceased) represented through LRs and others Vs. J.S. Sharma and others
Page-572

Himachal Pradesh Urban Rent Control Act, 1987- Section 14(3)(c)- Eviction suit – Reconstruction and unsafe condition of building – Proof of – On facts, building found crumbled and thus unsafe and unfit for human habitation – Landlord having applied for reconstruction of building – Also having sufficient means to carry out reconstruction - Building plan sanctioned by Municipal Corporation – Held, findings of fact recorded by Rent controller and Appellate Authority

and ordering eviction of tenant on these grounds based on proper appreciation of evidence – Revision dismissed.

Title: Title: Ramesh Malik (deceased) represented through LRs and others Vs. J.S. Sharma and others Page- 572

Himachal Pradesh Urban Rent Control Act, 1987- Section 14(3)(c)- Rebuilding and Reconstruction – Prior Sanction to build – Necessity of – Held, Absence of prior sanctioned building plan is not ground for non-suiting landlord who otherwise satisfies ingredients of provisions of statute – Hari Dass Sharma v. Vikas Sood & others, (2013) 5 SCC 243 referred and relied upon.

Title: Title: Ramesh Malik (deceased) represented through LRs and others Vs. J.S. Sharma and others Page-572

Himachal Pradesh Urban Rent Control Act, 1987- Section 24(5) – Revision – Whether a third party is a person "aggrieved"? – Petitioner though in settled possession of demised premises yet he was not party to eviction proceedings initiated by landlord against tenant – Rent Controller had passed eviction order against tenant and same was upheld by Appellate Authority in appeal – Petitioner then filing revision in High Court and assailing eviction order as "collusive" – Held, on meaning of words 'person aggrieved' may vary according to context of statute – Normally one is required to establish that he has been denied or deprived of something to which he is legally entitled in order to make him "person aggrieved" – In circumstances, question whether petitioner was a "person aggrieved" left open inasmuch as revision petition was hopelessly time barred – Eviction order was passed by Rent Controller on 30.6.2011, order was upheld by Appellate Authority on 27.7.2013, whereas revision was filed by petitioner on 10.8.2016 – Petition dismissed.

Title: Narinder Kumar Vs. Rohit Madan & others Page-491

Himachal Pradesh Urban Rent Control Act, 1987- Section 24(5)- Revision – Scope – Explained – Held – Revisional power under Act may not be as narrow as revision power under Section 115 of Code of Civil Procedure but certainly it is not wide enough to make High Court a second Court of first appeal – However, revisional power of High Court includes power to examine whether finding of fact is based on some legal evidence or it suffers from any illegality like misreading of evidence, overlooking or ignoring material evidence altogether etc.

Title: Title: Ramesh Malik (deceased) represented through LRs and others Vs. J.S. Sharma and others Page-572

Himachal Pradesh Urban Rent Control Act, 1987- Sections 14(2)(i) and 14(3)(c)- Eviction suit on grounds of arrears of rent and reconstruction – Proof of – Petitioner-landlord wanted to rebuild structure with modern amenities – Also alleging that tenant was in arrears of rent – Tenant pleading that more floors with modern amenities can be added to existing structure without evicting him – Rent Controller dismissing eviction petition on both counts – Appellate Authority reversing order of Rent Controller and ordering eviction on ground of rebuilding and reconstruction – On facts, building was found quite old (40 years) - Modern amenities, lacking in said structure - Steps for obtaining building sanction were taken by landlord – Held, order of Appellate Authority is not improper – However, eviction order made subject to right of re-entry of tenant – Further, construction activity of landlord also directed to be time bound – Petition disposed of – Order modified.

Title: Sita Ram Vs. K.P. Sood & ors. Page-434

Himachal Pradesh Urban Rent Control Act, 1987- Sections 14(2)(i), 14(2)(ii) and 14(3)(c)- Eviction suit – Petitioner/landlord filing eviction suit against tenant (R1) on grounds of arrears of

rent, subletting of premises in favour of R2 and reconstruction and rebuilding – Rent Controller allowing petition only on ground of arrears of rent – Appellate Authority, in appeal, additionally ordering eviction on ground of reconstruction subject to sanctioning of building plan by competent authority and obtaining consent of another landlord 'M' "owning" top floor of same building – Revision against – Tenant submitting that sanctioned plan was not filed in evidence and 'M' was also not examined to prove his consent – On facts, High Court found that building though was old but it required "repairs" only – Petitioner had no sanctioned building plan 'M' landlord of upper portion of same building not examined to prove his consent – Eviction order was based upon happening of certain events in future – Held, such order is not executable – Revision allowed – Order of Appellate Authority set aside.

Title: Mansa Devi (since deceased) through her legal representatives Vs. Krishan Pal Sood (since deceased) through his legal representatives Page-431

Himachal Pradesh Village Common Land Vesting and Utilization Act, 1971- Section – 2(c) **Himachal Pradesh Utilization of Surplus Area Scheme, 1974-** Clause 11 **– H.P. Ceiling on Land Holdings Act, 1972 (Ceiling Act)-** Section 15**-** Grant of Patta – Cancellation of – Challenge thereto – Allotment of land to petitioner was cancelled by State on ground that he was in Government job at the time of allotment, and not entitled for grant as per the Act - Further, before vestment of said land in State of Himachal Pradesh one 'C' was in its possession and he had purchased said land from the then Ruler – Petitioner arguing that no opportunity of being heard was given to him before cancelling grant and order is illegal – High Court found that petitioner was granted land as per the Scheme, framed under Ceiling Act – Himachal Pradesh Village Common Land Vesting and Utilization Act has no applicability and provisions thereof could not have been invoked to cancel grant – Harmonious reading of the Scheme and Ceiling Act, no where shows that a person in Government job is not entitled for allotment of land – Petition allowed – Order of Competent Authority set aside.

Title: Panch Ram Vs. State of Himachal Pradesh and another Page-141

Hindu Marriage Act, 1955- Section 25- **Hindu Adoption and Maintenance Act, 1956-** Section 21- Alimony- Grant of, after death of husband – Held, After death of husband, against whom an order for payment of alimony has been made, the widow being one of dependents as defined in Section 21 of Hindu Adoptions and Maintenance Act would be entitled to the benefit of the obligation imposed on heirs of deceased husband to maintain her out of the estate of deceased inherited by them.

Title: Darshana Devi Vs. Ramesh Chand Jaswal & ors. Page-275

'I'

Indian Easement Act, 1882- Sections 4 and 15- Easement of Light and air – Mode of acquisition – Prescription, what is? - Plaintiff claiming easementary right of light and air with respect to her room coming from the adjoining land of defendant – Plaintiff alleging exercise of such right for the last more than 25 years without interruption and seeking relief of prohibitory injunction against defendant from raising construction over his own land (servient tenement) and thereby blocking light and air to her room – Suit dismissed by Trial Court and appeal against that decree by First Appellate Court – Regular Second Appeal - High Court found that plaintiff in an earlier suit, had claimed ownership with respect to defendant's land (servient tenement) by way of adverse possession and over which she in the present suit, was claiming easementary right and acknowledging defendant's title in it - Earlier suit was withdrawn by her – Held, claimant's consciousness during the statutory period that she is exercising such right on property treating it as somebody else's property is a necessary ingredient in proof of the establishment of that right as an easement – Plaintiff had actually claimed ownership over servient tenement in a previous litigation within the statutory period of twenty years might be regarded as an important piece of

evidence to show that she did not exercise that right as an easement - Appeal dismissed with cost of Rs.50,000/- as suit was considered an abuse of process of Court.

Title: Sukha Devi Vs. Paritosh Chauhan Page-352

Indian Evidence Act, 1872- Section 32- Dying declaration - Proof of – Held, Dying declaration if true and voluntary can be basis of conviction and Court should not look for corroborative material – However, there should be evidence that maker was in fit state of mind at time of making of statement – A declaration made while its maker was unconscious and never in position to make the same, must be outrightly rejected – Prosecution relying upon statement of deceased 'R' that her mother-in-law sprinkled kerosene on her and set her ablaze – Statement said to have been given to District Revenue Officer (DRO) in hospital – However, DRO admitting that deceased was sleeping at that time and was in severe pain – He did not obtain medical opinion whether deceased was in position to make statement nor see such opinion allegedly given by Medical Officer to Police – Oral as well as medical evidence clearly showing that deceased was not in a fit condition to make statement – Further held, such statement cannot be relied upon as dying declaration.

Title: State of Himachal Pradesh Vs. Sunil Kumar & another (D.B.) Page-605

Indian Evidence Act, 1872- Section 65- Secondary evidence – Loss of original – Proof of – Plaintiff wanting to prove copies of tatima and field book of land by way of secondary evidence on ground that original thereof were destroyed in connivance with defendant No.3, who was draftsman in office of Town and Country Planning Dharamshala – In proof of plea of destruction of records, plaintiff relying upon order of State Information Commissioner, Shimla finding defendant No.3 guilty for misplacement/loss of original record and imposing fine on him – Trial Court however framing issue and asking plaintiff to adduce evidence qua loss of original documents – Petition against – Plaintiff submitting that witnesses already examined have deposed qua non-availability of original documents and Trial Court should not have framed issued – Held, question whether documents in question existed or not, destroyed or not is pending adjudication before Trial Court – It was justified in framing issues in this regard – Petition dismissed.

Title: Suresh Kumar Vs. Harbans Lal & ors. Page-559

Indian Evidence Act, 1872- Section 73- Hand writing - Comparison of – Permissibility – Plaintiff filing suit for recovery and relying upon certain documents purportedly executed by defendant and his father, in support of his claim – Application of plaintiff for directing defendant and his father to give specimen handwriting for comparison with document in question, dismissed by trial Court – Petition against – Held, purpose of Section 73 of Act is to bring truth before Court – Plaintiff specifically stated on oath of said documents written by defendant and his father-cum-SPA – Further held, comparison of these documents with admitted writings necessary – Petition allowed – Order set aside – Matter remanded - Defendant and his father/SPA directed to give specimen handwriting before Trial Court for comparison.

Title: Rajinder Singh Chawla Vs. Vivek Ahluwalia Page-419

Indian Penal Code, 1860- Section 304-B and 201- **Indian Evidence Act, 1872 (Act)-** Section 113-B- Dowry death – Presumption, when can be drawn? – 'R', wife of 'A' went missing from her matrimonial house and her dead body recovered from canal – Death found having taken place because of consumption of poison and not by drowning – Trial Court by drawing presumption under Section 113-B of Act convicting husband 'A' for offence under Section 304-B and 201 and other relatives (co-accused) for offence under Section 201 I.P.C.- Appeal against on ground of judgment being based on conjectures and surmises – Held, for drawing presumption under Section 113-B of Act it must be shown by way of some evidence that soon before her death, woman was subjected to cruelty or harassment for or in connection with demand of dowry – No evidence on record that 'R' was subjected to any such cruelty immediately before her death – No

such allegations of dowry harassment were made in complaint by mother of 'R', when missing report was filed by her – Other evidence regarding demand of dowry and quarrel with 'R' by 'A' contradictory – Appeals allowed – Conviction and final order of sentence set aside.

Title: Ashwani Kumar alias Faquir Chand and others Vs. State of Himachal Pradesh Page-475

Indian Penal Code, 1860- Section 376- Rape- Consent, what is? – Accused was tried on allegation that he developed physical relations with victim on pretext of marrying her – Also executed affidavit of marriage with her before Executive Magistrate though he was already married to one 'K' – Trial Court convicting accused for rape by holding that consent of victim, if any, was vitiated – Appeal against – High Court found that (i) accused and victim were residents of same area and (ii) victim probably knew that accused was already married to 'K', when she consented for sexual relationship with him- On facts, Held, consent of victim was not obtained by accused on false promise to marry her – Sexual act, if any, was with her free consent – Appeal allowed – Accused acquitted.

Title: Rajinder Kumar Vs. State of Himachal Pradesh Page-507

Indian Penal Code, 1860- Section 378- **Indian Electricity Act, 1910 (Act)-** Section 39- Theft – Movable property – Whether electricity running in cables is movable property? – Held, by legal fiction created by Section 39 of Act, running electricity is movable property and its dishonest abstraction amounts to theft.

Title: Suresh Kumar Vs. University Grants Commission and another Page-514

Indian Penal Code, 1860- Sections 279, 304-A and 337- Rash and negligent driving – Proof of – Trial Court convicting and sentencing accused for offences under Sections 279, 304-A and 337 of Code – Add. Sessions Judge upholding conviction and sentence – Revision against – Accused submitting that Lower Courts were wrong in relying upon photographs and spot map for drawing inferences of rash driving – Alleging that these documents were taken/prepared after removal of vehicles from the place of accident and oral evidence was also self contradictory – Accused also contending that deceased was overtaking a bus going ahead of him and in that process his car struck against the offending bus – On facts, High Court found that road was straight and 22 feet wide– Offending bus had gone to Kachha portion of road towards its right – After hitting against car, the offending bus had dragged it upto 80 feet – Photographs of vehicles involved in accident also prove rash and negligent driving on part of driver of bus (accused) – 'V', an occupant of car and 'Y' an eye witness clearly deposed that accused was driving bus on wrong side of road and in high speed – Held, facts proved on record themselves show that accused was rash and negligent in driving on public highway and such driving was cause of accident – Conviction upheld – But sentence modified – Appeal partly allowed.

Title: Ranbir Singh Vs. State of Himachal Pradesh Page-47

Indian Penal Code, 1860- Sections 302 & 498-A- Murder and dowry harassment – Trial Court tried husband 'S' and mother-in-law 'B' on allegations that 'S' used to harass his wife for dowry, whereas 'B' on date of incident, sprinkled kerosene on 'R' and set her ablaze – Trial Court acquitting both accused – Appeal by State – State arguing wrong appreciation of evidence on part of Trial Court, particularly dying declaration of deceased – On facts, High Court finding dying declaration of deceased as well as alleged harassment on account of dowry demand doubtful – Presence of 'B' in house at time of incident, itself was doubtful – Extensive burns on body of deceased were inconsonance with suicide by burning – Held, evidence was wholly insufficient to prove charges against accused – Appeal dismissed – Judgment of Trial Court upheld.

Title: State of Himachal Pradesh Vs. Sunil Kumar & another (D.B.) Page-605

Indian Penal Code, 1860- Sections 323, 427, 452, 504 & 506/34- Appeal against acquittal – Accused were tried and acquitted by Trial Court on allegations that they trespassed in house of 'S' made assault and caused simple injuries to her and her daughter-in-law 'K' – State submitting that acquittal is based on wrong appreciation of evidence- On facts, High Court found statements of 'S' and 'K' contradictory to each other on material particulars – Presence of eye-witnesses 'R' and 'B' on spot at the time of occurrence doubtful - There was previous enmity between parties and cases were already pending in Courts – Even eye-witnesses had dispute with accused 'R' regarding path and that was also pending before SDM – Held, on basis of such evidence Trial Court was justified in recording judgment of acquittal against accused – Appeal dismissed – Acquittal upheld.

Title: State of Himachal Pradesh Vs. Rattan Lal & others Page-135

Indian Penal Code, 1860- Sections 363, 366 and 376- **Protection of Children from Sexual Offences Act, 2012 (Act)-** Sections 4, 7 and 16- **Code of Criminal Procedure, 1973-** Section 439- Grant of Bail – Accused in judicial custody for committing offences under I.P.C. and Act - Accused seeking bail – Although, victim was shown minor in School certificate and also in her MLC, but victim filing affidavit claiming to be major at time of alleged offences and of having married the accused – MLC not bearing signature or thumb mark of victim – Her Radiological age was not determined – Birth Certificate of victim not taken from the Competent Authority – Held, lack of firm and best documentary evidence on record qua age of victim, accused entitled for bail – Petition allowed – Accused granted conditional bail.

Title: Roop Dutt Sharma Vs. State of H.P. Page-289

Indian Telegraph Act, 1885- Section 16- Damages to property during construction of power project etc. – Petitioner filing writ in High Court - Compensation – Dispute as to quantum – Held, dispute concerning sufficiency of compensation to be paid to claimant, is to be determined by District Judge within whose jurisdiction, property is situated – Therefore, dispute whether damage to 12 trees or 38 trees of claimant was caused, is cognizable by District Judge more so when amount of compensation stood determined by company stood paid to the petitioner- Writ petition in High Court, is not maintabiable – Petition disposed of with liberty to petitioner to approach the District Judge for adjudication of dispute.

Title: Kamlesh Kumar Vs. Jaypee Powergrid Ltd. and others Page- 29

Industrial Disputes Act, 1947- Sections 25-G and 25-H- Retirement of employee- Delay in raising demand, Plea of, When can be raised? – Held, objection with regard to raising demand after considerable delay, if any, can be taken by employer before framing of terms of reference, and not thereafter – Labour Court is supposed to answer reference as is sent to it.

Title: The Executive Engineer, HPSEBL Vs. Jagdish Chand (D.B.) Page-382

Industrial Disputes Act, 1947- Sections 25-G and 25-H- Retrenchment – When illegal? – Respondent worked as beldar from 25.11.1997 till 24.4.1998, but was disengaged thereafter- Claiming that he was intentionally given fictional breaks to prevent completion of 240 days in a year on work – Defendant claiming that respondent himself abandoned job – Labour Court found retrenchment illegal and directed department to re-engage respondent and also give seniority etc. to him but without back wages – Single Judge Bench of High Court dismissing writ petition of department – LPA – High Court found that after retrenchment of respondent many persons were employed and no opportunity of re-engagement was given to him – No proceedings were ever initiated against employee or notice issued for absence from duties and calling/advising him to resume duties – Held, on such facts abandonment of job by respondent not established – Retrenchment was illegal – LPA dismissed.

Title: The Executive Engineer, HPSEBL Vs. Jagdish Chand (D.B.) Page-382

'J'

Jurisprudence- Judgment declaring law- Whether prospective or retrospective? – Held, Prospective declaration of law is just a device innovated to avoid reopening of settled issues – However, there has to be no prospective overruling unless it is so indicated in a particular judgment – A declaration by Court is; "This was the law, this is the law" – This is how provisions have to be construed – The Court merely declares law and earlier decision by Court is "simply no law".

Title: Kam Raj and others Vs. State of Himachal Pradesh and others Page-626

Jurisprudence- Merger of decrees- Held – Appeal is continuation of original proceedings and when decision passed in original proceedings is under consideration of appellate authority, whole matter is writ large – Even while affirming in appeal, Court would be passing its own judgment, decree or award which would then merge with award, judgment or decree passed by court/authority of first instance with that of appellate authority – Said doctrine postulates that there cannot be more than one decree governing the same subject matter at a given point of time. (Paras-14 and 19) Title: Kam Raj and others Vs. State of Himachal Pradesh and others Page-626

Jurisprudence- Ratio decidendi – What is? Held, Ratio of any decision must be understood in the background of the facts of that case and the case is only an authority what it actually decides and not what follows from it – The Court should not place reliance on decisions without discussing as to how the factual situation fits in with fact situation on the decision on which reliance is placed.

Title: Gram Panchayat Thunag Vs. State of Himachal Pradesh & others (D.B.)
Page-120

Jurisprudence- Tenancy- Determination – Destruction of super structure - Whether automatically amounts to determination of tenancy also– Held, tenancy cannot be said to have been determined by attracting applicability of doctrine of frustration consequent upon demolition of premises – Doctrine of frustration belongs to realm of law of contracts; it does not apply to transaction where not only a privity of contract but a privity of estate stands created by way of lease.

Title: Title: Ramesh Malik (deceased) represented through LRs and others Vs. J.S. Sharma and others Page-572

'L'

Land Acquisition Act, 1894- Section 18- Reference to Court – District Judge declining to assess compensation of acquired land on ground that it was recorded in ownership of State and petitioners were entered merely in its possession (Kabijan) – Reference Court further found that land was 'Shamlat-deh' and there was no evidence that said land fell in any of the exemption clauses saving it from vestment in State – Appeal against – Petitioners wanted to file additional documents in evidence showing that land was exempted from vestment – Petitioner filing application for permission of Court to lead additional documents in evidence – Additional evidence considered necessary for just decision - Award(s) of Reference Court set aside- Matter remanded to take additional evidence of petitioners on record and decide reference accordingly.

Title: Mangat Ram & others Vs. The Land Acquisition Collector, Railways and others
Page-66

Land Acquisition Act, 1894– Section 28-A- Statutory interest – Grant of – Petitioners filing application under Section 28-A of Act before Land Acquisition Collector for compensation in terms of award of District Judge, in respect of their own acquired land(s) – Land Acquisition Collector on analogy of award of District Judge passing similar award(s) in favour of petitioners – However, State challenging award of Land Acquisition Collector passed under Section 28-A of Act,

by way of writ – State also challenging award of District Judge, which was basis of proceedings under Section 28-A of Act by filing First appeal – Appeal of State dismissed by High Court on 23.4.2007 and award of District Judge upheld – Also directed State to pay/deposit compensation in favour of petitioners within two months – State deposited some amount which according to petitioners was not in consonance with award of District Judge – Writ Petition – Land Acquisition Collector declined statutory interests on ground that judgment of High Court was silent on the point – Held, once award of Land Acquisition Collector or District Judge is under challenge in appeal before High Court, then judgment rendered by High Court either affirming and dismissing the appeal, award originally passed becomes inoperative since the lacuna of merger will come into play – When High Court directed that compensation in "accordance with law" to be paid to petitioner that would essentially mean the law as determined in Sunder's case – Finding of Land Acquisition Collector held perverse and set aside – Petition allowed – Respondents directed to deposit balance amount of consideration within two months from receipt of copy of judgment.

Title: Kam Raj and others Vs. State of Himachal Pradesh and others Page-626

Land Acquisition Act, 1894- Section 34- Interest, payment of- Relevant date, what is?- Reference Court directing payment of interest on compensation amount from date of taking of possession (1.5.1982), much prior to issuance of notification under Section 4 of Act – Held, expression "taking possession" occurring in Section 34 of Act means valid possession of acquired land as assumed subsequent to commencement of acquisition proceedings – Holding of possession and utilization of land prior thereto does not foist any jurisdiction upon Collector or Reference Court to levy statutory interest thereon – Appeals allowed – Direction to pay interest since 1982 set aside – Awards modified.

Title: State of H.P. and others Vs. Roop Lal & others Page-541

Land Acquisition Act, 1894- Section 36- Damages – Grant of – Acquiring department was in actual possession of land since 1974 – Notification under Section 4 of Act was issued only on 29.4.2006 – Claimant was deprived of usages and occupation of land for 32 years – Held, market value on date of acquisition cannot account for deprivation of land for 32 years – Therefore, competing interest of parties are required to be balanced – As such, acquiring department directed to award additional interest @ 15% per annum on market value (Rs. 666.66/- per sq. meter) of land as damages from date of dispossession till date of notification under Section 4 of Act.

Title: The Land Acquisition Collector Vs. Surjit Singh and others Page-242

Land Acquisition Act, 1894- Sections 12(2) and 18(2)(b) – Refusal of Collector to make reference to District Judge – Justifiability – Land of petitioners was acquired for public purpose –Collector pronounced award on 28th May, 1999 - Petitioners filing application before Collector on 19th August, 2016 for making reference to District Judge for enhancement of compensation – Petitioners contending that their application was within limitation from date of knowledge of award – However, Collector refusing to make reference on ground that application was not within time – Petition against – State arguing that 'D', predecessor-in-interest of petitioners, had applied for copy of award of Collector in November, 2008 and thus award of Collector was known to him – And application for reference in 2016, thus is not maintainable – High Court found that CD Form was not bearing signatures of 'D' – It was filed by an Advocate, who is not shown to have been authorized by 'D' or petitioners to obtain copy of award – 'D' was shown to have died on 1st January, 2005- Therefore, question of obtaining copy of award by him in November, 2008 does not arise – Notice regarding deposit of amount was issued to petitioners on 14th July, 2016 – Held, this was the date on which the petitioners could be said to have knowledge of contents of award – Application for making reference was filed before Collector on 19th August, 2016 and thus was within limitation – Petition allowed – Collector directed to make reference to District Judge.

Title: Jalmi Ram and others Vs. The Land Acquisition Collector and another Page-200

Land Acquisition Act, 1894- Sections 18 & 23- Market Value – Determination – Acquisition of part of building only – Reference Court assessing rental value of acquired part at Rs.34,580/- and granting 40% increase keeping in view location of property – Appeal by State and cross-objections by landowner – Cross-objector did not lead any evidence qua claim of Rs.500/- per square yard nor evidence regarding spending of Rs. 5 lakh for restoring affected part of building – Assessment of Reference Court found proper – Appeal and cross-objections dismissed.

Title: State of H.P. & another Vs. Santosh Sood Page-539

Land Acquisition Act, 1894- Sections 18 and 23- Determination of market value – Principles enunciated – Land acquired for public purpose – On reference by claimants, market value of land determined by District Judge at Rs.2,000/- per square meter – Appeal against – High Court found that notification under Section 4 of Act was issued on 29.4.2006 – Proximate sale deed was dated 11.9.2006 and as per that market value of acquired land was Rs. 666.66 per square meter – Other documents relied upon by claimants were deeds of conveyance of 'houses' or of period much later of acquisition – Held, such conveyance deeds or deeds much later in time cannot be made basis for determination of market value of land.

Title: The Land Acquisition Collector Vs. Surjit Singh and others Page-242

Land Acquisition Act, 1894- Sections 18 and 23- Reference – Enhancement of compensation – Market value of land – Determination – Collector awarding compensation on basis of classification of land – Additional District Judge reassessing market value and granting compensation for land irrespective of its classification – RFA by acquiring department and cross-objection by claimants – Department assailing award on ground that (i) reliance by ADJ on previous awards without proof of similarly of both the lands, is wrong and (ii) deduction towards development charges is on lesser side which ought to have been at 40% - High Court found that Reference Court had relied upon previous award in respect of lands in village Ajnauli, which was acquired for same purpose – Award in that case had become final – Lands in both cases were in the periphery of Una town and had same potentiality – Reference Court had determined market value on lower side – Land was acquired for construction of railway tract – Development charges not involved – No deduct can be made under that head – Award of Reference Court upheld – Appeals and cross-objections dismissed.

Title: General Manager, Northern Railway Vs. Sidhu Ram and others Page-373

Legal Services Authority Act, 1987- Section 21- Award of Lok Adalat – Appeal against by insured – National Lok Adalat passing award in motor accident claims case - Held, Award of Lok Adalat is not appealable - It cannot be entertained.

Title: Praveen Kumar Vs. Bhupinder Singh & anr. Page-473

Legal Services Authority Act, 1987- Section 21- Award of Lok Adalat – Validity - Award passed by Lok Adalat on basis of statement given by Advocate of party – However, party was not present before Lok Adalat – Party challenging award on ground of its having been passed behind his back - Held, it is valid award as Advocate would not give statement without authorization/instructions of party – Petition dismissed.

Title: Praveen Kumar Vs. Bhupinder Singh & anr. Page-473

Limitation Act, 1963- Articles 24, 68, 70 and 71- Misappropriation of Istridhan by in-laws – Suit for compensation – Limitation – Plaintiff alleging misappropriation of Istridhan and other gift items by in-laws – Plaintiff filing suit for compensation and claiming money equivalent of misappropriated articles – Trial Court decreeing suit – Appeal against – High Court found entrustment of articles/gifts with in-laws having been made on 8.5.1994, 12.10.1994 and

13.10.1994 – Suit for compensation was filed on 13.11.2001 – Held, suit for compensation could have been filed within three years of receipt of Istridhan by defendants – Suit barred by limitation – Appeal allowed – Judgment and decree of Addl. District Judge set aside – Suit dismissed.

Title: Sandeep Singh & ors. Vs. Vandana & another Page-600

Limitation Act, 1963- Section 3- Limitation – Plea of, Stage at which can be raised – Held, Section 3 of Act casts a duty upon Court to dismiss a suit, appeal or application if barred by limitation even if no such plea has been taken in pleadings – Point of limitation is admissible even in the Court of last resort although it had not been raised in the Lower Courts – Application of petitioner seeking amendment in writ petition for enabling them to take plea of limitation dismissed with liberty to raise this point at the time of arguments.

Title: Chiplu Ram and others Vs. State of H.P. & others Page-21

'M'

Medical Jurisprudence – Schizophrenia – What is? – Held, schizophrenia is a difficult mental-affliction - Insidious in its onset, it is characterized by the shallowness of emotions and is marked by a detachment from reality - In paranoid-state, the victim responds even to fleeting expressions of disapproval from others – However, not all schizophrenias are characterized by same intensity of the disease, therefore, degree of mental disorder is required to be proved.

Title: Parvesh Kumar Vs. Asha Kumari & Anr. Page-236

Motor Vehicles Act, 1988- Section 140- No fault liability – Claims Tribunal directing Insurance Company to pay compensation towards no fault liability – Appeal against – Insurance Company assailing liability on ground that accident took place at 1:00 P.M., whereas, policy was effective from 3:30 P.M. – Question of liability left open with liberty to Insurer to agitate it at appropriate stage in claim petition – Appeal disposed of.

Title: United India Insurance Company Ltd. Vs. Vidya Devi & ors. Page-264

Motor Vehicles Act, 1988- Section 166- Claim application – Grant of compensation – Claimant seeking compensation for bodily injuries suffered by him in a motor accident – Claims Tribunal granting compensation to the tune of Rs.17,000/- with interest – Appeal against – Claimant arguing that he had suffered fracture of frontal bone of right side and one chip was found lying in brain – And because of head injury his vision had become weak and there was loss of memory as well – Petitioner also seeking medical reimbursement of Bills – High Court found that (i) though there was head injury but its effect on claimant's vision and memory was not got proved by him from medical evidence (ii) there was no evidence qua medical expenses incurred by him – Held, claimant was not entitled for compensation towards medical expenses and alleged loss of vision/disability on account of injuries to brain – However, in view of nature of injuries, compensation towards pain and sufferings enhanced from Rs. 10,000/- to Rs. 35,000/- with interest – Appeal partly allowed – Award modified.

Title: Rajinder Singh Sablaik Vs. Pritmi Devi and others Page-147

Motor Vehicles Act, 1988- Section 166- Claim application – Permanent disability – Effect of – Claims Tribunal granting compensation under head 'loss of earning capacity', on finding that claimant had suffered permanent disability in motor accident – Appeal against – Claimant was a tailor – As per his own evidence, he was still working as tailor – Loss of earning capacity on account of permanent disability not proved – Held, Claims Tribunal went wrong in granting compensation towards loss of earning capacity – Appeal partly allowed – Award modified.

Title: Prithvi Singh Vs. Mahinder Pal Page-558

Motor Vehicles Act, 1988- Section 166- Claim for bodily injuries – Permanent disability – Determination of quantum – Whether 2nd Schedule to the Act can be applied in a case of non-earning person? – Claimant a boy aged 9 years suffered crush injuries on a right foot beside other injuries in a motor accident - There was permanent disability to the extent of 40% with respect to his right foot – Claims Tribunal by recourse to 2nd Schedule to Act assessing income of injured notionally at Rs.15,000/- per annum and taking into consideration disability to the extent of 40% granting compensation of Rs. 1,08,000/- towards loss of future income after applying multiplier of '18' – Claims Tribunal not granting additions towards future prospects or compensation towards loss of amenities – Appeal against by claimant – Held, there was loss of earning capacity of the petitioner – Further, he would face difficulties in getting a lucrative job because of permanent disability – Tribunal ought to have given additions towards future prospects as also compensation for loss of amenities – High Court allowed 40% increase towards future prospects and granted compensation of Rs.1 lac under head 'loss of amenities' – Compensation for pain and suffering also enhanced from Rs.50,000/- to Rs.1 lac - Appeal allowed – Award modified.

Title: Master Ritik Verma (Minor) Vs. Sunita Kashyap and others Page-213

Motor Vehicles Act, 1988- Sections 147 & 166 – Compensation – Liability of insurer – Claims Tribunal on the basis of salary certificate assessing monthly income of deceased at Rs.4,000/- - Claims Tribunal also granting compensation to legal representatives under conventional heads – Appeal by insurer – Insurance company submitting that salary certificate could not have been relied upon for want of non-production of attendance and salary register maintained by the employer of deceased - Being so, assessment of income of deceased as determined by Claims Tribunal is wrong – Held, it was open to insurer to ensure production of such record before the Tribunal but it omitted to do so, hence cannot object to the assessment of income done on basis of such salary certificate – High Court further enhanced compensation under conventional heads in tune with ratio laid down in **National Insurance Co. Ltd. vs. Pranay Sethi and others,** reported in **2017 ACJ 2700** – Appeal partly allowed – Award modified.

Title: The New India Assurance Company Ltd. Vs. Kashmiri Devi & Others

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Motor Vehicles Act, 1988- Sections 147 & 166 – Compensation – Liability of insurer – Claims Tribunal on the basis of salary certificate assessing monthly income of deceased at Rs.5,000/- - Claims Tribunal also granting compensation to legal representatives under conventional heads – Appeal by insurer – Insurance company submitting that salary certificate could not have been relied upon for want of non-production of attendance and salary registers maintained by the employer of deceased - Being so, assessment of income of deceased as determined by Claims Tribunal is wrong – Held, it was open to insurer to ensure production of such record before the Tribunal but it omitted to do so, hence cannot object to the assessment of income done on basis of such salary certificate – High Court further enhanced compensation under conventional heads in tune with ratio laid down in **National Insurance Co. Ltd. vs. Pranay Sethi and others,** reported in **2017 ACJ 2700** – Appeal partly allowed – Award modified.

Title: The New India Assurance Company Ltd. Vs. Rajni Devi & Others Page-309

Motor Vehicles Act, 1988- Sections 147 & 166- Claim application(s) – Liability of insurer – Claims Tribunal holding that the accident was the result of rash and negligent driving of driver of offending vehicle and fastening liability on Insurer to indemnify award(s) – Appeal(s) against – Insurer assailing award(s) on grounds that (i) sudden mechanical defect was cause of accident (ii) driver was drunk while driving, (iii) ten persons were travelling in light goods vehicle and they were gratuitous passengers – Held, (i) in absence of any mechanical report no finding can be given that some mechanical defect was cause of accident, (ii) FSL report though proves highly inebriated condition of driver indicating that he was driving in intoxicated condition, but drunken driving is not a defence available to the insurer (iii) documents tender on record prove that

deceased were travelling as owners of goods – Further held, Claims Tribunal was justified in fastening liability on insurer – Appeals dismissed – Awards upheld.

Title: United India Insurance Company Ltd. Vs. Vidya Devi & Others Page-321

Motor Vehicles Act, 1988- Sections 149 and 166- Claim application – Liability of Insurer – Gratuitous passenger, who is? – Claims Tribunal fastening liability on Insurer – Appeal against – Insurance company assailing award of Claims Tribunal on ground that claimants had not pleaded that deceased was travelling in light goods vehicle as owner of goods, being so, it had no liability to indemnify award – On facts, High Court found that claimants had failed in establishing that deceased was travelling as owner of goods in a 'goods vehicle' – Held, deceased was a gratuitous passenger in the vehicle - Insurance Company had no liability – However, Insurer directed to pay the amount in question first to claimants and then recover same from Insured – Appeal disposed of – Award modified.

Title: Reliance General Insurance Company Ltd. Vs. Neelam Devi & Others

Page-303

Motor Vehicles Act, 1989- Section 174- Execution of Award – Claims Tribunal granting compensation to claimant with interest for loss caused to his property and directing insurer to indemnify the award in toto – In appeal, High Court allowing appeal of insurance Company and restricting its liability towards third party loss at Rs. 6,000/- only – Claimant filing execution against owners of offending vehicle – Executing Court dismissing execution application on ground that award of Claims Tribunal as modified by High Court does not impose any liability on owners – Petition against – Held, Claims Tribunal in its award had specifically held that claimant suffered loss because of rash and negligent driving of driver of bus, owned by said owners – Also that owners had not contravened any terms and conditions of Insurance Policy and in that view of matter had fastened liability on Insurance Company – Further held, it is not a case where Claims Tribunal did not hold owners of bus liable to indemnify the claimants, notwithstanding that their liability is not written in so many words in the award – Approach of Executing Court is hyper technical – Petition allowed – Order set aside – Matter remanded to Executing Court to execute award in its letter and spirit.

Title: Dharam Pal (deceased) through Sheela Rani and others Vs. Yashwant Singh and another

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'N'

Narcotic Drugs and Psychotropic Substances Act, 1985 (Act)- Section 25- **Registration of Foreigners Act, 1939-** Section 5- **Registration of Foreigners Rules, 1992-** Rule 14- **Code of Criminal Procedure, 1973-** Section 216- Framing of charge – Material to be looked into – During raid, police recovering huge quantity of Hashish, Hashish oil, Ganja, syringes etc. from building owned by petitioner but given on rent to 'V', a foreigner – During investigation 'V' disclosing that petitioner had been occasionally visiting premises and knew of activities – Trial Court charging petitioner for offences under Sections 20 and 21 of Act and 5 of Registration of Foreigners Act without assigning any reason - Challenge thereto – Charge-sheet filed by police no where alleging that petitioner was also involved in commission of offences under Sections 20 and 21 of Act- Allegations against him were regarding offence under Section 25 of Act and Registration of Foreigners Act only – Order of Trial Court also did not record any reason for framing charges under Section 20 & 21 of Act- Held, No doubt, court can frame charges under other provisions/sections of law not specifically included in charge-sheet but clearly made out from material on record – However, it is obligatory for Court to given reasons for framing charges under other Sections of law - Impugned order did not give any reason for framing charges under Section 20 & 21 of Act against petitioner – Petition allowed – Order set aside.

Title: Daulat Ram Vs. State of Himachal Pradesh Page-483

Narcotic Drugs and Psychotropic Substances Act, 1985- Sections 18, 20 and 29- Jurisprudence – Possession : What is ? – Held, in a given case, possession need not be a physical possession – It can be constructive with animus and control over the articles in question – A person may possess an article by keeping its physical possession with another – But having animus dominion and control over it, with him.

Title: Title: State of Himachal Pradesh Vs. Mohit and others (D.B.) Page-1

Narcotic Drugs and Psychotropic Substances Act, 1985- Sections 18, 20 and 29- Recovery of opium and charas from vehicle – Liability of owner – Police intercepting a vehicle and recovering packets of opium and charas lying concealed in it – All occupants managed to escape in darkness – Trial Court acquitting all accused including owner 'M' of all the offences – Appeal by State – High Court found that (i) vehicle was a newly purchased one and had not yet been registered (ii) 'M' was the owner of this vehicle (iii) Recovery of huge quantity of contraband was recovered from the vehicle (iv) 'M' could not explain as how his vehicle happened to be present at that relevant point of time and in a remote part of the State (v) 'M' produced documents of vehicle during investigation – Held, onus was on 'M' to show for what purpose his vehicle was at Ani, particularly when he claimed to have never ever visited that place – Since, he did not explain these circumstances, he is to be considered in possession of articles recovered from the vehicle – Appeal partly allowed – Acquittal of 'M' set aside, and he is convicted of offences under Sections 18 and 20 of Act.

Title: State of Himachal Pradesh Vs. Mohit and others (D.B.) Page-1

Negotiable Instruments Act, 1881- Section 138- Dishonour of cheque – Closure of account – Complainant, a company filing complaint against another company for dishonour of cheque - Trial Court dismissing complaint and acquitting accused on ground that one 'S' not proved to have been duly authorized to depose on behalf of complainant – Also that disputed cheque appeared to have been issued towards 'security' - Appeal against acquittal – High Court found that there were specific averments in the complaint that pursuant to a resolution of Board of Directors, Power of Attorney was executed in favour of 'H' under which he was authorized to further delegate his powers – In exercise of his powers, 'H' had executed Special Power of Attorney in favour of 'S' – Special Power of Attorney was filed in evidence – No cross-examination whatsoever was done on 'S' regarding authorization of 'H' by company and his power to execute SPA – Held, Trial Court went wrong in holding that 'S' was not competent to depose on behalf of Company.

Title: M/s Mohan Meakin Limited Vs. M/s Spirit and Beverages L-1 Page-72

Negotiable Instruments Act, 1881- Section 138- Dishonour of cheque – Cheque, Whether for consideration or towards 'security' – Determination - Trial Court acquitting accused on ground that disputed cheque appeared to have been given as a 'security' – Appeal against – High Court found that complainant–company was manufacturer of IMFL – Accused-company was purchasing liquor from complainant – There were financial transactions between them till October, 2004 – Accused admitted in his statement recorded under Section 313 of Cr.P.C. regarding financial dealings – Accused failed to prove discharge of liability – Held, Cheque was given for consideration and it was not issued towards security – Appeal of complainant allowed – Accused convicted.

Title: M/s Mohan Meakin Limited Vs. M/s Spirit and Beverages L-1 Page-72

Negotiable Instruments Act, 1881- Section 138- Dishonour of Cheque – Cheque, whether for consideration? Trial Court convicting accused for offence under Section 138 of Act – Additional Sessions Judge upholding conviction and sentence in appeal – Revision against – Accused taking plea that dishonoured cheque was issued as security in favour of one 'N' and not for discharge of any liability existing in favour of complainant – Accused however admitting his signatures on cheque in question – Not taking any such plea in statement recorded under Section 313 Cr.P.C.

that it was a security cheque – 'N' was not examined in defence – Held, accused failed to discharge presumption that cheque was issued for consideration in complainant's favour – Other ingredients of offence under Section 138 of Act also stand proved - Conviction and order of sentence upheld.

Title: Onkar Chand Vs. Dharam Pal Page-413

Negotiable Instruments Act, 1881- Section 138- Dishonour of cheque – Cheque, whether for consideration? – Accused acquitted by Trial Court by holding that cheque was obtained from him by complainant under police pressure- Appeal against – Complainant alleging lending of amount to accused and of latter having given cheque in question to him at complainant's house – High Court found that (i) wife and sister-in-law of complainant had issued Special Power of Attorney in favour of accused to sell their land at Shimla, (ii) As there was some dispute regarding money having been received by accused after selling their land, accused was called to police station on that date and (iii) cheque was filled in by MHC of Police Station and not by accused – Held, defence of accused that cheque in question was procured under police pressure is probablised on record – Appeal dismissed – Judgment of Trial Court upheld.

Title: Laxmi Dhar Vs. Gurdial Singh Page-395

'P'

Protection of Children from Sexual Offences Act, 2012- Section 4 – Penetrative sexual assault – Special Judge charged, tried and convicted accused of said offence on allegations that he committed penetrative sexual assault on victim in September, 2012 and April, 2013 – Appeal against – Act however came into force on and w.e.f. 14.11.2012 – And thus had no retrospective operation – No allegation in statement recorded under Section 164 Cr.P.C. that she was sexually assault in April, 2013 – Held, Accused could have been tried for offences under Indian Penal Code for such misdemeanor – Appeal allowed – Conviction and final order of sentence set aside – Matter remanded to Special Judge for de novo trial.

Title: Dilbagh Singh alias Ashu Vs. State of H.P. Page-198

Protection of Children from Sexual Offences Act, 2012- Section 4- **Indian Penal Code, 1860-** Sections 452 and 506- House trespass and aggravated sexual assault – Special Judge holding accused guilty and sentencing him for aforesaid offences – Appeal against – Defence assailing judgment on ground of wrong appreciation of evidence – As per allegations, victim was sleeping with her grand-mother in ground floor of house, where accused came, ravished her and fled away – Accused had allegedly raped her after gagging her mouth – High Court found that (i) no injuries on mouth or any part of body of victim were there, (ii) On alleged date of incident, victim was menstruating and blood on her salwar could be her own, (iii) No other incriminatory material was found on her clothes or pubic hair, (iv) Grand-mother of victim, who had allegedly seen accused fleeing from room was not cited as witness, (v) Statement of complainant (father) found contradictory vis-à-vis a version given in FIR – In his deposition before Court complainant (father) himself claims to have seen accused fleeing out of room whereas in FIR he had alleged of his mother having seen accused fleeing and (vi) Entry or escape of accused through main door found improbable - Held, on such improbable evidence accused could not be held guilty – Appeal allowed – Judgment and final order set aside.

Title: Kashmir Singh alias Kashmiru Vs. State of H.P. Page-387

Punjab Re-organization Act, 1966- Section 79(9) – Bhakhra Beas Management Board Class III and Class IV Employees (Recruitment & Conditions of Service) Regulations, 1994 (Regulations) - Power of Chairman to amend Regulations without prior approval of Central Government – Held, Language of sub Section 9 of Section 79 of Act is unambiguously clear – Regulations stipulating the conditions of service of Officers and other staff, which expression would also include amended Regulations can be framed by the Board with previous approval of Central Government and by

issuing a notification in the official gazette – As the prior approval of Central Government for the proposed amendment in the Regulations for promotion to the post of Sub Fire Officer was not obtained, it cannot be said that Regulations stood amended with exercise of such power by Chairman of the Board – Therefore, promotion to the post of Sub Fire Officer is to be governed by original Rules/Regulations.

Title: Kashmir Chand Vs. Bhakra Beas Management Board and another (D.B.)
Page-327

'R'

Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013- Sections 63 and 76- Apportionment of compensation – Dispute regarding - Bar of jurisdiction of Civil Court – Held, Civil court has no jurisdiction whatsoever to entertain any dispute pertaining to acquisition proceedings or any other related issue including dispute qua apportionment of amount awarded as compensation to landowners.

Title: Balbir Singh and Anr. Vs. State of HP and Ors. (D.B.) Page- 68

'S'

Specific Relief Act, 1963- Section 34- Suit for declaration and injunction – Plaintiff claiming ownership and joint possession by way of inheritance to estate of father 'S' alongwith defendants No.1 and 2 (Brother and Sister) – Also disputing Will purportedly executed by 'S' on ground that father was old, ill and bed ridden at the relevant time of execution of Will- Trial Court dismissing suit of plaintiff- First Appellate Court dismissing his appeal also – Regular Second Appeal – High Court found that Will in fact, was in favour of plaintiff and defendant No.1 (Son) as lands were given to both of them – Though in different villages – Marginal witness 'A' proving due execution of Will by testator – No evidence adduced by plaintiff to prove serious illness or unsound state of mind of his father – Held, findings of fact recorded by Lower Courts are based on correct appreciation of evidence- RSA dismissed.

Title: Chimanu Vs. Chamaru and another Page-40

Specific Relief Act, 1963- Section 34- Suit for declaration and injunctions – **Code of Civil Procedure, 1908-** Order XVIII Rule 18- Before First Appellate Court, defendants filing application under Order XVIII Rule 18 of Code for spot inspection – Appellate Court deciding appeal without passing any order on it – RSA by defendants – Held, decree of First Appellate Court was vitiated for non-consideration of application under Order XVIII Rule 18 of Code – Appeal allowed – Judgment and decree of First Appellate Court set aside – Matter remanded.

Title: Chhering Dorje (Deceased) through LRs Smt. Padma Devi and ors. Vs. Dawa Gialchhan & anr. Page-293

Specific Relief Act, 1963- Section 38- Suit for permanent prohibitory injunction – Plaintiff seeking permanent prohibitory injunction for restraining defendants from damaging/destroying brick kiln and its other assets, etc., being run in partnership by him and defendants till firm is legally dissolved and accounts are rendered and paid to him – Suit decreed by Trial Court – In appeal, First Appellate Court allowing appeal setting aside judgment and decree and dismissing suit of plaintiff – Regular Second Appeal – High Court found that partnership had validly been dissolved with mutual consent of parties through a dissolution deed – Due execution of dissolution deed further proved from statement of marginal witness 'M' – Held, Suit for injunction was not maintainable and suit, if any, ought to have been for rendition of accounts – Parties even can go for arbitration as per term of dissolution deed – RSA dismissed – Decree of First Appellate Court upheld.

Title: Sanjay Kumar Vs. Shri Amar Nath (deceased) through his L.Rs. Page-344

Specific Relief Act, 1963- Sections 5 and 34- Suit for declaration & Injunction - In alternative for possession also – Plaintiff by alleging of having married to R as per 'Nath Chadar' custom after death of her husband 'T', claiming succession to R's estate – Also alleging that revenue entries showing defendant No.1 (D1) as widow of 'R', and of her having succeeded to estate of 'R' are wrong – Defendants No.2 and 3, purchasers from D1 pleading that plaintiff was widow of 'T' and no customary marriage took place between her and 'R' – Also asserting that D1 infact was widow of 'R' and she executed sale of land in their favour – Trial Court dismissing suit by holding that neither dissolution of marriage between 'R' and D1 nor prevalence of custom of 'Nath Chadar' in community of 'R' was proved – Trial Court disbelieving entries of voter list and Pariwar register showing plaintiff as wife of 'R'- In appeal, District Judge allowing plaintiff's appeal by holding that oral as well as documentary evidence clearly revealed that D1 had married 'P' after death of first wife of 'P' and was so recorded throughout as his wife in records of Panchayat – District Judge also held plaintiff having married to 'R' as per customary rites and decreeing suit – RSA by defendants- On facts, High Court found that (i) D1 did not file any written statement and never controverted case of plaintiff (ii) Written statement was only of persons who had purchased property from D1, (iii) plaintiff was married to R as per Nath Chadar, as this marriage was attended by witnesses 'S' and 'H' examined by plaintiff (iv) Plaintiff was consistently recorded as wife of ''R' in voter list (v) Foster son of D1 proved that D1 was married to his father 'P' after death of his mother 'B' - D1 is recorded wife of 'P' in vote list and other records of Panchayat – Held, District Judge was justified in reversing decree of trial court – RSA dismissed.

Title: Besri Devi & ors. Vs. Ramku & ors Page-459

Specific Relief Act, 1963- Sections 5 and 38- Suit for possession and injunction – Trial Court granting decree of permanent prohibitory injunction with respect to part of suit land, and of vacant possession by demolition of construction of defendants with respect to remaining land, after denying plea of adverse possession of defendants – Appeal of defendants dismissed by First Appellate Court – RSA – On facts, High Court found that some land was granted to defendants predecessor-in-interest as 'Nautor' adjoining to suit land in 1969 - Exact locations and dimensions of such land are not depicted in 'patta' – Nor does grant shows that suit land was part of such land allotted to defendants' predecessor – Held, it cannot be held that defendants were possessing part of suit land since 1969 adversely to 'K', the predecessor of plaintiff – Adverse possession over part of suit land not proved - RSA dismissed.

Title: Besar Singh & others Vs. Ramesh Chand & another Page-266

Specific Relief Act, 1963- Sections 37 and 39- Permanent prohibitory and mandatory injunctions – Entitlement of – Dispute interse co-sharers – Plaintiff seeking decree of permanent prohibitory injunction for restraining defendant from raising construction over joint land – Also praying for mandatory injunction for demolition of 'dhara' raised by defendant over suit land – Trial Court decreeing suit in toto – Appellate Court partly allowing appeal and declining mandatory injunction – RSA – High Court found that (i) 'Dhara' was constructed over land which was in exclusive possession of defendant (ii) it was well within share of defendant (iii) it was not as valuable portion of joint land and (iv) Partition proceedings were pending before revenue officer – On facts, High Court refused to interfere with decree of first appellate Court.

Title: Rattani Vs. Amrit Lal Page-580

Specific Relief Act, 1963- Sections 38 and 40- Suit for permanent prohibitory injunction and damages – Plaintiff filing suit for permanent prohibitory injunction and damages against defendants on allegations that they interfered in his land and illicitly cut grass from there – Trial Court decreeing suit and First Appellate Court dismissing appeal of defendants – RSA – On facts, High Court found that factual position on the spot was not as per 'Aks Musabi' – Exact location of disputed lands of parties thus was not determinable as noticed by Local Commissioner in his report – Held, Lower Courts went wrong in holding interference by defendants over plaintiff's

possession and decreeing his suit for injunction and damages – RSA allowed – Decrees of Lower Courts set aside – Suit dismissed.

Title: Khem Singh (since deceased) through his legal representatives and others Vs. Thakur Dass Page-203

'T'

Torts – Damages – Quantum - Determination of – Plaintiff filing suit for damages on ground that defendant by assaulting with a drat, caused grievous injuries to him - And on account of which, he suffered permanent disability to the extent of 15% - Plaintiff also claiming medical expenses and damages towards future prospects – Defendant denying allegations in toto – Trial Court assessing monthly income of plaintiff at Rs.3,000/- and on basis of 15% permanent disability determining annual loss of income at Rs.5,400/- - Trial Court taking average age of an individual at 60 years and deducting actual age (21 years) of plaintiff - Court assessing total loss of income for remaining 39 years at 5400 x 39 = Rs. 2,10,600/- but, confining decreeing to Rs.1,30,000/- what was claimed in plaint and partly decreeing suit – Appeal of defendant dismissed by District Judge – RSA by defendant – Defendant arguing that Lower Courts were influenced by findings of conviction recorded by criminal Court against him and there was no independent evidence in Civil proceedings regarding defendant having caused such injuries – High Court though found that there was independent evidence proving that defendant had caused permanent disability by inflicting injuries to plaintiff with a drat, but held that multiplier of '39' was highly unreasonable – In view of age of plaintiff, multiplier of '18' was applied and damages reduced to Rs.97,200/- - RSA partly allowed – Decree modified.

Title: Naresh Kumar alias Sonu Vs. Mehar Singh Page-468

Transfer of Property Act, 1882- Section 44- Joint land – Rights of co-sharers – Held, no co-sharer is empowered to make exclusive use of any part of undivided land.

Title: Rattani Vs. Amrit Lal Page-580

'W'

Workmen's Compensation Act, 1923- Section 22- **Code of Civil Procedure, 1908-** Section 11- Resjudicata - whether applicable in proceedings before Commissioner? – Petitioner's application for compensation was dismissed by Motor Accidents Claims Tribunal, Mandi – Thereafter, application filed by petitioner's wife for compensation was also dismissed in default by Workmens Compensation Commissioner, Sadar Mandi on ground that said Authority had no territorial jurisdiction – Then petitioner filed application before Commissioner at Sarkaghat, which was allowed – Appeal by insurer - Arguing that application before Commissioner was barred by res judicata - Held, earlier applications were not decided on merit(s)- So, principle of res judicata, has no applicability in subsequent proceedings – Appeal of Insurer dismissed.

Title: Oriental Insurance Company Vs. Brij Lal and another Page-429

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

State of Himachal Pradesh ....Appellant
Versus
Mohit and others ....Respondents

Cr. Appeal No. 343 of 2011
Judgment reserved on 21.08.2017
Date of Decision 12th September, 2017

Narcotic Drugs and Psychotropic Substances Act, 1985- Sections 18, 20 and 29- Jurisprudence – Possession : What is ? – Held, in a given case, possession need not be a physical possession – It can be constructive with animus and control over the articles in question – A person may possess an article by keeping its physical possession with another – But having animus dominion and control over it, with him. (Para- 56)

Narcotic Drugs and Psychotropic Substances Act, 1985- Sections 18, 20 and 29- Recovery of opium and charas from vehicle – Liability of owner – Police intercepting a vehicle and recovering packets of opium and charas lying concealed in it – All occupants managed to escape in darkness – Trial Court acquitting all accused including owner 'M' of all the offences – Appeal by State – High Court found that (i) vehicle was a newly purchased one and had not yet been registered (ii) 'M' was the owner of this vehicle (iii) Recovery of huge quantity of contraband was recovered from the vehicle (iv) 'M' could not explain as how his vehicle happened to be present at that relevant point of time and in a remote part of the State (v) 'M' produced documents of vehicle during investigation – Held, onus was on 'M' to show for what purpose his vehicle was at Ani, particularly when he claimed to have never ever visited that place – Since, he did not explain these circumstances, he is to be considered in possession of articles recovered from the vehicle – Appeal partly allowed – Acquittal of 'M' set aside, and he is convicted of offences under Sections 18 and 20 of Act. (Paras-68 to 78)

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For the Appellant: Mr.D.S.Nainta and Mr.Virender Verma, Additional Advocates General.
For Respondent No.1: Mr.N.S.Chandel, Advocate with Mr.Dinesh Thakur, Advocate.
For Respondents Nos. 2 and 3: Mr. Manoj Pathak, Advocate with Mr.Vikas Chandel, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.

State has preferred present appeal against acquittal of respondents by learned Special Judge (II), Kinnaur at Rampur, vide judgment dated 30.3.2011, passed in sessions trial No. 15-AR/3 of 2008/2010, title State vs. Mohit and others, in case FIR No. 70 of 2008, dated 22.6.2008 registered at Police Station Ani, under Sections 18, 20 and 29 of Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to the Act).

2. Case of the prosecution is that during intervening night between 21st and 22nd June, 2008, after 1 AM, PW11 ASI Prem Lal along with PW4 HHC Roshan Lal, C. Sunder and HHG Daya Ram, during Nakabandi duty, was returning to police station Ani and on reaching behind Kiran Bazar at 1.30 AM a vehicle, coming from Ani side towards Luhari, was noticed, which was stopped by giving signal by police party. In the said vehicle four persons were sitting. On asking by PW11, driver of vehicle handed over his driving licence as well as documents of vehicle. Vehicle was not having registration certificate but driver produced documents indicating temporary registration No. HR-99-BY.Temp-3059. Papers of vehicle were returned but licence of driver was with PW11. Occupants of vehicle could not satisfactorily explain for travelling during midnight, whereupon on suspicion PW11 along with other police officials, started checking the

vehicles and found a packet concealed in stepney of vehicle. The moment PW11 started opening the packet, all four persons fled away from spot by taking benefit of darkness but leaving the vehicle there. Police party unsuccessfully attempted to apprehend these persons by chasing them. In recovered packet, other packets containing charas and opium were found. As there was no arrangement of light on the spot, place was secluded one and there was no possibility of crossing another vehicle on the spot at that time and also because of night there was non-availability of independent witnesses, it was not plausible to carry on proceedings on the spot. Therefore, PW4 HHC Roshan Lal and C.Sunder Singh were associated as witnesses in proceedings and vehicle in question was brought to old bus stand near police station along with accompanying police officials with the help of driver Dalip Singh and HHG Daya Ram was retained with intercepted vehicle.

3. Police party headed by PW11 Prem Lal, reached at police station at about 2.30 AM and arrival report No.3 dated 22.6.2008 was recorded. PW11 informed PW5 SHO Nathu Ram about the incident, who in turn, deputed police officials/parties to search accused vide report No. 5 dated 22.6.2008 Ext.PW6/D recorded at 3.05 AM. Licence of driver of vehicle, left with PW11, revealed name and address of driver of vehicle as Pawan Kumar son of Sube Singh resident of VPO Chiri Rohtak (Haryana). On weighing charas and opium of four packets, found in recovered packet of cloth, in presence of witnesses associated in proceedings, charas weighing 1.430 Kg., 1.740 Kg. and 3.285 Kg was found in three different packets, whereas in fourth packet 320 grams opium was found. Two samples each from all packets were taken and samples as well as remaining contraband in respective packets were sealed with seal 'T' and packets of remaining contraband were marked as P-1 to P-4 and samples were marked as S-1 to S-8 and NCB form was filled in triplicate and seal was handed over to PW4 HHG Roshan Lal after taking the specimen of seal Ext.PW4/B on cloth and on NCB forms Ext.PW5/C. Thereafter ruka Ext.PW11/A was prepared and handed over to PW5, in pursuance to which FIR Ext.PW5/A was registered at 4.20 AM and endorsement thereabout Ext.PW5/B was made by PW5 on the ruka at 5.50 AM as PW11 also produced case property including samples, specimen impression of seal and NCB form before PW5 regarding which Ext.PW6/F report No. 8 dated 22.6.2008 was recorded. PW11 resealed the parcels of samples as well as remaining contraband with seal 'H' and after taking specimen impression of seal Ext.PW4/C and filling columns of NCB form Ext.PW5/C deposited case property in malkhana with PW6 MHC Rajinder Singh at 6.15 AM vide Ext.PW6/G report No. 9 dated 22.6.2008. PW6 entered the same at Sr. No. 170 (Ext.PW6/A) in the Malkhana register. Special report Ext.PW1/A prepared by PW11 ASI Prem Lal was also submitted to Reader to Dy.S.P. Ani at 6.15 PM on 22.6.2008 through PW1 HHC Kashmi Ram. Copy of FIR was also delivered to Sub Divisional Judicial Magistrate, Ani at 5.10 PM on 22.6.2008.

4. PW7 ASI Ludar Singh was also instructed by PW5 to search culprits towards Dalash, who at about 2.30 PM had a clue from driver and conductor of a bus coming from Dalash side about persence of strangers, who alighted from bus on the last curve whereupon PW7 along with police officials reached at the place, informed by bus driver and conductor and found respondents there. Police party apprehended two of respondents whereas respondent Ajmer Singh jumped down the hill from road. However, he was also impressed upon by PW7 to come back and surrender. All of them were brought to police station Ani and produced before investigating officer on reaching there at 7 PM. Respondent Mohit Kumar produced documents i.e. delivery challan Ext.P-17, pollution under control certificate Ext.P-18 and application for inspection of vehicles Ext.P-19 and photocopy of voter ID card to investigating officer which were taken in possession vide memo Ext.PW4/G and respondents were arrested vide memos Ext.PW4/D, Ext.PW4/E and Ext.PW4/F. Three sample parcels of charas and one sample parcel of opium were sent to State Forensic Science Laboratory by PW6 HC Rajinder through PW2 C.Hans Raj vide road certificate Ext.PW2/A who delivered the same in State Forensic Science Laboratory against proper receipt on road certificate and deposited the road certificate with PW6 Rajinder Kumar on his return. On 9.3.2010 all remaining eight sealed pracels (four of samples + four of remaining contraband) were also sent to State Forensic Science Laboratory by PW8 HC Anup Kumar through PW9 C.Puran Chand vide road certificate Ext.PW8/A, which were delivered in State Forensic Laboratory against

proper receipt which was deposited in police station by PW9 on his return. PW9 Puran Chand also brought sealed parcels back along with reports from State Forensic Science Laboratory on 8.5.2010 and deposited the same in malkhana.

5 On completion of investigation challan was presented in Court. During trial parcels of remaining bulk of recovered contraband were produced in the Court on 27.2.2010 by PW10 C.Chande Ram after receiving the same from Malkhana on that day and on the very same day it was deposited in the Malkhana. On that day application of the State filed under Section 311 Cr.P.C. was allowed and State was permitted to send entire bulk of remained contraband to State FSL for chemical analysis. Thereafter on 9.3.2010 entire bulk was sent to State FSL for chemical examination by MHC PW8 Anoop Kumar through PW9 Puran Chand on 8.5.2010, parcels of contraband and chemical analysis reports from State FSL were also brought back and deposited in the Malkhana by PW9. As per chemical examination report Ext.PW8/C recovered contraband Ext.P1, Ext.P2 and Ext.P4 and samples thereof were found to be charas and in Ext.P3 and its sample was found to be opium. Chemical Analyst report of State FSL along with supplementary challan under Section 173 Cr.P.C. was filed in Court on 5.6.2010 and thereafter trial was completed.

6. According to defence taken by respondents, none of them were travelling in pick-up vehicle at the time of recovery of contraband from it and respondent No.1 Mohit, owner of vehicle, was contacted on his mobile phone from P.S. Ani, after having his mobile number scribed on body of vehicle, informing that his vehicle had been found abandoned in Ani bazar and after receiving the call, he tried to contact his driver Vishal on his mobile but his number was not responding. Whereafter he requested respondent No. 2 Ajmer and respondent No. 3 Pawan to accompany him to Ani as he had never visited the said place. They boarded Haryana Roadways bus from Chandigarh going to Rampur and after alighting at Sainj, they reached Police Station Ani at about 2.30 PM where police started harassing them and after taking documents and their bus tickets in possession, they were implicated in present case.

7. Prosecution has examined eleven witnesses to prove its case. Respondents, after recording of statements under Section 313 of Code of Criminal Procedure, has chosen not to lead any evidence in their defence. On conclusion of trial, respondents stand acquitted.

8. We have heard learned Additional Advocate General appearing on behalf of State and also learned counsel appearing on behalf of respondents and have also perused the record.

9. PW1 has proved delivery of special report to SDPO/Dy.S.P., Ani in present case on 22.6.2008 at about 6.15 PM by producing copy of same Ext.PW1/A having endorsement of receipt thereon. PW6 Rajinder Kumar has proved deposit of four big parcels and eight sample parcels duly sealed with seals 'H' and 'T' along with specimen impression of seal and NCB form in triplicate in Malkhana, which were handed over to him by PW5 SHO Nathu Ram on 22.6.2008 and entered by him in malkhana register at Sr. No. 170 (Ext.PW6/A). He also corroborated handing over three sample parcels of charas and one sample of opium to PW2 C.Hans Raj along with documents, NCB form and specimen impression of seal in State Forensic Science Laboratory vide RC Ext.PW2/A. He further certified that during his custody sealed exhibits remained intact. PW2 has proved delivery of four sealed parcels in State Forensic Science Laboratory vide road certificate No. 36 of 2008 Ext.PW2/A on 24.6.2008. In cross examination he has denied that no exhibits were handed over to him to be delivered at State Forensic Science Laboratory vide RC Ext.PW2/A.

10. PW10 C. Chande Ram has proved production of sealed exhibits in Court on 27.2.2010 after receiving the same from PW8 MHC Anup Kumar and also returning these exhibits in malkhana on same day after producing in the Court. He further certified that during his possession these parcels were not tampered.

11. PW8 HC Anup Kumar has proved handing over eight sealed parcels duly sealed with seals 'T' and 'H' along with Court seal to PW9 C.Puran Chand on 9.3.2010 for delivering the same in State Forensic Science Laboratory vide RC No. 126/09-10 Ext.PW8/A and NCB form

Ext.PW8/B along with specimen impression of seals. He also proved bringing back sealed exhibits along with report Ext.PW8/C from State Forensic Science Laboratory by PW9 C.Puran Chand on 8.5.2010. He proved entries made in malkhana register in this regard.

12. PW9 Puran Chand has corroborated the fact of receiving eight sealed parcels along with other documents for handing over in State Forensic Science Laboratory and also depositing RC with PW8 H.C. Anoop Kumar having receipt thereon with regard to deposit of these articles in laboratory. He also certified that there was no tampering with sealed exhibits during his possession. He further proved bringing back sealed exhibits along with report Ext.PW8/C from State Forensic Science Laboratory on 8.5.2010.

13. Report Ext.PW6/D was recorded at instance of PW5 Nathu Ram who was SHO at that time. As per PW11 Prem Lal, after recovering contraband at about 1.30 AM near Kiran Bazar, he reached in police station at about 2.30 AM regarding which DD report No. 3 (Ext.PW6/C) was entered in police station. As per his deposition in Court, he informed PW5 Nathu Ram about fleeing of accused from spot. As per prosecution case, after receiving this information PW5 Nathu Ram deputed police parties in search of accused regarding which DD entry Ext.PW6/D was made at 3.05 AM. In the meanwhile, PW11 Prem Lal prepared ruka and handed over the same to PW5 Nathu Ram at 4.20 AM who in turn registered FIR Ext.PW5/A at 4.20 AM. Thereafter, PW11 Prem Lal produced case property sealed with seal 'T' along with sample seal and NCB-I form in triplicate before PW5 Nathu Ram SHO and vehicle along with key and stepeny was handed over to MHC at 5.50 AM regarding which report No. 8 dated 22.6.2008 Ext.PW6/F was recorded whereafter PW5 Nathu Ram resealed parcels with seal 'H' and affixed seal on NCB-I forms also and after taking sample seal, deposited case property along with sample seals and NCB-I form with MHC at 6.15 AM regarding which DD report No. 9 dated 22.6.2008 Ext.PW6/G was recorded.

14. As per deposition of PW5 Nathu Ram in Court, he came to know about recovery of contraband when I.O. came to the police station from spot but he also stated that I.O. had told him about fleeing of accused at the time of handing over of ruka and not at the time when I.O. reached in police station from spot. Ruka was handed over at 4.15 AM whereas I.O. reached in police station at 2.30 AM and PW5, at 3.05 AM, deputed police parties to search accused.

15. According to Ext.PW6/D, HHG Jeevan Singh was deputed with PW7 ASI Luder Singh and HC Punne Ram along with C.Beli Ram were deputed towards Luhari side and C.Hans Raj along with HHG Jai Singh was sent towards Samash. After closing line in the end of this report, that report is recorded, it was further added that official vehicle No. HP-34-398 along with driver Dalip Singh and HHG Duni Chand was also deputed with police officials. With whom out of three police parties, official jeep with driver and HHG Duni Chand was sent, is not clear in this report.

16. As per report No. 5 dated 22.6.2008 Ext.PW6/D police parties were departed in search of absconding accused at the time of recording the said report i.e. at 3.05 AM. PW7, in Court, deposed that he could not say time of his departure from Police Station in the morning. According to log book of official vehicle, extract of which has been placed on record in defence as Ext.DB and Ext.DC, vehicle was with PW7 ASI Ludar Singh from 8 AM to 6 PM on that day i.e. 22.6.2008 and before that since 21.6.2008 from 10 PM to 6 AM on 22.6.2008, it was with PW11 ASI Prem Lal.

17. PW3 Joban Dass has deposed that on 22.6.2008 he was sent by SHO P.S. Ani at 10 AM towards Runa, Thanog and Thashog to have information about absconding persons and on inquiry about them he came to know that three persons had gone towards Dalash after inquiring about path leading to Dalash and thereafter he returned back to police station and informed PW5 SHO Nathu Ram accordingly. In his cross examination he expressed his inability to disclose identity of persons from whom he made inquiry. He also stated that distance of Thanog to Ani is about 10 K.m. and that he went on foot to the area to which he was deputed and he returned to police station in the evening at about 7 PM.

18. As per Ext.PW6/D, PW7 ASI Ludar Singh along with HHG Jeewan Singh was sent towards Dalash at 3.05 AM. PW3 Joban Dass deposed that he was sent by PW5 Nathu Ram at about 10 AM towards Runa, Thanog and Thashog and he went on foot. From his statement it is evident that he went alone.As per Ext.DB, Ext.PW6/E and also deposition of PW7 ASI Luder Singh, official vehicle was with him and he was at Luhri at about 10/11 AM. According to Ext.PW6/D, HHG Jeewan Singh also should have been with him. PW3 Joban Dass stated that he was sent from police station by PW5 Nathu Ram at 10 AM towards Runa, Thanog and Thashog. There is nothing on record to suggest that PW2 Joban Dass and HHG Jeewan Singh are one and the same person. According to Ext.PW6/E, report No. 26 dated 22.6.2008 at 7 PM, PW7 ASI Ludar Singh accompanied by C.Bhup Singh, HHG Duni Chand returned to police station in official vehicle No. HP-34-0298 being driven by Dalip Singh along with absconding accused. PW7 Luder Singh never said that PW3 Joban Dass or HHG Jeevan Singh was with him but stated that he had left police station in the morning in the official vehicle with C.Bhup Singh, HHG Duni Chand and driver C.Dalip Singh. In Ext.PW6/D there is no reference of C.Bhup Singh being sent with ASI Ludar Singh or even any other police party as his name does not figure in the said report. As per Ext.PW6/D, HHG Jeevan Singh was deputed with PW7 but on return he was not with PW7. Where, when and how HHG Jeewan Singh parted with PW7 ASI Ludar Singh and C.Bhup Singh joined him, is not clear from record.

19. As per prosectuion case, contraband was recovered by PW11 Prem Lal and accused were apprehended by PW7 Ludar Singh whereas as per admission of PW7 Ludar Singh in his cross examination, entry has been made in his service book for 'C' certificate for seizure of contraband in case FIR of present case.

20. Prosecution has examined PW4 HHC Roshan Lal and PW11 ASI Prem Lal to prove recovery of contraband from vehicle and fleeing of respondents from the spot and also for the purpose of identification of respondents as the same persons who fled from spot. Both of them corroborated the prosecution story with regard to intercepting the vehicle, recovery of contraband from its stepney, fleeing of occupants thereof from the spot, unsuccessful chasing attempt to apprehend them, associating PW4 Roshan Lal and C.Sunder Singh (not examined) as witnesses in proceedings, bringing the vehicle from spot with help of driver Dalip Singh and carrying on remaining proceedings in police station. They also deposed that respondents were apprehended by PW7 Ludar Singh near Soedhar and brought to police station at about 7 PM on 22.6.2010 where respondent Mohit produced documents of vehicle which were taken in possession vide seizure memo Ext.PW5/G and respondents were arrested after disclosing grounds of their arrest and informing about their arrest vide memos Ext.PW4/D, Ext.PW4/E and Ext.PW4/F.

21. PW5 SHO Nathu Ram stated that on 22.6.2008 after receiving ruka from ASI Prem Lal, he registered FIR Ext.PW5/A and made endorsement Ext.PW5/B on ruka and on the same day resealed parcels of case property submitted by PW11 to him along with specimen impression of seal and NCB forms and also took specimen impression of seal Ext.PW4/C and filled NCB form Ext.PW5/C and deposited the case property along with documents in malkhana. He further deposed that he had sent police party in search of accused and on same day, at about 7 PM, PW7 ASI Ludar Singh had produced the accused in police station who were handed over to investigating officer.

22. PW7 ASI Ludar Singh in his deposition in Court stated that on 22.6.2008 when he was at Luhri, he received instructions from PW5 SHO Nathu Ram to lay nakabandi at place Jajjar as accused had fled away from Ani. He also stated about receiving of instructions at 2 PM with respect to description of accused, their dress, name of one accused as Pawan Kumar driver and to move towards Dalash whereafter on reaching Soedhar, driver of a transport bus coming from Dalash side, on inquiry, disclosed three persons had alighted from bus at Dalash, whereupon, he cordoned off the area and in forest two accused whose names were Mohit and Pawan Kumar were overpowered whereas third accused Ajmer was overpowered at a some

distance. He identified all accused present in Court, who were apprehended by him and produced before SHO in police station.

23. As per Nakal rapat No. 28 Ext.PW6/B, PW11 Prem Lal had departed for nakabandi towards Nagan etc. on 21.6.2010 at 10 PM which fact is corroborated by extract of log book Ext.DC wherein the vehicle No. HP-34-0298 used by him has been shown to be departed at 10 PM from police station. As per rapat No. 3 Ext.PW6/C, he reached back in police station at 2.30 AM after intercepting vehicle in question.

24. PW11 ASI Prem Lal stated that he had informed PW5 immediately after reaching in police station about fleeing of occupants of vehicle whereas PW5 denied this fact in his statement in Court but Rapat Ext.PW6/D recorded at the instance of PW5, at 3.05 AM corroborates statement of PW11. But PW5 Inspector Nathu Ram, in his deposition in Court specifically stated that he was not informed about this fact by PW11 before handing over the ruka and it was only at the time of handing over of ruka he was informed about this. As per evidence on record, ruka was handed over to PW5 by PW11 at 4.20 AM. If it was so then it was not possible for PW5 to send police parties in search of respondents at 3.05 AM.

25. In report Ext.PW6/D, it is not mentioned that with whom and in what direction the official vehicle No. HP-34A-298 with driver and HHG Duni Chand was sent. However, as per extract of log book Ext.DB, admitted to be correct by PW7 ASI Ludar Singh, he had departed in this official vehicle at 8 AM from police station towards Luhri, Jajjar, Soedhar, Dalash etc. As per Ext.PW6/D, PW7 was deputed for search of accused at 3.05 AM. There is nothing on record to show that PW7 had left police station at 3.05 AM, but in his statement he stated that he left police station in the morning but time was not remembered by him. As per extracts of log book Ext.DB and Ext.DC the vehicle was with PW11 ASI Prem Lal till 6 AM and with PW7 ASI Ludar Singh from 8 AM.

26. Entries of daily diary and log book with respect to timings are in conflict with each other and there is discrepancy in these entries, which has not been explained by prosecution witnesses rather they have further complicated the facts by deposing either casually or in the hob-nobbing with accused despite the fact that one of them i.e. PW7 had been rewarded for excellent work in present case. Record reflects that despite deputing police officers/officials at 3.05 AM to search accused, they left Police Station leisurely according to their convenience, in deviation and definace to direction of PW5 Nathu Ram as recorded in Ext.PW6/D.

27. In Ruka Ext.PW11/A, consequently in FIR Ext.PW5/A, it is stated that at the time of interception of vehicle, papers of vehicle, after checking, were returned but before returning driving licence of driver Pawan Kumar, which was in the hand of PW11, on starting checking of vehicle by police, all occupants of vehicle skipped from the spot. This fact is also mentioned in special report Ext.PW1/A submitted to SDPO Ani at 6.15 PM on 22.6.2010. As per endorsement of SDPO, report was seen by him at 10 AM on 23.6.2010. The said driving licence was taken in possession vide seizure memo Ext.PW4/A by I.O. along with other case property in presence of witnesses PW4 HHC Roshan Lal and C.Sunder Singh. In ruka, FIR, special report and seizure memo contain details of driving licence of Pawan Kumar bearing No. 113945 dated 19.3.2008 valid upto 18.3.2008 for driving LMV (NT), left by driver with I.O. PW11 before fleeing.

28. The seizure memo Ext.PW4/A was prepared after 2.30 AM after arrival of PW11 in Police Station but before 4.20 AM before submitting Ruka to PW5 SHO Nathu Ram. Entire case property except driving licence was deposited in Malkhana. In his cross examination PW11 has stated that driving licence was not an article to be deposited in Malkhana. There is no reference of driving licence of Pawan Kumar in rapat No. 3 Ext.PW6/C, but this report is only with respect to arrival of police party in Police Station. For not mentioning of the said fact in rapat No. 6 relating to submition of ruka to PW5 SHO Nathu Ram, PW11 explained that in this report only gist of ruka was recorded. There is no reference of driving licence of Pawan Kumar or description of accused in report No. 5 dated 22.6.2008 Ext.PW6/D vide which police officials were deputed by PW5 SHO to search accused. It was recorded at 3.05 AM and at that time Ruka was yet to be

prepared and submitted. Ruka was submitted at about 4.20 AM whereafter in Ruka, FIR and special report, name of Pawan Kumar and reference of his driving licence is there.

29. PW7 ASI Ludar Singh deposed that he had left Police Station in official vehicle along with constable Bhup Singh, HHG Duni Chand and driver Dalip Singh and when he was present at Luhari at 10/11 AM, PW5 ASI Nathu Ram instructed him to lay naka at Jajjar for tracing occupants of vehicle and description of accused was conveyed to him at 2 PM whereas as per Ext.PW6/D at 3.05 AM, when he was deputed to search accused, PW11 with driving licence of Pawan Kumar and also other police officials of his Naka party having knowledge of description of absconding accused were present in police station. Driving licence having details of accused with his photograph, was a vital information and clue with police. But non-supply of the said information and departure of police parties in search of accused without any description of accused, which was available with I.O. and other police officers, reflects incompetence of concerned police officers.

30. Neither memo of personal search (Jama Talashi) at the time of arrest has been exhibited nor entry of deposit of articles taken in possession at that time has been placed and exhibited on record. Copy of malkhana entry No. 170 is exhibited as Ext.PW6/A which also contains some portion of Entry No. 171 with respect to deposit of articles taken in possession during personal search (Jama Talashi) of respondents at the time of their arrest, perusal of which reveals that mobile phone Nokia 1110 was also taken in possession from respondent Mohit. But for reasons best known to police, no efforts appear to have taken for ascertaining location of respondents with the help of call details and location of mobile.

31. As evident from copy of FIR Ext.PW5/A, it's copy was delivered to Sub Divisional Judicial Magistrate Ani on 22.6.2008 at 5.10 PM and special report was delivered to Dy.S.P. at 6.15 PM. As per claim of respondents accused, they reached in police station at their own at 2.30 PM on 22.6.2008 on calling of police and thereafter police robed them. In such eventuality, it would not have possible for police to submit copy of FIR to concerned Magistrate at 5.10 PM and special report to Dy.S.P. at 6.15 PM after completing all formalities.

32. Incident is of 22.6.2008. PW5 SHO Nathu Ram was examined on 10.12.2009 whereas PW7 Ludar Singh and PW11 Prem Singh were examined on 27.02.2010 and 9.12.2010. PW5, PW7 and PW11 were examined after 1½, 1¾ and 2½ years after this incident. Therefore, discrepancies in their statements with respect to time etc. were bound to occur as power to observe, retain and narrate always differs from person to person. For other evidence on record such discrepancies are not fatal for prosecution case.

33. It is settled that though the investigating agency is expected to be fair and effiecient, but any lapse on its part cannot per se be a ground to throw out the prosecution case when there is overwhelming evidence on record to prove the offence. Since the object is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not a bout over technicalities and must be conducted under such rules as well protect the innocent, and punish the guilty. In the case of a defective investigation the Court has to be circumspect in evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect as to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective. The prosecution evidence is required to be examined dehors such omissions to find out whether the said evidence is reliable or not and contaminated conduct of officials should not stand in the way of evaluating the evidence by the Courts. ***(See Zahira Bahibullah Sheikh (5) vs. State of Gujarat (2006)3 SCC 374, Dhanaj Singh vs. State of Punjab (2004)3 SCC 654, Karnel Singh vs. State of M.P. (1995)5 SCC 518, Paras Yadav vs. State of Bihar (1999)2 SCC 126, Ram Bihari Yadav vs. State of Bihar (1998)4 SCC 517, Amar Singh vs. Balwinder Singh (2003)2 SCC 518 and State of Karnataka vs. Suvarnamma and another (2015)1 SCC 323).***

34. It is also held by the Apex Court that investigation is not the solitary area for judicial scrutiny in a criminal trial, the conclusion of the court in the case cannot be allowed to

depend solely on the probity of investigation and even if the investigation is illegal or even suspicious the rest of the evidence must be scrutinized independent of the impact of it. Otherwise the criminal trial will plummet to the level of the investigating officers ruling the roost. The court must have predominance and pre-eminence in criminal trials over the action taken by investigating officers. Criminal justice should not be made a casualty for the wrongs committed by the investigating officers in the case and the investigating officer is not obliged to anticipate all possible defences and investigate in that angle. In any event, any omission on the part of the investigating officer cannot go against the prosecution. Interest of justice demands that such acts or omission of the investigating officer should not be taken in favour of the accused or otherwise it would amount to placing a premium upon such omissions. ***(SeeState of Karnataka vs. K. Yarappa Reddy (1999)8 SCC 715 & V.K. Misra and another vs. State of Uttarakhand and another (2015)9 SCC 588)***

35. In present case, though for laxity on part of police officials including the driver of official vehicle in making entries either in log book or in DDR in casual manner, there are discrepancies with respect to direction and time of departure of police officials/official vehicle to apprehend absconding accused. But so far as recovery of contraband is concerned from vehicle owned and possessed by respondent No. 1 Mohit, that has been duly proved on record.

36. Now the question for consideration, which arises, is that whether respondent No.1 Mohit being owner of vehicle is liable to be punished for recovery of contraband from vehicle owned by him.

37. Defective or illegal investigation and also lapse and irregularities in investigation, maintaining log book and recording proper DDRs and also failure in depicting exact times in police record and stating it in the Court is not sufficient to reject the prosecution case in present case against respondent No.1 Mohit for the reason that prosecution case is substantiated by other reliable evidence on record. Incompetent prosecution agencies, driven by extraneous consideration, should not be allowed to take the Court for ride particularly in offences having effect not only on individual but society at large. Committing mistake in awarding medal/certificate of appreciation to a police officer can also not be ground to reject the prosecution case. Mistakes committed by police officials resulting into discrepancies are not fatal to the prosecution case as the same does not affect the recovery of contraband from vehicle owned by accused Mohit for which accused Mohit has failed to give satisfactory explanation.

38. In criminal cases the onus to bring the facts on record is upon the prosecution. However, Section 106 of Indian Evidence Act is exception to the same and facts within exclusive knowledge of accused are to be brought on record by accused only, in case they are required to be explained for proving his innocence.

39. In ***Gian Chand and others vs. State of Haryana (2013)14 SCC 420,*** the Apex Court has held as under:-

"22. In State of West Bengal v. Mir Mohammad Omar & Ors. (2000)8 SCC 382, this Court held that if the fact is specifically in the knowledge of any person, then the burden of proving that fact is upon him. It is impossible for the prosecution to prove certain facts particularly within the knowledge of accused. Section 106 is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the Section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the Court to draw a different inference.

"38.....Section 106 of the Evidence Act is designed to meet certain exceptional cases, in which, it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused." (SCC p. 393, para 38) (emphasis supplied)

(See also: Shambhu Nath Mehra v. The State of Ajmer AIR 1956 SC 404; Gunwantlal v. The State of Madhya Pradesh AIR 1972 SC 1756; Sucha Singh v. State of Punjab AIR 2001 SC 1436; Sahadevan v. State (2003)1 SCC 534; Durga Prasad Gupta v. The State of Rajasthan, (2003) 12 SCC 257; Santosh Kumar Singh v. State, (2010) 9 SCC 747; Manu Sao v. State of Bihar (2010) 12 SCC 310; Neel Kumar v. State of Haryana (2012) 5 SCC 766)."

40. It is held by the Apex Court in ***Sunil Mahadeo Jadhav vs. State of Maharashra (2013) 15 SCC 177*** as under:-

"36. Section 106 of the Evidence Act states that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Since it was Accused 1 who had arrested the deceased at 00.45 a.m. on 17.12.1985 and kept the deceased in police lock-up after his arrest was compelte, it was for Accused 1 to explain the injuries on the body of the deceased other than those which were noticed in Ext.76. Accused 1 has not stated anything in this regard in his statement under section3 13 of the Code of Criminal Procedure, 1973 (for short "CrPC") nor adduced any evidence in defence to explain these injuries. In the absence of any explanation by Accused 1 or any evidence adduced on behalf of Accused 1 to explain these injuries on the body of the deceased, there can be no escape from the conclusion that these injuries have been caused on the body of the deceased by Accused 1 and no one else."

41. Statement under Section 313 Cr.P.C. is not a substantive piece of evidence but it can be considered to corroborate the facts on record. False plea taken in reply to question under Section 313 Cr.P.C. in given facts and circumstances can be considered as completion of missing link in chain of circumstances against the accused. But it does not absolve prosecution from discharging its onus to prove its case as it cannot be substituted to evidence to be led by prosecution for proving basic facts of the case. Entire case of prosecution cannot be based on plea taken by accused in his statement under Section 313 Cr.P.C.

42. It is also settled that to discharge reverse onus by accused, statement under Section 313 Cr.P.C. being a statement without oath with no opportunity of cross examination, is not a substantive piece of evidence and accused is required to lead evidence under Section 315 Cr.P.C.

43 In ***Selvi and others vs. State of Karnataka (2010)7 SCC 263*** the Apex Court has held that not only does an accused person have the right to refuse to answer any question that may lead to incrimination, there is also a rule against adverse inferences being drawn from the fact of his/her silence and Section 313 (3) Cr.P.C. lays down that the accused shall not render himself/herself liable to punishment by refusing to answer such questions, or by giving false answers to them. Further, proviso (b) to Section 315 (1) Cr.P.C. mandates that even though an accused person can be a competent witness for the defence, his/her failure to give evidence shall not be made the subject of any comment by any of the parties or the court or give rise to any presumption against himself or any person charged together with him at the same trial. However, as held by the Apex Court in ***State of Himachal Pradesh vs. Wazir Chand and others (1978)1 SCC 130,*** where the commencement or genesis of the occurrence is not available because there was no witness to the occurrence available, the only direct version of the commencement of the occurrence would be found in the statement of the accused, if he chooses to give out his version of the occurrence and further held that his statement has to be considered in the light of the evidence adduced by the prosecution and weighing his statement with the probabilities of the case either in his favour or against him.

44. In ***Raj Kumar Singh alias Raju alias Batya versus State of Rajasthan (2013)5 SCC 722*** after considering pronouncements in ***State of Maharashtra vs. Sukhdev Singh (1992)3 SCC 700, Mohan Singh vs. Prem Singh (2002)10 SCC 236, Dharnidhar vs. State of U.P. (2010)7 SCC 759, Dehal Singh vs. State of H.P. (2010)9 SCC 85, State of M.P. vs. Ramesh (2011)4 SCC 786, Rafiq Ahmad vs. State of U.P. (2011)8 SCC 300, Ramnaresh***

vs. State of Chhattisgarh (2012)4 SCC 257, Brajendrasingh vs. State of M.P. (2012)4 SCC 289, and ***Munish Mubar vs. State of Haryana (2012)10 SCC 464,*** the Apex Court held as under:-

"41. In view of the above, the law on the issue can be summarised to the effect that statement under Section 313 Cr.P.C. is recorded to meet the requirement of the principles of natural justice as it requires that an accused may be given an opportunity to furnish explanation of the incriminating material which had come against him in the trial. However, his statement cannot be made a basis for his conviction. His answers to the questions put to him under Section 313 Cr.P.C. cannot be used to fill up the gaps left by the prosecution witnesses in their depositions. Thus, the statement of the accused is not a substantive piece of evidence and therefore, it can be used only for appreciating the evidence led by the prosecution, though it cannot be a substitute for the evidence of the prosecution. In case the prosecution's evidence is not found sufficient to sustain conviction of the accused, the inculpatory part of his statement cannot be made the sole basis of his conviction. The statement under Section 313 Cr.P.C. is not recorded after administering oath to the accused. Therefore, it cannot be treated as an evidence within the meaning of Section 3 of the Evidence Act, though the accused has a right if he chooses to be a witness, and once he makes that option, he can be administered oath and examined as a witness in defence as required under Section 315 Cr.P.C. An adverse inference can be taken against the accused only and only if the incriminating material stood fully established and the accused is not able to furnish any explanation for the same. However, the accused has a right to remain silent as he cannot be forced to become witness against himself."

45. By refering ***Munish Mubar vs. State of Haryana (2012)10 SCC 464 and Rohtash Kumar vs. State of Haryana (2013)14 SCC 434*** wherein ***State of Maharashtra vs. Suresh (2000)1 SCC 471, Musheer Khan vs. State of M.P. (2010)2 SCC 748, Sunil Clifford Daniel vs. State of Punjab (2012)11 SCC 205***, it is reiterated by the Apex Court in ***S. Govindraju vs. State of Karnataka (2013)15 SCC 315*** that

"29. It is obligatory on the part of the accused while being examined under Section 313 Cr.P.C., to furnish some explanation with respect to the incriminating circumstances associated with him, and the Court must take note of such explanation even in a case of circumstantial evidence in order to decide whether or not the chain of circumstances is complete. When the attention of the accused is drawn to circumstances that inculpate him in relation to the commission of the crime, and he fails to offer an appropriate explanation, or gives a false answer with respect to the same, the said act may be counted as providing a missing link for completing the chain of circumstances. (Vide: Munish Mabar v State of Haryana, (2012)10 SCC 464).

30. This Court in Rohtash Kumar v. State of Haryana, (2013)14 SCC 434) held as under: (SCC p.448, para 31)

"31. Undoubtedly, the prosecution has to prove its case beyond reasonable doubt. However, in certain circumstances, the accused has to furnish some explanation to the incriminating circumstances, which have come in evidence, put to him. A false explanation may be counted as providing a missing link for completing a chain of circumstances". (Emphasis supplied)

46. In ***Kuldeep Singh and others vs. State of Rajasthan, (2000)5 SCC 7,*** the Apex Court has held as under:-

"18. In the case of Swapan Patra vs. State of W.B. (1999)1 SCC 242 it has been held that it is a well-settled principle that in a case of circumstantial evidence when the accused offers an explanation and that explanation is found to be untrue then the same offers an additional link in the chain of circumstances to compelte the chain. The same principle is reiterated in the case of State of Maharashtra vs. Sures (2000)1 SCC 471. In this case it has been held that a false answer offered by the accused when his attention

was drawn to a cricumstance renders that circumstance capable of inculpating him. It is held that in a situation like this a false answer can also be counted as providing "a missing link" for completing the chain."

47. In ***Manu sao vs. State of Bihar 2010)12 SCC 310,*** the Apex Court has held as under:-

"12. Let us examine the essential features of this Section 313 Cr.P.C. and the principles of law as enunciated by judgments, which are the guiding factors for proper application and consequences which shall flow from the provisions of Section 313 of the Code.

13. As already noticed, the object of recording the statement of the accused under Section 313 of the Code is to put all incriminating evidence against the accused so as to provide him an opportunity to explain such incriminating circumstances appearing against him in the evidence of the prosecution. At the same time, also to permit him to put forward his own version or reasons, if he so chooses, in relation to his involvement or otherwise in the crime. The Court has been empowered to examine the accused but only after the prosecution evidence has been concluded. It is a mandatory obligation upon the Court and besides ensuring the compliance thereof the Court has to keep in mind that the accused gets a fair chance to explain his conduct. The option lies with the accused to maintain silence coupled with simplicitor denial or in the alternative to explain his version and reasons, for his alleged involvement in the commission of crime. This is the statement which the accused makes without fear or right of the other party to cross-examine him. However, if the statements made are false, the Court is entitled to draw adverse inferences and pass consequential orders, as may be called for, in accordance with law. The primary purpose is to establish a direct dialogue between the Court and the accused and to put to the accused every important incriminating piece of evidence and grant him an opportunity to answer and explain. Once such a statement is recorded, the next question that has to be considered by the Court is to what extent and consequences such statement can be used during the enquiry and the trial. Over the period of time, the Courts have explained this concept and now it has attained, more or less, certainty in the field of criminal jurisprudence.

14. The statement of the accused can be used to test the veracity of the exculpatory of the admission, if any, made by the accused. It can be taken into consideration in any enquiry or trial but still it is not strictly evidence in the case. The provisions of Section 313 (4) explicitly provides that the answers given by the accused may be taken into consideration in such enquiry or trial and put in evidence against the accused in any other enquiry or trial for any other offence for which such answers may tempt to show he has committed. In other words, the use is permissible as per the provisions of the Code but has its own limitations. The Courts may rely on a portion of the statement of the accused and find him guilty in consideration of the other evidence against him led by the prosecution, however, such statements made under this Section should not be considered in isolation but in conjunction with evidence adduced by the prosecution."

48. In ***Sidhartha Vashisht vs. State (NCT of Delhi) (2010)6 SCC 1*** the Apex Court has held that while answer given by the accused to question put under section 313 of the Code are not *per se* evidence because, firstly, it is not on oath and, secondly, the other party i.e. the prosecution does not get an opportunity to cross-examine the accused, it is nevertheless subject to consideration by the Court to the limited extent of drawing an adverse inference against such accused for any false answers voluntarily offered by him and to provide an additional/missing link in the chain of circumstances.

49. After considering ***Asraf Ali vs. State of Assam (2008)6 SCC 328 and Manu Sao vs. State of Bihar (2010)12 SCC 310,*** the Apex Court, in ***Munna Kumar Upadhyay vs. State of Andhra Pradesh (2012)6 SCC 174,*** has held as under:-

"76. If the accused gave incorrect or false answers during the course of his statement under Section 313 Cr.P.C., the court can draw an adverse inference against him....."

50. In ***Nagesh vs. State of Karnataka (2012)6 SCC 477*** the Apex Court has held as under:-

"32. It is also possible and permissible that an accused may remain silent but in that circumstance and with reference to the facts and circumstances of a given case, the court may be justified in drawing an adverse inference against the accused.....The trend of cross-examination on behalf of the accused implies admission of the death of the deceased having taken place in the premises in question by taking poison, however, the accused have failed to offer any explanation therefor which was least expected of him."

51. In ***Dharam Deo Yadav vs. State of Uttar Pradesh (2014)5 SCC 509*** the Apex Court has held as under:-

"37. The accused, in his examination under Section 313 Cr.P.C., had denied the prosecution case completely, but the proseuction has succeeded in proving the guilt beyond reasonable doubt. Often, false answers given by the accused in Section 313 Cr.P.C. statement may offer an additional link in the chain of circumstances to complete the chain. See Anthony D'Souza vs. State of Karnataka (2003)1 SCC 259. We are, therefore, of the considered view that both the trial Court as well as the High Court have correctly appreciated the oral and documentary evidence in this case and correctly recorded the conviction and we are now on sentence."

52. In ***Nagaraj vs. State (2015)4 SCC 739*** the Apex Court has held as under:-

14. The Impugned Judgment has found the answers of the Accused under Section 313 CrPC evasive and untrustworthy, and held this to be another factor indicating his guilt. Section 313 CrPC is of seminal importance in our criminal law jurisdiction and, therefore, justifies reiteration and elucidation by this Court. We shall start, with profit, by reproducing extracts from 41st Report of the Law Commission made in the context of Section 342 of the old Criminal Procedure Code which corresponds to this Section where the Commission observed, inter alia, thus:

"24.40. Section 342 is one of the most important sections in the Code. It requires that the Court must, at the close of prosecution evidence, examine the accused "for the purposes of enabling him to explain any circumstances appearing in the evidence against him." The section for a moment, brushes aside all counsel, all prosecutors, all witnesses, and all third persons. It seeks to establish a direct dialogue between the Court and the accused for the purpose of enabling the accused to give his explanation. For a while the section was misunderstood and regarded as authorizing an inquisitorial interrogation of the accused, which is not its object at all. The key to the section is contained in the first sixteen words of the section. Giving an opportunity to the accused to explain the circumstances appearing in the evidence is the only object of the examination. He may, if he chooses, keep his mouth shut or he may give a full explanation, or, he is so advised, he may explain only a part of the case against him. *****

24.45 We have, after considering the various aspects of the matter as summarized above, come to the conclusion that S.342 should not be deleted. In our opinion the stage has not yet come for its being removed from the statute book. With further increase in literacy and with better facilities for legal aid, it may be possible to take that step in the future." (ii) 'Clause 320 - The existing provision in S.342 (2) enabling a Court to draw an inference, whether adverse or not from an answer or a refusal to answer a question put to the accused during the examination, is being omitted as it may offend Art. 20(3) of the Constitution" - S.O.R."

15. In the context of this aspect of the law it is been held by this Court in Parsuram Pandey vs. State of Bihar (2004) 13 SCC 189 that Section 313 CrPC is imperative to

enable an accused to explain away any incriminating circumstances proved by the prosecution. It is intended to benefit the accused, its corollary being to benefit the Court in reaching its final conclusion; its intention is not to nail the accused, but to comply with the most salutary and fundamental principle of natural justice i.e. audi alteram partem, as explained in Arsaf Ali vs. State of Assam (2008) 16 SCC 328.In Sher Singh vs. State of Haryana (2015) 1 SCR 29 this Court has recently clarified that because of the language employed in Section 304B of the IPC, which deals with dowry death, the burden of proving innocence shifts to the accused which is in stark contrast and dissonance to a person's right not to incriminate himself. It is only in the backdrop of Section 304B that an accused must furnish credible evidence which is indicative of his innocence, either under Section 313 CrPC or by examining himself in the witness box or through defence witnesses, as he may be best advised. Having made this clarification, refusal to answer any question put to the accused by the Court in relation to any evidence that may have been presented against him by the prosecution or the accused giving an evasive or unsatisfactory answer, would not justify the Court to return a finding of guilt on this score. Even if it is assumed that his statements do not inspire acceptance, it must not be lost sight of that the burden is cast on the prosecution to prove its case beyond reasonable doubt. Once this burden is met, the Statements under Section 313 assume significance to the extent that the accused may cast some incredulity on the prosecution version. It is not the other way around; in our legal system the accused is not required to establish his innocence. We say this because we are unable to subscribe to the conclusion of the High Court that the substance of his examination under Section 313 was indicative of his guilt. If no explanation is forthcoming, or is unsatisfactory in quality, the effect will be that the conclusion that may reasonably be arrived at would not be dislodged, and would, therefore, subject to the quality of the defence evidence, seal his guilt. Article 20(3) of the Constitution declares that no person accused of any offence shall be compelled to be a witness against himself. In the case in hand, the High Court was not correct in drawing an adverse inference against the Accused because of what he has stated or what he has failed to state in his examination under Section 313 CrPC.

53. Commission of offence under NDPS Act is not only a serious, but a heinous crime for the reason that it not only affects individual and his family, but also society at large and for that reason, stringent provisions have been enacted to curb the menace of drugs and psychotropic substances and therefore in case of possession of contraband for which a person fails to account satisfactorily, reverse presumption of culpable mental state and commission of offence has been provided under Sections 35 and 54 of NDPS Act which read as under:-

"35. Presumption of culpable mental state.

(1) In any prosecution for an offence under this Act which requires a culpable mental state of the accused, the Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

Explanation: In this section "culpable mental state" includes intention, motive, knowledge of a fact and belief in, or reason to believe, a fact.

(2) For the purpose of this section, a fact is said to be proved only when the court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability.

54. Presumption from possession of illicit articles.

In trials under this Act, it may be presumed, unless and until the contrary is proved, that the accused has committed an offence under this Act in respect of-

(a) any narcotic drug or psychotropic substance or controlled substance;

(b) any opium poppy, cannabis plant or coca plant growing on any land which he has cultivated;

(c) any apparatus specially designed or any group of utensils specially adopted for the manufacture of any narcotic drug or psychotropic substance or controlled substance; or

(d) any materials which have undergone any process towards the manufacture of a narcotic drug or psychotropic substance or controlled substance, or any residue left of the materials from which any narcotic drug or psychotropic substance or controlled substance has been manufactured, for the possession of which he fails to account satisfactorily.]

54. Section 54 of NDPS Act shifts the onus of proving his innocence upon the accused and states that in trials under NDPS Act unless or until contrary is proved, it may be presumed that an accused has committed an offence under it with respect of article recovered from him, for possession of which he fails to account satisfactorily.

55. Section 35 of NDPS Act also provides presumption of existence of culpable mental state of accused and onus to prove that no such mental state with respect to act charged as an offence in prosecution was there, is upon accused. Explanation of Section 35 of the Act clarifies that culapable mental state includes intention, motive, knowledge of fact and belief in or reason to believe a fact.

56. Possession in a given case need not be a physcial possession but can be constructive with animus and control over the articles in question and the word conscious means awareness about a particular fact. Article, possession of which is in question, may be kept in physical possession of another person with animus or dominion and control over the said article and such a situation is sufficient to hold the possession of such article with first person.

57. It is held by Hon'ble Apex Court in case reported in ***Madan Lal and another vs. State of H.P. (2003)7 SCC 465*** that:-

"22. The expression "possession" is a polymorphous term which assumes different colours in different contexts. It may carry different meanings in contextually different backgrounds. It is impossible, as was observed in Superintendent & Remembrancer of Legal Affairs, W.B. vs. Anil Kumar Bhunja (1979)4 SCC 274 to work out a completely logical and precise definition of "possession" uniformally applicable to all situations in the context of all statutes.

23. The word "conscious" means awareness about a particular fact. It is a state of mind which is delierate or intended.

24. As noted in Gunwantal vs. State of M.P. (1972)2 SCC 194 possession in a given case need not be physical possession but can be constructive, having power and control over the article in the case in question, while the person to whom physical possession is given holds it subject to that power or control.

25. The word "possession" means the legal right to possession (see Heath vs. Drown (1972)2 All ER 561). In an interesting case it was observed that where as person keeps his firearm in his mother's flat which is safer than his own home, he must be considered to be in possession of the same. (See Sullivan vs. Earl of Caithness (1976)1 All ER 844).

26. Once possession is established, the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of the presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles."
(at p. 472)

58. It is also held by Hon'ble Apex Court in ***Dharampal Singh vs. State of Punjab (2010)9 SCC 608*** that

12. ..... It is trite that to bring the offence within the mischief of Section 18 of the Act possession has to be conscious possession. The initial burden of proof of possession lies on prosecution and once it is discharged legal burden would shift on accused. Standard

of proof expected from the prosecution is to prove possession beyond all reasonable doubt but what is required to prove innocence by the accused would be preponderance of probability. Once the accused plea is found probable, discharge of initial burden by the prosecution will not nail him with offence. Offences under the Act being more serious in nature higher degree of proof is required to convict an accused.

13. It needs no emphasis that the expression possession is not capable of precise and completely logical definition of universal application in context of all the statutes. Possession is a polymorphous word and cannot be uniformly applied, it assumes different colour in different context. In the context of Section 18 of the Act once possession is established the accused, who claims that it was not a conscious possession has to establish it because it is within his special knowledge.

14. Section 54 of the Act raises presumption from possession of illicit articles. It reads as follows :

"54. Presumption from possession of illicit articles. - In

trials under this Act, it may be presumed, unless and until the contrary is proved, that the accused has committed an offence under this Act in respect of –

- ***(a) any narcotic drug or psychotropic substance or controlled substance;***
- ***(b) any opium poppy, cannabis plant or coca plant growing on any land which he has cultivated;***
- ***(c) any apparatus specially designed or any group of utensils specially adopted for the manufacture of any narcotic drug or psychotropic substance or controlled substance; or***
- ***(d) any materials which have undergone any process***

towards the manufacture of a narcotic drug or psychotropic substance or controlled substance, or any residue left of the materials from which any narcotic drug or psychotropic substance or controlled substance has been manufactured,

for the possession of which he fails to account satisfactorily."

15. From a plain reading of the aforesaid it is evident that it creates a legal fiction and presumes the person in possession of illicit articles to have committed the offence in case he fails to account for the possession satisfactorily. Possession is a mental state and Section 35 of the Act gives statutory recognition to culpable mental state. It includes knowledge of fact. The possession, therefore, has to be understood in the context thereof and when tested on this anvil, we find that the appellants have not been able to account for satisfactorily the possession of opium.

16. Once possession is established the Court can presume that the accused had culpable mental state and have committed the offence. In somewhat similar facts this Court had the occasion to consider this question in the case of Madan Lal and another vs. State of H.P.,2003 (7) SCC 465, wherein it has been held as follows:

"26. Once possession is established, the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of the presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles.

27. In the factual scenario of the present case, not only possession but conscious possession has been established. It has not been shown by the accused- appellants that the possession was not conscious in the logical background of Sections 35 and 54 of the Act." (at pp. 614-615)

59. The Apex Court in ***Ram Singh vs. Central Bureau of Narcotics (2011)11 SCC 347*** has also held as under:-

"24. It is trite that to hold a person guilty, possession has to be conscious. Control over the goods is one of the tests to ascertain conscious possession so also the title. Once an article is found in possession of an accused it could be presumed that he was in conscious possession. Possession is a polymorphous term which carried different meaning in different context and circumstances and, therefore, it is difficult to lay down a completely logical and precise definition uniformly applicable to all situations with reference to all the statutes....." (at p.354)

60. It has been held by the Apex Court in ***Kulwinder Singh and another vs. State of Punjab (2015)6 SCC 674*** that

"17.In this context reference to the decision in Madan Lal v. State of H.P.would be fruitful wherein it has been held thus-(SCC p.472, paras 22-25)

"22.The expression "possession" is a polymorphous term which assumes different colours in different contexts. It may carry different meanings in contextually different backgrounds. It is impossible, as was observed in Supdt. & Remembrancer of Legal Affairs, W.B.v.Anil Kumar Bhunja (1979)4 SCC 274 to work out a completelylogical and precise definition of "possession"uniformally applicable to all situations in thecontext of all statutes.

23.The word "conscious" means awareness about a particular fact. It is a state of mind which is deliberate or intended.

24.As noted in Gunwantlal v. State of M.P.(1972)2 SCC 194 possession in a given case need not be physical possession but can be constructive, having power and control over the article in the case in question, while the person to whom physical possession is given holds it subject to that power or control.

25.The word "possession" means the legal right to possession (see Heath v.Drown 1973 AC 498). In an interesting case it was observed that where a person keeps his firearm in his mother's flat which is safer than his own home, he must be considered to be in possession of the same. (See Sullivan v. Earl of Caithness (1976)2 WLR 361.)"

18. In Dharampal Singh v. State of Punjab (2010)9 SCC 608, it has been ruled that the expression "possession" is not capable of precise and complete logical definition of universal application in the context of all the statutes. Recently, in Mohan Lal v. State of Rajasthan (2015)6 SCC 222 , after referring to certain authorities, this Court has held as follows:- (Mohar Lal case, SCC pp.238-39, paras 21-22)

"21. From the aforesaid exposition of law it is quite vivid that the term "possession" for the purpose of Section 18 of the NDPS Act could mean physical possession with animus, custody or dominion over the prohibited substance with animus or even exercise of dominion and control as a result of concealment. The animus and themental intent which is the primary and significant element to show and establish possession. Further, personal knowledge as to the existence of the "chattel" i.e. the illegal substance at a particular location or site, at a relevant time and the intention based upon the knowledge, would constitute the unique relationship and manifest possession. In such a situation, presence and existence of possession could be justified, for the intention is to exercise right over the substance or the chattel and to act as the owner to the exclusion of others.

22. In the case at hand, the appellant, we hold, had the requisite degree of control when, even if the said narcotic substance was not within his physical control at that moment. To give an example, a person can conceal prohibited narcotic substance in a property and move out thereafter. The said person because of necessary animus would be in possession of the said substance even if he is not, at the moment, in physical control. The situation cannot be viewed differently when a person conceals and hides the prohibited narcotic substance in a public space. In the second category of cases, the person would be in

possession because he has the necessary animus and the intention to retain control and dominion."

19.In view of the aforesaid enunciation of law, once possession is found, the accused is presumed to be in conscious possession as has been held in Ram Singh v. Central Bureau of Narcotics (2011)11 SCC 347. If the accused takes a stand that he was not in conscious possession, he has to establish the same, as has been held in Dharampal Singh (supra). As the materials brought on record would show, the accused-appellants were sitting in the truck; their presence in the truck has been clearly established; and they had run away from the spot and absconded for some days from the village. It is proven that there were 110 bags of poppy husk in the truck and the accused-appellants were in control of the articles in the truck. Therefore, there can be no iota of doubt that they were in conscious possession of the same. In view of the aforesaid analysis, we do not find any force in the submission of the learned counsel for the appellants."

61. Now we have to proceed in the light of above discussed settled position of law and material on record. According to accused Mohit, he was informed by police about his abandoned vehicle whereupon he tried to contact his driver Vishal but on getting no response, he along with co-accused Ajmer and Pawan reached Ani after boarding Haryana Roadways bus enroute from Chandigarh to Rampur and alighted at Sainj and then reached in Police Station Ani at 2.30 PM. It is undisputed that accused persons belong to Rohtak. The journey from Rohtak to Chandigarh, at least is of 3-4 hours and in bus more than 4 hours may also be taken for the said journey. From Chandigarh to Sainj it is at least 8 hours journey. For reaching Ani from Sainj it takes 1½-2 hours and in case of non-stop journey, at least the journey from Rohtak to Ani, would take minimum 14 hours.

62. It is undisputed that respondent No.1 Mohit is owner in possession of the vehicle in question. It is also admitted that documents of vehicle were also produced by respondent No.1 Mohit to the police. Contraband was recovered from vehicle owned and possessed by him. Respondents belong to Rohtak. Vehicle purchased at Rohtak, was yet to be registered but was temporarily registered in Haryana and it was in the exclusive knowledge of respondent Mohit (owner of vehicle) that for what purpose the vehicle was at Ani at a so distant place from its original place where respondent Mohit claimed to have never visited ever before.

63. It is the case of accused persons that they had never visited Ani. Ani is a remote area of Himachal Pradesh, not situated on any highway or route well known to all. Even many educated Himachalis might not be knowing route to reach Ani. There are a few buses plying to Ani from Shimla and person well versed with route can catch a direct bus from Chandigarh upto Sainj situated in upper Shimla wherefrom Ani is connected directly with local road.

64. According to respondents, they boarded the direct bus from Chandigarh to Sainj but how and when they travelled from Rohtak to Chandigarh is not disclosed. From whom they enquired, who guarded them to reach Ani in shortest time by catching direct bus from Chandigarh is a mystry. They claimed that they reached in Police Station at Ani at 2.30 PM meaning thereby they must have alighted from bus at Sainj at about 12 O'clock in noon for which they had to start from Chandigarh at 3-4 AM. No time of starting journey from Rohtak to Chandigarh and from Chandigarh to Sainj has been disclosed nor any material has been placed on record to corroborate the plea of accused persons with respect to their journey on 22.6.2010 as claimed.

65. It is claimed that it is on telephonic call received from Police Station Ani on mobile number of Mohit, taken by police from body of vehicle in question, the accused persons had started to Ani but at what time he was contacted by police is also not stated. No call details indicating the time of call and location of mobile phone of Mohit accused has been produced or sought to be produced in support of plea of accused.

66. The vehicle, belonging to Rohtak, was found in a remote area of Himachal Pradesh. There was no possibility of presence of this vehicle in that area in normal course of

business, but for specific purpose which was to be disclosed and explained by its owner. The plea of respondents that when they failed to produce driver, they were implicated is infact admission of recovery of contraband from vehicle for which driver was required to be produced before the police as no other reason, for which driver was to be produced, has been brought on record. Therefore, provision of Section 54 of NDPS Act becomes applicable. It was for owner to explain the presence of vehicle at Ani and also to disclose the name and address of driver and also purpose of plying the vehicle in Ani area but owner-respondent Mohit is conspicuously silent on this count.

67. No doubt, the accused has right to remain silent as he cannot be forced to become a witness against himself. However, as discussed supra, it is also settled that an adverse inference can be drawn against the accused if incriminating material stood fully established and accused is not able to furnish any explanation for the same. In present case, the movement of vehicle, exclusively in knowledge of driver and owner, was necessarily to be disclosed to prove his innocence by respondent Mohit. Being owner in possession of vehicle, he was responsible for legal or illegal activity being carried out through his vehicle unless explained otherwise. The trial Court has not considered this aspect.

68. As discussed hereinabove recovery of contraband stands connected to the vehicle owned by accused Mohit and he was also having possession over the vehicle through his driver and otherwise also. Therefore, he is to be considered in possession of article recovered from the said vehicle unless he has some plausible explanation in his defence. Under Section 54 of NDPS Act, for possession of contraband recovered from vehicle owned by accused Mohit, he has to account satisfactorily to rebut the presumption that he has not committed an offence under NDPS Act in respect of contraband recovered from his vehicle. As soon as presumption under Section 54 comes into play presumption of culpable mental state under Section 35 becomes operative and unless contrary is brought on record Court shall presume the acceptance of culpable mental state of accused for commission of offence under NDPS Act.

69. Impact of provisions of Sections 35 and 54 of the NDPS Act have also been ignored by the trial Court and also the fact that respondent No.1, being owner of vehicle, having control and possession thereof, failed to satisfactorily explain the presence of vehicle at Ani with recovered contraband. Once the prosecution has successfully established that contraband was recovered from vehicle owned by respondent No.1 Mohit, it was upon him to rebut the presumption of his conscious possession by bringing explanation on record, definitely not beyond reasonable doubt, but at least having preponderance of probability. But respondent Mohit has failed to discharge reverse onus to explain as required under Section 54 of NDPS Act, inviting presumption under Section 35 of NDPS Act.

70. It is defence of respondents that they were not travelling in vehicle in question, when it was intercepted by police. According to them, when driver was not traceable then they were implicated in this case. There is suggestion put to PW11 Prem Lal on behalf of respondents that respondents were asked to produce driver and when driver was not traceable they were implicated. Though this suggestion has been denied by investigating officer, however, it is only reason which has been assigned by respondents for their false implication in present case. It is stated on behalf of respondents that vehicle in question was found in abandoned condition and for the said reason respondent Mohit was called by police for inquiry after having his mobile number which was published on body of vehicle and on production of documents of vehicle in question, he and his companions were robed by police alleging them occupants of the vehicle during previous night travelling with recovered contraband. Recovery of contaband is 6.755 Kg charas with 320 grams opium. Such a huge quantity of charas cannot be believed to be planted against respondents for no reason or for not producing driver before police particularly when no enmity with police officials has ever been alleged much less any proof thereof placed on record. There is nothing on record to suggest that respondents were having any social, political, economical or any other conflict of interest with police or anybody else in Ani or at any other place, so as to implicate them in such a henious crime falsely under conspiracy.

71. Explanation rendered by respondents for their presence in Ani is highly improbable and there is no plausible reason disclosed for presence of vehicle in question in Ani which provide missing links to complete the chain of evidence in prosecution case. It is claimed by respondents that some Vishal was driver of vehicle in question but neither his address was ever disclosed nor he was produced in Court to rebut the presumption under NDPS Act. The purpose of presence of vehicle in Ani area is also not disclosed or explained. Plea of accused persons in statement under Section 313 Cr.P.C. that they reached in police station at 2.30 PM and produced documents of vehicle to police is also an important clue to complete missing link as it is self contradictory, fortifying the prosecution story for the reason that in case accused persons or either of them was not present in vehicle during previous night, then there was no question of possession of documents of vehicle with accused Mohit or his companions who claimed themselves to have travelled from Rohtak to Ani on telephonic call of police when number of driver Vishal did not respond to their call, as documents of vehicle in normal circumstances, that too at a distant place from a place where vehicle is ordinarily supposed to be plied, are bound to be in vehicle or in possession of incharge/driver of vehicle. Accused Mohit could have produced documents of vehicle only if he was also travelling in the said vehicle during preceding night. Therefore, plea of respondents that they reach Ani together at 2.30 PM on 22.6.2008 after receiving call from Police Station Ani is also not reliable.

72. No doubt, accused has a right to remain silent and not to disclose any incriminatory material against him, however, Section 106 of the Indian Evidence Act is an exception to this principle and in certain circumstances it devolves burden of disclosing certain facts by the accused, exclusively in his knowledge, necessary to establish his non-complicity in the commission of crime. In present case, it is suggested to PW11 Prem Lal, Investigation Officer, though denied by him, that respondent Mohit opened the dash board of jeet with duplicate key and handed over the documents to him. In answer to question No. 21, in statement recorded under Section 313 Cr.P.C., respondent Mohit has admitted it to be correct that he presented the documents of the vehicle which were taken in possession by PW11 with clarification that those were taken in possession when he was called and reached in police station. Except disclosing the name of driver Vishal, he did not disclose the particulars of residence of his driver, purpose of presence of the vehicle and his driver at Ani, which was in his exclusive knowledge and was necessary to be disclosed to rebut the evidence of prosecution proving the recovery of contraband from the vehicle owned and possessed by him. It is not the case of respondent Mohit that his jeep was stolen or his driver was plying the vehicle without his consent or beyond his control. Further production of documents either by opening the dash board of jeep with duplicate key or otherwise substantiates the fact that he was having the full control and possession of vehicle in question.

73. Therefore, even if evidence of prosecution with respect to manner of apprehending respondents is discarded for discrepancies in reports, log book and statements of prosecution witnesses, then also from careful scrutiny of evidence on record; in the facts and circumstances of case, as discussed above, even ignoring false plea taken in statement under Section 313 Cr.P.C., only one view establishing complicity of respondent No.1 in commission of offence is possible.

74. The trial Court has failed to consider the evidence on record in right perspective. There is cogent, reliable and convincing evidence on record to hold that accused Mohit, being owner of vehicle, was in conscious possession of recovered contraband and is liable to be punished under Sections 18 and 20 of NDPS Act and is liable to be punished accordingly.

75. The trial Court has also failed to consider the provisions of Section 60 of NDPS Act, which provides confiscation of vehicle found transporting narcotic drugs, irrespective of acquittal or conviction of accused, unless owner proves that it was so used without knowledge or connivance of owner, his agent or person incharge of vehicle and each of them had taken all reasonable precautions against such use. Section 60 reads as under:-

"***60. Liability of illicit drugs, substances, plants, articles and conveyances to confiscation.***

[(1) Whenever any offence punishable under this Act has been committed, the narcotic drug, psychotropic substance, controlled substance, opium poppy, coca plant, cannabis plant, materials, apparatus and utensils in respect of which or by means of which such offence has been committed, shall be liable to confiscation.]

(2) Any narcotic drug or psychotropic substance 2[or controlled substances] lawfully produced, imported inter-State, exported inter-State, imported into India, transported, manufactured, possessed, used, purchased or sold along with, or in addition to, any narcotic drug or psychotropic substance 2[or controlled substances] which is liable to confiscation under sub-section (1) and there receptacles, packages and coverings in which any narcotic drug or psychotropic substance 2[or controlled substances], materials, apparatus or utensils liable to confiscation under sub-section (1) is found, and the other contents, if any, of such receptacles or packages shall likewise be liable to confiscation.

(3) Any animal or conveyance used in carrying any narcotic drug or psychotropic substance 2[or controlled substance], or any article liable to confiscation under sub-section (1) or sub-section (2) shall be liable to confiscation, unless the owner of the animal or conveyance proves that it was so used without the knowledge or connivance of the owner himself, his agent, if any, and the person-in-charge of the animal or conveyance and that each of them had taken all reasonable precautions against such use."

76. Therefore, the trial Court is directed to take appropriate steps for confiscation of vehicle involved in transporting contraband in present case.

77. We feel that for glaring discrepancies and shortcomings in reports, log book entries, investigation and deposition in Court, there is need for explanation of PW5 Nathu Ram, PW7 Luder Singh and PW11 Prem Lal by the department and if found unsatisfactory, to take action against erring official(s). Director General of Police is directed to ensure compliance and to file compliance affidavit within four months.

78. In view of above discussion hereinabove judgment passed by learned Special Judge (II), Kinnaur at Rampur, in sessions trial No. 15-AR/3 of 2008/2010, title State vs. Mohit and others, is modified. Respondent No.1 Mohit is convicted under Sections 18 and 20 of NDPS Act and acquittal of respondents No. 2 and 3 Ajmer Singh and Pawan is maintained. Bail bonds furnished by and on behalf of convict Mohit also stand cancelled and those of Ajmer Singh and Pawan are discharged. Production warrant be issued against convict-Mohit for his presence in this Court on 9.10.2017 for hearing him on quantum of sentence.

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

Shri Chiplu Ram and others ....Petitioners.

Versus

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

CMP No. 3471 of 2016 in
Civil Writ Petition No. 4501 of 2011
Order reserved on 12th January, 2018
Date of Decision 8th March, 2018

Limitation Act, 1963- Section 3- Limitation – Plea of, Stage at which can be raised – Held, Section 3 of Act casts a duty upon Court to dismiss a suit, appeal or application if barred by limitation even if no such plea has been taken in pleadings – Point of limitation is admissible even

in the Court of last resort although it had not been raised in the Lower Courts – Application of petitioner seeking amendment in writ petition for enabling them to take plea of limitation dismissed with liberty to raise this point at the time of arguments. (Paras-8 to 12 and 20)

Cases referred:

Vineet Kumar vs. Mangal Sain Wadhera (1984)3 SCC 352

Management of the State Bank of Hyderabad vs. Vasudev Anant Bhide and others AIR 1970 SC 196

Muni Lal vs. Oriental Fire and General Insurance Co.Ltd and another (1996)1 SCC 90

Manindra Land and Building Corporation Ltd. vs. Bhutnath Banerjee and others AIR 1964 SC 1336

Gannmani Anasuya and others vs. Parvatini Amarendra Chowdhary and others (2007)10 SCC 296

Municipal Council, Ahmednagar and another vs. Shah Hyder Beig and others (2000)2 SCC 48

Lachhman Singh (deceased) through LRs and others vs. Hazara Singh (Deceased) through LRs (2008)5 SCC 444

Kamlesh Babu and others vs. Lajpat Rai Sharma and others (2008)12 SCC 577

For the Petitioners:	Shri Neeraj Gupta, Advocate.
For the Respondents:	Shri Pankaj Negi, Deputy Advocate General for respondents No.1 to 4, Shri Rajnish K. Lall, Advocate vice for respondents No. 5 and 6.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.

This application has been filed seeking amendment in writ petition for incorporating certain sub-paras in para 7 of the petition to raise plea that application for redemption, filed by respondent No. 6 Arun Kumar under the provisions of H.P.Tenancy and Land Reforms Act 1972, was barred by limitation, as the said application, as per H.P. Tenancy and Land Reforms Rules, could have been filed within six months from the date of attaining majority by the said respondent, but was filed after two years of attaining majority.

2. Application has been contested by respondents mainly on the ground that no such objection was taken before the Courts below and amendment sought is barred by inordinate delay and latches and allowing of amendment of writ petition at this stage would cause serious prejudice to respondents No. 5 and 6 jeoparadising their valuable rights. It is also contended that application is neither bonafide nor has been moved with due diligence and as the ground now sought to be raised was within the knowledge of petitioners, the same cannot be allowed to be raised by way of amendment of petition when the case has been listed for final hearing and more particularly, when the petitioners have taken adjournments on a number of times.

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

4. Learned counsel for the petitioners submits that the facts regarding date of death of Smt. Gharini Devi, predecessor-in-interest of respondents No. 5 and 6, filing of application by these respondents for redemption of land and other documents necessary for determining the issue of limitation, sought to be incoroporated by way of amendment, are already on record. No new document or fact is intended to be placed on record except incorporation of plea of limitation in the writ petition.

5. Relying upon ***Vineet Kumar vs. Mangal Sain Wadhera (1984)3 SCC 352*** learned counsel for the petitioners has argued that as the amendment sought does not constitute

an addition of a new cause of action, or raising a new case, but amounts to no more than adding to the facts already on the record, the amendment should be allowed at this stage to promote substantial justice.

6. Another judgment of the Constitutional Bench in case ***Management of the State Bank of Hyderabad vs. Vasudev Anant Bhide and others AIR 1970 SC 196*** has also been relied upon, wherein also appellant was permitted to raise plea of limitation as no fresh fact had to be investigated and as the matter could be dealt with as a pure question of law.

7. Reliance has also been put by the petitioners on the observations of the Apex Court in ***Muni Lal vs. Oriental Fire and General Insurance Co.Ltd and another (1996)1 SCC 90*** wherein it is stated that Section 3 of the Limitation Act speaks of bar of limitation providing that subject to the provisions contained in Sections 4 to 24 (inclusive), every suit instituted, after the prescribed period shall be dismissed, although limitation has not been set up as the defence. In other words, unless there is a power for the court to condone the delay, as provided under Sections 4 to 24 (inclusive), every suit instituted after the prescribed period shall be dismissed although limitation has not been set up as the defence.

8. Similarly, judgment in ***Manindra Land and Building Corporation Ltd. vs. Bhutnath Banerjee and others AIR 1964 SC 1336*** of the Constitutional Bench has also been referred by quoting observations therein that Section 3 of the Limitation Act enjoins a Court to dismiss any suit instituted, appeal preferred and application made, after the period of limitation prescribed therefor by Schedule I irrespective of the fact whether the opponent has set up the plea of limitation or not and it is the duty of the Court not to proceed with the application if it is made beyond the period of limitation prescribed. The Court has no choice and if in construing the necessary provision of the Limitation Act or in determining which provisions of the Limitation Act applies, the subordinate Court comes to an erroneous decision, it is open to the Court in revision to interfere with that conclusion as that conclusion has led the Court to assume or not to assume the jurisdiction to proceed with the determination of that matter.

9. Observations in ***Gannmani Anasuya and others vs. Parvatini Amarendra Chowdhary and others (2007)10 SCC 296*** to the same effect have also been relied upon by the petitioners.

10. Learned counsel for the petitioners has also referred the judgment in ***Municipal Council, Ahmednagar and another vs. Shah Hyder Beig and others (2000)2 SCC 48*** wherein it is stated that it is true that the plea of limitation ought to be raised at the first available opportunity but that does not mean and imply that the party raising it even during the course of hearing would be barred therefrom. Limitation is a mixed question of law and fact. Time barred claim would not even be entertained by a civil court without there being any opportunity of filing a pleading by the respondents or the defendants in a civil suit.

11. Similarly, judgment in case ***Lachhman Singh (deceased) through LRs and others vs. Hazara Singh (Deceased) through LRs*** reported in ***(2008)5 SCC 444*** has been referred wherein it is held that limitation is a question of jurisdiction and Section 3 of the Limitation Act puts an embargo on the Court to entertain a suit if it is found to be barred by limitation.

12. Judgment in case ***Kamlesh Babu and others vs. Lajpat Rai Sharma and others (2008)12 SCC 577*** has also been relied on the same proposition of law wherein it is held that a point of limitation is prima facie admissible even in the Court of last resort, although it had not been taken in the lower Courts.

13. Learned counsel for respondents No. 5 and 6 has convassed that on filing of application for redemption by respondent No. 6 Arun Kumar, petitioners were duly served but they opted to remain absent despite due service as evident from order dated 25.2.1999 (Annexure P-2) and the said order has been upheld upto the Financial Commissioner level and now at this stage petitioners cannot be allowed to raise issue of limitation. It is contended that ground set up

for assailing the impugned redemption of land was that as the landlady died after enactment of Act, application could not have filed by her successors through 'Will' and also that entire land could not have been resumed and only ½ acre of irrigated and 3 acre of un-irrigated land could have been redeemed and further that redemption of land was not agitated on the ground that application filed by respondent No. 6 was beyond limitation period. It is also argued that in revision petition preferred before the Financial Commissioner, initially plea of not filing the application for redemption within six months period after attaining majority was raised and revision petition was admitted by the Financial Commissioner on the said issue, but at the time of final hearing, no such issue was raised and thus now petitioners cannot be permitted to raise such issue at this stage, as the matter is alive since ages and petitioners, well aware about issue of limitation, did not agitate the same before the lower Courts and it is also submitted that parties cannot be taken to surprise at the last stage of litigation and there is unexplained and inordinate delay in raising the issue and thus amendment sought is not legally permissible and present application has been filed to linger on present proceedings.

14. Learned Deputy Advocate General has reiterated the grounds taken in reply and has supported the contentions raised by respondents No. 5 and 6.

15. Instant application has been filed stating therein that at the time of filing of writ petition, plea proposed to be incorporated in writ petition could not be incorporated for want of availability of complete record and it is only on inspection of record in this Court after the receipt of same in this Court, certain facts were noticed leading to filing of this application.

16 Present revision petition is not a first step litigation but is a petition filed for judicial review of the decision, arrived at by the highest competent authority prescribed in complete mechanism provided under the H.P. Tenancy and Land Reforms Act. Therefore, plea that certain facts were noticed only during pendency of present writ petition cannot be a good ground for filing this application as parties are agitating and contesting their respective claims since 1981.Therefore, in this background, no new plea can be permitted to be taken at this stage despite the fact that writ petition in this Court has been filed invoking the original side jurisdiction of the Court.

17. Be that as it may, as propounded by the Hon'ble Apex Court in numerous judgments, question of limitation is a mixed question of facts and law and Section 3 of Limitation Act, 1963 casts the duty upon Court to dismiss a time barred suit insituted, appeal preferred and efforts made after prescribed period even though limitation has not been set up as a defence. In present case, the facts and circumstances are already on record. Various dates such as date of death of Gharini Devi, attestation of mutation, date of attaining majority by respondent No. 6 and date of filing of application for redemption by respondent No. 6 are matters on record, which are undisputed. Provisions of Rule 21 of H.P. Tenancy and Land Reforms Act are also unambiguous. No new facts are required to be placed on record to consider the question of limitation in terms of H.P.Tenancy and Land Reforms Act for filing an application for redemption by respondent No.6 after attaining the age of majority. Therefore, in the present case question of limitation is a pure question of law to be determined on the basis of material already on record and thus can be raised at any time and failure of the first Court to consider this question can be agitated at this stage.

18. The fundamental issue in plea of limitation raised by the petitioners is that allowing application filed for redemption of land in favour of respondent No. 5 is against the provisions of Section 3 of Limitation Act, 1963. In ground (a) of para 7 of the writ petition it has been specifically pleaded that impugned order passed by the Financial Commissioner affirming the orders passed by the Courts below allowing the application filed for redemption of land in favour of respondents No. 5 and 6 is against law. In my opinion, any issue which is purely question of law can be covered in this ground. In present case, as observed supra, issue of limitation is purely question of law, and therefore, can be encompassed in ground (a) of para 7 of the writ petition and there was/is no necessity for filing present application much less to allow the same. Otherwise also, respondents themselves have convassed that revision petition before

the Financial Commissioner was admitted on the issue of six months limitation period for filing the application for redemption but the said issue was not raised at the time of final hearing. On this ground also, ground 7(a) of writ petition can be considered in continuity with issue raised before the revenue Courts.

19 Case law referred by the petitioners also does not warrant any amendment as sought in present application as such issue, in given facts and circumstances of the present case, can be raised without incorporating the proposed amendment in writ petition.

20 In view of above observations, I hold that in present case parties are at liberty to raise and defend the issue of limitation with respect to filing of application for redemption by respondent No. 6, on the basis of material already on record, at the time of final hearing of the case for which no amendment in pleadings is required and hence present application is dismissed.

21. Observations made in this order will not affect the merits of civil writ petition in any manner and will strictly confine for the disposal of this application.

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

Kishori Lal .....Petitioner.
Versus
Gian Chand & another ....Respondents.

Criminal Revision No. 66 of 2017.
Date of Decision: 6th April, 2017.

Code of Criminal Procedure, 1973- Section 374- Appeal against conviction- Mode of disposal – Additional Sessions Judge dismissing such appeal of accused 'in default' for want of prosecution – Revision against – Held, Provisions of Code do not empower Additional Sessions Judge to dismiss appeal in default – Order being without jurisdiction set aside – Revision allowed – Additional Sessions Judge directed to restore appeal and decide in accordance with law.

(Paras-1 to 3)

For the Petitioner: Mr. G.R. Palsra, Advocate.
For Respondent No.1: Mr. T. S. Chauhan, Advocate.
For Respondent No.2: Mr. Vivek Singh Attri, Dy. A. G.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral)

The petitioner herein stood convicted by the learned Chief Judicial Magistrate, Mandi, for his committing an offence punishable under Section 138 of the Negotiable Instrument Act also consequent sentence(s) stood imposed upon him. Standing aggrieved there from, the petitioner herein preferred an appeal before the learned Additional Sessions Judge-1, Mandi. However, on 17.01.2017 neither the petitioner herein nor his counsel recorded their appearance before the learned Additional Sessions Judge-I, Mandi, whereupon, he for want of its prosecution, hence, stood constrained to dismiss Criminal Appeal No. 29 of 2013. Since, in pursuant to the order of conviction standing pronounced upon the petitioner herein by the learned Chief Judicial Magistrate, Mandi, also with consequent sentence(s) standing imposed upon him, thereupon, the petitioner/convict held the statutory facilitation to contest in appeal the apposite verdict pronounced upon him by the learned Chief Judicial Magistrate also when for want of his appearance before the learned Additional Sessions Judge-I, Mandi on 17.01.2017, his appeal

stood dismissed for hence his inability to prosecute it, yet any affirmation by this Court of the impugned verdict would entail upon him the ill fate of his suffering the sentence of imprisonment imposed upon him by the learned Chief Judicial Magistrate. The aforesaid causality would impinge upon his liberty also would disrobe him of his legitimate statutory right to contest his conviction and consequent imposition of sentence(s) upon him by the learned Chief Judicial Magistrate, Mandi.

2. Moreover, the learned Additional Sessions Judge, Mandi, despite the petitioner nor his counsel recording their respective appearance(s) therebefore on 17.01.2017 stood enjoined to in accordance with the apposite procedure prescribed in the Cr.P.C. proceed to elicit therebefore the presence of the petitioner herein comprised in his issuing bailable warrants or non bailable warrants upon him rather than his in a summary manner proceeding to dismiss criminal appeal No. 29 of 2013, merely for want of appearance therebefore of the petitioner herein or his counsel. Also the aforesaid dismissal of criminal appeal No. 29 of 2013 by the learned Additional Sessions Judge-1, Mandi is beyond his jurisdictional domain, as the relevant procedure and laws do not empower the learned Additional Sessions Judge-1, Mandi, to, for want of appearance, on the relevant date, of the appellant/petitioner herein or his counsel, to proceed to hence dismiss his statutory appeal. In sequel, the order impugned hereat is jurisdictionally void also suffers from a vice of grave illegality or impropriety.

3. For the foregoing reasons, the instant petition is allowed and the order impugned hereat is quashed and set aside. The learned Additional Sessions Judge-1, Mandi is directed to restore criminal appeal No. 29 of 2013 to its original number and thereafter decide it in accordance with law. The petitioner herein as also the respondent/complainant are directed to appear before the learned Additional Sessions Judge-1, Mandi on 24th April, 2017. All pending applications also stand disposed of.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, ACJ AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Sanju ....Appellant.

Versus

State of HP and others ....Respondents.

LPA No. 281 of 2010.
Reserved on 8.5.2018
Decided on 29.5.2018.

Constitution of India, 1950- Article 16- Appointment to public office – Selection made on basis of tampered record – Effect – Petitioner selected for post of Constable against reserved (SC –IRDP) Category – On challenge, Hon'ble Single Judge setting aside appointment of petitioner on ground that on the date of interview, he was not in IRDP Category – LPA by petitioner – On facts, it was found that appellant-petitioner had furnished a photocopy of B.P.L. Certificate, on which there was interpolation as to date of its renewal – He also did not produce original before Competent Authority and took plea that original was lost – Held, when appellant was not in possession of validly issued Schedule Caste (IRDP) Certificate on date of interview, his appointment given on tampered certificate was rightly set aside by Hon'ble Single Judge – LPA dismissed. (Para-8)

For the appellant. : Mr. P.P. Chauhan, Advocate.

For the respondents : Mr. Ashok Sharma, Advocate General with M/s. J.K. Verma, Ranjan Sharma and Nand Lal Thakur, Addl. Advocate Generals for respondent-State.

Ms. Nishi Goel, Advocate, for respondent No.4.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.

By way of this appeal, the appellant has laid challenge to the judgment passed by learned Single Judge in CWP No. 3338 of 2010 dated 19.11.2010, titled as Narender Singh Vs. State of HP and others, vide which learned Single Judge while allowing the writ petition filed by present private respondent, set aside the appointment of appellant against the post of Constable under Scheduled Caste (IRDP) Category, primarily on the ground that on the date when the interview was conducted for the post of Constable, the selected candidate, i.e., present appellant was not in possession of a valid certificate reflecting that he belonged to IRDP family. The petitioner had challenged the appointment of present appellant against the post reserved for SC (IRDP), on the ground that the family of appellant stood excluded from IRDP on 18.2.2007 and his family had never objected to the said exclusion from the IRDP list and as such, present appellant had tempered certificate to reflect him as a candidate belonging to SC (IRDP), on the strength which he had procured appointment against the post in issue.

2. Before proceeding further, it is pertinent to mention that in the writ petition, appointment of two persons stood challenged i.e., Sanju and Sheetal Kumar. Learned Single Judge has set aside the appointment of Sanju, who is in appeal before us and therefore, we are not concerned with the candidature of other candidate i.e., Sheetal Kumar.

3. While allowing the petition, learned Single Judge taking into consideration the contents of para 5 to 7 of the reply filed by respondents No.1 to 3 held that it was evident from the stand of the said respondents that on the date when the interview was conducted, Sanju was not in possession of certificate reflecting that he belonged to family in the IRDP Category. Learned Single Judge also held that how and under what circumstances he was considered and appointed was not clarified in the reply save and except mention of the fact that photocopies of certificate were produced by the selected candidate which were also subject matter of departmental/criminal investigation. On these bases, it was held by learned Single Judge that it was obvious that on the date when Sanju appeared for the interview and was selected, he did not satisfy the essential criteria belonging to IRDP family. Accordingly, writ petition was disposed of by the learned Single Judge by passing the following order.

> *"I do find it a bit strange that the selection which is presided over by high ranking police officials (Selection Committee) should ignore the very basic criteria to be followed for selection and appointment. I also find that despite the fact that the writ petition having been filed on 16th June, 2010, instead of proceeding with the inquiry expeditiously, it seems to have been kept on the back burner. Learned counsel appearing for the respondents submits that the order Annexure:P5/G has, in fact, been passed in accordance with law and that the exclusion of the name of the family of respondent No.4 was a mistake. Later on the list was corrected by the Panchayat.*
>
> *He also submits that even if respondent No.4 is to be removed from service, the select list would be valid only for one year which period has now expired and the petitioner would not be entitled to any appointment. This submission requires to be rejected out right. The eligibility criteria was to be satisfied on the date of interview/selection. The reply of respondent-State reproduced in extenso supra is clear and does not support the case of respondent No.4. The writ petition is accordingly disposed of with the following directions:*
>
> *1. The appointment of respondent No.4 is quashed and set aside.*
>
> *2. Respondents No.1 to 3 shall re-consider the entire case afresh to determine as to whether by virtue of Annexure:P5/G the appointment of respondent No.4 could be validated and whether such an order could be produced after he had been appointed on 1.7.2008. The respondents shall also determine as to under what*

circumstances the appointment order was issued to respondent No.4 without verification of his original documents. In case it is found that respondent No.4 does not satisfy the basic eligibility criteria or that his selection is in violation of the rules, it is but obvious that the petitioner herein shall be entitled to appointment and the fact that the waiting list has exhausted cannot be used against the petitioner.

3. This order/judgment shall have no bearing on the departmental inquiry or in criminal proceedings which are contemplated/ have been taken/initiated against respondent No.4 which shall needless to say, be concluded expeditiously. The entire exercise shall be completed by respondents No. 1 to 3 not later than 31st December, 2010.

No order as to costs."

4. Feeling aggrieved, the present appellant has preferred this appeal.

5. We have heard learned counsel for the parties and have also gone through the judgment passed by learned Single Judge and have also perused the records of the case.

6. The factum of a forged IRDP certificate having been submitted by the present appellant at the time of interview stands admitted in para 5 onwards of the reply filed to the writ petition by respondents No.1 to 3, which reply was filed on the affidavit of Director General of Police of Himachal Pradesh. Para 5 to 7 of the same are also being reproduced for ready reference:

"5. That the contents of this para 5 are admitted to the extent that a news item datelined Rajgarh 23rd February 2010 appeared in "Punjab Kesri" wherein it was reported that one Shri Nitya Nand had made a complaint to Superintendent of Police, Sirmaur regarding selection of a candidate by producing forged IRDP certificate. It is humbly submitted that a complaint was made by Shri Nitya Nand to the replying respondent which was got enquired into by the Superintendent of Police, Sirmaur, through SHO Rajgarh. The enquiry revealed that the family of respondent No.6 was in BPL list w.e.f. 1998-99 to 18.2.2007. This family was deleted from B.P.L. list on 18.2.2007 by the resolution of Gram Panchayat. It was also revealed in the enquiry that the B.P.L. certificates are issued maximum for six months or the family crosses the poverty line. The photocopy received with complaint disclosed that there was interpolation in the dates of issuing the certificates. During enquiry the BDO stated that he had not signed the certificates as he was transferred from Rajgarh in the year 2006.

6. That the contents of this para call for no reply. It is, however, submitted that a complaint was also made by the petitioner to the respondent Department against selection of respondent No.4.

7. That in reply to this para it is reiterated that the complaint was got inquired into. It was revealed that the family of respondent No.4 and 5 had been deleted from B.P.L. list by gram Panchayat vide resolution dated 18.2.2007. However, respondent No.6 father of the respondent No.4 assailed the aforesaid resolution by submitted an appeal to Sub Divisional Magistrate, Rajgarh and Sub Divisional Magistrate, Rajgarh vide order dated 15.10.2008 observed that the family of Shri Attar Singh respondent NO6 was actually living below the poverty line but the Panchayat Authority has wrongly passed the resolution dated 18.2.2007. Thus the Sub Divisional Magistrate dismissed the resolution and ordered that the family of respondent No.6 be entertained in B.P.L. list till June, 2008 and thereafter the family will not be considered in BPL List. It is pertinent to submit here that the respondent No.4 appeared in ground test on 23.9.2007 and personality test on 17.6.2008 in Sirmaur district. It is further submitted that the photocopy of B.P.L. certificate produced by respondent No.4 reveals that it has over-writing/interpolation in the renewal

date. The report was sent by the S.P. Sirmaur to Commandant 1st Bn for taking further action. However, the Commandant 1st Bn. Took up the matter with the Chairman Recruitment Board i.e. Deputy Inspector General of Police Southern Range(now Inspector General of Police Southern Range Shimla). The Inspector General of Police Southern Range has been asked to prove the matter with regard to appointment of Sanju vide letter dated 19.7.2010 and report has been asked within a fortnight. It is pertinent to submit that the respondent No.4 was asked by the Commandant 1st battalion under whom he is serving to appear before him and explain the position on 15.2.2010. He has submitted that original certificate of IRDP was not available with him as the same has been lost during the RTC. It is humbly submitted that the matter is being probed as to how the forged IRDP certificate produced by respondent No.4 was taken into consideration by the Recruitment Board. Action shall be taken as warranted under law. A copy of letter dated 19.7.2010 issued in this regard is appended as Annexure R-1."

7. In fact, it has been clearly mentioned in para 7 of the reply so filed to the writ petition that photocopy of B.P.L. certificate produced by present appellant revealed that there was overwriting/interpolation in the renewal date. It is also mentioned in the reply that the appellant was asked by the Commandant 1st Battalion to appear before him and explain the position on 15.2.2010 and when an inquiry stood ordered and the appellant was asked to produce original certificate, he stated that the same was lost during RTC.

8. During the course of arguments, learned counsel for the appellant could not demonstrate from the records that the averments so contained in the reply of respondent-State were incorrect. In our considered view, when it stood borne out from the records that the appellant was not in possession of a validly issued SC (IRDP) family certificate, as on the date when he appeared in the interview, we do not find any perversity with the judgment passed by learned Single Judge, who has set aside the appointment which was gained by appellant on the basis of a tempered SC (IRDP) certificate. It is also a matter of record that neither as on the date when the interview took place, the appellant has produced original SC (IRDP) certificate nor thereafter any such certificate was produced during the course of inquiry. This thus demonstrates that the findings which had been returned against the present appellant by learned Single Judge are borne out from the records of the case and are not perverse. Accordingly, we do not find any infirmity with the judgment passed by learned Single Judge. We uphold the findings returned by learned Single Judge that as on the date of interview, the family of the appellant did not belong to SC (IRDP) family and the appellant had gained said employment on the basis of a forged certificate.

Accordingly, the appeal is dismissed being devoid of any merit. Pending miscellaneous applications also stand disposed of.

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

Kamlesh Kumar. ...Petitioner.

Versus

Jaypee Powergrid Ltd. and others. ...Respondents.

CWP No. 9709 of 2011
Date of Decision: 31.5.2018

Indian Telegraph Act, 1885- Section 16- Damages to property during construction of power project etc. – Petitioner filing writ in High Court - Compensation – Dispute as to quantum – Held,

dispute concerning sufficiency of compensation to be paid to claimant, is to be determined by District Judge within whose jurisdiction, property is situated – Therefore, dispute whether damage to 12 trees or 38 trees of claimant was caused, is cognizable by District Judge more so when amount of compensation stood determined by company stood paid to the petitioner- Writ petition in High Court, is not maintabiable – Petition disposed of with liberty to petitioner to approach the District Judge for adjudication of dispute. (Paras- 8 to 10)

For the Petitioner:	Mr.V.D. Khidtta, Advocate.
For the Respondents:	Ms.Aruna Sharma, Advocate, for respondent No. 1. Mr.Lokinder Paul Thakur, Senior Penal Counsel, for respondent No. 2. Mr.Shiv Pal Manhans and Ms.Rameeta Kumari, Additional Advocate Generals, with Mr.Raju Ram Rahi, Deputy advocate General, for respondent No. 3.

The following judgment of the Court was delivered:

Vivek Singh Thakur Judge (oral)

In present petition, main grievance of the petitioner is that during laying down electricity transmission line by respondent No. 1, 38 trees of different specious, standing on his land, have been damaged, whereas the compensation for only 12 trees have been paid to him.

2. It is undisputed that work of laying transmission line stands completed and damage has calculated by respondent No. 1 as its own which stands disbursed to the petitioner. Whereas the petitioner has claimed the same to be inadequate, as the total number of damaged trees have not been taken into consideration for calculating damages to trees and also the damage caused to the land has not been considered for determining the same. Learned counsel for the petitioner has relied upon judgment passed by the Division Bench of this High Court in CWP No. 9740 of 2011, titled Diwan Singh Vs. Jaypee Powergrid Ltd. and others decided on 29th December, 2011 and submit that his case is squarely covered by the direction issued in the said judgment.

3. Learned counsel for the petitioner also submits that petitioner would be entitled to file an application under Section 16 of the Indian Telegraph Act, 1885 (herein after referred to as the "Act") before the District Judge only after determination of compensation under Section 10 (d) of the Act, whereas in present case, respondent No. 1 has determined compensation for 12 trees only instead of 38 trees and damage caused to the land has also not been assessed and when there is no damage calculated and paid under Section 10(d) of the Act. Section 16 of the Act will not be applicable, therefore, he prays for direction to respondent No. 1 to determine the damage for making compensation under Section 10(d) of the Act.

4. Learned counsel for respondent No. 1 submits that like Diwan Singh's case the amount of compensation has been determined by respondent No. 1 and stands disbursed to the petitioner as prescribed under Section 10(d) of the Act, but she asserts that there were only 12 number of tress on the land of the petitioner, for which he has duly been compensated.

5. As apparent from rival contentions, there is dispute between the parties with regard to damage caused to the number of trees and land as well as quantum thereof. Section 16 of the "Act" provides that in case any dispute arises concerning the sufficiency of the compensation to be paid under Section 10 of the Act, it shall be determined by District Judge in whose jurisdiction property situates, on application filed by either of disputing parties for that purpose. In absence of making application by Telegraph Department, it was for petitioner to make such application to District Judge.

6. In the judgment relied upon by learned counsel for the petitioner, compensation had already been assessed by respondent No. 1, but had not been disbursed and therefore, keeping in view the provisions of the Act, it was directed that said amount shall be paid to the petitioner therein, whereafter, in case the petitioner was still aggrieved, it was kept open to take recourse/remedy under Section 16 of the Act before the District Judge within another month and in such situation the District Judge was directed to consider the matter on merits and dispose of the same within six months.

7. In present case the amount as per respondent No. 1 has not only determined, but has also been disbursed to the petitioner, but instead of invoking the provisions of Section 16 of the Act, petitioner has approached this Court despite having efficacious alternative remedy available to him.

8. Considering the respective contentions of learned counsel for the parties and also after going through the provisions of the Act, I find that, respondent No. 1, to the best of its wisdom, has determined the compensation under Section 10(d) of the Act for damage of property which may or may not be correct. Any dispute with regard to sufficiency of assessment as alleged that compensation for 12 trees only has been paid and all 38 trees standing on land have not been taken into consideration and also that damage for land has also not been assessed, is certainly questionable before the District Judge under Section 16 of the Act.

9. In Diwan Singh's case relied upon by learned counsel for the petitioner also, the amount of compensation determined by respondent No. 1, was ordered to be disbursed and any dispute, with regard to sufficiency thereof, was directed to be raised before the District Judge, as provided under Section 16 of the Act. Therefore, the petitioner has to approach the District Judge concerned for all issues raised in this petition which along with other if any are to be determined by him in accordance with law.

10. In view of above discussion, present petition is disposed of with liberty to the petitioner to approach the District Judge under Section 16 of the Act by filing a comprehensive application within one month from receipt of certified copy of this judgment and to raise all issues and contentions before him, who after receiving such application shall dispose of the same on merits preferably within six months thereafter.

11. The writ petition stands disposed of with aforesaid observations, so also the pending application(s), if any.

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

Sandeep Negi ...Petitioner

Versus

State of Himachal Pradesh and another ...Respondents

Arb. Case No. 5 of 2018

Decided on: June 1, 2018

Arbitration and Conciliation Act, 1996- Sections 11 and 16- Appointment of Arbitrator – Neutrality Principle - Whether an employee of a party to dispute, can be an arbitrator? - Held, Arbitrator, who is an employee of one of the party, is ineligible to act as an arbitrator – Therefore, Superintending Engineer Arbitration Circle, HP PWD cannot act as an arbitrator in a dispute between HP PWD and a contractor – High Court appointed an Advocate as an Arbitrator instead of Superintending Engineer and asked him to enter into reference. (Paras- 9, 12 and 13)

Cases referred:
Volestalpine Schienen GMBH v. Delhi Metro Rail Corporation Ltd., (2017) 4 SCC 665
Duro Felguera, S.A. v. Gangavaram Port limited, (2017) 9 SCC 729

For the Petitioner	:	Mr. J.S. Bhogal, Senior Advocate with Mr. Parmod Negi, Advocate.
For the Respondents	:	Mr. S.C. Sharma and Mr. Dinesh Thakur, Addl. AG's with Mr. Amit Kumar, DAG.

The following judgment of the Court was delivered:

Justice Sandeep Sharma, Judge(oral**)**

In the petition at hand, filed under Section 11 (6) of the Arbitration & Conciliation Act (hereinafter, 'Act'), prayer has been made on behalf of petitioner-claimant for appointment of an impartial and independent arbitrator to adjudicate upon the dispute pertaining to work i.e. "C/o Road Chota Kamba to Vilalge Gharshu RD 1/350 to 1/400", in terms of Clause 25 of agreement No. 50 of 2014-15 (Annexure C-1).

2. Facts, as emerge from the record are that above captioned work came to be awarded to the petitioner by the Executive Engineer, Karchham Division, HPPWD Bhavanagar, vide award dated 4.7.2016 amounting to Rs.14,88,000/-. As per averments contained in the petition, work in question was completed in all respects by the petitioner and same was certified by the Executive Engineer. However, the fact remains that certain disputes arose *inter se* parties with regard to final payment and as a consequence of which, petitioner by way of communication dated 30.8.2017 addressed to the Chief Engineer, HPPWD, Shimla Zone, made a request for appointment of an arbitrator to adjudicate upon the dispute *inter se* parties. Chief Engineer, HPPWD, Shimla Zone, acceding to the aforesaid request made by petitioner appointed Superintending Engineer, Arbitration Circle, HPPWD, Solan, as an arbitrator vide letter dated 18.9.2017.

3. Mr. J.S. Bhogal, learned Senior Advocate duly assisted by Mr. Parmod Negi, Advocate, on behalf of petitioner, while inviting attention of this Court to Section 12 of the amending Act (Amendment Act No. 3 of 2016) contended that person having either direct or indirect relationship with any of the parties or in relation to subject matter in dispute, can not be appointed as an arbitrator, as such, appointment of Superintending Engineer, Arbitration Circle, HPPWD Solan, as an arbitrator deserves to be set aside. He further states that since despite there being specific request made by petitioner, Chief Engineer, HPPWD Shimla Zone failed to appoint a neutral /impartial arbitrator in terms of Section 12 of the amending Act, this Court while exercising powers under Section 11(6) needs to appoint an impartial and independent person, who has no direct or indirect relation with the parties or dispute in question, as an arbitrator to adjudicate upon the dispute *inter se* parties.

4. Mr. Dinesh Thakur, learned Additional Advocate General, while opposing aforesaid prayer having been made by the learned counsel representing the petitioner, contended that the present petition deserves to be dismissed with exemplary costs because at no point of time, objection, if any, was ever raised by the petitioner, with regard to appointment of Superintending Engineer, Arbitration Circle, HPPWD, Solan as an arbitrator. While inviting attention of this Court to annexure C-2, communication sent by the claimant-petitioner for appointment of an arbitrator, Mr. Thakur contended that there is no prayer, if any, for appointment of any arbitrator other than the Superintending Engineer, Arbitration Circle, HPPWD, Solan. He further contended that otherwise also, as per agreed terms *inter se* parties, petitioner can not have any objection to the appointment of a government official as an arbitrator. Lastly, Mr. Dinesh Thakur, learned Additional Advocate General contended that no arbitrable dispute, within the purview of contract agreement executed between the parties, has been raised by the petitioner and, as such, instant petition deserves to be dismissed. He further stated that

an amount of Rs.8,61,000/- stands paid to the petitioner on account of work executed by him and he has been repeatedly requested to attend office of the respondent to receive the payment of final bill, but he has not shown any interest and as such, petition deserves to be dismissed.

5. Before adverting to the factual matrix of the case vis-à-vis prayer made in the instant petition, it would be apt to take note of the Section 12 of the amending Act, which provides as under:

> "12. Grounds for challenge.— (1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances ,-
>
> a) Such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and b) Which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.
>
> Explanation 1. –The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.
>
> Explanation 2. – the disclosure shall be made by such person in the form specified in the Sixth Schedule.]
>
> (2) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him.
>
> (3) An arbitrator may be challenged only if—
>
> (a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or
>
> (b) he does not possess the qualifications agreed to by the parties.
>
> (4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.
>
> [(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator: Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.]"

6. Bare perusal of aforesaid amended provision of Act clearly suggests that a person having direct or indirect control over the day to day affairs of the authority, cannot be appointed as an Arbitrator.

7. Hon'ble Apex Court in **Volestalpine Schienen GMBH** v. **Delhi Metro Rail Corporation Ltd**., (2017) 4 SCC 665, has held as under:-

> "14. From the stand taken by the respective parties and noted above, it becomes clear that the moot question is as to whether panel of arbitrators prepared by the Respondent violates the amended provisions of Section 12 of the Act. Subsection (1) and Sub-section (5) of Section 12 as well as Seventh Schedule to the Act which are relevant for our purposes, may be reproduced below:
>
> 8. (i) for sub-section (1), the following Sub-section shall be substituted, namely

(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances—

(a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and

(b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.

Explanation 1.--The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.

Explanation 2.--The disclosure shall be made by such person in the form specified in the Sixth Schedule.;

(ii) after Sub-section (4), the following Subsection shall be inserted, namely—

(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator: Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this Sub-section by an express agreement in writing. (emphasis supplied)

THE SEVENTH SCHEDULE

Arbitrator's relationship with the parties or counsel

1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.

2. The arbitrator currently represents or advises one of the parties or an affiliate of one of the parties.

3. The arbitrator currently represents the lawyer or law firm acting as counsel for one of the parties.

4. The arbitrator is a lawyer in the same law firm which is representing one of the parties.

5. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration.

6. The arbitrator's law firm had a previous but terminated involvement in the case without the arbitrator being involved himself or herself.

7. The arbitrator's law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties.

8. The arbitrator regularly advises the appointing party or an affiliate of the appointing party even though neither the arbitrator nor his or her firm derives a significant financial income therefrom.

9. The arbitrator has a close family relationship with one of the parties and in the case of companies with the persons in the management and controlling the company.

10. A close family member of the arbitrator has a significant financial interest in one of the parties or an affiliate of one of the parties.

11. The arbitrator is a legal representative of an entity that is a party in the arbitration.

12. The arbitrator is a manager, director or part of the management, or has a similar controlling influence in one of the parties.

13. The arbitrator has a significant financial interest in one of the parties or the outcome of the case.

14. The arbitrator regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator or his or her firm derives a significant financial income therefrom. Relationship of the arbitrator to the dispute

15. The arbitrator has given legal advice or provided an expert opinion on the dispute to a party or an affiliate of one of the parties.

16. The arbitrator has previous involvement in the case. Arbitrator's direct or indirect interest in the dispute.

17. The arbitrator holds shares, either directly or indirectly, in one of the parties or an affiliate of one of the parties that is privately held.

18. A close family member of the arbitrator has a significant financial interest in the outcome of the dispute.

19. The arbitrator or a close family member of the arbitrator has a close relationship with a third party who may be liable to recourse on the part of the unsuccessful party in the dispute.

Explanation 1.---The term "close family member" refers to a spouse, sibling, child, parent or life partner.

Explanation 2.--The term "affiliate" encompasses all companies in one group of companies including the parent company.

Explanation 3.--For the removal of doubts, it is clarified that it may be the practice in certain specific kinds of arbitration, such as maritime or commodities arbitration, to draw arbitrators from a small, specialized pool. If in such fields it is the custom and practice for parties frequently to appoint the same arbitrator in different cases, this is a relevant fact to be taken into account while applying the Rules set out above. (emphasis supplied)

15. It is a well known fact that the Arbitration and Conciliation Act, 1996 was enacted to consolidate and amend the law relating to domestic arbitration, inter alia, commercial arbitration and enforcement of foreign arbitral awards etc. It is also an accepted position that while enacting the said Act, basic structure of UNCITRAL Model Law was kept in mind. This became necessary in the wake of globalization and the adoption of policy of liberalisation of Indian economy by the Government of India in the early 90s. This model law of UNCITRAL provides the framework in order to achieve, to the maximum possible extent, uniform approach to the international commercial arbitration. Aim is to achieve convergence in arbitration law and avoid conflicting or varying provisions in the arbitration Acts enacted by various countries. Due to certain reasons, working of this Act witnessed some unpleasant developments and need was felt to smoothen out the rough edges encountered thereby. The Law Commission examined various shortcomings in the working of this Act and in its first Report, i.e., 176th Report made various suggestions for amending certain provisions of the Act. This exercise was again done by the Law Commission of India in its Report No. 246 in August, 2004 suggesting sweeping amendments touching upon various facets and acting upon most of these recommendations, Arbitration Amendment Act of 2015 was passed which came into effect from October 23, 2015.

16. Apart from other amendments, Section 12 was also amended and the amended provision has already been reproduced above. This amendment is also based on the recommendation of the Law Commission which specifically dealt with the issue of 'neutrality of arbitrators' and a discussion in this behalf is contained in paras 53 to 60 and we would like to reproduce the entire discussion hereinbelow:

NEUTRALITY of ARBITRATORS

53. It is universally accepted that any quasi-judicial process, including the arbitration process, must be in accordance with principles of natural justice. In the context of arbitration, neutrality of arbitrators, viz. their independence and impartiality, is critical to the entire process. 54. In the Act, the test for neutrality is set out in Section 12(3) which provides

> 12(3) An arbitrator may be challenged only if—
>
> (a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality..."

55. The Act does not lay down any other conditions to identify the "circumstances" which give rise to "justifiable doubts", and it is clear that there can be many such circumstances and situations. The test is not whether, given the circumstances, there is any actual bias for that is setting the bar too high; but, whether the circumstances in question give rise to any justifiable apprehensions of bias.

56. The limits of this provision has been tested in the Indian Supreme Court in the context of contracts with State entities naming particular persons/designations (associated with that entity) as a potential arbitrator. It appears to be settled by a series of decisions of the Supreme Court (See Executive Engineer, Irrigation Division, Puri v. Gangaram Chhapolia MANU/SC/0001/1983 : 1984 (3) SCC 627; Secretary to Government Transport Department, Madras v. Munusamy Mudaliar MANU/SC/0435/1988 : 1988 (Supp) SCC 651; International Authority of India v. K.D. Bali and Anr. MANU/SC/0197/1988 : 1988 (2) SCC 360; S. Rajan v. State of Kerala MANU/SC/0371/1992 : 1992 (3) SCC 608; Indian Drugs & Pharmaceuticals v. IndoSwiss Synthetics Germ Manufacturing Co. Ltd. MANU/SC/0139/1996 : 1996 (1) SCC 54; Union of India v. M.P. Gupta (2004) 10 SCC 504; Ace Pipeline Contract Pvt. Ltd. v. Bharat Petroleum Corporation Ltd. MANU/SC/7273/2007 : 2007 (5) SCC 304) that arbitration agreements in government contracts which provide for arbitration by a serving employee of the department, are valid and enforceable. While the Supreme Court, in Indian Oil Corporation Ltd. v. Raja Transport (P) Ltd. MANU/SC/1502/2009 : 2009 8 SCC 520 carved out a minor exception in situations when the arbitrator "was the controlling or dealing authority in regard to the subject contract or if he is a direct subordinate (as contrasted from an officer of an inferior rank in some other department) to the officer whose decision is the subject matter of the dispute", and this exception was used by the Supreme Court in Denel Proprietary Ltd. v. Govt. of India, Ministry of Defence MANU/SC/0010/2012 : AIR 2012 SC 817 and Bipromasz Bipron Trading SA v. Bharat Electronics Ltd. MANU/SC/0478/2012 : (2012) 6 SCC 384, to appoint an independent arbitrator Under Section 11, this is not enough.

57. The balance between procedural fairness and binding nature of these contracts, appears to have been tilted in favour of the latter by the Supreme Court, and the Commission believes the present position of law is far from satisfactory. Since the principles of impartiality and independence cannot be discarded at any stage of the proceedings, specifically at the stage of constitution of the arbitral tribunal, it would be incongruous to say that party autonomy can be exercised in complete disregard of these principles-even if the same has been agreed prior to the disputes having arisen between the parties. There are certain minimum levels of independence and impartiality that should be required of the arbitral process regardless of the parties' apparent agreement. A sensible law cannot, for instance, permit appointment of an arbitrator who is himself a party

to the dispute, or who is employed by (or similarly dependent on) one party, even if this is what the parties agreed. The Commission hastens to add that Mr. PK Malhotra, the ex officio member of the Law Commission suggested having an exception for the State, and allow State parties to appoint employee arbitrators. The Commission is of the opinion that, on this issue, there cannot be any distinction between State and non State parties. The concept of party autonomy cannot be stretched to a point where it negates the very basis of having impartial and independent adjudicators for resolution of disputes. In fact, when the party appointing an adjudicator is the State, the duty to appoint an impartial and independent adjudicator is that much more onerous-and the right to natural justice cannot be said to have been waived only on the basis of a "prior" agreement between the parties at the time of the contract and before arising of the disputes.

58. Large scale amendments have been suggested to address this fundamental issue of neutrality of arbitrators, which the Commission believes is critical to the functioning of the arbitration process in India. In particular, amendments have been proposed to Sections 11, 12 and 14 of the Act.

59. The Commission has proposed the requirement of having specific disclosures by the arbitrator, at the stage of his possible appointment, regarding existence of any relationship or interest of any kind which is likely to give rise to justifiable doubts. The Commission has proposed the incorporation of the Fourth Schedule, which has drawn from the Red and Orange lists of the IBA Guidelines on Conflicts of Interest in International Arbitration, and which would be treated as a "guide" to determine whether circumstances exist which give rise to such justifiable doubts. On the other hand, in terms of the proposed Section 12(5) of the Act and the Fifth Schedule which incorporates the categories from the Red list of the IBA Guidelines (as above), the person proposed to be appointed as an arbitrator shall be ineligible to be so appointed, notwithstanding any prior agreement to the contrary. In the event such an ineligible person is purported to be appointed as an arbitrator, he shall be de jure deemed to be unable to perform his functions, in terms of the proposed explanation to Section 14. Therefore, while the disclosure is required with respect to a broader list of categories (as set out in the Fourth Schedule, and as based on the Red and Orange lists of the IBA Guidelines), the ineligibility to be appointed as an arbitrator (and the consequent de jure inability to so act) follows from a smaller and more serious sub-set of situations (as set out in the Fifth Schedule, and as based on the Red list of the IBA Guidelines).

60. The Commission, however, feels that real and genuine party autonomy must be respected, and, in certain situations, parties should be allowed to waive even the categories of ineligibility as set in the proposed Fifth Schedule. This could be in situations of family arbitrations or other arbitrations where a person commands the blind faith and trust of the parties to the dispute, despite the existence of objective "justifiable doubts" regarding his independence and impartiality. To deal with such situations, the Commission has proposed the proviso to Section 12(5), where parties may, subsequent to disputes having arisen between them, waive the applicability of the proposed Section 12(5) by an express agreement in writing. In all/all other cases, the general Rule in the proposed Section 12(5) must be followed. In the event the High Court is approached in connection with appointment of an arbitrator, the Commission has proposed seeking the disclosure in terms of Section 12(1) and in which context the High Court or the designate is to have "due regard" to the contents of such disclosure in appointing the arbitrator. (emphasis supplied)

> 17. We may put a note of clarification here. Though, the Law Commission discussed the aforesaid aspect under the heading "Neutrality of Arbitrators", the focus of discussion was on impartiality and independence of the arbitrators which has relation to or bias towards one of the parties. In the field of international arbitration, neutrality is generally related to the nationality of the arbitrator. In international sphere, the 'appearance of neutrality' is considered equally important, which means that an arbitrator is neutral if his nationality is different from that of the parties. However, that is not the aspect which is being considered and the term 'neutrality' used is relatable to impartiality and independence of the arbitrators, without any bias towards any of the parties. In fact, the term 'neutrality of arbitrators' is commonly used in this context as well.
>
> 18. Keeping in mind the afore-quoted recommendation of the Law Commission, with which spirit, Section 12 has been amended by the Amendment Act, 2015, it is manifest that the main purpose for amending the provision was to provide for neutrality of arbitrators. In order to achieve this, Sub-section (5) of Section 12 lays down that notwithstanding any prior agreement to the contrary, any person whose relationship with the parties or counsel or the subject matter of the dispute falls under any of the categories specified in the Seventh Schedule, he shall be ineligible to be appointed as an arbitrator. In such an eventuality, i.e., when the arbitration Clause finds foul with the amended provisions extracted above, the appointment of an arbitrator would be beyond pale of the arbitration agreement, empowering the court to appoint such arbitrator(s) as may be permissible. That would be the effect of non-obstante Clause contained in Sub-section (5) of Section 12 and the other party cannot insist on appointment of the arbitrator in terms of arbitration agreement."

8. It is quite apparent from the aforesaid enunciation of law that main purpose for amending the provision is to provide for neutrality of the arbitrators. Hon'ble Apex Court has categorically held that in order to achieve neutrality as referred to above, Sub-section (3) of Section 12 lays down that notwithstanding any prior agreement to the contrary, any person having relation with the parties or with the subject matter of dispute, falling in any of the categories specified in Schedule, shall be ineligible to be appointed as an arbitrator. Hon'ble Apex Court has further held that in order to achieve the neutrality, as referred to above, Sub-section (5) of Section 12 lays down that notwithstanding any prior agreement to the contrary, any person, whose relationship with the parties or counsel or subject matter of dispute falls under any of the categories specified in the Schedule, he shall be ineligible to be appointed as an arbitrator

9. In view of the aforesaid specific finding returned by Hon'ble Apex Court, submission having been made by the learned Additional Advocate General that the petitioner himself had agreed at the time of the execution of agreement that he shall not raise any objection for appointment of government servant as an arbitrator, has no merit and deserves outright rejection. At this stage, it may be noticed that Mr. Thakur, learned Additional Advocate General was unable to dispute that Superintending Engineer, Arbitration Circle, HPPWD, Solan, is not an employee of the respondent, who has direct relation with the subject matter of the dispute. At the cost of repetition, it may be observed that bare perusal of aforesaid amended provision of the Act clearly provides that a person having direct or indirect relation with any of the party to the dispute, cannot be appointed as an Arbitrator.

10. Section 11(6A) of the Amended Act, 2015 which came into force on 23.10.2015, specifically provides that the Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement, meaning thereby that court after having perused agreement executed *inter se* parties being convinced and satisfied that there is an arbitration clause in agreement, may consider prayer having been made by applicant for appointment of an arbitrator.

11. Recently Hon'ble Apex Court in **Duro Felguera, S.A.** v. **Gangavaram Port limited,** (2017) 9 SCC 729, while dealing with case filed under Section 11 of the Arbitration & Conciliation Act for appointment of arbitrator has held that after the amendment, all that the court needs to see is that whether an arbitration agreement exists –nothing more, nothing less, because the legislative policy and purpose is essentially to minimize the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11 (6A) ought to be respected. Relevant paras of aforesaid judgment are reproduced herein below:-

> "58. This position was further clarified in National Insurance Company Limited v. Boghara Polyfab Private Limited. To quote: (SCCp.283, para22)
>
> > "22. Where the intervention of the court is sought for appointment of an Arbitral Tribunal under Section 11, the duty of the Chief Justice or his designate is defined in SBP & Co. This Court identified and segregated the preliminary issues that may arise for consideration in an application under Section 11 of the Act into three categories, that is, (i) issues which the Chief Justice or his designate is bound to decide; (ii) issues which he can also decide, that is, issues which he may choose to decide; and (iii) issues which should be left to the Arbitral Tribunal to decide.
> >
> > 22.1. The issues (first category) which the Chief Justice/his designate will have to decide are:
> >
> > > (a) Whether the party making the application has approached the appropriate High Court.
> > >
> > > (b) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement.
> >
> > 22.2. The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the Arbitral Tribunal) are:
> >
> > > (a) Whether the claim is a dead (long-barred) claim or a live claim.
> > >
> > > (b) Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.
> >
> > 22.3. The issues (third category) which the Chief Justice/his designate should leave exclusively to the Arbitral Tribunal are:
> >
> > > (i) Whether a claim made falls within 43 the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).
> > >
> > > (ii) Merits or any claim involved in the arbitration."
>
> 59. The scope of the power under Section 11 (6) of the 1996 Act was considerably wide in view of the decisions in SBP and Co. (supra) and Boghara Polyfab (supra). This position continued till the amendment brought about in 2015. After the amendment, all that the Courts need to see is whether an arbitration agreement exists - nothing more, nothing less. The legislative policy and purpose is essentially to minimize the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11 (6-A) ought to be respected."

12. It is quite apparent from the aforesaid law laid down by the Hon'ble apex Court that this Court is only required to see whether an agreement exists or not. Necessarily, it is not required to take into consideration all other ancillary issues raised on behalf of the opposite

party, which is opposing the appointment of an Arbitrator and as such, another argument advanced by the learned Additional Advocate General that since petitioner has already received an amount of Rs. 8,61,000/- on account of works executed by him in terms of agreement in question, no arbitrable dispute exists within purview of contract agreement executed *inter se* parties, deserves to be rejected.

13. Consequently, in view of detailed discussion made herein above as also law laid down by the Hon'ble Apex Court, present petition is allowed. Appointment of Superintending Engineer, Arbitration Circle, HPPWD, Solan as an arbitrator made vide communication dated 18.9.2017 (Annexure R-1) is quashed and set aside and with the consent of the learned counsel representing the parties, **Mr. Jagdish Thakur, Advocate, HP High Court**, who is present in the Court, is appointed as an arbitrator to adjudicate upon the dispute *inter se* parties. His consent/declaration under Section 11 (8) of the Act *ibid* has been obtained and is placed on record. Mr. Jagdish Thakur has no objection to his appointment as an arbitrator in the present matter. He is requested to enter into reference within a period of two weeks from the date of receipt of a copy of this order. It shall be open for the learned arbitrator to determine his own procedure with the consent of the parties. Otherwise also, entire procedure with regard to fixing of time limit for filing pleadings or passing of award stands prescribed under Sections 23 and 29A of the Act.

14. Needless to say, award shall be made strictly as per provisions contained in Arbitration & Conciliation Act. A copy of this order shall be made available to the learned arbitrator named above, by the Registry of this court within one week enabling him to take steps for commencement of the arbitration proceedings within stipulated period.

15. The petition is disposed of.

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

Chimanu .....Appellant

Versus

Chamaru and another .....Respondents

RSA No. 169 of 2007
Decided on: June 15, 2018

Code of Civil Procedure, 1908- Section 100 – Substantial Question of Law, What is? – Held, Misconstruction of a document is a question of law – And if it has material bearing on decision of case, it is substantial question of law and Regular Second Appeal, would be maintainable. (Para-22)

Specific Relief Act, 1963- Section 34- Suit for declaration and injunction – Plaintiff claiming ownership and joint possession by way of inheritance to estate of father 'S' alongwith defendants No.1 and 2 (Brother and Sister) – Also disputing Will purportedly executed by 'S' on ground that father was old, ill and bed ridden at the relevant time of execution of Will- Trial Court dismissing suit of plaintiff- First Appellate Court dismissing his appeal also – Regular Second Appeal – High Court found that Will in fact, was in favour of plaintiff and defendant No.1 (Son) as lands were given to both of them – Though in different villages – Marginal witness 'A' proving due execution of Will by testator – No evidence adduced by plaintiff to prove serious illness or unsound state of mind of his father – Held, findings of fact recorded by Lower Courts are based on correct appreciation of evidence- RSA dismissed. (Para-18 to 21)

Cases referred:

Narendra Gopal Vidyarthi vs. Rajat Vidyarthi, (2009)3 SCC 287, (2000)3 SCC 708

Laxmidevamma and Others vs. Ranganath and Others, (2015)4 SCC 264
Sebastiao Luis Fernandes (Dead) through LRs and Others vs. K.V.P. Shastri (Dead) through LRs and Others, (2013)15 SCC 161

For the appellant	Ms. Ruma Kaushik, Advocate.
For the respondents:	Mr. Bhupender Gupta, Senior Advocate with Mr. Neeraj Gupta, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge

Instant Regular Second Appeal under Section 100 of the Code of Civil Procedure is directed against judgment and decree dated 28.2.2007 passed by the learned Additional District Judge, Fast Track Court, Chamba (HP) in Civil Appeal no. 22/06, affirming judgment and decree dated 30.6.2006 passed by the learned Civil Judge (Senior Division), Chamba, HP, in Civil Suit No. 177/02, whereby suit for declaration and permanent prohibitory injunction having been filed by the appellant-plaintiff (hereinafter, 'plaintiff') came to be dismissed.

2. Necessary facts, as emerge from the record are that the plaintiff filed a suit for declaration to the effect that land comprised in Khata/ Khatauni No. 25/36, Khasra Nos. Kitta 20 measuring 08-13-00 Bigha situate in Mauza Moura, Pargana Jund, Tehsil Salooni, District Chamba and land comprised in Khata Khatauni No. 8/8, Khasra Nos. Kita 17, measuring 11-16-00 Bigha situate in Mauza Chatraid, Up Tehsil Bhalei, Pargana Jund, District Chamba, Himachal Pradesh (hereinafter, 'suit land') was owned and possessed by Santa, who died intestate without executing any Will in respect of suit land. In the aforesaid suit, plaintiff averred that deceased Santa was father of the plaintiff and defendants No.1 and 2 and he was owner-in-possession of suit land till he was alive. It is claimed that deceased Santa never executed any Will because at that time he was aged 60 years and was seriously ill and bed-ridden, who could not hear and understand the things. Plaintiff further averred that had Shri Santa executed Will, Mutation No. 218 dated 28.5.2002 in respect of land comprised in Mauza Chatraid, Pargana Jund, would not have been attested in favour of the parties in equal shares as per Hindu Succession Act. Plaintiff further claimed that he alongwith defendants is in peaceful possession of the land as owner. Plaintiff claimed before the learned trial Court that defendant No.1 on the basis of a false and forged Will, dated 8.4.1993 (Exhibit DW-3/A) is trying to dispossess him from the suit property with a view to grab valuable portion of the suit property without any right or authority. Since defendants failed to admit the claim of the plaintiff, he was compelled to file the suit at hand.

3. Defendants filed a joint written statement controverting therein the averments contained in the plaint. Defendants though admitted that the suit land originally belonged to Santa, who breathed his last on 10.3.2002, but specifically denied that Santa died intestate. Defendants further stated before the learned trial Court that aforesaid Will was executed by deceased owner in the names of plaintiff and defendant No.1. He further stated that neither Santa was suffering from any ailment nor he was bed-ridden, rather, he was hale and hearty at the time of execution of Will (Exhibit DW-3/A). Defendants further denied that suit property is under occupation of the plaintiff as claimed. By way of replication, plaintiff, while reiterating the averments contained in the plaint, refuted the averments contained in the written statement.

4. On the basis of pleadings adduced on record, learned trial Court, framed issues No.1 to 4 on 26.3.2004 and additional issue No. 4(A) on 12.6.2006, as under:

"1) Whether no valid Will so far has been executed by Santa as alleged? OPP

2) If issue No. 1 is proved in affirmative, whether the plaintiff is entitled for relief of injunction as prayed for? OPP

3) Whether the plaintiff has got no cause of action to file the present suit as alleged? OPD

4) Whether the suit is not maintainable in the present form as alleged? OPD

4(A) Whether deceased Santa had executed a valid will in favour of defendant as alleged? OPD

5) Relief?"

5. On the basis of pleadings and evidence adduced on record by respective parties, learned trial Court, vide judgment and decree dated 30.6.2006, dismissed the suit of the plaintiff and held him not entitled to decree or relief as prayed for in the suit filed by him. Being aggrieved, plaintiff preferred an appeal under Section 96 of the Code of Civil Procedure before the learned Additional District Judge, Fast Track Court, Chamba, Himachal Pradesh, which came to be dismissed vide judgment and decree dated 28.2.2007, as a consequence of which, judgment and decree passed by learned trial Court came to be upheld. In the aforesaid background, plaintiff has approached this Court, in the instant proceedings, praying therein for decreeing the suit after setting aside judgments and decrees passed by both the learned Courts below.

6. Vide order dated 4.5.2007, appeal at hand came to be admitted by this Court on the following substantial questions of law:

"1. Whether the ld. Court below has correctly appreciated the provisions of law pertaining to pleadings?

2. Whether the Ld. Court below has not correctly appreciated the provisions of Section 35-B, of the Code of Civil Procedure and thus arrived at a wrong conclusion in law?

3. Whether the Ld. Court below could have appreciated the document Exhibit DW-3/A, despite a specific condition/order passed in application under Order 8 Rule 1-A, CPC?"

7. Taking note of the text of the substantial questions of law referred to herein above, this Court intends to take all the substantial questions of law for determination together in order to avoid repetition of discussion of evidence.

8. Having carefully perused the pleadings vis-à-vis evidence available on record, this Court is not persuaded to agree with the contention made by Ms. Ruma Kaushik, learned counsel representing the plaintiff that there is total misreading and mis-appreciation of the evidence led on record by respective parties, rather, this Court is of the view that both the learned courts below have dealt with each and every aspect of the matter meticulously and there is no mis-appreciation of evidence. Inviting attention of this Court to Will Ext. DW-3/A, allegedly executed by late Santa in favour of the defendants, learned counsel made a serious attempt to persuade this Court to agree with her contention that Will set up by the defendants is false and fictitious and shrouded by suspicious circumstances, as such, learned Courts below have fallen into grave error while placing undue reliance upon the same. Ms. Kaushik further contended that it is a matter of record that Will was not produced before the Assistant Collector 2nd Grade, Salooni at the time of attestation of mutation, as such, it could be safely concluded by the learned Courts below that plaintiff and defendants being legal heirs of deceased Santa were rightly given land in question in equal shares. Ms. Kaushik further stated that no reliance, if any, could be placed upon Will, exhibit DW-3/A because it was never produced by the defendants, rather, learned trial Court while allowing application under Order 8 Rule 1-A CPC filed on behalf of the defendants, had granted opportunity to the defendants to produce aforesaid Will subject to payment of costs of Rs. 300/- but since defendants failed to pay/deposit the costs, learned trial Court had no occasion to look into copy of Will exhibit DW-3/A placed on record by the defendants. Lastly, Ms. Kaushik contended that both the learned Courts below have miserably failed to take note of the fact that the marginal witnesses, Achhru and Duni Chand, are related to

defendant No.1 and as such, their statements could not have been taken into consideration by the learned Courts below, while ascertaining correctness and genuineness of the Will set up by defendants.

9. Learned counsel for the defendants, while inviting the attention of this Court to the judgment passed by Hon'ble Apex Court in **Narendra Gopal Vidyarthi** vs. **Rajat Vidyarthi**, (2009)3 SCC 287, (2000)3 SCC 708 and **Laxmidevamma and Others** vs. **Ranganath and Others**, (2015)4 SCC 264, forcibly contended that present appeal is not maintainable, in view of concurrent findings of fact recorded by learned Courts below and as such same deserves to be quashed and set aside.

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

11. With a view to explore answer to the substantial questions of law as well as to ascertain correctness and genuineness of the submissions having been made by the learned counsel for the plaintiff, this Court carefully examined the pleadings as well as evidence adduced on record by the respective parties and after having perused the same, finds no force in the aforesaid arguments advanced by the learned counsel for the plaintiff. Exhibits P1 and P2, copies of *Jamabandis* for the years 2000-01 and 1996-97, clearly suggest that deceased Santa was owner-in-possession of suit land. Similarly, in the remarks column of Exhibit P2, note appended in rend ink clearly suggests that on the death of Santa, Mutation No. 218 relating to land at Village Chatraid was sanctioned on 22.5.2002 in favour of both the parties. It is also undisputed that disputed property was initially owned and possessed by their father, Santa, who expired on 10.3.2002. Case of the plaintiff is that Santa did not execute Will and Will dated 8.4.1993 set up by defendants is false and fabricated document and same is result of fraud and misrepresentation but unfortunately no evidence has been led on record by plaintiff to substantiate his aforesaid claim.

12. On the other hand, defendants have set up a case that late Santa had executed valid Will on 8.4.1993. With a view to prove valid execution of Will, defendants have examined marginal witnesses. Needless to say for proving the aforesaid Will, propounder of Will is/was required to prove that Will is a valid and legal document. Plaintiff namely Chimanu, in his statement recorded before the court below has admitted that the suit land was owned and possessed by late Santa, who stated that he did not make any Will. He further stated that suit property devolved upon him and defendant in accordance with Hindu Succession Act and Santa was not competent to execute Will as he, at the time of execution of Will, was 60 years old and seriously ill and bed-ridden. He further deposed before the court below that he was unable to see, hear and understand things. He further stated before the court below that last rites of Santa were performed by him being elder son. Marginal witnesses are close relatives of defendant No.1. PW-1 further averred that he was in occupation of the suit land alongwith the defendants and defendant No.1 was trying to oust him from the disputed land and to raise the construction over its best and valuable portion on the basis of forged and fabricated Will. Interestingly, this witness in his cross-examination categorically admitted that Smt. Chimbo (defendant No.2) was married and living in the house of her in-laws. PW-1 further admitted that at the time of marriage of defendant No.2, dowry etc. was given to her by his father. This witness categorically denied that deceased Santa was residing with defendant No.1 and he served him during his life time and performed his last rites. Though this witness claimed that at the time of execution of Will, Santa was not in his senses and was bed-ridden but in this regard, no documentary evidence, if any, was led by plaintiff.

13. PW-2 Chanalu Ram supported the case of the plaintiff, but in his cross-examination, stated that Santa had fallen ill four years prior to his death.

14. DW-2 Chamaru Ram testified that disputed land belonged to their father, who had executed a Will on 8.4.1993 in favour of plaintiff and defendant No.1. Land at Village Chatraid was bequeathed in favour of the plaintiff, whereas, land in Village Moura was given to

him (defendant No.1). DW-2 further stated that defendant No. 2 was married and putting up in her matrimonial home. He also deposed that he served his father and performed his last rites. It has also come in his examination that Santa was mentally and physically alert till his death and he executed Will in a sound state of mind. This witness also stated that after demise of Santa, land at Village Moura is under his exclusive possession, whereas, land of village Chatraid is in possession of the plaintiff. Careful perusal of cross-examination conducted on this witness nowhere suggests that plaintiff was able to elicit anything material from him detrimental to the case as set up by the defendants. In his cross-examination, he categorically stated that report qua Will was lodged by him with the Halka Patwari. Though this witness admitted that Will was not executed in his presence by deceased Santa but stated that same was executed in presence of Achhru and Duni Chand, who are his maternal uncle (Mama) and real brother, respectively. He categorically denied that deceased Santa was blind or ill during fifteen years prior to his death. While admitting the fact that while land in Village Moura is cultivable this witness in his cross-examination stated that he was not aware as to whether mutation of land at Village Chatraid was attested as he was busy performing last rites of his father.

15. Careful perusal of Exhibit DW-3/A, original registered Will dated 8.4.1993, suggests that deceased Santa had executed Will in favour of his sons, plaintiff and defendant No.1, in the presence of marginal witnesses S/Shri Achhru and Duni Chand.

16. DW-2 Chain Lal has stated that he is working as a Document Writer in Chamba for the last thirteen years and he knew Deena Nath (deceased). This witness stated that he had learnt work from late Deena Nath and was conversant with his handwriting and signatures. This witness stated that the original Will had been written by Deena Nath and signed by him. This witness in his cross-examination admitted that Will was not written in his presence.

17. Similarly, DW-3 Achhru, one of the marginal witnesses to the Will also supported the case as set up by defendants. He deposed that Will was got scribed by Santa from the Document Writer, who after scribing the same, read over and explained contents thereof to its executant. This witness further stated that Santa thumb marked the Will in his presence and in the presence of Shri Duni Chand, who admitted the contents of Will to be correct. He further stated that the entries qua Will were made by Document Writer in his register. Most importantly, this witness stated that Santa, Duni Chand and Advocate went to the Tehsil Office, where deceased Santa admitted Will to be correct before Sub Registrar and thumb marked it. This witness stated that at the time of execution of Will, Santa was in a fit state of mind and health. Though in his cross-examination this witness testified that he was maternal uncle of defendant No.1, but categorically denied that deceased Santa was blind at the time of execution of Will and was putting up with the plaintiff. This witness also denied that mental state of Santa was not good for the last fifteen years prior to his death and no Will was executed by him.

18. Having carefully examined the evidence be it ocular or documentary adduced on record by the respective parties, this Court has no hesitation to conclude that Will Exhibit DW-3/A, is a legal and valid document executed by deceased Santa in a sound state of mind. From the depositions made by marginal witnesses, as has been taken note above, it is abundantly clear that deceased Santa had come to Chamba, of his own alongwith witnesses and executed Will of his own free will without any external pressure. Moreover, reasons assigned in Exhibit DW-3/A for disinheriting defendant No.2 clearly belie the case set up by plaintiff.

19. Careful perusal of Exhibit DW-3/A clearly suggests that plaintiff was not ignored/disinherited by his father, rather land at Village Chatraid was given to him by deceased Santa, whereas land in Village Moura was given to defendant No.1. No doubt, while allowing application under Order 8 Rule 1-A, CPC having been filed by defendants, opportunity was granted to the defendants to place on record copy of Will subject to payment of costs but otherwise, perusal of record clearly suggests that certified copy of Will in question was placed on record by plaintiff himself at the time of institution of suit and as such, there appears to be no force in the arguments of the learned counsel representing the plaintiff that since, defendants

failed to pay costs to the tune of Rs. 300/-, Will being relied upon by defendants could not be read in evidence by the learned trial Court

20. In the case at hand, plaintiff has miserably failed to prove that Will exhibit DW-3/A is a forged document procured by defendants by way of fraud and misrepresentation, whereas, defendants by leading cogent and convincing evidence, have been able to discharge their onus being propounder of the Will that the same was executed by Santa in favour of plaintiff and defendant No.1 in a sound state of mind, without there being any external pressure or coercion.

21. Interestingly, no reliable evidence, if any, with regard to serious illness of deceased Santa as projected in the plaint has been led on record and as such, this Court finds no illegality or infirmity in the judgments and decrees passed by both the learned Courts below, which otherwise appear to be based upon correct appreciation of evidence adduced on record by the respective parties.

22. 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 the defendants, this Court also deems it necessary to deal with the same. Though learned counsel representing the defendants has placed reliance upon the judgments, as have been taken note above, this Court deems it proper to take into consideration latest judgment passed by Hon'ble Apex Court in **Laxmidevamma's** case supra, 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)

23. 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 learned counsel representing the defendants 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.

24. In this regard reliance is placed upon judgment passed by Hon'ble Apex Court in **Sebastiao Luis Fernandes (Dead) through LRs and Others** vs. **K.V.P. Shastri (Dead) through LRs and Others,** (2013)15 SCC 161, wherein the Court held:

> "35. The learned counsel for the defendants relied on the judgment of this Court in Hero Vinoth v. Seshammal, (2006)5 SCC 545, wherein the principles relating to Section 100 of the CPC were summarized in para 24, which is extracted below : (SCC pp.555-56)
>
> "24. The principles relating to Section 100 CPC relevant for this case may be summarised thus:

(i) An inference of fact from the recitals or contents of a document is a question of fact. But the legal effect of the terms of a document is a question of law. Construction of a document involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a document or wrong application of a principle of law in construing a document, it gives rise to a question of law.

(ii) The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue. A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law.

(iii) The general rule is that High Court will not interfere with the concurrent findings of the courts below. But it is not an absolute rule. Some of the well-recognised exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to "decision based on no evidence", it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding."

We have to place reliance on the afore-mentioned case to hold that the High Court has framed substantial questions of law as per Section 100 of the CPC, and there is no error in the judgment of the High Court in this regard and therefore, there is no need for this Court to interfere with the same." (pp.174-175)

25. The Hon'ble Apex Court in **Parminder Singh** versus **Gurpreet Singh**, Civil Appeal No. 3612 of 2009, decided on 25.7.2017, has held as under:

"14) In our considered opinion, the findings recorded by the three courts on facts, which are based on appreciation of evidence undertaken by the three Courts, are essentially in the nature of concurrent findings of fact and, therefore, such findings are binding on this Court. Indeed, such findings were equally binding on the High Court while hearing the second appeal.

15) It is more so when these findings were neither found to be perverse to the extent that no judicial person could ever record such findings nor these findings were found to be against the evidence, nor against the pleadings and lastly, nor against any provision of law."

26. It is quite apparent from aforesaid exposition of law that concurrent findings of facts and law recorded by both the learned Courts below can not be interfered with unless same are found to be perverse to the extent that no judicial person could ever record such findings. In the case at hand, as has been discussed in detail, there is no perversity as such in the impugned judgments and decrees passed by learned Courts below, rather same are based upon correct appreciation of evidence as such, same deserve to be upheld.

27. Substantial questions of law are answered accordingly.

28. Consequently, in view of discussion above, there is no merit in the appeal and same is dismissed. Judgments and decrees passed by both the learned Courts below are upheld. Pending applications, if any, are disposed of. Interim directions, if any, are vacated.

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

Ranbir Singh .....Petitioner.
Versus
State of Himachal Pradesh. .....Respondent.

Cr. Revision No. 136 of 2009.
Date of decision: June 15, 2018.

Indian Penal Code, 1860- Sections 279, 304-A and 337- Rash and negligent driving – Proof of – Trial Court convicting and sentencing accused for offences under Sections 279, 304-A and 337 of Code – Add. Sessions Judge upholding conviction and sentence – Revision against – Accused submitting that Lower Courts were wrong in relying upon photographs and spot map for drawing inferences of rash driving – Alleging that these documents were taken/prepared after removal of vehicles from the place of accident and oral evidence was also self contradictory – Accused also contending that deceased was overtaking a bus going ahead of him and in that process his car struck against the offending bus – On facts, High Court found that road was straight and 22 feet wide– Offending bus had gone to Kachha portion of road towards its right – After hitting against car, the offending bus had dragged it upto 80 feet – Photographs of vehicles involved in accident also prove rash and negligent driving on part of driver of bus (accused) – 'V', an occupant of car and 'Y' an eye witness clearly deposed that accused was driving bus on wrong side of road and in high speed – Held, facts proved on record themselves show that accused was rash and negligent in driving on public highway and such driving was cause of accident – Conviction upheld – But sentence modified – Appeal partly allowed. (Paras- 13 to 17)

Cases referred:
Mangla Ram vs. The Oriental Insurance Company, Civil Appeal Nos. 24992500 of 2018
State of H.P. versus Parmodh Singh, Latest HLJ 2008 (HP) 1360
State of Himachal Pradesh, 2013 (1) Him L.R. 232

For the petitioner Ms. Ritika Jassal, Advocate.
For the respondent Mr. R.P. Singh and Mr. Kunal Thakur, Dy. Advocate Generals.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. ***(Oral)***

Petitioner herein is convict. He has been tried and convicted for the commission of offence punishable under Sections 279, 337 and 304-A of the Indian Penal Code by learned Judicial Magistrate Ist Class, Court No. I, Amb, District Una H.P. in case No. 132-1/2001. Consequently, he has been sentenced to undergo simple imprisonment for three months under Section 279 IPC, simple imprisonment for three months for the commission of offence punishable under Section 337 IPC and rigorous imprisonment for two years and to pay Rs.5000/- fine under Section 304-A IPC. Learned Additional Sessions Judge, Una in Criminal Appeal No. 18 of 2008 decided vide impugned judgment dated 22.8.2009 has upheld the findings of conviction and sentence recorded by learned trial Court.

2. The impugned judgment has been challenged on the grounds, inter-alia, that the photograph Ext.P12 has erroneously been relied upon while recording the findings of conviction for the reasons that both vehicles i.e. offending bus and ill fated car already removed from the spot. The statement of PW2 to this effect has been pressed in service. The evidence as has come on record by way of the testimony of PW1 to PW3 irrespective of self contradictory has been erroneously relied upon and rather misread and misappropriated also. The spot map having been prepared after removal of both vehicles on the spot could have also not been relied upon.

3. The facts giving rise for filing the present petition in a *nut shell* are that deceased Vijay Kumar accompanied by his wife Smt. Veena was away to Bhaderkali on 27.5.2001 in his Maruti car bearing No. HP-20A-3902. On way back around 1:00 P.M. while at Charood the car being driven by deceased Vijay Kumar in normal speed and in his own side was hit by the accused with offending bus bearing registration No. HP-38-3556 on account of driving the same in a rash and negligent manner. As a result thereof PW1 and her husband both suffered injuries on their person. Her husband got seriously injured in the accident. He scummed to the injuries received in the accident on the way to zonal hospital, Una.

4. Since the accident occurred due to rash and negligent driving attributed to the accused-petitioner, therefore, the matter was reported to the police of police station, Amb. The information received qua the accident was reduced into writing vide rapat No. 14 Ext.PW11/B in the police diary. The police of police Station, Amb was also informed from Zonal Hospital, Una that the dead body of a person died in the accident has been brought to the hospital. Rapat Ext.PW11/C in this behalf was also entered in the rapat rojnamcha. The police swung into action. In the hospital PW1 Veena was got medically examined vide MLC Ext.PW4/A. Post Morten of the dead body was also got conduced vide post mortem report Ext.PW12/A. The statement Ext.PW1/A under Section 154 Cr.P.C. of PW1 was also recorded on the basis of which FIR Ext.PW11/A registered in the police station. The I.O. PW8 during the course of investigation has inspected the spot and prepared the site plan Ext.PW8/A. The photographs Ex.P7 to P12 of the place of accident with position of both vehicles were also taken. The photographs Ext.P1 to Ext.P3 are that of the dead body of deceased Vijay Kumar. The statements of witnesses were recorded as per their version.

5. On completion of the investigation, report under Section 173 Cr.P.C. was prepared and filed in the Court.

6. Learned trial Judge on appreciation of the final report and also the documents annexed therewith and on being satisfied that the accident has occurred on account of rash and negligent driving has proceeded to put notice of accusation under Sections 279,337 and 304-A of the Indian Penal Code. He, however, pleaded not guilty and claimed trial. This has led the prosecution to produce the evidence comprising oral as well as documentary.

7. The material prosecution witnesses are Veena Kumari (PW1) one of the victim of the accident, Yog Raj PW2 an eye witness, Raghu Dutt PW3 being a witness qua the seizure of ill fated car vide memo Ext.PW3/A, Dr. V.K. Raizada PW4, Medical officer Zonal Hospital, Una who has medically examined PW1 Veena Kumari and issued MLA Ext.PW4/A, PW5 Vipan Kumar who had produced the RC of the ill fated car and driving licence of the deceased before police and proved the memo Ext.PW5/A. PW6 HHC Karnail Singh had taken the photographs Ext.P1 to Ext.P3, PW7 HC Pradhan Singh had taken photographs Ext.P7 to Ext.P12, PW8 HC Rajesh Kumar during the course of investigation had taken into possession both vehicles vide memo Ext.PW3/A, the documents of the offending bus i.e. RC, insurance policy and diving licence of the accused vide memo Ext.PW8/B and the RC as well as driving licence etc. of the ill fated car vide memo Ext.PW5/A. He is also author of the spot map Ext.PW8/A. PW9 Avtar Singh had partly investigated the case and recorded the statements of PW1 Veena Kumari Ext.PW1/A. PW10 C. Narender Kumar had witnessed the recovery memo Ext.PW5/A vide which the RC, Insurance Policy and driving licence of the car have been taken in possession. PW11 HC Jasbir Singh was posted as Moharar Head Constable in the police Station at the relevant time. He has proved Rukka Ext.PW1/A and the FIR Ext.PW11/A he registered on the basis thereof. He has also

proved the copies of rapat rojnamcha Ext.PW11/B and Ext.PW11/C. The RC and Insurance Policy of the offending bus and driving licence of the accused were produced before him which were taken in possession vide memo Ext.PW8/A. He witnessed the recovery thereof by putting his signature on the memo. The case property was deposited before him by Constable Vijay Kumar on 4.6.2001 which he later on forwarded to Forensic Science Laboratory, Junga on 4.6.2001 vide RC No. 76 of 2001. PW12 Dr. Vipan Kumar has proved the post mortem report Ext.PW12/A and PW13 Hawaldar Shakti Kumar Mechanic driver has proved the mechanical reports Ext.PW13/A and Ext.PW13/B of the ill fated car and of offending bus after checking both vehicles mechanically. PW14 C. Vijay Kumar was examined to prove the delivery of case property in Forensic Science Laboratory, Junga.

8. On the other hand, the accused in his statement recorded under Section 313 Cr.P.C. while admitting that bus bearing No. HP-38-3556 being driven by him from Una towards Amb and the same met with an accident has denied that he was driving the same at a high speed and wrong side of the road. The remaining incriminating circumstances appearing in prosecution evidence against him have also been denied either being wrong or for want of knowledge. In his defence, it is pleaded that the deceased on the wheel of the car was driving the same on wrong side of the road and was trying to overtake the bus on its way to Una from Amb. The deceased had overtaken the HRTC bus from wrong side and as he was driving the bus from opposite direction the car came in contact therewith and it is for this reason the accident had taken place.

9. In his defence he has examined Kishori Lal DW1, Inspector HRTC Dharamshala, district Kangra. He has produced the record and stated that Bus No. HP-39-3966 was on its route from Dharamshala to Shimla via Chandigarh and one Rakesh Kumar (III) was its driver. He expressed his inability as to what time the HRTC bus crossed Charood gaon. He has also expressed his ignorance about the accident in question.

10. On appreciation of the evidence as discussed hereinabove and taking note of the factum of the offending bus being driven by the accused in wrong side of the road and having dragged the Maruti car at a distance of 80 feet, learned trial Court has concluded that the rashness and negligence on the part of the accused is criminal rashness and negligence. Consequently, he was convicted and sentenced in the manner as pointed out at the outset. Learned lower Appellate Court on reappraisal of the prosecution evidence has arrived at a conclusion that the trial Court has not committed any illegality or irregularity in convicting and sentencing the accused for the commission of the offence he committed under Sections 279,337 and 304-A of the Indian Penal Code.

11. Ms. Ritika Jassal, Advocate has argued with all vehemence that as per the testimony of PW2 not only the photographs but the spot map was prepared at a stage when both vehicles were already removed therefrom. According to her the position reflected in the map Ext.PW8/A and the photographs Ext.P7 to Ext.P12 could have not been given undue weightage while arriving at a conclusion that the rashness and negligence on the part of the accused was criminal rashness and criminal negligence. She has also placed reliance on the judgment of the Apex Court in ***Mangla Ram*** vs. ***The Oriental Insurance Company, Civil Appeal Nos. 24992500 of 2018*** and that of this Court in ***State of H.P.*** versus ***Parmodh Singh, Latest HLJ 2008 (HP) 1360*** and ***Joginder Singh*** versus ***State of Himachal Pradesh, 2013 (1) Him L.R. 232.*** On the other hand, Mr. R.P. Singh, learned Deputy Advocate General has not only repelled the arguments addressed on behalf of the accused-petitioner but also pointed out from the evidence available on record that the guilt of the accused-petitioner in this case is fully established.

12. Before coming to the rival submissions and merits of the case in the light of the arguments addressed on both sides, it is worth mentioning that under limited revisional jurisdiction the Court should be slow in interferring with the findings recorded by the trial Court and for that matter learned lower appellate Court on appreciation of the given facts and circumstances and also the evidence available on record. The findings so recorded in revisional jurisdiction can only be interferred in a case of sheer miscarriage of justice and where there is an

error apparent on the face of the record and the court below has committed an illegality or irregularity glaring in nature while passing the order sought to be revised.

13. On going through the evidence produced in this case, it is writ large that the accident leading to the death of Vijay Kumar, the driver of the ill fated car and injuries on the person of his wife PW1 is the result of rash and negligent driving on the part of the accused-petitioner. PW1 has deposed unequivocally that the bus was being driven by the accused at a high speed and as a result thereof he lost control over the same and hit the ill fated car which was being driven by the deceased on the other side of the road. There is no explanation in the statement under Section 313 Cr.P.C. qua this aspect of the matter. The suggestion that a Sumo was being driven ahead of the bus has been denied by this witness being incorrect. It is also denied by her that ill fated car was being driven by her husband at a high speed and that he was trying to overtake HRTC bus being driven ahead of the car. It is also denied that her deceased husband could not control the car and as a result thereof the same dashed against the bus.

14. Another material witness is Yog Raj. He has arranged 'Bhandara' on that day. He witnessed the offending bus being driven at high speed and on the wrong side of the road, as a result thereof the same hit the ill fated car. They had to push behind the bus to bring out the injured from the ill fated car. The documentary evidence is the spot map Ext.PW8/A. The position of the bus and ill fated car shown in this document make it crystal clear that both vehicles were on kachha road in right side of the bus. Point-C on the road is in right side while going from Una to Amb side. The bus, therefore, was being driven in wrong side of the road. The distance from point-B to C in the map is 80 feet. This documents amply demonstrate that the car was hit at point-C and bus dragged it up to point 'B', distance whereto is 80 feet. Such evidence itself speaks in plenty about the speed of the offending bus. Had the bus was being driven in a normal speed and in left side of the road the accident would have not taken place and even if the strike having taken place the accused would have in a position to control and stop the bus by applying the brakes there and then.

15. Interestingly enough the road at the place of accident is 22 feet wide and straight also. The ill fated car was being driven on its own side of the road. Such situation prevailing on the spot amply demonstrate that the accused was driving the bus in a rash and negligent manner. The photographs Ext.P-7 to Ext.P12 showing the position of the offending bus and ill fated car from different angle leave no manner of doubt that the bus was being driven in a rash and negligent manner and on wrong side of the road. As a matter of fact, the bus dragged the car out of Kachha portion of the road. Such evidence is sufficient to conclude that the rashness and negligence on the part of the accused while driving the offending bus was criminal rashness and negligence. The judgment of the Apex Court in Mangla Ram's case cited supra is distinguishable on facts, hence not applicable in the case in hand. The law laid down by the Apex Court in the case cited supra is also of no help to the case of the accused-petitioner. Since in this accident a precious human life is lost besides causing injuries to PW1, one of the occupants of the ill fated car, therefore, both Courts below have not committed any illegality or irregularity in holding the accused guilty for the commission of the offence punishable under Sections 279, 337 and 304-A of the Indian Penal Code.

16. In the matter of sentence though the accused-petitioner has been rightly sentenced to undergo three months each simple imprisonment for the commission of offence punishable under Sections 279 and 337 IPC. As regards the commission of offence punishable under Section 304-A IPC, both Courts below have sentenced the accused-petitioner with maximum sentence i.e. two years, however, without assigning any reason. True it is that in view of there being increase in road accidents the cases pertaining to road accidents should be deal with sternly and in case the guilt of the accused established suitable sentence commensurate with the magnitude of the offence committed should be passed against him. At the same time, suitable amount by way of fine to compensate the victim of the accident can also be imposed against the convict.

17. In the opinion of this Court, sentence to undergo one year rigorous imprisonment and to pay Rs.50,000/- as fine for the commission of the offence punishable under Section 304-A IPC wold serve the ends of justice. Therefore, in modification of the impugned judgment, the accused is sentenced to undergo rigorous imprisonment for a period of one year and also to pay Rs.50,000/- fine for the commission of offence punishable under Section 304-A IPC. He is stated to have undergone the sentence for five months as has come in para-20 of the impugned judgment. He, therefore, is directed to surrender in the trial Court to serve out the remaining part of the sentence in terms of this judgment. On deposit of the fine in the trial Court, the same shall be payable to the victim of the accident PW1 Veena Kumari as compensation under proper receipt. In case the accused-convict fails to deposit the fine, he shall undergo simple imprisonment for a further period of six months.

18. In view of above, this petition is partly allowed and the impugned judgment is modified as indicated in para supra.

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

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

Subhash Chand .....Petitioner
Versus
Bhim Sen .....Respondent

Civil Revision No. 251 of 2017
Decided on: 15.06.2018

Code of Civil Procedure, 1908- Order XXI Rule 11(2)- Execution of decree- Objections thereto – Judgment debtor objecting execution on grounds (i) decree did not specifically grant relief of possession of suit land and (ii) D.H. is non-agriculturist of Himachal Pradesh, and he cannot be put into possession of land in execution of decree in view of Section 118 of H.P. Tenancy and Land Reforms Act (Act) – Objections of judgment debtor dismissed by Executing Court – Petition against - Held, Executing Court though cannot go beyond decree under execution but at the same time its duty is to find out its true effect which can only be done by construing decree – Section 118 of Act is prospective in nature on facts, D.H. was held entitled for possession of land in question – Further, land was found purchased by D.H. in 1966, when Act had not come into operation – Objection of J.D. thus held to have rightly been rejected by Executing Court – Order upheld – Petition dismissed. (Paras-5 to 8)

For the petitioner: Mr. Suneet Goel, Advocate.
For the respondent: Mr. Ajay Sharma, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)

Order dated 15.11.2017 passed by learned Civil Judge, Baijnath, District Kangra, H.P. in an application under Order 21 Rule 11(2) of the Code of Civil Procedure registered as Execution No. 14/17, is under challenge in this petition.

2. The judgment and decree, Annexure P-1 passed by learned Civil Judge (Junior Division), Baijnath, District Kangra, H.P. in Civil Suit No. 157/10 not only affirmed by learned lower appellate Court but also this Court as well as the Apex Court, has resulted in initiating execution proceedings at the instance of respondent-decree holder. The petitioner-JD has

objected to the execution proceedings on the grounds *inter-alia* that without there being any decree of possession passed in favour of DH, he cannot be put in possession of the suit land. The sale of the suit land by their father and in view of partition thereof behind the back of the plaintiff-JD as he was not served in the partition proceedings, the suit land should have been declared joint of the parties. The applicant, one of the decree holders, has only part interest in the suit land as per his share and not the entire suit land. Also that, in view of the provisions contained under Section 118 of the H.P. Tenancy and Land Reforms Act, 1972, the DH, who is not an agriculturist of the State of Himachal Pradesh is not entitled to the possession of the suit land except for the permission of the appropriate authority. Learned trial Judge on appreciation of the given facts and circumstances and on perusal of the judgment and decree sought to be executed has answered all the objections in negative and has dismissed the same.

3. Mr. Suneet Goel, learned counsel representing the petitioner-JD has strenuously contended that the decree for the relief of possession of the suit land is not executable.

4. Mr. Ajay Sharma, learned counsel representing the respondent-DH has repelled the arguments so addressed while submitting that the decree sought to be executed has to be gone into as a whole and not only the relief granted. He has also pointed out from the decree that the respondent-DH has been held entitled to the possession of the suit land. As regards objection qua right of the respondent-DH to claim possession of the suit land barred under Section 118 of the H.P. Tenancy and Land Reforms Act, 1972, it is canvassed that the Act has retrospective application and not prospective.

5. On analyzing the rival submissions and also the record of the case, no doubt, in the relief granted, it is the entries showing the defendants owner in possession of the suit land have been held illegal, null and void, hence not binding upon the plaintiffs and there is no direction to the defendants to hand over the vacant possession of the suit land to them. The findings recorded on issue No. 5, however, demonstrate that the plaintiffs-DH have been held entitled to the possession of the suit land. The judgment of the Apex Court in *Bhavan Vaja's* case relied upon by learned trial Court, while emphasizing that the executing Court cannot go behind the decree under execution and at the same time has reminded that the Court has duty to find out the true effect of the decree also, which can only be done by construing the decree in appropriate cases, taking into consideration the pleadings of the parties as well as other material leading to the passing of the decree. Therefore, learned trial Court has not committed any illegality while arriving at a conclusion that proper construction of the decree sought to be executed, the DH has been granted relief of the possession of the suit land also.

6. As regards, objection No.2, learned trial Court has rightly concluded that no such objection could have been raised during the execution proceedings. Had the partition of the suit land been not effected in accordance with law, such defence would have been raised in the written statement and during the course of trial.

7. The 3rd objection, to the mind of this Court, was raised merely for rejection for the reason that DH No.1 was attorney of DH No.2 also in execution proceedings. The implication of Section 118 of the H.P. Tenancy and Land Reforms Act has also been appropriately considered by learned trial Court for the reason that at page 8 of the decree sought to be executed, it is observed that after purchase of the suit land in the year 1966 by the DH from the father of JD, the entries to this effect came to be recorded in *Misal Hakiyat Bandobast Jadid* for the year 1971. Therefore, the plaintiffs bestowed with the rights qua the suit land well before coming in force the Tenancy and Land Reforms Act. The findings so recorded even were reiterated by learned lower appellate Court in the bottom of para 11 of its judgment. Even, this Court has also considered this aspect of the matter in the judgment dated 2.12.2016 passed in RSA No. 310/15, which was preferred by the petitioner-DH.

8. Such being the factual position considered and discussed by the trial Court, the objections so raised has rightly been rejected. No other point is urged nor arises for

determination in this petition. The same, as such, is dismissed being devoid of any merits. Pending application(s), if any, shall also stand disposed of.

The parties through learned counsel representing them are directed to appear before the executing Court i.e. Civil Judge, Baijnath, District Kangra, H.P. on *19.07.2018*.

An authenticated copy of this judgment be sent to learned trial Court for record.

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

Tek Chand … Petitioner
Versus
State of H.P. and others … Respondents

CrMMO No. 249 of 2018
Decided on June 15, 2018

Code of Criminal Procedure, 1973- Section 482- Inherent Powers – Quashing of FIR – Whether Court be ordered? - Petitioner-accused seeking cancellation of FIR and consequential proceedings initiated against him for offences under Sections 279, 337 of I.P.C. and 187 of M.V. Act on account of compromise with complainant – Held, In exercise of powers under Section 482 of Code, High Court may quash criminal proceedings, even in those cases, which are not compoundable but where parties have settled the matter between themselves – However, this power is to be exercised sparingly and with great caution to prevent the abuse of process of Court and to meet the ends of justice – Since, compromise was found bonafide, FIR and consequential proceedings quashed – Petition allowed.

Cases referred:
Narinder Singh and others versus State of Punjab and another (2014)6 Supreme Court Cases 466
Gian Singh v. State of Punjab and anr. (2012) 10 SCC 303
Dimpey Gujral and Ors. vs. Union Territory through Administrator, UT, Chandigarh and Ors. (2013(11 SCC 497

For the petitioner and Respondent No.4: Mr. Rakesh Kumar and Mr. Aman Parth Sharma, Advocates.
For respondents No. 1 to 3 Mr. S.C. Sharma and Mr. Dinesh Thakur, Addl. AG's with Mr. Amit Kumar, DAG.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

By way of instant petition filed under Section 482 CrPC, a joint prayer has been made on behalf of the petitioner-accused and respondent No. 4-complainant, for quashing of FIR No. 321 of 2013 dated 6.11.2013 under Sections 279 and 337 IPC, and Section 187 of Motor Vehicles Act, registered at Police Station, Kullu, District Kullu, Himachal Pradesh and consequential proceedings in *Challan* No. 26-I/14 titled State vs. Tek Chand, pending before Judicial Magistrate 1st Class, Lahaul & Spiti at Kullu, Himachal Pradesh.

2. Facts, as emerge from the record are that FIR referred to herein above came to be lodged at the behest of complainant/respondent No. 4 against petitioner on 6.11.2013 at Police Station Kullu, District Kullu. After completion of investigation, *Challan* was presented in the competent Court of law and case is pending adjudication.

3. By way of instant petition accused as well as complainant have jointly prayed for quashing of FIR as well as consequential proceedings on the ground that with the intervention of the elders in their families, they have resolved to settle the dispute amicably. Learned counsel representing the parties, while inviting attention of this Court to the compromise (Annexure P-2, page-17 of paper book), contend that both the parties, with a view to maintain cordial relations with each other in future have decided to not to pursue the matter and as such, case registered at the behest of the complainant may be ordered to be quashed and set aside.

4. Though, this court after having perused compromise placed on record finds that both the parties i.e. accused and complainant (respondent No.4) have compromised the matter, but this court, solely with a view to ascertain the correctness and genuineness of the compromise placed on record, also recorded statement of complainant, who is present in court and identified by Mr. Aman Parth Sharma, Advocate. Respondent No.4-complainant categorically stated on oath before this Court that he has compromised the matter with the accused with the intervention of the elders of both the families and he has no objection in case FIR as also criminal proceedings pending in the court of learned Judicial Magistrate 1st Class, Lahul & Spiti at Kullu, in *Challan* No. 26-I/14 are ordered to be quashed and set aside. His statement has been taken on record.

5. Having carefully perused compromise placed on record as well as statement given by the complainant in the court, prayer made in the instant petition deserves to be considered.

6. Since the instant petition has been filed under Section 482 Cr.P.C, this Court deems it fit to consider the same in the light of the judgment passed by Hon'ble Apex Court in **Narinder Singh and others** versus **State of Punjab and another** (2014)6 Supreme Court Cases 466, whereby 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 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, 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 pre-dominantly 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".

7. 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.

8. 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."

9. Recently 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."

10. Accordingly, in view of the averments contained in the petition as well as the submissions having been made by the learned counsel for the petitioner and respondent No. 4, that the matter has been compromised, and keeping in mind the well settled proposition of law as well as the statement of the complainant recorded on oath before the Court, this Court has no inhibition in accepting the prayer made in the present petition and quashing the FIR as well as consequential proceedings pending in the trial Court. Moreover, the Hon'ble Apex Court in the judgment supra, has observed that power under Section 482 CrPC is not to be exercised in those cases which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. However, in the present case, the offence is a minor offence and further the chances of conviction in the case are bleak and remote since complainant has compromised the matter as such no fruitful purpose will be served in continuing with the criminal proceedings against the petitioner-accused.

11. Consequently, in view of the peculiar facts and circumstances of the case, wherein parties have resolved to settle the matter at hand, this Court while exercising power vested in it under Section 482 Cr.P.C., deems it fit to accept the prayer having been made by the learned counsel representing the petitioner and respondent No. 4, as such, the matter is ordered to be compounded. Proceedings pending before the learned Judicial Magistrate 1st Class, Lahul & Spiti at Kullu in *Challan* No. 26-I/14, against the petitioner, arising out of FIR No. 321 dated 6.11.2013 under Sections 279 and 337 IPC and Section 187 of Motor Vehicles Act are quashed and set aside. Petitioner-accused is acquitted of the offences punishable under Sections 279 and 337 IPC, and Section 187 of Motor Vehicles Act.

Pending applications, if any, are also disposed of.

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

Santosh Rana ...Petitioner

Versus

The Kangra Co-op. Primary Agriculture & Rural Development Bank Ltd. ...Respondent

Cr. MMO No. 36 of 2018
Reserved on: 30.05.2018
Decided on: 18.06.2018

Code of Criminal Procedure, 1973- Section 311 – **Negotiable Instruments Act, 1881-** Section 138- Additional Evidence –Adduction of – When can be availed? – Petitioner/accused filing application under Section 311 of Code in order to examine Manager of a bank to show that cheque in question was given by him to complainant bank as a 'security' – Complainant resisting application on ground that accused issued cheque only when complainant started auction process of his mortgaged land – Trial Court dismissing application of accused – Petition against – On facts, it was found that (i) accused had taken loan from complainant bank and prima facie the dishonoured cheque was issued by him towards discharge the said liability (ii) he had taken many opportunities for leading his evidence (iii) no cross-examination was done on banker's witness regarding non-production of loan file – Held, application filed for leading additional

evidence was not bonafide and it was filed just to delay the proceedings – Petition dismissed – Order of Trial Court upheld. (Para-7)

For the petitioner: Mr. Anil Thakur, Advocate.
For the respondent: Mr. Tarun K. Sharma, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge

The present petition, under Section 482 of the Code of Criminal Procedure, is maintained by the petitioner, against the order, dated 12.01.2018, passed by learned Judicial Magistrate 1st Class, Court No. III, Hamirpur, District Hamirpur, H.P. in Criminal Complaint No. 43-1/2015, whereby an application under Section 311 Cr. P.C., filed by the petitioner for leading additional evidence has been dismissed.

2. The brief facts of the case are that in the month of January, 2008, the petitioner approached the respondent-bank for grant of loan of Rs. 14,00,000/- for installation of Green House, which was sanctioned by the respondent in his favour on 22.01.2008 as a term loan of Rs. 14,00,000/- with interest @ 14% p.a. for a period of ten years and the monthly installment of said amount had come to Rs. 22,400/-. As per the respondent-bank, on 20.06.2015, the petitioner in order to discharge his liability, issued a cheque, bearing No. 047446, drawn at Allahabad Bank, Branch at Hamirpur, H.P. in favour of the respondent-bank. However, when the same was presented by the respondent in the bank, the same was dishonoured due to insufficient fund. Consequently, the respondent-bank filed a complainant, under Section 138 of the Negotiable Instruments Act, against the petitioner before the learned trial Court. During the pendency of the case the petitioner filed an application, under Section 311 Cr. P.C., wherein he prayed that he may be allowed to recall the Manager, Kangra Co-op. Primary Agriculture & Rural Development Bank Ltd. alongwith the records regarding loan sanctioned for green house, as the same was not brought by the Manager earlier. As per the petitioner, he only wants to prove that he has issued the cheque only for the security purpose, not to discharge his liability. Thus, the said witness, alongwith the records qua loan sanctioned for green house, is material and necessary for proper adjudication of the case. However, the learned trial Court vide order dated 12.01.2018, dismissed the application filed by the petitioner, hence the present petition.

3. In reply, it has been averred by the respondent-bank that the petitioner did not pay even a single installment of the loan amount and when the respondent-bank started auction process of the mortgaged land, which belongs to the petitioner, he issued a cheque, amounting Rs. 10,00,000/- in favour of the respondent-bank, however the same was dishonoured due to insufficient fund. It has been further averred that the application filed by the petitioner has rightly been dismissed by the learned trial Court, as despite number of opportunities afforded to him, he failed to lead evidence. Thus the order passed by the learned trial Court needs no interference and the present petition deserves dismissal.

4. Learned counsel for the petitioner has argued that the learned trial Court has erred in holding that there are no grounds to allow the application for additional evidence, however for proper adjudication of the case, the Manager, Kangra Co-operative Primary Agriculture & Rural Development Bank Ltd., alongwith records was required to be examined. Hence, the present petition may be allowed and impugned order, passed by the learned trial Court may be set aside. On the other hand, learned counsel for the respondent has argued that the application has been moved by the petitioner just for delaying the proceedings, even otherwise, learned trial Court has granted six opportunities to the petitioner to lead his evidence, so it cannot be said that learned trial Court has erred in dismissing the application of the petitioner, thus the impugned order calls for no interference.

5. To appreciate the arguments of the learned counsel for the parties, this Court has gone through the records in detail.

6. Section 311 of the Code of Criminal Procedure, 1973 reads as under:

> ***"311. Power to summon material witness, or examine person present.- Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to just decision of the case."***

7. The purpose of this provision is to find out the truth in order to render a just decision. However, as the loan was taken by the petitioner and there is a presumption attached to the issuance of cheque towards the repayment of the loan and the petitioner even after many opportunities granted to him could not lead his evidence. So, the only purpose of filing the application for leading additional evidence, appears to be delaying the proceedings, as CW-2 was not cross-examined by the petitioner on the facts of not producing the file pertaining to the loan earlier, so the application is afterthought and to delay the proceedings, which cannot be allowed.

8. From the records, it is clear that the accused was having an opportunity to call for the records pertaining to the loan in his defence evidence, as the complainant evidence was closed on 05.10.2016, statement of the petitioner under Section 313 Cr. P.C. was recorded on 18.11.2016 and thereafter the matter was listed for defence evidence. Since 23.12.2016, almost six opportunities were granted to the petitioner to lead evidence, but he could not lead his evidence and consequently, learned trial Court on 15.11.2017, closed his evidence.

9. From the conduct of the petitioner, it seems that he is only interested in delaying the proceedings, which is not the intent of the legislature behind the framing of Section 311 Cr. P.C. So, this Court finds no infirmity with the order passed by the learned trial Court. Accordingly, the present petition, which sans merits, deserves dismissal and is accordingly dismissed. Pending application(s), if any, shall also stand(s) disposed of. Parties through their counsel are directed to appear before the learned trial Court on ***18th July, 2018.***

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

Dinender Morya … Petitioner

Versus

State of Himachal Pradesh …Respondent

CrMP(M) No. 570 of 2018
Decided on June 19, 2018

Code of Criminal Procedure, 1973- Section 439- Regular Bail – Grant of – Accused seeking regular bail in a case registered against him for house trespass and rape on and w.e.f. April, 2017 to August, 2017– Accused, who used to come to give tuitions to children of victim, allegedly recorded video of prosecutrix while taking bath by her and by blackmailing her, raped her – Accused submitting that he and prosecutrix were well known to each other and no case of rape is made out – State opposing bail on ground of seriousness of offences – High Court found that (i) accused and victim were known to each other since long (ii) incident of video-graphing of prosecutrix while taking bath and rape happened in April, 2017, however, FIR lodged in April, 2018 (iii) Cell Phone of accused was not found containing any video relevant to case (iv) investigation was complete – Accused ordered to be released on bail subject to conditions- Application allowed (Paras- 7, 8 and 15)

Cases referred:
Sanjay Chandra versus Central Bureau of Investigation (2012)1 Supreme Court Cases 49
Manoranjana Sinh alias Gupta versus CBI, (2017) 5 SCC 218
Prasanta Kumar Sarkar versus Ashis Chatterjee and another (2010) 14 SCC 496

For the petitioner	:	Mr. Mohan Sharma, Advocate.
For the respondent	:	Mr. S.C. Sharma and Mr. Dinesh Thakur, Addl. AG's with Mr. Amit Kumar, DAG. ASI Dev Raj, Police Station, West, Shimla.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

Bail petitioner, Dinender Morya, who is behind the bars since 22.4.2018, has approached this Court by way of instant bail petition filed under Section 439 CrPC, seeking therein regular bail in case FIR No. 94/18 dated 18.4.2018 under Sections 323, 452, 354, 376 and 506 IPC, registered at Police Station West, Shimla, District Shimla, Himachal Pradesh.

2. Sequel to orders dated 24.5.2018 and 29.5.2018, ASI Dev Raj, has come present with the record. Mr. S.C. Sharma, 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. Close scrutiny of status report suggests that on 18.4.2018, complainant-prosecutrix filed a complaint to the Station House Officer, Police Station West, Shimla alleging therein that she was sexually assaulted by the bail petitioner during April, 2017 to August, 2017. As per complainant, in April, 2017, bail petitioner who used to come to her house for giving tuitions to her children, recorded a video of the complainant-prosecutrix while taking bath and on the basis of such recording started blackmailing her and sexually assaulted her during April, 2017 to August, 2017. It is further alleged by complainant-prosecutrix that on 17.4.2018, bail petitioner forcibly entered her house and made an attempt to outrage her modesty, whereafter, FIR detailed herein above came to be lodged against the bail petitioner at the behest of complainant-prosecutrix.

4. Mr. Mohan Sharma, learned counsel representing the bail petitioner, while referring to the status report/record vehemently argued that no case under Section 376 IPC is made out against his client because it is quite apparent from the averments made in the complaint that complainant-prosecutrix was known to the bail petitioner for quite considerable time and during this period, they had developed intimate relations. He further stated that there is no explanation rendered on record by complainant-prosecutrix for not lodging complaint in April, 2017 itself, when allegedly bail petitioner recorded the video. Lastly, Mr. Mohan Sharma, Advocate contended that bail petitioner is behind bars since 22.4.2018, investigation in the case is complete and nothing is required to be recovered from the bail petitioner, as such, bail petitioner deserves to be enlarged on bail.

5. Mr. S.C. Sharma, learned Additional Advocate General , vehemently opposed the prayer having been made by the learned counsel representing the bail petitioner and contended that keeping in view the gravity of the offence allegedly committed by bail petitioner, he does not deserve to be shown any lenience, rather bail petitioner deserves to be dealt with severely. While fairly acknowledging that investigation is almost complete and nothing is required to be recovered from the bail petitioner, learned Additional Advocate General contended that since bail petitioner hails from the State of Madhya Pradesh, there is every likelihood of his fleeing from justice, in the event of his being enlarged on bail and as such, bail petition deserves to be rejected.

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

7. It is apparent from the record/status report that allegation against bail petitioner pertains to April, 2017 and there is no explanation rendered on record by the complainant for not lodging complaint at the first instance in April, 2017 itself. Allegedly, bail petitioner videographed complainant-prosecutrix while she was taking bath, in April, 2017 and factum with regard thereto came into notice of complainant-prosecutrix in April, 2017 itself, but it is not understood that what prevented complainant-prosecutrix from lodging complaint against bail petitioner at the first opportunity. Complainant-prosecutrix is a married woman having two children and it can not be accepted that she was under constant threats from the bail petitioner.

8. Having carefully perused the complaint having been lodged by complainant-prosecutrix, there appears to be considerable force in the arguments of learned counsel representing the bail petitioner that bail petitioner and complainant-prosecutrix were known to each other for quite considerable time and during this period, they had been meeting frequently. On the last date of hearing, i.e. 29.5.2018, this Court was informed that mobile phone of the bail petitioner containing the video allegedly recorded by him has been sent to Forensic Science Laboratory, Junga and report is awaited. Now, today, during the course of proceedings, report of Forensic Science Laboratory, Junga, qua mobile of bail petitioner has been made available, perusal whereof clearly suggests that no video relevant to the case, could be found in the data extracted from the mobile phone of bail petitioner. Though, aforesaid aspects of the matter are to be considered and decided by the learned trial Court, on the basis of evidence led on record by investigating agency, but this Court having taken note of the fact that investigation in the case is complete and nothing is required to be recovered from the bail petitioner, sees no reason to let bail petitioner incarcerate in jail for indefinite period.

9. Apprehension expressed by the learned Additional Advocate General that bail petitioner hails from Madhya Pradesh, can be met by putting bail petitioner to stringent conditions, as has been fairly stated by the learned counsel representing the bail petitioner. This court also cannot lose sight of the fact that guilt, if any, of the bail petitioner is yet to be proved by investigating agency by leading cogent and convincing evidence on record and by now it is settled law that until guilt is proved, one is deemed to be innocent.

10. 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 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."

11. 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; 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."

12. In **Manoranjana Sinh alias Gupta** versus **CBI,** (2017) 5 SCC 218, Hon'ble Apex Court has held as under:

> "This Court in Sanjay Chandra vs. Central Bureau of Investigation (2012) 1 SCC 40, also involving an economic offence of formidable magnitude, while dealing with the issue of grant of bail, had observed that deprivation of liberty must be considered a punishment unless it is required to ensure that an accused person would stand his trial when called upon and that 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 found guilty. It was underlined that the object of bail is neither punitive nor preventive. This Court sounded a caveat 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 a conduct whether an accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson. It was enunciated that since the jurisdiction to grant bail to an accused pending trial or in appeal against conviction is discretionary in nature, it has to be exercised with care and caution by balancing the valuable right of liberty of an individual and the interest of the society in general. It was elucidated that the seriousness of the charge, is no doubt one of the relevant considerations while examining the application of bail but it was not only the test or the factor and that grant or denial of such privilege, is regulated to a large extent by the facts and circumstances of each particular case. That detention in custody of under-trial prisoners for an indefinite period would amount to violation of Article 21 of the Constitution was highlighted."

13. 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.

14. 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.

15. In view of above, present bail petition is allowed. Petitioner is ordered to be enlarged on bail subject to his furnishing bail bonds in the sum of Rs.1,00,000/- (Rs. One Lakh) with one local surety in the like amount, to the satisfaction of the learned Chief Judicial Magistrate, Shimla, besides 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 him.

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

16. 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 instant petition alone.

The petition stand accordingly disposed of.

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

Sh. Mangat Ram & others .....Appellants.

Versus

The Land Acquisition Collector, Railways and others ....Respondents.

RFA No. 207 of 2011 alongwith connected matters.
Date of Decision: 19.6.2018

Land Acquisition Act, 1894- Section 18- Reference to Court – District Judge declining to assess compensation of acquired land on ground that it was recorded in ownership of State and petitioners were entered merely in its possession (Kabijan) – Reference Court further found that land was 'Shamlat-deh' and there was no evidence that said land fell in any of the exemption clauses saving it from vestment in State – Appeal against – Petitioners wanted to file additional documents in evidence showing that land was exempted from vestment – Petitioner filing application for permission of Court to lead additional documents in evidence – Additional evidence considered necessary for just decision - Award(s) of Reference Court set aside- Matter remanded to take additional evidence of petitioners on record and decide reference accordingly.

(Para-3)

For the appellants: Mr. Ajay Kumar, Sr. Advocate with Mr. Dheeraj K Vashishta, Advocate.

For the Respondents: Mr. Yudhveer Singh Thakur, Deputy Advocate General and Mr. Vikrant Chandel, Advocate, for respondent-State.
Mr. Rahul Mahajan, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

The instant appeals, are, directed against the awards pronounced by the learned Reference Court, upon, Reference Petitions' bearing numbers 101,103,105,115, and, number 116 of 2008, whereunder the learned Reference Court hence declined, to, assess compensation, vis-a-vis, the acquired lands, of, the land owners concerned. The reason assigned, by the learned Reference Court, in, declining, to make assessment of compensation, vis-a-vis, the acquired lands of the land owners, is, comprised in Paragraphs 34 to 36 of the impugned award, paragraphs whereof are extracted hereinafter:-

> " 34. Admittedly, in the revenue papers at the time of acquisition of the land, the State of Himachal Pradesh (respondent No.2) was recorded as the owner of the land. Of course, the possession of the petitioners was recorded over the acquired land as 'Kabijan'. For this reason, the compensation was not paid to them by the Collector and is lying un-disbursed till date. After the institution of the reference petitions, the mutations were entered and attested in favour of the petitioners. They were recorded as hissedaran in place of 'Kabijan'. Even the entry in the column of ownership was changed to 'Shamlat Deh Hassab Hissa Malkiat Mandarza Sharja Nasab' by deleting the name of the State of Himachal Pradesh.
>
> 35. There is no denial of the fact that the acquired land was situated in the State of Punjab prior to the formation of the State of Himachal Pradesh. As such, the Punjab Village Common Lands (Regulation) Act, 1961 was applicable to the area. It is not the case of the petitioners that they had raised the abadies over the Shamlat land. Even there is nothing on the record to show that the land was assessed to land revenue and the same was in cultivating possession of the petitioners not in excess of their share prior to 26th January, 1950. The land did not fall within the exemption clause of Section 2(g) of the Act ibid.

36. By coming into force of the Act of 1974, the acquired land vested in favour of the State of Himachal Pradesh free from all encumbrances. The mutations sanctioned in favour of the petitioners during the pendency of the petitions will not come to their rescue."

2. The apt underlinings therein, reveal, the factum of, the relevant mutation, for, all the reasons' spelt therein rather gathering an aura of suspicion. However, during the pendency of the instant appeals before this Court, the learned counsel for the appellants, has instituted an application, cast under the provisions of Order 41 Rule 27 readwith Sections 94, 107 and 151 of Code of Civil Procedure in RFA No. 207 of 2011, seeking the leave of the Court, to, append certain documents, carrying therein, the apt reflections qua the suit land, being described in the records apposite to the suit land, as "Shamlat Deh Hasab Mandarja Shajra Nasab", documents whereof, are, jamabandis apposite to the suit land, and, appertains to the year 1998-99 and vis-a-vis year 2013-2014, and, mutation number 256 of 27.4.2002. If so and if the said entries, are, in consonance with tandem therewith, entries as initially made in the year 1950 (i) thereupon, the apt mandate of Section 4 of the Punjab Village Common Lands (Regulation) Act, 1961, provisions, whereof are extracted hereinafter, and, the apt mandate of clause (d) of Section 3 of the Himachal Pradesh Village Common Lands Vesting and Utilization (Amendment)Act, No.20 of 2001, provisions whereof stand extracted hereinafter, especially, the apt exclusionary benefits thereof, hence barring the vesting of lands, rather described in the apt revenue records, as Shamlat Deh, in, the Panchayat, hence being visitable upon the appellants. Consequently, the adduction(s) into evidence of the aforesaid documents prima-facie appears to be both just and essential, hence for determining, the, controversy, vis-a-vis, the entitlements, of the land owners, to seek compensation vis-a-vis their lands also their adduction(s) into evidence are hence essential, for, dispelling the aura of suspicion purportedly surrounding, the, attestation of the relevant mutation, thereupon leave is granted, to tender/exhibit the aforesaid documents into evidence.

Section 4 of the Punjab Village Common Lands (Regulation) Act, 1961

4. Vesting of rights in Panchayats and non-proprietors. - (1) Notwithstanding anything to the contrary contained in any other law for the time being in force or in any agreement, instrument, custom or usage or any decree or order of any court or other authority, all rights, title and interests whatever in the land:-

(a) which is included in the shamilat deh of any village and which has not vested in a panchayat under the shamilat law shall, at the commencement of this Act, vest in a panchayat constituted for, such,village, and, where no such panchayat, has been constituted for such village; vest in the panchayat on such date, as a panchayat having jurisdiction over that village is constituted;

(b) which is situated within or outside the abadi deh of a village and which is under the house owned by a non-proprietor, shall on the commencement of the shamilat law, be deemed to have been vested in such non-proprietor.

(2) Any land which is vested in a panchayat under the shamilat law shall be deemed to have been vested in the panchayat under this Act.

(3) Nothing contained in clause (a) of sub-section (1)and in sub-section (2) shall affect or shall' be deemed ever to have affected the-

(I) existing rights, title or interest of persons who though not entered as occupancy tenants in the revenue records are accorded a similar status by custom or otherwise, such as Dholidars, Bhondedars, Butimars, Bosikhuopahus, Saunjidars, Muqararidars;

(ii) rights of persons in cultivating possession of shamilat deh for more than twelve years without payment of rent or by payment of charges not exceeding the land revenue and cesses payable thereon;

(iii) rights of a mortgagee to whom such land is mortgaged with possession before, the 26th January, 1950."

clause (d) of Section 3 of the Himachal Pradesh Village Common Lands Vesting and Utilization (Amendment)Act, No.20 of 2001

> "(d) land records as "Shamlat tika Hasab Raad Malguzari" or by any such other name in the ownership column of jamabandi and assessed to land revenue and has been continuously recorded in cultivating possession of co-sharers so recorded before 26th January, 1950 to the extent of their shares therein."

3. However, since the aforesaid documents, are, required to be adduced into evidence, and, exhibited only before the learned Reference Court, hence after quashing the impugned award, the matters, are, remanded to the learned Reference Court, with a direction to the learned Reference Court, to, after enabling tendering(s) and exhibition(s) thereof, and, also after opportunities being granted to the respondents, to, lead apt evidence in rebuttal, render, a decision afresh upon the land Reference Petitions No. 101,103,105,115, and, number 116 of 2008, within three months hereafter.

In view of the above, the appeals stand disposed of, alongwith, all pending applications.

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

Balbir Singh and Anr. ....Petitioners.

Versus

State of HP and Ors. .....Respondents.

CWP No. 975 of 2018
Date of Decision: 21.6.2018

Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013- Sections 63 and 76- Apportionment of compensation – Dispute regarding - Bar of jurisdiction of Civil Court – Held, Civil court has no jurisdiction whatsoever to entertain any dispute pertaining to acquisition proceedings or any other related issue including dispute qua apportionment of amount awarded as compensation to landowners. (Para- 4 and 5)

For the Petitioners:	Mr. Tara Singh Chauhan, Advocate.
For the Respondents:	Mr. Ashok Sharma, Advocate General with Mr. Ajay Vaidya, Senior Additional Advocate General and Mr. Ranjan Sharma, Mr. Nand Lal Thakur, Additional Advocate Generals, for respondents No.1 and 2. Mr. Ajeet Jaswal, Advocate vice Mr. Neeraj Gupta, Advocate, for respondents No. 3, 9 and 12. Mr. Dheeraj K. Vashishat, Advocate, for respondent No.6.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. *(oral)*

In the nature of the dispute involved in this petition, we propose to dispose of the same at this stage.

2. The facts reveal that the petitioners and respondent No.3 as well as proforma respondents No. 4 to 12 are joint owners in possession of the land entered in khata khatauni No. 67min/116 min bearing khasra No.1902/357, measuring 177.0 Sq. meters situate at mohal

Salogra, District Solan, H.P. The said land has been acquired by the National Highway Authority through respondents No.1 and 2 for construction of four lane road. One of the co-sharers i.e. third respondent has filed the civil suit for declaration that he along with respondent No. 12 Jitender is exclusive owner in possession of the land in question in the Court of Senior Civil Judge, Solan. In the interim, learned trial Court has directed the parties to maintain status quo qua the land in dispute. As a result whereof, the petitioners herein, who claims themselve to be joint owners in possession of the suit land, could not receive the compensation awarded by the second respondent.

3. The interim order (Annexure P-7) has been sought to be quashed and set-aside with further direction to second respondent to release the compensation to the petitioners in terms of the award (Annexure P-2). The relief has been sought on the grounds inter-alia that the suit is not maintainable and any dispute concerning the apportionment etc. of the acquired land could have been settled through the due process of law i.e. in the reference Court, under Section 76 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013. It has further been urged that under Section 63 of the Act, the Civil Court has no jurisdiction to entertain any dispute relating to acquisition proceedings. In the alternative, a direction has been sought to be issued to learned Senior Civil Judge to decide interim application in a time bound manner.

4. We are not entering upon the controversy on merits for the reason that if the suit is not maintainable and the Civil Court has no jurisdiction to entertain and try the same, the petitioners are at liberty to resort to the remedy available to them in accordance with law. However, prima-facie, we are satisfied that in view of the provisions contained under Section 63 of the Act, the Civil Court has no jurisdiction to entertain the suit pertaining to the acquisition proceedings and any other related issues including the dispute qua apportionment of the amount awarded as compensation. Such dispute in terms of Section 76 of the Act, can be agitated before the authority to whom it is referred by the Collector for settlement, however, keeping in view that the interim order (Annexure P-6) was passed long back on 16.2.2017, a direction to the learned trial Court to dispose of the application finally at the earliest would serve the ends of justice.

5. The writ petition, therefore, is disposed of with a direction to the learned Senior Civil Judge, Solan, to decide the application bearing CMA No. 26/6 of 2017 filed in CS No. 16/1 of 2017 at the earliest, however, not beyond 31.7.2018. Parties through learned counsel representing them are directed to appear before the trial Court on **6.7.2018**. Pending application(s), if any, shall stand disposed of accordingly.

Authenticated copy of this order be sent to the learned trial Court for compliance.

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

Inder Singh Chauhan ...Petitioner

Versus

State of Himachal Pradesh ...Respondent

CrMMO No. 264 of 2017
Decided on: June 22, 2018

Code of Criminal Procedure, 1973- Sections 311 and 482- Inherent powers - Adduction of additional evidence - Permissibility – Accused facing trial for offence under Section 20 of N.D.P.S. Act before Special Judge and case at final stage of arguments – He took adjournment for addressing arguments - Accused then moving application under Section 311 of Code for examining P, Managing Director of an institute where he was allegedly doing his Civil Engineering as a defence witness – He wanted to show that he was present in the said institute till 4:00 P.M.

on that day making it impossible to be present at place of crime – Trial Court dismissing application of accused – Petition against - High Court observed that no cross-examination on any prosecution witness was done nor accused stated in his own statement under Section 313 of Code that he was pursuing Civil Engineering from said institute and he was present there till 4:00 P.M. on that day – Held, Special Judge was justified in dismissing application of accused for leading additional evidence in defence – Petition dismissed. (Para- 8 to 10)

For the petitioner: Mr. T.S. Chauhan, Advocate.
For the respondent: Mr. S.C. Sharma and Mr. Dinesh Thakur, Addl. AG's with Mr. Amit Kumar, DAG.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Being aggrieved and dissatisfied with order dated 23.6.2017, passed by learned Special Judge, Chamba, District Chamba, Himachal Pradesh in Sessions Trial No. 14/16, whereby learned Special Judge dismissed the application having been filed by the petitioner-accused (hereinafter, 'accused') under Section 311 CrPC, accused has approached this Court in the instant proceedings, praying therein to set aside the aforesaid order (Annexure P-1) and allow the application having been filed by him under Section 311 CrPC.

2. Precisely, the facts as emerge from the record are that accused, who has been charge sheeted for having committed offence punishable under Sections 20 and 29 of the Narcotic Drugs & Psychotropic Substances Act (hereinafter, 'Act') moved an application under Section 311 CrPC, for leading additional evidence in the court of learned Special Judge, Chamba, District Chamba, in Sessions Trial No. 14/16. Accused also averred in the application that while leading defence evidence, he inadvertently failed to examine one Ms. Pooja Thakur, Managing Director, Hill Academy, Chamba, whose examination is very material and essential for the just decision of the case. As per accused, he was present in Hill Academy Chamba, on the date of alleged incident till 4 pm being a student of Civil Engineering. He further averred that since distance of the place of occurrence is 40 kms from the aforesaid Academy, he can not be expected to cover distance of 40 kms within one hour.

3. Respondent-State opposed the application by way of filing reply *inter alia* on the ground that application has been filed with a view to delay the proceedings and to fill up lacuna as such, same deserves to be dismissed. Learned Court below, taking note of the pleadings adduced on record by respective parities, dismissed the application by concluding that applicant-accused can not be allowed to fill up lacuna in defence at this belated stage, especially when defence evidence stands closed. In the aforesaid background, accused has approached this Court in the instant proceedings praying therein to allow application under Section 311 after setting aside the impugned order.

4. I have heard the learned counsel for the parties and gone through the record carefully. It has been repeatedly held by Hon'ble Apex Court as well as this Court that lacuna in the prosecution must be construed to be an inherent weakness in the case and a latent wedge in the prosecution case and advantage of it should normally go to the accused in the trial of the case.

5. Hon'ble Apex Court in **Rajendra Prasad** vs **Narcotic Cell**, which has been relied upon by the learned Special Judge, while passing impugned order, has categorically laid down difference between "lacuna in prosecution" and "correction of error" and has concluded that lacuna in prosecution case is not to be equated with the fallout of an oversight committed by a public prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses. Hon'ble Apex Court has further held that adage to err is human recognition of possibility of making mistakes, to which humans are prone. Corollary of such

lapses or mistakes during trial/case can not be understood to be lacuna, which a court can not fill up.

6. Mr. Tara Singh Chauhan, learned counsel representing the accused, while placing reliance upon aforesaid judgment made a serious attempt to persuade this Court to agree with his contention that learned Court below has fallen into grave error while holding that allowing of application at this stage, would amount to filing up lacuna, which has crept in the defence of the accused.

7. Mr. Chauhan, contended that while exercising powers under Section 311 CrPC, paramount consideration of court is to do justice to the case and court can examine a witness at any stage, even if same results in filling up lacuna or loopholes. In that situation, it is a subsidiary factor. In this regard, he placed reliance upon judgments rendered by this Court in CrMMO No. 209 of 2017, **Sardar Singh** vs. **State of Himachal Pradesh** decided on 1.8.2017 and CrMMO No. 56 of 2018 titled **Irshad** vs. **State of Himachal Pradesh**, decided on 7.3.2018.

8. Having heard the learned counsel representing the petitioner and perusing material adduced on record vis-à-vis impugned order passed by learned Court below, this court is not inclined to accept the prayer made in the instant petition. It is quite apparent from the impugned order passed by court below that accused had closed his evidence on 13.5.2017, whereafter matter was listed for final arguments on 3.6.2017 and 15.6.2017 but on 15.6.2017, application in question came to be filed by accused. It also emerges from the impugned order that on 3.6.2017, adjournment was sought by defence counsel on the ground that they were not able to procure certified copies of the statements of witnesses and documents exhibited in the trial.

9. Not even a single suggestion has been put to the prosecution witnesses including Investigating Officer that accused Inder Singh was a student of Hill Academy being run by Ms. Pooja Thakur and on the date of occurrence, he was in the Academy till 4 pm.

10. Leaving everything aside, accused in his statement recorded under Section 313 CrPC has not set up a case that on the date of alleged occurrence, he was not present on the spot and till 4 pm he was in the Academy, rather, he has simply stated that false case has been implanted against him by the police. Learned Special Judge, has recoded in the impugned order that on 13.5.2017, accused examined two defence witnesses namely Om Parkash and Lekh Raj, as DW-1 and DW-2. During their examination, no such case is set up that on the date of alleged occurrence, accused Inder Singh was present in Academy being run by Pooja Thakur till 4 pm. Accused has also failed to cross-examine complainant HC Virender Singh PW-4 and other prosecution witnesses qua the aforesaid assertion made in the application in question. No suggestion worth the name has been put to prosecution witnesses on the aforesaid aspect of the matter. In the photographs Ext. PW-1/C-1 and Ext. PW-1/C-3, accused is seen. As per prosecution, aforesaid photographs have been clicked by police party on the spot. Interestingly, applicant-accused is seen in the photographs and it is none of the case of the petitioner that photographs were subsequently procured. Had accused examined prosecution witnesses on the aforesaid aspect of the matter, this Court would have been persuaded to agree with the contention of Mr. Tara Singh Chauhan, learned counsel representing the accused that accused failed to examine Ms. Pooja Thakur, Managing Director, Hill Academy due to inadvertence. But in the case at hand, this Court having carefully perused material available on record has no hesitation to conclude that accused after closure of his evidence has made an attempt to set up altogether a different case. Defence sought to be raised by accused in the application in question could be considered by the court but since case set up by accused is that he has been falsely implicated, learned Court below rightly came to the conclusion that accused can not be allowed to fill up lacuna which has crept in his defence. As has been noticed herein above, though accused examined two witnesses in his defence but even then, no such case as is sought to be projected by way of application under Section 311 CrPC has been set up and it is only after closure of evidence that accused thought it proper to move an application under Section 311 CrPC, taking therein altogether different stand.

11. No doubt, this Court has repeatedly held that, while exercising power under Section 311 CrPC, paramount consideration of the Court should be to do justice to the case and court can summon a witness at any stage, even if same results in filling up lacuna or loopholes. Similarly, this Court has also held that material essential for just decision of the case ought to be taken on record. However, in the case at hand, this Court having carefully perused the explanation rendered in the application filed under Section 311 CrPC vis-à-vis reasons recorded by learned Special Judge in support of his decision, finds no occasion for examination of Ms. Pooja Thakur, Managing Director, Hill Academy, Chamba, especially when plea of alibi has not been taken by accused.

12. At the cost of repetition, it may be noticed that accused has not taken plea of alibi rather, he, in his statement recorded under Section 311 CrPC, while claiming himself to be innocent, has categorically stated that he has been falsely implicated. In view of aforesaid specific stand taken by accused coupled with the fact that no suggestion with regard to aforesaid aspect of the matter has been put to the prosecution witnesses, this Court is not inclined to agree with the contention of Mr. Tara Singh Chauhan, learned counsel representing the petitioner that examination of Ms. Pooja Thakur is essential for just decision of the case.

13. In view of detailed discussion made hereinabove, I find no merit in the present appeal, which is accordingly dismissed. Order dated 23.6.2017, passed by learned Special Judge, Chamba, District Chamba, Himachal Pradesh in Sessions Trial No. 14/16 is upheld. Pending applications, if any, are disposed of.

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

M/s Mohan Meakin Limited ...Appellant
Versus
M/s Spirit and Beverages L-1 ...Respondent

Cr. Appeal No. 592 of 2017
Reserved on: May 14, 2018
Decided on: June 22, 2018

Negotiable Instruments Act, 1881- Section 138- Dishonour of cheque – Closure of account – Complainant, a company filing complaint against another company for dishonour of cheque - Trial Court dismissing complaint and acquitting accused on ground that one 'S' not proved to have been duly authorized to depose on behalf of complainant – Also that disputed cheque appeared to have been issued towards 'security' - Appeal against acquittal – High Court found that there were specific averments in the complaint that pursuant to a resolution of Board of Directors, Power of Attorney was executed in favour of 'H' under which he was authorized to further delegate his powers – In exercise of his powers, 'H' had executed Special Power of Attorney in favour of 'S' – Special Power of Attorney was filed in evidence – No cross-examination whatsoever was done on 'S' regarding authorization of 'H' by company and his power to execute SPA – Held, Trial Court went wrong in holding that 'S' was not competent to depose on behalf of Company. (Para-13 to 17)

Negotiable Instruments Act, 1881- Section 138- Dishonour of cheque – Cheque, Whether for consideration or towards 'security' – Determination - Trial Court acquitting accused on ground that disputed cheque appeared to have been given as a 'security' – Appeal against – High Court found that complainant–company was manufacturer of IMFL – Accused-company was purchasing liquor from complainant – There were financial transactions between them till October, 2004 – Accused admitted in his statement recorded under Section 313 of Cr.P.C. regarding financial

dealings – Accused failed to prove discharge of liability – Held, Cheque was given for consideration and it was not issued towards security – Appeal of complainant allowed – Accused convicted.

(Para-22 to 25)

Cases referred:

M/s. Sri Balaji Agencies Pvt. Ltd. Goa Vs. M/s Samudra Ropes Pvt. Ltd. 2011(4) Civil Court Cases 515 Bombay

The Associated Cement Co. Ltd vs Keshvanand, AIR 1998 SC 596

H.S. Co-op., Supply and Mkt. Federation Ltd. v. Jayam Textiles AIR 2014 SC 1926

Rangappa v. Sri Mohan, (2010) 11 SCC 441

Hiten P. Dalal vs Bratindranath Banerjee, 2001(1) Apex Court Journal 617 (SC)

M/s. Laxmi Dyechem v. State of Gujarat, 2013(1) RCR

M.S. Narayana Menon v. State of Kerala, (2006) 6 SCC 39

Goaplast (P) Ltd. v. Chico Ursula D'Souza, (2003) 3 SCC 232

Sampelly Satyanarayana Rao v. Indian Renewable Energy Development Agency Ltd., (2016) 10 SCC 458

ICDS LTD v. Beena Shabeer, (2002) 6 SCC 426

For the appellant: Mr. K.D. Sood, Senior Advocate with Mr. Rajnish K. Lal, Advocate.

For the respondent: Mr. Sudhir Thakur, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

Instant criminal appeal is directed against judgment dated 18.5.2015, passed by the learned Judicial Magistrate 1st Class, Solan in Criminal Complaint No. 863/3 of 2011/05, whereby complaint under Section 138 of the Negotiable Instruments Act (hereinafter, 'Act') having been filed by the appellant-complainant (hereinafter, 'complainant'), came to be dismissed.

2. Necessary facts, shorn of unnecessary details as emerge from record are that the complainant filed a complaint under Section 138 of the Act, averring therein that the complainant is a Company duly incorporated and registered under the Companies Act, 1956 with the Registrar of Companies vide Registration No. 06-00135 dated 2.10.1934. Complainant further averred that the Board of Directors of the Company in its meeting held on 29.9.1979, passed a Resolution No. 9, resolving therein to execute Power of Attorney in favour of Shri H.N. Handa, Secretary of the Company to perform and execute all the acts, deeds, things and matters with regard to the business of the company. A General Power of Attorney was executed on 25.3.1980 in favour of Shri H.N. Handa, who was further authorized vide clause No. 22 of the General Power of Attorney to delegate such powers from time to time and at any time specifically any of the powers given therein except the power under the said Clause No. 7 to any person from time to time or at any time to enlarge, modify or revoke any such delegation and for the purpose to sign, execute, and/or register for and /or on behalf of the Company any power(s) of attorney. Mr. H.N. Handa, in terms of Clause 22 of the General Power of Attorney, authorized one Shri Sudesh Kumar on behalf of the Company to act on his behalf to prosecute the complaint on behalf of the Company. Complainant further averred that it deals in the business of manufacture and sale of Indian made foreign spirit and beer. It is further averred in the complaint that the respondent-accused (hereinafter, 'accused') also deals in liquor trade in the name and style of M/s Spirit and Beverages, holding L-1 licence and had been purchasing different brands of liquor from the complainant for the last four-five years. Since accused had to pay a sum of Rs.8,03,248/- to the complainant as per accounts with regard to purchase of liquor, he issued a duly signed cheque No. 361413 dated 26.2.2005 in the sum of Rs.8,03,248/- drawn on Punjab National Bank, Sector 22-D, Chandigarh of his account No. CC-4 in favour of the complainant, however, fact remains that on presentation, said cheque was returned with the remarks "account closed". After having

received memo with regard to aforesaid information furnished by the Bank, complainant sent a registered A.D. notice dated 7.4.2005 on 8.4.2005, which was duly delivered to the accused on 11.4.2005 but despite that he failed to make payment within stipulated period of 15 days, as a consequence of which, complaint under Section 138 of the Act came to be filed.

3. Learned court below, on the basis of evidence led on record by the complainant came to the conclusion that the complainant has failed to prove its case beyond reasonable doubt and accordingly acquitted the accused by extending him benefit of doubt. In the aforesaid background, complainant has approached this Court in the instant proceedings, praying therein to allow the complaint filed by it under Section 138 of the Act, after setting aside impugned judgment of acquittal recorded by the learned Court below.

4. Mr. K.D. Sood, learned Senior Advocate duly assisted by Mr. Rajnish K. Lal, Advocate, appearing for the complainant, while referring to the impugned judgment passed by the court below, vehemently argued that same 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 set aside. Mr. Sood, while inviting attention of this Court to the Special Power of Attorney exhibit CW-2/G dated 24.5.2005, vehemently argued that the complainant successfully proved on record that CW-2 Sudesh Kumar, representative of the company was duly authorized by Shri H.N. Handa, Secretary of the Company to represent the complainant-company in the court of law, as such, there was no occasion for the court below to conclude that Sudesh Kumar was not authorized representative of the company to prosecute the case in the court of law on behalf of the company. With a view to substantiate his aforesaid argument, Mr. Sood placed reliance upon **M/s. Sri Balaji Agencies Pvt. Ltd. Goa** Vs. **M/s Samudra Ropes Pvt. Ltd.** 2011(4) Civil Court Cases 515 Bombay and contended that the complaint can be filed through Power of Attorney as such, finding returned by the court below qua this aspect of the matter deserves to be quashed and set aside being erroneous and contrary to settled law. Mr. Sood, while making this Court to peruse evidence adduced on record by the complainant i.e. exhibits CW-1/A, CW-1/B, CW-1/C, CW-2/D, CW-2/E, CW-2/F, CW-2/H, CW-2/J, CW-2/L and CW-2/M, strenuously argued that the complainant proved beyond reasonable doubt that the respondent-accused being proprietor of the company, issued cheque amounting to Rs. 8,03,248/- with a view to discharge his liability and same was dishonoured on its presentation to the Bank. He further contended that bare perusal of Exhibit CW-1/A clearly suggests that the cheque in question was presented to the bank, however, same was returned with the remarks “account closed”. He further argued that it further stands duly proved on record that the complainant after having received memo from the concerned bank, got issued a legal notice by way of registered A.D. as well as under postal certificate, which was duly delivered to the accused and as such, there was no occasion for the court below to dismiss the complaint. Lastly, Mr. Sood contended that it stands duly proved on record that accused was purchasing liquor from the complainant company and with a view to discharge his liability, he issued the cheque in question. He further stated that the factum with regard to issuance of cheque is also not in dispute because accused in his statement under Section 313 CrPC, has admitted the factum with regard to issuance of cheque by stating that cheque in question was issued as a security cheque but there is nothing on record to prove that the cheque in question was a security cheque.

5. Mr. Sudhir Thakur, learned counsel representing the accused supported the impugned judgment and contended that there is no illegality or infirmity in the impugned judgment, as such, same deserves to be affirmed. Mr. Thakur, while referring to exhibit CW-2/G, i.e. Special Power of Attorney executed by Shri H.N. Handa in favour of Sudesh Kumar, contended that there is no document available on record suggestive of the fact that Shri H.N. Handa was Secretary/Director of company and he was authorized to delegate power further to Sudesh Kumar, representative of the complainant, in the present case. Mr. Thakur further contended that there is no resolution placed on record authorizing Shri H.N. Handa to further nominate Shri Sudesh Kumar, to represent the company in the present *lis*, as such, learned Court below rightly dismissed the complaint on this count. While referring to the statement of CW-2, Sudesh Kumar, Mr. Thakur made a serious attempt to persuade this Court to agree with

his contention that the cheque in question was a security cheque because, as per statement of CW-2, Sudesh Kumar, account with regard to sale and purchase, if any, made by the company of accused was closed in October, 2004, whereas, cheque in question is dated 26.2.2005, which itself creates doubt with regard to correctness of the averments contained in the complaint. Mr. Thakur further contended that as per statement of the representative of the company, cheque was given on 26.2.2004, whereas, it is dated 26.2.2005, which raises doubt with respect to outstanding amount on the date when cheque was issued and CW-2 Sudesh Kumar in his statement has admitted that they dealt with the accused till October, 2004 and as such, there was no occasion for the accused to give cheque, if any, after four months of last dealing. While referring to the observations made by learned Court below in para-24 of the judgment, Mr. Thakur tried to persuade this Court to agree with his contention that bare perusal of the handwriting on the cheque suggests that a blank cheque was issued as a security by the accused but the same has been later on filled in by the complainant that too after the settlement of accounts in the month of October, 2004.

6. I have heard learned counsel representing the parties and have carefully gone through the record made available.

7. Having carefully perused the pleadings and evidence, be it ocular or documentary, led on record, it clearly emerges that at the time of filing complaint under the Act, complainant specifically averred that Board of Directors of the Company in its meeting held on 29.9.1979 passed a resolution authorizing Shri H.N. Handa, Secretary of the Company to perform and execute all acts and things with regard to matters of the company, however, the fact remains that no such resolution is placed on record. Similarly, though there is mention with regard to execution of General Power of Attorney on 25.3.1980 in favour of Shri H.N. Handa, who as per Clause 22 of the General Power of Attorney, subsequently authorized Shri Sudesh Kumar, representative of the company to prosecute the complaint on behalf of the company, but same is not placed on record.

8. True it is, that perusal of record of the court below nowhere suggests that copy of resolution dated 29.9.1979 and General Power of Attorney dated 25.3.1980 are/were placed on record but definitely the Special Power of Attorney Exhibit CW-2/G placed on record by the complainant clearly suggests that Shri H.N. Handa, Secretary of the Company drawing power from Clause 22 of the General Power of Attorney executed on 25.3.1980, authorized Sudesh Kumar, to represent the company in the case at hand. Careful perusal of contents of Special Power of Attorney clearly reveal that there is specific mention with regard to passing of resolution dated 29.9.1979, by Board of Directors and execution of General Power of Attorney dated 25.3.1980, in favour of Shri H.N. Handa, who by way of Special Power of Attorney, further authorized Sudesh Kumar, to represent the company in the complaint.

9. Having carefully perused the contents of the complaint and Special Power of Attorney exhibit CW-2/G, this Court finds considerable force in the arguments of Mr. Sood, learned Senior Advocate that the court below after having noticed omission, if any, on the part of company to place on record resolution and General Power of Attorney, ought to have afforded opportunity to the complainant to rectify its mistake by placing aforesaid documents on record.

10. Hon'ble Apex Court in **2013(3) ACJ 323 SC** and **2011(4) CCC 515 Bombay**, which has also been otherwise taken note by the court below, have categorically held that complaint can be filed through General Power of Attorney holder, if he is aware of the transaction and an explicit assertion is made about his knowledge of transaction in the complaint. These judgments further lay down that Power of Attorney holder can initiate criminal proceedings on behalf of the principal and not in his own name. Though, Power of Attorney can not delegate his functions in the absence of specific clause permitting same in the Power of Attorney but Power of Attorney can file, appear and oppose on behalf of the principal in the complaint.

11. It is quite apparent from the aforesaid exposition of law that there is no bar for Power of Attorney of a principal to lodge or prosecute complaint on behalf of the complainant.

High Court of Bombay in 2011 (4) CCC 515 Bombay (supra) has further held that where a company raises plea that there was resolution passed by company authorizing its director to file complaint and no reason has been assigned, why such resolution has not been placed before the court, same is required to be observed/termed to be an inherent defect in the complaint. Hon'ble Apex Court in **The Associated Cement Co. Ltd** vs **Keshvanand,** AIR 1998 SC 596 has categorically observed that the complainant must be a corporeal person, who is capable of making physical presence in the court. The corollary is that even if a complaint is made in the name of an incorporeal person (like a company or corporation) it is necessary that a natural person represents such juristic person in the court and it is that natural person who is looked upon, for all practical purposes to be the complainant in the case. Court has further held that it is the duty of the complainant that it must be human being as de facto complainant to represent the former in court proceedings, that no magistrate shall insist that the particular person, whose statement was taken on oath at the first instance, alone can continue to represent the company till end of the proceedings. It has also been held in the aforesaid judgment that it is open for the complainant to seek permission of the court for sending any other person to represent the company in the court, meaning thereby, if initially there was no authority, still the company can, at any time, rectify the defect and at a subsequent stage, company can send a person, who is competent to represent the company.

12. Hon'ble Apex Court in **H.S. Co-op., Supply and Mkt. Federation Ltd.** v. **Jayam Textiles** AIR 2014 SC 1926 has held that once specific averment is made by the appellant before the Judicial Magistrate that a General Power of Attorney has been executed which has neither been denied nor disputed by the respondent, court below ought to have granted opportunity to the complainant to place the document containing authorization on record and prove the same in accordance with law. Hon'ble Apex Court has further held that procedural defects and irregularities, which are curable, should not be allowed to defeat substantive rights or to cause injustice. Procedure a hand-maiden to justice, should never be made a tool to deny justice or perpetuate injustice by any oppressive or punitive use. The Hon'ble Apex Court has held as under:

> "6. Having heard learned counsel for the parties and after perusing the material on record, we find that admittedly authorisation by the Board of Directors of the appellant-Federation was not placed before the Courts below. But, we may notice that a specific averment was made by the appellant-Federation before the learned Judicial Magistrate that the said General Power of Attorney has been filed in connected case being CC No. 1409/1995, which has neither been denied nor disputed by the respondents. In any case, in our opinion, if the Courts below were not satisfied, an opportunity ought to have been granted to the appellant-Federation to place the document containing authorisation on record and prove the same in accordance with law. This is so because procedural defects and irregularities, which are curable, should not be allowed to defeat substantive rights or to cause injustice. Procedure, a hand-maiden to justice, should never be made a tool to deny justice or perpetuate injustice, by any oppressive or punitive use. {See Uday Shankar Triyar Vs. Ram Kalewar Prasad Singh, (2006) 1 SCC 75}.
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> 7. In view of the fact that in spite of arbitration award against the respondents, there was non-payment of amount by the respondents to the appellant-Federation, and also in the light of authorisation contained in Annexure–P/7, we are of the opinion that, in the facts and circumstances of the case, an opportunity should be given to the appellant-Federation to produce and prove the authorisation before the Trial Court, more so, when money involved is public money. We, therefore, set aside the judgments of the Courts below and remit the matters back to the Trial Court with a direction to conduct trial afresh taking into consideration the authorisation placed before us and dispose of the matter as expeditiously as possible in accordance with law."

13. In the case at hand, complainant has specifically averred in the complaint that Board of Directors vide resolution No. 9 passed in its meeting held on 29.9.1979, resolved to execute Power of Attorney in favour of Shri H.N. Handa, authorizing him to act, perform and do all the acts and things, in the matters with regard to business and affairs of the company as detailed in the said General Power of Attorney. It stands further averred in the complaint that General Power of Attorney was executed on 25.3.1980 in favour of Shri H.N. Handa, who further as per Clause 22 of the General Power of Attorney, delegated such power to Shri Sudesh Kumar, who subsequently represented company before the court of law. Apart from above, Special Power of Attorney, which is placed on record as Exhibit CW-2/G, further contains recital with regard to passing of resolution and execution of General Power of Attorney in favour of Shri H.N. Handa. There is a specific averment contained in the complaint that Shri H.N. Handa is Secretary of the Company as such finding returned by the court below to the effect that there is no mention, if any, with regard to Shri H.N. Handa, being Secretary or Director of the company, is contrary to record and can not be allowed to sustain.

14. Careful perusal of cross-examination conducted upon CW-2, Sudesh Kumar nowhere reveals that suggestion, if any, was ever put to him with regard to power of Shri H.N. Handa, who further authorized him to represent the complainant in the court of law, rather, CW-2 has categorically stated in his statement that he has been authorized by Shri H.N. Handa, to represent the company, by way of Special Power of Attorney. No suggestion worth the name has been put to the complainant during his cross-examination with regard to his authorization, meaning thereby no dispute whatsoever is/was ever raised by the accused with regard to capacity and competence of Sudesh Kumar CW-2 to represent the complainant company. Otherwise also as has been specifically held by Hon'ble Apex Court, court below having taken note of specific averments contained in the complaint ought to have granted sufficient opportunity to the complainant to place on record authorization as well as General Power of Attorney.

15. At this stage, it may be noticed that during the pendency of the present appeal, application under Section 482 CrPC came to be filed (CrMP No. 1014 of 2017), on behalf of the complainant, seeking therein permission to place on record copy of General Power of Attorney executed by the company in favour of Shri H.N. Handa and Vakalatnama signed by H.N. Handa and Sudesh Kumar. Though, accused by way of reply opposed the prayer made in the application referred to herein above, but no specific dispute with regard to correctness of General Power of Attorney dated 25.3.1980 has been raised in the reply rather, prayer made in the application has been opposed on the ground that present application has been filed with a view to fill up lacuna with mala fide intention as such, same deserves to be rejected. Respondent has further stated in the reply that during the course of trial neither resolution No. 9 nor General Power of Attorney dated 25.3.1980 was placed on the case file, as such, application is not maintainable at this stage and deserves to be rejected.

16. Since, there is no specific challenge with regard to correctness and genuineness of the averments contained in the General Power of Attorney sought to be placed on record by complainant, this Court deems it proper to accept the prayer made in the application and accordingly, General Power of Attorney/documents are taken on record, which otherwise court below ought to have called for, after having noticed averments contained in the complaint, as has been held by the Hon'ble Apex Court in judgments supra.

17. Since there is no denial/dispute with regard to passing of resolution No. 9 and valid execution of General Power of Attorney dated 25.3.1980 in favour of Shri H.N. Handa, there is no force in the argument of Mr. Sudhir Thakur, learned counsel representing the accused that in case this court intends to take note of the documents referred to herein above, opportunity of cross-examination on this aspect of the matter is required to be afforded to the accused. Had accused disputed correctness and genuineness of General Power of Attorney in the reply filed to the application, aforesaid contention having been made by the learned counsel representing the accused could be considered by the Court

18. In view of detailed discussion made herein above, finding returned by court below that there was no authorization in the name of Sudesh Kumar to represent the company in the court of law, in the instant proceedings, can not be allowed to sustain.

19. There is no denial, if any, with regard to issuance of cheque in question (exhibit CW-2/B) because in the cross-examination conducted upon CW-2, representative of the complainant, no suggestion has been put that cheque in question was never issued, rather suggestion has been put that cheque in question was issued as a security. Accused in his statement recorded under Section 313 CrPC has also admitted that Sudesh Kumar has been authorized by the company through Special Power of Attorney exhibit CW-2/G for prosecuting the complaint in the court.

20. Everything apart, accused in his statement recorded under Section 313 CrPC has categorically stated, while answering question No. 8 that he has signed the cheque exhibit CW-2/B. He has further stated that cheque exhibit CW-2/B is a security cheque, which has been misused by the company against him.

21. Similarly, perusal of examination-in-chief and cross-examination conducted upon CW-2 Sudesh Kumar clearly suggests that there were business dealings between complainant company and accused and accused had been purchasing liquor from the complainant company. Specific suggestion has been put to CW-2 that the business of accused with the complainant company had come to an end before 31.3.2004. CW-2 in his cross-examination has categorically stated that lastly liquor was supplied to the accused in the month of October, 2004. If pattern of cross-examination is examined carefully, it certainly suggests that accused had been purchasing liquor from the complainant company and in this regard, sometimes payment was made through cheque and some times in cash. Accused in his statement recorded under Section 313 CrPC, while answering question No. 2 has specifically admitted that he had some business relations with the complainant company and he had purchased different brands of liquor amounting to Rs.8,03,248/- from the complainant company. While answering aforesaid question, accused has stated that he had paid entire amount to the complainant for the entire liquor purchased. Though the statement recorded under Section 313 CrPC can not be read in evidence, but if same is perused in conjunction/juxtaposing cross-examination conducted upon CW-2, representative of the complainant company, it can be safely concluded that there were business dealings *inter se* complainant and accused and money was transacted *inter se* them on account of sale-purchase of liquor.

22. As has been noticed herein above, there is no dispute with regard to issuance of cheque rather, defence which has been taken by accused is that cheque in question was a security cheque, and same has been misused but this Court taking note of material available on record finds no force in the aforesaid defence taken by the accused. No doubt, CW-2 in his cross-examination has stated that representative of the accused had presented cheque in question in the Accounts Department on 26.2.2004, but that admission, if any, on the part of CW-2 can not be a basis to conclude that cheque in question was issued as a security. Perusal of cheque, exhibit CW-2/B suggests that it is dated 26.2.2005, but issuance of post-dated cheque is well recognized mode of payment and presumption of legally enforceable debt or liability in favour of drawer of cheque. Reliance is placed upon judgment of Hon'ble Apex Court in **Rangappa** v. **Sri Mohan**, (2010) 11 SCC 441, wherein it has been held as under:

> "21 Specifically in relation to the nature of the presumption contemplated by Section 139 of the Act, it was observed;
>
> > "45. We are not oblivious of the fact that the said provision has been inserted to regulate the growing business, trade, commerce and industrial activities of the country and the strict liability to promote greater vigilance in financial matters and to safeguard the faith of the creditor in the drawer of the cheque which is essential to the economic life of a developing country like India. This however, shall not mean that the courts shall put a blind eye to the ground realities. Statute mandates raising of presumption but it stops at that. It does not say how

presumption drawn should be held to have been rebutted. Other important principles of legal jurisprudence, namely, presumption of innocence as a human right and the doctrine of reverse burden introduced by Section 139 should be delicately balanced. Such balancing acts, indisputably would largely depend upon the factual matrix of each case, the materials brought on record and having regard to legal principles governing the same." **(emphasis supplied)**

22. With respect to the decision cited above, counsel appearing for the respondent-claimant has submitted that the observations to the effect that the Rs.existence of legally recoverable debt is not a matter of presumption under Section 139 of the Act' and that Rs.it merely raises a presumption in favour of a holder of the cheque that the same has been issued for discharge of any debt or other liability' [See Para. 30 in Krishna Janardhan Bhat (supra)] are in conflict with the statutory provisions as well as an established line of precedents of this Court. It will thus be necessary to examine some of the extracts cited by the respondent-claimant. For instance, in Hiten P. Dalal v. Bratindranath Banerjee, (2001) 6 SCC 16, it was held (Ruma Pal, J. at Paras. 22-23):

"22. Because both Sections 138 and 139 require that the Court Rs.shall presume' the liability of the drawer of the cheques for the amounts for which the cheques are drawn, ..., it is obligatory on the Court to raise this presumption in every case where the factual basis for the raising of the presumption has been established. It introduces an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on to the accused (...). Such a presumption is a presumption of law, as distinguished from a presumption of fact which describes provisions by which the court may presume a certain state of affairs. Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable probability of the non-existence of the presumed fact.

23. In other words, provided the facts required to form the basis of a presumption of law exists, the discretion is left with the Court to draw the statutory conclusion, but this does not preclude the person against whom the presumption is drawn from rebutting it and proving the contrary. A fact is said to be proved when,

> 'after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.'

Therefore, the rebuttal does not have to be conclusively established but such evidence must be adduced before the Court in support of the defence that the Court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the prudent man." **(emphasis supplied)**"

23. Though there appears to be a clerical mistake while recording statement of CW-2 and it appears that it has been wrongly mentioned 26.2.2004 in the cross-examination of CW-2, but otherwise, bare perusal of complaint suggests that in para-3, it has been specifically stated that the accused issued cheque No. 361413 dated 26.2.2005, duly signed by him, in favour of the complainant and there is no mention, if any, with regard to acceptance or delivery of cheque on 26.2.2004. Another argument of the learned counsel representing the accused that as per statement made by CW-2 in his cross-examination, that account of accused was closed in October, 2004, as such, there was no occasion for the accused to issue cheque dated 26.2.2005, is also not tenable because careful perusal of cross-examination conducted upon CW-2 suggests

that he specifically denied the suggestion put to him that business of accused had closed on 31.3.2004. This witness has stated in his cross-examination that last consignment was sent to the accused in October, 2004, as such, it can not be concluded that the account was closed on 31.3.2004.

24. No doubt, in the case at hand, no statement of accounts, save and except exhibit CW-1/C has been produced on record by the complainant but that may not be sufficient to conclude that the accused was not able to prove that no amount was outstanding against the accused. In the case at hand, accused got his bank account closed on 27.5.2004 i.e. much prior to issuance of cheque exhibit CW-2/B. In the case at hand, as clearly emerges from cross-examination conducted upon CW-2, which is further substantiated by admission made by accused in his statement under Section 313 CrPC that an amount of Rs. 8,03,248/- was payable towards purchase of liquor. Since accused in his statement under Section 313 CrPC, while admitting that amount was payable, claimed that entire amount stands paid, accused ought to have placed on record statement of accounts to show that amount being claimed through cheque in question stands already remitted in the bank account of complainant company.

25. Otherwise also, if version put forth by CW-2 in his cross-examination that last consignment was given to accused in the month of October, 2004, is taken to be correct, it is not understood how cheque issued on 26.2.2005 could be termed to be doubtful, as has been concluded by the court below. Since parties were in business for quite considerable time and accused had been taking liquor from the company, it can be safely presumed that money qua purchases, if any, made by accused was paid after some interval, sometimes in cash and sometimes by way of cheque, as has been suggested to CW-2 in his cross-examination. Though in the instant case, respondent-accused has taken a stand that the cheque in question was issued as a security but no specific evidence has been led on record to prove aforesaid factum, if any. It has been repeatedly held that once issuance of cheque and signatures thereupon are admitted, presumption of legally enforceable debt in favour of the drawer of the cheque arises and it is for the accused to rebut said presumption. True it is, accused need not adduce his own evidence and he can rely upon the material submitted by the complainant but mere statement of accused may not be sufficient to rebut presumption that he had issued cheque, rather, he is required to adduce evidence.

26. Hon'ble Apex Court in **Hiten P. Dalal** vs **Bratindranath Banerjee,** 2001(1) Apex Court Journal 617 (SC), has held that although by reason of Sections 138 and 139 of the Act, presumption of law as distinguished from presumption of fact is drawn, the Court has no other option but to draw the same in every case where the factual basis of raising the presumption is established. *'Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter, all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact. In other words, provided the facts required to form the basis of a presumption of law exist, no discretion is left with the court but to draw the statutory conclusion, but this does not preclude the person against whom the presumption is drawn from rebutting it and proving the contrary. A fact is said to be proved when, after considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists*."

27. It is ample clear from the aforesaid exposition of law that presumption of law in fact can be rebutted by accused by adducing evidence showing the reasonable possibility of the non-existence of the presumed fact.

28. Similarly, it is true that rebuttal does not have to be conclusively established but such evidence must be adduced before the Court in support of defence that Court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the 'prudent man'.

29. However, in the case at hand, respondent-accused has not been able to discharge the burden that cheque was issued as a security and not towards lawful discharge of liability or any other reasons on account of some business transaction or the cheque was obtained unlawfully.

30. At the cost of repetition, it is observed that no doubt, accused can rely upon the material submitted by complainant in order to raise his defence and in some cases, accused may not need to adduce the evidence of his/her own. However, if the accused/drawer of a cheque in question neither raises a probable defence nor able to contest existence of a legally enforceable debt or liability, obviously statutory presumption under Section 139 of the NI Act regarding commission of the offence comes into play.

31. Reliance is placed upon judgment rendered by Hon'ble Apex Court in **M/s. Laxmi Dyechem** v. **State of Gujarat**, 2013(1) RCR (Criminal), wherein it has been held as under:

> "23. Further, a three judge Bench of this Court in the matter of Rangappa vs. Sri Mohan [3] held that Section 139 is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies the strong criminal remedy in relation to the dishonour of the cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. The Court however, further observed that it must be remembered that the offence made punishable by Section 138can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose money is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the defendant accused cannot be expected to discharge an unduly high standard of proof". The Court further observed that it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is all preponderance of probabilities.
>
> 24. Therefore, if the accused is able to establish a probable defence which creates doubt about the existence of a legally enforceable debt or liability, the prosecution can fail. The accused can rely on the materials submitted by the complainant in order to raise such a defence and it is inconceivable that in some cases the accused may not need to adduce the evidence of his/her own. If however, the accused/drawer of a cheque in question neither raises a probable defence nor able to contest existence of a legally enforceable debt or liability, obviously statutory presumption under Section 139 of the NI Act regarding commission of the offence comes into play if the same is not rebutted with regard to the materials submitted by the complainant.
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> 25. It is no doubt true that the dishonour of cheques in order to qualify for prosecution under Section 138 of the NI Act precedes a statutory notice where the drawer is called upon by allowing him to avail the opportunity to arrange the payment of the amount covered by the cheque and it is only when the drawer despite the receipt of such a notice and despite the opportunity to make the payment within the time stipulated under the statute does not pay the amount, that the said default would be considered a dishonour constituting an offence, hence punishable. But even in such cases, the question whether or not there was lawfully recoverable debt or liability for discharge whereof the cheque was issued, would be a matter that the trial court will have to examine having regard to the evidence adduced before it keeping in view the statutory presumption that unless rebutted, the cheque is presumed to have been issued for a valid consideration. In view of this the responsibility of the trial judge while issuing summons to conduct the trial in matters where there has been instruction to stop payment despite sufficiency of funds and whether the same would be a sufficient ground to proceed in the matter, would be extremely heavy."

32. Reliance is also placed on **M.S. Narayana Menon** v. **State of Kerala**, (2006) 6 SCC 39, wherein it has been held as under:

> "26. In view of the said error of record, the findings of the High Court to the effect that the Appellant had not been able to substantiate his contention as regard the correctness of the accounts of Exhibit P-10 series must be rejected.
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> 27. In view the aforementioned backdrop of events, the questions of law which had been raised before us will have to be considered. Before, we advert to the said questions, we may notice the provisions of Sections 118(a) and 139 of the Act which read as under:
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> > "118. Presumptions as to negotiable instruments - Until the contrary is proved, the following presumptions shall be made:
> >
> > > (a) of consideration - that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration."
> >
> > "139. Presumption in favour of holder It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability."
>
> Presumptions both under Sections 118(a) and 139 of the Act are rebuttable in nature.
>
> 28. What would be the effect of the expressions 'May Presume', 'Shall Presume' and 'Conclusive Proof' has been considered by this Court in Union of India (UOI) v. Pramod Gupta (D) by L.Rs. and Ors., [(2005) 12 SCC 1] in the following terms:
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> > "It is true that the legislature used two different phraseologies "shall be presumed" and "may be presumed" in Section 42 of the Punjab Land Revenue Act and furthermore although provided for the mode and manner of rebuttal of such presumption as regards the right to mines and minerals said to be vested in the Government vis- `-vis the absence thereof in relation to the lands presumed to be retained by the landowners but the same would not mean that the words "shall presume" would be conclusive. The meaning of the expressions "may presume" and "shall presume" have been explained in Section 4 of the Evidence Act, 1872, from a perusal whereof it would be evident that whenever it is directed that the court shall presume a fact it shall regard such fact as proved unless disproved. In terms of the said provision, thus, the expression "shall presume" cannot be held to be synonymous with "conclusive proof""
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> 29. In terms of Section 4 of the Evidence Act whenever it is provided by the Act that the Court shall presume a fact, it shall regard such fact as proved unless and until it is disproved. The words 'proved' and 'disproved' have been defined in Section 3 of the Evidence Act (the interpretation clause) to mean: -
>
> > "Proved" .-- A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.
> >
> > "Disproved".-- A fact is said to be disproved when, after considering the matters before it the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist."
>
> 30. Applying the said definitions of 'proved' or 'disproved' to principle behind Section 118(a) of the Act, the Court shall presume a negotiable instrument to be for consideration unless and until after considering the matter before it, it either believes that the consideration does not exist or considers the non-existence of the consideration so probable that a prudent man ought, under the circumstances of the particular case, to

act upon the supposition that the consideration does not exist. For rebutting such presumption, what is needed is to raise a probable defence. Even for the said purpose, the evidence adduced on behalf of the complainant could be relied upon.

33. It is quite apparent from the aforesaid exposition of law that accused can raise probable defence for rebutting presumption in favour of holder of a cheque but for that purpose, burden is upon the accused for proving non-existence of consideration, which can be direct or by bringing on record preponderance of probabilities by referring to the circumstances, upon which he relies. In such an event, complainant is entitled to rely upon law and evidence lead on record including that of complainant but in case, accused fails to discharge initial onus of proof by showing non-existence of consideration, holder of cheque would invariably be held entitled to benefit of presumption arising under Section 118-A. Though, court can not insist upon accused to disprove existence of consideration by leading direct evidence of existence because negative existence is neither possible nor contemplated and even if led, is to be seen with a doubt, but accused is obliged to adduce evidence showing reasonable possibility of non-existence of the presumed fact that may be either by way of defence evidence or by relying upon material or evidence led on record by complainant.

34. Question, whether post-dated cheque was for "discharge of debt or liability' depends upon the nature of transaction. If on the date of cheque, liability or debt exists or the amount has become legally enforceable, Section 138 is attracted and not otherwise.

35. Reliance is also placed upon **Goaplast (P) Ltd.** v. **Chico Ursula D'Souza**, (2003) 3 SCC 232, wherein it has been held as under:

> "4. The learned counsel for the appellant has submitted that mere writing of letter to the Bank stopping payment of the post-dated cheques does not take the case out of the purview of the Act. He has invited our attention to the object behind the provision contained in Chapter XVII of the Act. For appreciating the issue involved in the present case, it is necessary to refer to the object behind introduction of Chapter XVII containing Sections 138 to 142. This Chapter was introduced in the Act by the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988 (Acts 66 of 1998) with the object of inculcating faith in the efficacy of banking operations and giving credibility to negotiable instruments in business transactions and in order to promote efficacy of banking operations. With the policy of liberalisation adopted by the country which brought about increase in international trade and commerce, it became necessary to inculcate faith in banking. World trade is carried through banking operations rather than cash transactions. The amendment was intended to create an atmosphere of faith and reliance on banking system. Therefore, while considering the question of applicability of Section 138 of the Act to a situation presented by the facts of the present case, it is necessary to keep the objects of the legislation in mind. If a party is allowed to use a cheque as a mode of deferred payment and the payee of the cheque on the faith that he will get his payment on the due date accepts such deferred payment by way of cheque, he should not normally suffer on account of non payment. The faith, which the legislature has desired that such instruments should inspire in commercial transactions would be completely lost if parties are as a matter of routine allowed to interdict payment by issuing instruction to banks to stop payment of cheques. In today's world where use of cash in day to day life is almost getting extinct and people are using negotiable instruments in commercial transactions and plastic money for their daily needs as consumers, it is all the more necessary that people's faith in such instruments should be strengthened rather than weakened. Provisions contained in Sections 138 to 142 of the Act are intended to discourage people from not honouring their commitments by way of payment through cheques. It is desirable that the court should ban in favour of an interpretation which serves the object of the statute. The penal provisions contained in Sections 138 to 142 of the Act are intended to ensure that obligations undertaken by issuing cheques as a mode of payment are honoured. A post-

dated cheque will lose its credibility and accepatibility if its payment can be stopped routinely. A cheque is a well recognized mode of payment and post-dated cheques are often used in various transactions in daily life. The purpose of a post-dated cheque is to provide some accommodation to the drawer of the cheque. Therefore, it is all the more necessary that the drawer of the cheque should not be allowed to abuse the accommodation given to him by a creditor by way of acceptance of post-dated cheque. If stoppage of payment of a post-dated cheque is permitted to take the case out of the purview of Section 138 of the Act, it will amount to allowing the party to take advantage of his own wrong.

6. In the present case the issue is very different. The issue is regarding payment of a post-dated cheque being countermanded before the date mentioned on the face of the cheque. For purpose of considering the issue, it is relevant to see Section 139 of the Act which creates a presumption in favour of the holder of a cheque. The said Section provides that "it shall be presumed that, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in Section 138 for the discharge, in whole or in part, or any debt or other liability". Thus it has to be presumed that a cheque is issued in discharge of any debt or other liability. The presumption can be rebutted by adducing evidence and the burden of proof is on the person who wants to rebut the presumption. This presumption coupled with the object of Chapter XVII of the Act which is to promote the efficacy of banking operation and to ensure credibility in business transactions through banks persuades us to take a view that by countermanding payment of post- dated cheque, a party should not be allowed to get away from the penal provision of Section 138 of the Act. A contrary view would render Section 138 a dead letter and will provide a handle to persons trying to avoid payment under legal obligations undertaken by them through their own acts which in other words can be said to be taking advantage of one's own wrong. If we hold otherwise, by giving instructions to banks to stop payment of a cheque after issuing the same against a debt or liability, a drawer will easily avoid penal consequences under Section 138. Once a cheque is issued by a drawer, a presumption under Section 139 must follow and merely because the drawer issued notice to the drawee or to the bank for stoppage of payment it will not preclude an action under Section 138 of the Act by the drawee or the holder of the cheque in due course. This was the view taken by this Court in Modi Cements Ltd. vs. Kuchil Kumar Nandi [1998 (3) SCC 249]. On same facts is the decision of this Court in Ashok Yeshwant Badave vs. Surendra Madhavrao Nighojakar and another [2001 (3) SCC 726]. The decision in Modi's case overruled an earlier decision of this Court in Electronics Trade & Technology Development Corpon. Ltd. vs. Indian Technologists & Engineers [AIR 1996 SC 2339] which had taken a contrary view. We are in respectful agreement with the view taken in Modi's case. The said view is in consonance with the object of the legislation. On the faith of payment by way of a post-dated cheque, the payee alters his position by accepting the cheque. If stoppage of payment before the due date of the cheque is allowed to take the transaction out of the purview of Section 138 of the Act, it will shake the confidence which a cheque is otherwise intended to inspire regarding payment being available on the due date."

36. This court, having carefully perused the evidence adduced on record, especially statement of CW-2 has no hesitation to conclude that cheque in question was issued by accused towards discharge of his legally enforceable liability. Complainant has successfully proved on record that after having received memo from the bank, he took all necessary steps as envisaged under Section 138 of the Act before filing of the complaint. CW-1, Bank official has categorically admitted the factum with regard to presentation of cheque and issuance of copy of memo and copy of cheque, exhibits CW-1/A and CW-1/B.

37. Similarly, complainant has successfully proved on record that prior to institution of complaint, he had issued legal notice by way of registered A.D. exhibits CW-2/E, CW-2/F and CW-2/H, CW-2/J, CW-2/L and CW-2/M. Perusal of CW-2/L clearly suggests that accused

refused to receive the legal notice, meaning thereby that he was aware of contents of the legal notice since despite notice, he failed to pay amount, as such, complainant was well within its right to initiate proceedings under Section 138 of the Act.

38. As has been noticed above, respondent-accused has taken defence that he had issued cheque as security but his mere statement may not be sufficient to rebut the presumption of issuance of cheque, rather, respondent-accused is/was either expected to lead positive evidence in this regard or could rely upon the material submitted by complainant but, in the case at hand, neither the respondent-accused has been able to lead specific evidence to prove his defence that cheque in question was issued as a security nor he has been able to show from the material led on record by the complainant that cheque in question was issued as a security and not towards lawful discharge of legally enforceable liability.

39. In this regard, reliance is placed upon judgment of Hon'ble Apex Court in **Sampelly Satyanarayana Rao** v. **Indian Renewable Energy Development Agency Ltd.**, (2016) 10 SCC 458, has held as under:

> "9. We have given due consideration to the submission advanced on behalf of the appellant as well as the observations of this Court in Indus Airways (supra) with reference to the explanation to Section 138 of the Act and the expression "for discharge of any debt or other liability" occurring in Section 138 of the Act. We are of the view that the question whether a post-dated cheque is for "discharge of debt or liability" depends on the nature of the transaction. If on the date of the cheque liability or debt exists or the amount has become legally recoverable, the Section is attracted and not otherwise.
>
> 10. Reference to the facts of the present case clearly shows that though the word "security" is used in clause 3.1(iii) of the agreement, the said expression refers to the cheques being towards repayment of installments. The repayment becomes due under the agreement, the moment the loan is advanced and the installment falls due. It is undisputed that the loan was duly disbursed on 28th February, 2002 which was prior to the date of the cheques. Once the loan was disbursed and installments have fallen due on the date of the cheque as per the agreement, dishonour of such cheques would fall under Section 138 of the Act. The cheques undoubtedly represent the outstanding liability.
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> 11. The judgment in Indus Airways (supra) is clearly distinguishable. As already noted, it was held therein that liability arising out of claim for breach of contract under Section 138, which arises on account of dishonour of cheque issued was not by itself at par with criminal liability towards discharge of acknowledged and admitted debt under a loan transaction. Dishonour of cheque issued for discharge of later liability is clearly covered by the statute in question. Admittedly, on the date of the cheque there was a debt/liability in presenti in terms of the loan agreement, as against the case of Indus Airways (supra) where the purchase order had been cancelled and cheque issued towards advance payment for the purchase order was dishonoured. In that case, it was found that the cheque had not been issued for discharge of liability but as advance for the purchase order which was cancelled. Keeping in mind this fine but real distinction, the said judgment cannot be applied to a case of present nature where the cheque was for repayment of loan installment which had fallen due though such deposit of cheques towards repayment of installments was also described as "security" in the loan agreement. In applying the judgment in Indus Airways (supra), one cannot lose sight of the difference between a transaction of purchase order which is cancelled and that of a loan transaction where loan has actually been advanced and its repayment is due on the date of the cheque. .
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> 12. The Crucial question to determine applicability of Section 138 of the Act is whether the cheque represents discharge of existing enforceable debt or liability or whether it represents advance payment without there being subsisting debt or liability. While approving the views of different High Courts noted earlier, this is the underlying

principle as can be discerned from discussion of the said cases in the judgment of this Court.

17. In Rangappa versus Sri Mohan[9], this Court held that once issuance of a cheque and signature thereon are admitted, presumption of a legally enforceable debt in favour of the holder of the cheque arises. It is for the accused to rebut the said presumption, though accused need not adduce his own evidence and can rely upon the material submitted by the complainant. However, mere statement of the accused may not be sufficient to rebut the said presumption. A post dated cheque is a well recognized mode of payment."

40. Hon'ble Apex Court in **ICDS LTD** v. **Beena Shabeer**, (2002) 6 SCC 426 has held that security cheques would fall within the purview of Section 138 of the Act and a person can not escape his liability. When there is existing liability on the date of presentation of cheque and security cheques issued are dishonoured, accused shall be liable under Section 138 of the Act.

41. In the case referred to herein above, High Court of Kerala held that when a cheque was issued as a security, no complaint will lie under Section 138 of the Act since cheque issued can not be said to be for the purpose of discharge of any debt or liability. While arriving at aforesaid conclusion, High Court of Kerala recorded that reading of the above Section would make it clear that issuance of a cheque must be for payment of amount of money from out of the account. In the case of a guarantor or surety, even if a cheque is issued, that cannot be said to be for immediate payment of money. Section 138 of the Act further says that issuance of cheque to another person is towards discharge, in whole or in part of any debt or other liability.

Hon'ble Apex Court, while disagreeing with the aforesaid view taken by Kerala High Court held that from a bare reading of provisions contained in Section 138 of the Act, there remains no manner of doubt that for whatever reason it may be, liability under this provision can not be avoided in the event same stands returned by the banker unpaid. Hon'ble Apex Court, further held that the legislature has been careful enough to record not only "discharge in whole or in part of any debt" but has included the expression, "other liability" as well. Hon'ble Apex Court has held as under:

"9. As noticed hereinbefore, the principal reason for quashing of the proceeding as also the complaint by the High Court was by reason of the fact that Section 138 of the Act provides for issuance of a cheque to another person towards the discharge in whole or in part of any debt or liability and on the factual context, the High Court came to a conclusion that issuance of the cheque cannot be co-related for the purpose of discharging any debt or liability and as such complaint under Section 138 cannot be maintainable.

10. The language, however, has been rather specific as regards the intent of the legislature. The commencement of the Section stands with the words "Where any cheque". The above noted three words are of extreme significance, in particular, by reason of the user of the word "any" the first three words suggest that in fact for whatever reason if a cheque is drawn on an account maintained by him with a banker in favour of another person for the discharge of any debt or other liability, the highlighted words if read with the first three words at the commencement of Section 138, leave no manner of doubt that for whatever reason it may be, the liability under this provision cannot be avoided in the event the same stands returned by the banker unpaid. The legislature has been careful enough to record not only discharge in whole or in part of any debt but the same includes other liability as well. This aspect of the matter has not been appreciated by the High Court, neither been dealt with or even referred to in the impugned judgment.

11. The issue as regards the co-extensive liability of the guarantor and the principal debtor, in our view, is totally out of the purview of Section 138 of the Act, neither the

same calls for any discussion therein. The language of the Statute depicts the intent of the law-makers to the effect that wherever there is a default on the part of one in favour of another and in the event a cheque is issued in discharge of any debt or other liability there cannot be any restriction or embargo in the matter of application of the provisions of Section 138 of the Act: 'Any cheque' and 'other liability' are the two key expressions which stands as clarifying the legislative intent so as to bring the factual context within the ambit of the provisions of the Statute. Any contra interpretation would defeat the intent of the legislature. The High Court, it seems, got carried away by the issue of guarantee and guarantor's liability and thus has overlooked the true intent and purport of Section 138 of the Act. The judgments recorded in the order of the High Court do not have any relevance in the contextual facts and the same thus does not lend any assistance to the contentions raised by the respondents."

42. Mr. Sudhir Thakur, learned counsel representing the respondent-accused, while placing reliance upon the judgment rendered by Hon'ble Apex Court in **M/S Indus Airways Pvt. Ltd. and Ors.** v. **M/S Magnum Aviation Pvt. Ltd. and Anr**. Criminal Appeal No. 830 of 2014, decided on 7.4.2014, argued that on the date of issuance of cheque dated 26.2.2005, there was no transaction between the parties and admittedly there was no debt or other liability existing on that date and as such, cheque issued as security can not be deemed to have been issued in discharge of an existing debt or liability. In M/S Indus Airways Pvt. Ltd. (supra), question before the Hon'ble Apex Court was whether post-dated cheques issued as an advance payment in respect of purchase orders could be considered in discharge of legally enforceable debt or other liability and, if so, whether the dishonour of such cheques amounts to offence under Section 138 of the Act. Appellants before the Hon'ble Apex Court were purchasers, who had placed purchase order and issued post-dated cheques in favour of respondents as an advance payment. One of the terms and conditions of the contract was that the entire payment would be given to the supplier in advance. The supplier claimed that the advance payment was made by the purchasers as it had to procure the parts from aboard. The cheques were dishonoured when they were presented on the ground that purchasers had stopped payment and thereafter purchasers cancelled the purchase order requesting for return of cheques. Respondents/ suppliers later on filed complaint under Section 138 of the Act, after sending demand notice. Hon'ble Apex Court, while setting aside the judgment of Delhi High Court, observed that it failed to keep in mind fine distinction between civil liability and criminal liability under Section 138 of the Act. It would be profitable to take into account following paras of the judgment (supra):

"19. The above reasoning of the Delhi High Court is clearly flawed inasmuch as it failed to keep in mind the fine distinction between civil liability and criminal liability under Section 138 of the N.I. Act. If at the time of entering into a contract, it is one of the conditions of the contract that the purchaser has to pay the amount in advance and there is breach of such condition then purchaser may have to make good the loss that might have occasioned to the seller but that does not create a criminal liability under Section 138. For a criminal liability to be made out under Section 138, there should be legally enforceable debt or other liability subsisting on the date of drawal of the cheque. We are unable to accept the view of the Delhi High Court that the issuance of cheque towards advance payment at the time of signing such contract has to be considered as subsisting liability and dishonour of such cheque amounts to an offence under Section 138 of the N.I. Act. The Delhi High Court has traveled beyond the scope of Section 138 of the N.I. Act by holding that the purpose of enacting Section 138 of the N.I. Act would stand defeated if after placing orders and giving advance payments, the instructions for stop payments are issued and orders are cancelled. In what we have discussed above, if a cheque is issued as an advance payment for purchase of the goods and for any reason purchase order is not carried to its logical conclusion either because of its cancellation or otherwise and material or goods for which purchase order was placed is not supplied by the

supplier, in our considered view, the cheque cannot be said to have been drawn for an existing debt or liability."

43. It is amply clear from the aforesaid exposition of law that Hon'ble Apex Court, while disagreeing with the judgment of High Court, categorically observed that if cheque is issued as an advance payment for purchase of goods and for any reason, purchase order is not carried to its logical conclusion, either because of its cancellation or otherwise and material or goods for which purchase order was placed is not supplied by the supplier, in our considered view, the cheque cannot be said to have been drawn for an existing debt or liability.

44. Aforesaid judgment rendered by Hon'ble Apex Court is not applicable in the facts of present case, wherein admittedly, it is none of the case of the accused that he had issued cheque as an advance payment for purchase of liquor, rather, it is admitted case of the accused that he had been purchasing liquor from the complainant, sometimes against cash payment and sometimes against cheque.

45. In **M/S Indus Airways** (supra), Hon'ble Apex Court dismissed the complaint on the ground that there was no existing liability since contract had been terminated on the date of presentation of cheque for encashment and there was no existing, ascertained or liquidated liability or debt, rather, cheques were given as advance towards sale consideration and not for realization of any certain damage that may arise on account of wrongful termination of purchase order by the purchaser.

46. However, in the case at hand, liability or debt has arisen on account of sale of liquor made by complainant to the accused and cheque was issued purportedly for the payment to be made by accused on account of liquor purchased by him and as such, decision rendered by Hon'ble Apex Court in **M/S Indus Airways** (supra) can not be mechanically applied to the present case

47. Having applied ratio of the aforesaid exposition of law laid down by Hon'ble Apex Court from time to time, to the facts of the present case, this Court is of the definite view that in case plea raised by learned counsel representing the accused is accepted, it would not only defeat the object of Section 138 of the Act, rather would encourage dishonest people to avoid their penal liabilities by raising such pleas. It would also erode the efficacy and credibility of commercial transactions, which admittedly, in today's world, are carried out on the basis of post-dated cheques or cheques issued towards advance payments. Hence, this Court is not persuaded to agree with the contention raised by Mr. Sudhir Thakur, learned counsel representing the accused that in case titled **M/S Indus Airways** (supra)Hon'ble Apex Court has laid down a general legal proposition that on the date of issuance of cheque, debt or other liability should be subsisting to maintain complaint under Section 138 of the Act, because same would be contrary to the ratio laid down by Hon'ble Apex Court in its earlier decision in **ICDS LTD** v. **Beena Shabeer (supra)**, wherein it has been specifically held that security cheques would fall within the purview of Section 138 of the Act and a person can not escape his liability. At this stage, it may be noticed that both the aforesaid judgments/ decisions have been rendered by co-equal Benches. Hence, there is no merit in the submission raised by Mr. Thakur that since cheque in question was issued as security, complaint under Section 138 of the Act is not maintainable. Law raises a presumption in favour of holder of a cheque that dishonoured cheque was issued in respect of a debt or liability.

48. True it is, that the fact whether on the date of presentation of dishonoured cheque, debt or other liability did not exist would vary from case to case but definitely onus to raise such a probable defence would lie upon the accused, but, in the case at hand, as has been observed herein above, accused has not been able to raise probable defence to cast doubt on the claim made by the complainant with respect to enforceable debt or liability in relation to transaction in respect whereof cheque in question is alleged to have been issued as a security.

49. Consequently, in view of detailed discussion made herein above as well as law relied upon, this Court is of the view that learned Court below has wrongly arrived at a

conclusion that cheque in question was issued as a security cheque. Since judgment dated 18.5.2015, passed by the learned Judicial Magistrate 1st Class, Solan in Criminal Complaint No. 863/3 of 2011/05 is not based upon proper appreciation of evidence as well as law, same is accordingly set aside and respondent-accused is held guilty of having committed offence punishable under Section 138 of the Negotiable Instruments Act. Respondent namely D.S. Kanwar is directed to remain present in the Court on July 6, 2018, to be heard on quantum of sentence.

50. List on **July 6, 2018**.

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

Joga Singh @ Mulakh Raj ... Petitioner

Versus

State of Himachal Pradesh ... Respondent

CrMP(M) No. 493 of 2018
Decided on June 25, 2018

Code of Criminal Procedure, 1973- Section 439- Regular Bail – Grant of – Recovery of poppy husk – Accused was enlarged on bail on Court's order during investigation– After filing of charge-sheet, however, accused could not be served and eventually declared as a proclaimed offender – After arrest, accused seeking bail on ground that he was never served during trial of case – Contention of accused found correct - Accused granted regular bail subject to conditions. (Para-15)

Case referred:

Prasanta Kumar Sarkar versus Ashis Chatterjee and another (2010) 14 SCC 496

For the petitioner : Mr. Vivek Singh Attri, Advocate.

For the respondent : Mr. S.C. Sharma and Mr. Dinesh Thakur, Addl. AG's with Mr. Amit Kumar, DAG.
ASI Mohammed Sitar, IO, Police Station, Una, District Una, Himachal Pradesh.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

By way of instant petition filed under Section 439 CrPC, prayer has been made on behalf of the bail petitioner for grant of regular bail in respect of FIR No. 523/2002 dated 16.9.2002 under Section 15 of the Narcotic Drugs & Psychotropic Substances Act, registered at Police Station, Una, District Una, Himachal Pradesh.

2. Sequel to orders dated 24.4.2018, 8.5.2018, 14.5.2018 and 11.6.2018, ASI Mohammed Sitar, Police Station, Una, District Una, Himachal Pradesh has 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. Vide previous order dated 11.6.2018, this Court had summoned record of the Sessions Case No. 1 of 2008 titled State versus Pushpa Devi and others, which has also been received. Careful perusal of record/status report reveals that on 15.9.2002, police apprehended bail petitioner alongwith other co-accused and recovered 7 bags of poppy husk. Since bail

petitioner fled from the spot, police arrested other accused persons and after completing codal formalities commenced investigation. Co-accused namely Smt. Pushpa Devi and Usha Devi were found to be in possession of 20 kg of poppy husk each, whereas, accused No.3, Gajraj was found to be in possession of two bag containing 10 kg each of poppy husk. Present bail petitioner was alleged to have possessed bag containing 13 kg of poppy husk. BAIL PETITIONER was arrested by police on 21.1.2003, whereafter, he was enlarged on bail by the court below. After completion of investigation, police presented *Challan* in the competent Court of law, however, the fact remains that the bail petitioner after having obtained bail from the trial Court, failed to put in appearance during trial and as such he came to be declared as proclaimed offender vide order dated 30.11.2007. Co-accused as referred to herein above subsequently came to be acquitted of the charges framed against them. Present bail petitioner was arrested on 26.12.2017 and since then, he is behind the bars.

4. Mr. Vivek Singh Attri, learned counsel representing the bail petitioner argued that since no notice whatsoever was ever served upon the bail petitioner after passing of order dated 23.1.2003 when he was ordered to be enlarged on bail, there was no occasion for the bail petitioner to remain present during trial. He further contended that bail petitioner, who is a poor rustic villagers having no knowledge of law, remained under impression that he is not required to remain present in the Court during trial.

5. Mr. Dinesh Thakur, learned Additional Advocate General, while refuting aforesaid submissions having been made by Mr. Vivek Singh Attri, learned counsel representing the bail petitioner contended that bail petitioner is a clever person, who after having obtained bail from the trial Court, never presented himself for investigation or thereafter during trial, as such, he does not deserve to be shown any leniency, rather he needs to be dealt with severely. Mr. Thakur, contended that it is a matter of fact that bail petitioner was declared proclaimed offender and he absconded during trial for almost fourteen years, as such, his enlargement on bail at this stage, may further hamper trial, which is almost complete. Mr. Thakur also disputed the factum with regard to non-issuance of notice by trial Court to procure presence of bail petitioner during trial.

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

7. This Court solely with a view to ascertain the correctness of the submission having been made by the learned counsel representing the bail petitioner that after passing of order dated 23.1.2003, no notice was ever served upon the bail petitioner, summoned record of the court below. Having perused record of Sessions Case No. 1 of 2008, titled State vs. Pushpa Devi and others, there appears to be force in the arguments of Mr. Vivek Singh Attri, Advocate, that though after passing of order dated 23.1.2003, notices/non-bailable warrants were issued against bail petitioner but those remained unexecuted and finally on 30.11.2017, bail petitioner was declared proclaimed offender. Mr. Dinesh Thakur, learned Additional Advocate General, with a view to refute aforesaid contention made by Mr. Vivek Singh Attri, also invited attention of this Court to the report given by the process serving agency to demonstrate that bail petitioner was served through his wife. However, this Court having carefully perused report given on summons finds that wife of bail petitioner had informed the process server that her husband has gone to Jammu.

8. Section 64 CrPC provides as under:

> "64. Service when persons summoned cannot be found. Where the person summoned cannot, by the exercise of due diligence, be found, the summons may be served by leaving one of the duplicates for him with some adult male member of his family residing with him, and the person with whom the summons is so left shall, if so required by the serving officer, sign a receipt therefor on the back of the other duplicate. Explanation.- A servant is not a member of the family within the meaning of this section."

9. Section 64 provides that where despite due diligence, the person summoned is not served with the notice, the summons may be served by leaving one of the duplicates for him with some adult male member of his family residing with him, and the person with whom the summons is so left shall, if so required by the serving officer, sign a receipt thereof on the back of the other duplicate. It is further clarified in the aforesaid Section that servant is not a member of the family.

10. Mr. Dinesh Thakur, learned Additional Advocate General was unable to dispute the factum with regard to acquittal of other accused in the trial, which was admittedly initiated on the basis of same FIR, wherein bail petitioner has also been named as one of accused. Mr. Thakur was also unable to refute the argument raised by Mr. Vivek Singh Attri, that none of prosecution witnesses, especially complainant and independent witnesses have supported the case of prosecution, rather, they have resiled from their statements.

11. Though aforesaid aspects of the matter are to be considered and decided by the trial court on the basis of material available on record but this Court taking note of the fact that bail petitioner was not served with notice/non-bailable warrants, sees no reason to let bail petitioner incarcerate in jail for indefinite period during trial, especially when he is behind the bars for almost seven months. Guilt, if any, of the bail petitioner is yet to be proved in accordance with law as such, it may not be interest of justice to curtail his freedom for indefinite period.

12. 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.

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."

13. 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.

14. 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.

15. In view of above, bail petitioner has carved out a case for grant of bail and as such, present petition is allowed. Petitioner is ordered to be released on bail subject to furnishing bail bonds in the sum of Rs.50,000/- (Rs. Fifty Thousand) with one local surety in the like amount, to the satisfaction of the trial Court, 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.

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

17. 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.

Shafi Mohhamad ... Petitioner

Versus

State of Himachal Pradesh ... Respondent

CrMP(M)'s No. 721, 722 and 723 of 2018
Decided on June 25, 2018

Code of Criminal Procedure, 1973- Section 439- Regular Bail – Grant of – Applicants-Accused, 'S' 'K' and 'M' were arrested for house trespass and attempt to murder – Accused seeking regular bail – High Court found that complainant 'AM' was got examined from Medical Officer at Tissa, who reported injuries as simple in nature but referred him to Government Medical College, Chamba and thereafter to Zonal Hospital, Nurpur for C.T. Scan – However, complainant got C.T. Scan done from private hospital, which reported displaced fracture of nasal bone and small subgalead haernating in occiput region – Injury thus was reported to be dangerous to life – Accused submitted that material on record didn't make out a case of attempt to murder - High Court found that there were contradictions in the allegations made in FIR vis-à-vis medical evidence as alleged assault with pickaxe was made on head, whereas grievous injury of nasal bone was detected only in the report of private hospital – No reason was given as why C.T. Scan was not conducted at Chamba or Nurpur – Application allowed – Accused-applicants admitted on regular bail. (Paras- 8 to 14)

Cases referred:

Sanjay Chandra versus Central Bureau of Investigation (2012)1 Supreme Court Cases 49
Manoranjana Sinh alias Gupta versus CBI, (2017) 5 SCC 218
Prasanta Kumar Sarkar versus Ashis Chatterjee and another (2010) 14 SCC 496

For the petitioners : Mr. N.K. Thakur, Senior Advocate with Mr. Divya Raj Singh, Advocate.

For the respondent : Mr. S.C. Sharma and Mr. Dinesh Thakur, Addl. AG's with Mr. Amit Kumar, DAG.
ASI Hem Raj, Police Station, Tissa, District Chamba, HP.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

Since all these petitions arise out of same FIR, as such, same were taken up together and are being disposed of by this common judgment.

2. By way of these bail petitions filed under Section 439 CrPC, prayer has been made on behalf of bail petitioners for grant of regular bail in FIR No. 51/18 dated 28.4.2018 under Sections 307, 325, 451, 147, 149 and 323 IPC, registered at Police Station, Tissa, District Chamba, Himachal Pradesh.

3. Sequel to order dated 11.6.2018, ASI Hem Raj has 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.

4. Perusal of status report suggests that on 27.4.2018 complainant Yaseen got his statement recorded under Section 154 CrPC, alleging therein that on 27.4.2018, at about 4 pm, bail petitioners alongwith Kasim Deen and Manjoor entered their house unauthorizedly and gave merciless beatings to him and his parents, as a consequence of which, he as well as his mother and father suffered grievous injuries. Complainant and his parents were subsequently rescued by persons residing in the neighbourhood. Police got complainant, Amina and Ali Mohammed medically examined from Medical Officer, Tissa, who reported injuries allegedly suffered by complainant and other victims to be simple in nature. Medical Officer, Tissa, referred victim Ali Mohammed for CT Scan to Pt. Jawaharlal Nehru Government Medical College, Chamba and X-ray was got conducted at aforesaid Medical College but Ali Mohammed was further referred to Civil Hospital Nurpur for CT Scan. It appears that CT scan of Ali Mohammed was got done from some private hospital on 28.4.2018, wherein it was reported that there is "*mild displaced # of nasal bone (lt. side)*" as such, injury is grievous. Report of CT scan further reveals that there was "*small subgalead haernating in oeciput region (ltd. side*)" and if proper treatment is not taken, same would be dangerous to life. Police after completing all codal formalities, arrested all the accused on 4.5.2018 and since then they are behind the bars. Two of the accused namely Kasim Deen and Manjoor have been already enlarged on bail by the learned Additional Sessions Judge, Chamba.

5. Mr. N.K. Thakur, learned Senior Advocate duly assisted by Mr. Divya Raj Singh, Advocate, while referring to the record, vehemently argued that no case, if any, is made out under Section 307 IPC, against bail petitioners because there is no material adduced on record suggestive of the fact that complainant as well as other family members suffered grievous injuries on account of beatings, if any, given by bail petitioners and other accused. Mr. Thakur, further contended that medical evidence adduced on record completely belies the story of the prosecution because as per story of prosecution, victim Ali Mohammed was given blow with "Gainti" (pickaxe) on his head but as per report, no injury has been found on the head of the victim, rather, injury, if any, is on the left side of nose. He further argued that as per report given by Medical Officer, Tissa, who had first opportunity to examine the victims, all the injuries were found to be simple and victims were not hospitalized for even an hour. Lastly, Mr. Thakur, learned Senior Advocate contended that at present there is no independent witness, if any, associated by prosecution to prove factum with regard to quarrel, if any, having taken place between bail petitioners and complainant. Mr. Thakur, learned Senior Advocate further contended that all the bail petitioners are local residents of area and there is no likelihood of their absconding from investigation or trial, rather, they shall make themselves available for investigation and trial as and when required and as such, they deserve to be enlarged on bail.

6. Mr. Dinesh Thakur, learned Additional Advocate General, while refuting aforesaid submissions having been made by the learned counsel representing the bail petitioners, contended that it is amply clear from the medial evidence adduced on record that victims suffered grievous injuries on their persons, on account of merciless beatings given by bail petitioners and other accused, as such, they do not deserve to be enlarged on bail. Mr. Thakur further contended that keeping in view of gravity of offence allegedly committed by the bail petitioners, they do not deserve to be shown any leniency rather need to be dealt with severely. While inviting attention of this Court to medical evidence adduced on record, Mr. Thakur contended that it has been specifically opined by medical experts that injury No.1 i.e. displaced nasal bone is grievous in

nature and could be dangerous to life of victim namely Ali Mohammed and as such, bail petitioners have been rightly booked under Section 307 IPC.

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

8. Having carefully perused record /status report, this Court finds that immediately after alleged incident, victims were taken to Medical Officer, Tissa, who after having examined them, opined all the injuries to be simple in nature. Though, victim namely Ali Mohammed was referred to Medical College Chamba for CT Scan, but it is not understood why he was further referred to Zonal Hospital Nurpur. There is no mention, if any, in the record that why CT Scan of Ali Mohammed was not conducted at Medical College, Chamba or at Nurpur. It has come only in the report submitted by private Doctor/hospital that victim Ali Mohammed suffered grievous injury i.e. mild displaced nasal bone (left side). No doubt, X-ray was got conducted at Chamba, wherein injury No.3 was termed to be grievous in nature, but this Court, taking note of the fact that medical report adduced on record is not in consonance with the story put forth by the prosecution that Ali Mohammed was hit on head with pickaxe, finds considerable force in the argument of Mr. N.K. Thakur, learned Senior Advocate that at this stage, there appears to be no definite/direct evidence, if any, against accused named in the FIR, suggestive of the fact that they committed offence punishable under Section 307 IPC. Though aforesaid aspect of the matter is to be considered and decided by the trial court on the basis of evidence adduced on record by investigating agency but this Court, taking note of the fact that bail petitioners are local residents and they have no criminal background, sees no reason to let them incarcerate in jail, for indefinite period, especially when their 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 can not 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; 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. In **Manoranjana Sinh alias Gupta** versus **CBI,** (2017) 5 SCC 218, Hon'ble Apex Court has held as under:

"This Court in Sanjay Chandra vs. Central Bureau of Investigation (2012) 1 SCC 40, also involving an economic offence of formidable magnitude, while dealing with the issue of grant of bail, had observed that deprivation of liberty must be considered a punishment unless it is required to ensure that an accused person would stand his trial when called upon and that 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 found guilty. It was underlined that the object of bail is neither punitive nor preventive. This Court sounded a caveat 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 a conduct whether an accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson. It was enunciated that since the jurisdiction to grant bail to an accused pending trial or in appeal against conviction is discretionary in nature, it has to be exercised with care and caution by balancing the valuable right of liberty of an individual and the interest of the society in general. It was elucidated that the seriousness of the charge, is no doubt one of the relevant considerations while examining the application of bail but it was not only the test or the factor and that grant or denial of such privilege, is regulated to a large extent by the facts and circumstances of each particular case. That detention in custody of under-trial prisoners for an indefinite period would amount to violation of Article 21 of the Constitution was highlighted."

12. 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.

13. 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.

14. In view of above, all the bail petitions are allowed. Petitioners are ordered to be enlarged on bail subject to furnishing personal bonds in the sum of Rs.1,00,000/- (Rs. One Lakh) each with one local surety each in the like amount, to the satisfaction of the learned trial Court, besides following conditions:

(a) They shall make themselves 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) They shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;

(c) They 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) They shall not leave the territory of India without the prior permission of the Court.

(e) They shall surrender passports, if any, held by them.

15. It is clarified that if the petitioners misuse the liberty or violate any of the conditions imposed upon them, the investigating agency shall be free to move this Court for cancellation of the bail.

16. 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 instant petitions alone.

The petitions stand accordingly disposed of.

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

Shushil Kumar ... Petitioner

Versus

State of Himachal Pradesh ... Respondent

CrMP(M) No. 573 of 2018
Decided on June 25, 2018

Code of Criminal Procedure, 1973- Section 438 – Pre-arrest Bail- Grant of – Accused alongwith one 'S' allegedly wrongfully restrained and intimidated the complainant and video graphed her in a naked condition – Accused and co-accused 'S' also uploaded video graph on facebook – Accused seeking pre-arrest bail in aforesaid FIR registered for offences under Indian Penal Code and Information Technology Act - Accused taking plea of alibi and filing discharge slip of his mother issued by the Government Hospital – Investigating Officer submitting that discharge slip aforesaid was correct and there was no material so far against accused showing his involvement

in the aforesaid offences – Application allowed and accused is admitted on pre-arrest bail subject to his joining investigation and not to tamper with prosecution evidence etc. (Paras-4 and 10)

Cases referred:
Sanjay Chandra versus Central Bureau of Investigation (2012)1 Supreme Court Cases 49
Prasanta Kumar Sarkar versus Ashis Chatterjee and another (2010) 14 SCC 496

For the petitioner	:	Mr. Tara Singh Chauhan, Advocate.
For the respondent	:	Mr. S.C. Sharma and Mr. Dinesh Thakur, Addl. AG's with Mr. Amit Kumar, DAG. Yogesh Dutt Joshi, Dy.SP, Jawalaji, District Kangra, HP (IO)

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

By way of present bail petition filed under Section 438 CrPC, prayer has been made for grant of anticipatory bail in respect of FIR No. 26/18 dated 10.5.2018 under Sections 354 B&D, 341, 506 and 34 IPC and Sections 8 and 11 of Protection of Children from Sexual Offences Act and Section 67 of IT Act, registered at Police Station, Khundion, District Kangra, Himachal Pradesh.

2. Sequel to order dated 28.5.2018, Yogesh Dutt Joshi, Dy.SP./ Investigating Officer has 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. Close scrutiny of record/status report reveals that on 10.5.2018, complainant-prosecutrix lodged a complaint, alleging therein that on 26.2.2018, bail petitioner as well as co-accused namely Shami Kumar threatened to demolish cow-shed allegedly constructed on government land. Subsequently, on 28.2.2018, bail petitioner allegedly provided one new telephone to the complainant-prosecutrix and threatened her that in case she fails to talk to him, he will demolish the cowshed made by her father on the government land. Complainant also alleged that bail petitioner and co-accused Shami Kumar with a view to pressurize her for marriage, forcibly opened her *Salwar* and videographed her in a naked condition. Complainant also reported to the police that save and except video of her made against her wishes, bail petitioner as well as co-accused have not committed any offence. Allegedly video of complainant was later on put on Facebook by co-accused Shami Kumar and as such, FIR detailed herein above, came to be lodged against bail petitioner as well as co-accused Shami Kumar.

4. Mr. Dinesh Thakur, learned Additional Advocate General, while inviting attention of this Court to the status report and on the instructions of the Investigating Officer, who is present in court, fairly stated that bail petitioner has joined the investigation pursuant to order dated 14.5.2018 and is fully cooperating. Mr. Thakur further stated that bail petitioner during investigation revealed that on the alleged date of incident, i.e. 7.5.2018, he was at Medical College, Tanda, in connection with illness of his mother. In this regard, he also placed on record prescription /discharge slip issued by Medical College, Tanda. During investigation, police found discharge slip dated 7.5.2018, to have been issued by Medical College Tanda. Mr. Thakur, on the instructions of the Investigating Officer fairly stated that at this stage, there is no evidence available to connect bail petitioner with the offence alleged to have been committed by him, as such, he can be ordered to be enlarged on bail, subject to the condition that he shall make himself available for investigation as and when required by the investigating agency.

5. Consequently, in view of above, this Court sees no reason to keep the bail petitioner behind the bars for indefinite period, especially when he has joined investigation.

Moreover, as has been noticed herein above, explanation rendered on record by bail petitioner to prove his innocence has been found to be genuine and correct, as such, prayer made in the instant application deserves to be accepted. Further, bail petitioner is a government employee and as such, there is no likelihood of his absconding during investigation /trial.

6. 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."

7. 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."

8. 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.

9. 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.

10. In view of above, bail petitioner has carved out a case for grant of bail and as such, order dated 14.5.2018 is made absolute subject to petitioner furnishing fresh bail bonds in

the sum of Rs.50,000/- (Rs. Fifty Thousand) with one local surety in the like amount, to the satisfaction of the trial court/Chief Judicial Magistrate concerned, 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.

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

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

Dr. Ramesh Bharti. ...Petitioner

Versus

State of Himachal Pradesh & others. ...Respondents

CWP No. 1298 of 2018
Date of Decision: 26.6.2018

Constitution of India, 1950- Article 226- Stay of transfer – Administrative Tribunal refusing to stay transfer of petitioner, who was working as Principal of a medical college on ad hoc basis to Advisor to Government of Himachal Pradesh– Petition against – High Court refused to stay transfer but directed State Government not to force him to join new assignment – Petitioner was further enabled to avail leave of kind due, if he required so - Petitioner further permitted to join his duties in Department of Surgery in RPGMC, Tanda during the period, his original application is decided by Administrative Tribunal - Application directed to be decided within two months.

(Para-3 to 6)

For the Petitioners: Mr.K.D. Sood, Senior Advocate with Mr.Shubham Sood, Advocate.

For the Respondents: Mr.Ashok Sharma, Advocate General with Mr.Ajay Vaidya, Senior Additional Advocate General and Mr.Vikas Rathore & Mr.Narinder Guleria, Additional Advocate Generals for respondent No. 1.

Mr.B.C. Negi, Senior Advocate with Mr.Pranay Pratap Singh, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (oral)

In this Writ Petition order dated 1.6.2018, whereby prayer for grant of interim relief has been declined by learned H.P. State Administrative Tribunal, is under challenge.

2. The facts in a nutshell being noted only for the decision of this Writ Petition are that the respondent-State has transferred the petitioner against newly created post of Advisor to the Government of Himachal Pradesh at such a stage, when he was officiating as Principal, Dr. RPGMC, Tanda purely on ad-hoc basis and as a stop gap arrangement. Aggrieved by such action on the part of respondents, he preferred Original Application No. 2654 of 2018 in the Administrative Tribunal. In the said application while issuing notice on 15.5.2018, in the interim his joining as Advisor was made subject to final outcome of the Original Application. Aggrieved thereby, he preferred Writ Petition No. 1156 of 2018 in this Court, which has been disposed of by a Division Bench vide order dated 51.5.2018 (Annexure P-6) with a direction to learned Tribunal to decide the question of grant of interim relief to the petitioner afresh by assigning reasons.

3. Consequently, the impugned order Annexure P-8 in Original Application No. 2654 of 2018 has been passed by learned Tribunal declining thereby the prayer of the petitioner for interim direction on the grounds inter alia that he has been transferred to the post of Advisor equivalent to Principal/Professor by a committee constituted for the purpose and after adjudging his suitability for the post in question.

4. Since the Original Application is pending disposal before learned Tribunal, therefore, in the nature of order we propose to pass in this writ petition, there is no need to advert to all contentions and also the law point raised on both sides because in that event prejudice is likely to be caused to the case of either party in the pending Original Application.

5. This Court though has not accepted the prayer for the grant of interim relief made by the petitioner, except that he shall not be compelled to join his duties at the transferred station and may avail the leave of kind due. We have been informed that presently he is on leave. In such a situation a direction to the learned Administrative Tribunal to decide the Original Application in a time bound manner and in the interregnum allow the petitioner to join duties in the department of surgery RPGMC, Tanda, so that his services can be utilized as Surgeon and he is not compelled to avail prolonged leave, would serve the ends of justice. He is present in the Court. Learned arguing counsel on instructions submits that the petitioner is ready and willing to discharge his duties as Surgeon in the Department of Surgery as Professor and Head of course in case he is a senior Professor and that he will not stake his claim against the post of Principal. We take on record the statement so made on his behalf and finding not only fair, but reasonable also, accept the same.

6. The apprehension of learned Advocate General that allowing the petitioner to joint duties in Tanda Medical College may not be in the interest of administration as previously also he allegedly occupied the office of Principal by interpreting the interim order passed in this writ petition in his own way for a day. He may have done so on account of communication gap or having not understood the true import of the interim order because admittedly he did not stake his claim nor occupied the office of Principal thereafter during pendency of the writ petition. Anyhow, if such conduct is repeated by the petitioner in the College after joining the Department consequent upon this order, he shall render himself to be dealt with sternly in accordance with law, including the proceedings under Contempt of Courts Act.

7. In view of the observations made hereinabove, we direct learned H.P. Administrative Tribunal to decide the pending Original Application at the earliest, preferably within two months from today, of course subject to rendering all cooperation by the parties on

both sides and on the completion of pleadings. The writ petition is accordingly disposed of, so also the pending application(s), if any.

Copy **Dasti.**

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

Jaswinder Singh ....Petitioner.
Versus
State of Himachal Pradesh ....Respondent.

Cr.M.P(M) Nos. 762 and 763 of 2018
Decided on : 26.6.2018

Code of Criminal Procedure, 1973- Section 438 – Pre-arrest Bail- Grant of – Accused apprehending arrest in a case registered against him for assault, criminal intimidation, outraging of modesty of women and indecent behaviour – Accused denying involvement and alleging false implication – High Court found that accused was not named in FIR – Prosecutrix not giving key physical features of the assailants in her FIR – Further, there was no likelihood of accused fleeing away from justice or tampering with the prosecution evidence – Accused admitted on pre-arrest bail. (Para-3)

For the Petitioner(s): Mr. Vikram Thakur, Advocate.
For the Respondent-State: Mr. Hemant Vaid, Additional Advocate General with Mr. Vikrant Chandel, Deputy Advocate General and Mr. Yudhveer Singh Thakur, Deputy Advocate General.
SI Pardeep Singh, Addl. SHO, PS Baddi in person.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

Both these petitions arise out of a common FIR, hence are liable to be disposed, of, by a common order.

2. The instant petitions, stand instituted by the bail petitioners, under, Section 438, of, the Code of Criminal Procedure, wherein they seek the grant of anticipatory bail qua them, given theirs apprehending their arrest, for theirs allegedly committing offences punishable, under Sections 147,149,354 B, 504, 506,509,323 of Indian Penal Code, in case FIR No. 142/18 of 14.6.2018, registered at Police Station, Baddi.

3. Status report filed. The prima donna factum, as,is, brought to the notice of this Court, is, comprised in the factum of the accused, being not named by the prosecutrix in the FIR, rather hers making a disclosure, in the apt FIR, qua, upon hers being confronted with the accused/bail applicants, in a valid test identification parade, conducted by the Investigating Officer concerned, hers thereupon establishing their identities, besides, also hers establishing their participation, in, the alleged offences. However, the Investigating Officer has reported to this Court, that, despite his eliciting the presence of the prosecutrix, in a test identification parade, yet, the prosecutrix not recording her presence. Consequently, at this stage the participation of the accused in the alleged offences is prima facie not clinchingly established. Apart therefrom, prima-facie the prosecutrix, was (I) enjoined, to, unravel in the apposite FIR, the key characteristic features, of, each of the accused, and, also all apt features, as unraveled to the Investigating Officer concerned, were, on hers being confronted with the accused, in, a test

identification parade, enjoined to bear compatibility, with, their key physical appearances, as earlier disclosed, (ii) whereupon alone it may be convincingly inferred qua the prosecutrix establishing, the identities of the accused, also, hers' concomitantly establishing their participation in the alleged offences. However, the investigating Officer, has reported, to this Court, that the prosecutrix has not divulged in the apt FIR,the key characteristic features of each of the accused, (iii) thereupon she may be rather defacilitated, to, on hers being confronted, with, the physical appearances of the accused, in, a test identification parade, conducted by the Investigating Officer concerned, hence establish qua their physical appearances, bearing concurrence with, their key characteristic features,as, purportedly earlier disclosed, nor, hence she would be able to establish either the identities of the accused or their unflinching participation in the alleged offences. Thereupon, prima-facie hence it appears that the prosecution, at this stage, is, unable to firmly establish either the identity(s) of the accused or their participation in the alleged offences. Moreover, when at this stage, no material, has been placed on record, by the prosecution, demonstrating that in the event of bail being granted to the bail applicants, there being every likelihood of theirs fleeing from justice or tampering with prosecution evidence, thereupon this Court is constrained to grant indulgence of bail in favour of the bail applicants. Accordingly the order(s) rendered on 18.6.2018, are confirmed, on, the following conditions:-

1. That they shall join the investigation, as and when required by the Investigating agency;

2. That they 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 they shall not leave India without the previous permission of the Court;

4. That they shall deposit their passports, if any, with the Police Station, concerned;

5. That in case of violation of any of the conditions, the bail granted to the petitioners shall be forfeited and they shall be liable to be taken into custody;

6. That they shall apply for bail afresh when the challan is filed before the trial Court.

4. In view of above, petitions stand 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.

Shri Bhajan .....Petitioner/Judgment Debtor.

Versus

Dharam Parkash & Ors. .....Respondents/decree holders.

Civil Revision No. 182 of 2017.
Reserved on : 19th June, 2018.
Date of Decision: 29th June, 2018.

Code of Civil Procedure, 1908- Section 148- Extension of time – Decree of specific performance of agreement to sell - Trial Court passed decree in favour of plaintiff/D.H. subject to his paying balance sale price to judgment debtor within one month of decree – Decree assailed by

defendant/J.D. by way of first and second Appeal(s) – Second appeal dismissed by High Court on 13.7.2011 – Plaintiff/D.H. not tendering balance sale price nor filing application under Section 148 of Code for extension of time within one month on and w.e.f. 13.7.2011 (when RSA was dismissed) – D.H. filing execution application and during those proceedings filing application under Section 148 of Code and seeking extension of time for tendering balance sale price – Executing Court allowing such application of D.H. – Petition against – Held, D.H. was required to show good and sufficient cause which prevented him to mete compliance with condition precedent or avail mandate of Section 148 of Code earlier - Executing Court went wrong in allowing deposit of balance sale consideration with it – Petition allowed – Order of Executing Court set aside. (Paras-2 & 3)

For the Petitioner: Mr. Ramakant Sharma, Senior Advocate with Mr. Basant Thakur, Advocate.

For the Respondents: Mr. R.K. Gautam, Sr. Advocate with Mr. Gaurav Gautam, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

Through the instant petition, the petitioner/judgment debtor, challenge, the orders borne in Annexure P-9, rendered on 23.08.2017 whereby, the learned executing, dismissed, the application preferred before it for recalling of orders rendered by it, on, 28.10.2016, whereunder, the learned executing Court, allowed, the decree holders' application, for, permission being granted to them, for hence depositing the outstanding sale consideration of Rs.8,050/-, before its establishment.

2. Since, the impugned order, is, a sequel of orders, rendered, on 28.10.2016, hence, the validity, of, the order pronounced earlier, to, the pronouncement, of, the impugned order, is to be tested along with the validity, of, the impugned pronouncement. The preferment of the apt execution petition before the learned executing Court, was, a sequel to hence rendition, of, an affirmative decree, of, specific performance, of agreement to sell, upon, civil Suit No.156/1 of 1997, by the learned Sub Judge, Nalagarh. The apt operative portion, of the apposite decree, for specific performance, as, rendered upon the aforesaid civil suit, hence makes a clear and graphic display, of the JD/defendant No.2 being directed, to, execute the apt registered deed, of, conveyance, vis-a-vis, the suit property, with the plaintiffs/decree holders, subject to payment of balance sale consideration, within, a period of one month, commencing since 27th March, 2000. The affirmative pronouncement made upon Civil Suit No.156/1 of 1996, by the learned Sub Judge, Nalagarh, was, assailed by the aggrieved defendants, by, theirs preferring Civil Appeal No. 40-NL/13 of 2000 before the learned Additional District Judge, Solan, yet, thereon also the learned First Appellate Court, rather, pronounced a verdict bearing absolute concurrence, with, the verdict pronounced, by, the learned trial Judge concerned. The aggrieved defendants, thereafter proceeded to assail, the concurrent pronouncements, made, by both the learned Court(s) below, by theirs preferring a Regular Second Appeal before this Court, whereupon, this Court also made an order of dismissal, of the second appeal, and, obviously hence the defendants, rather unsuccessfully espoused, their grievance(s), before, the learned First Appellate Court, and, thereafter before this Court. However, as aforestated, with this Court also dismissing RSA No. 201 of 2001, thereby, hence its affirming the pronouncement(s), made, by both the learned courts below, thereupon, the apt condition precedent comprised, (a) in the factum, of, the decree holders being facilitated, to, derive the benefits of the decree, only upon theirs, tendering the outstanding sale consideration, within one month, from the date of the pronouncement, as, made by this Court, on 13.07.2011 upon RSA No. 201 of 2001, was rather enjoined to be meted its strictest compliance, and, conspicuously, within, one month commencing since 13.07.2011. The aforesaid non defeasance clause would obviously, upon, its infringement, hence beget the causality of the decree holders being deprived, of, the benefits of the apt concurrent affirmative pronouncement(s) recorded, upon, Civil Suit No. 156/1 of 1996.

3. Be that as it may, the decree holders, despite, a period of one month, elapsing, since, this Court making a pronouncement, upon, RSA No. 201 of 2001, neither begot compliance, with, the mandate of the non defeasance clause, nor they proceeded, to, before the period of one month hence elapsing, since the making, of, a pronouncement by this Court, upon, RSA No.201 of 2001, hence prefer an application, cast under the provisions of Section 148 of the CPC, provisions whereof stand extracted hereinafter, for hence seeking enlargement or extension, of, time as prescribed this Court, while, decreeing the plaintiffs' suit. Section 148 of the CPC reads as under:-

> "**148. Enlargement of time.-** Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Code, the court may, in its discretion, from time to time, enlarge such period, not exceeding thirty days in total, even though the period originally fixed or granted may have expired. "

Even though the mandate, occurring, in Section 148 of the CPC, does not necessarily hence oblige the decree holders, to, espouse qua benefits thereof being meted, vis-a-vis, him/them, only, upon theirs meteing, the requisite compliance, within the apt period prescribed in the operative part, of, the decree, (a) rather the coinage "even though the period originally fixed or granted may have expired", does bestow, a statutory leverage, in, the decree holders, to, even thereafter hence seek the indulgence, of, the executing Court or of the court of first instance, to grant extension or enlargement of time, for, theirs hence meteing compliance, with, the peremptory condition precedent. However, though, the coinage "even though the period originally fixed or granted may have expired", does purvey, qua the decree holders the aforesaid leverage, yet the deriving, of, benefits thereof, (a) obviously enjoins, upon, the decree holders, to, even upon theirs belatedly striving to derive the benefits thereof, to explain, the good and sufficient cause, which prevented or precluded them, to earlier avail the mandate, of Section 148 of the CPC. However, with a pronouncement, being rendered on 13.07.2011, by this Court upon RSA No. 201 of 2001, and, as aforestated, the decree holders neither tendered the balance sale consideration, within one month thereafter, nor they along with the belatedly instituted application preferred before the executing Court, for, permission to deposit, it, hence appended therewith an application, cast under the provisions of Section 5, of, the Limitation Act, earmarking therein the good and sufficient cause, which precluded or deterred them, to, earlier avail the mandate, of, Section 148 of the CPC, (b) especially within the ambit, of, the apt coinage "even though the period originally fixed or granted may have expired" occurring in Section 148 of the CPC. Despite the aforesaid lack of appending, by the decree holder, of, an application, cast under the provisions of Section 5 of the Limitation Act, with, the extant application nor hence with theirs explicating therein the good and sufficient cause, for, theirs earlier therewith, omitting, to mete compliance, with, the imperative condition precedent, for theirs hence being facilitated, to, derive the benefits of the affirmative concurrent decrees, yet the learned executing Court, granted, the apt permission to the decree holders. The aforesaid granting of permission to the decree holders, by the executing Court, is grossly improper for the reason (a), thereupon, the mandate of Section 148 of the CPC, being blatantly infringed, holistic purpose whereof, is, to ensure, of, the decree holders seeking leave of the Court, to, beget compliance, with, the apposite condition precedent, and, also in case the apposite scribed motion, qua, enlargement or extension of the time, for, hence begetting compliance, vis-a-vis, the apt condition precedent, is allowed, (b) thereupon, alone the apposite permission, on, a simplicitor application, for depositing the outstanding sale consideration, rather being affordable, (c) besides the affirmative order for depositing, the outstanding sale consideration before the executing Court , as, recorded upon the decree holders' application, being a sequel to or being preceded, by an apposite order, being, rendered within the domain of Section 148 of the CPC, and, upon a scribed motion made therebefore, (d) whereas, the learned executing Court being neither seized with any application, cast under Section 148, of the CPC nor with any application, cast under the provisions of Section 5 of the Limitation Act, being appended therewith, hence explicating therein the good and sufficient cause which prevented or precluded the decree holders/plaintiffs, to, earlier within the time prescribed, in the apposite decree, beget compliance, vis-a-vis, the apt condition precedent, (e) thereupon, the mandate of the non defeasance clause,

is blatantly infringed also when hence the decree holders were barred to derive the benefits, of, the apt affirmative concurrent decrees, (f) thereupon, it was insagacious, for the learned executing Court, to, relegate into the limbo, of, oblivion, the mandate of Section 148 of the CPC, and, to rather contrarily, hence untenably proceed, to make an affirmative order, upon an application preferred before it, by the decree Court, for depositing the outstanding sale consideration, (g) even when prior thereto, no affirmative orders were made, by the learned executing Court, upon, any apposite scribed motion, cast before it under Section 148 of the CPC, by the decree holders, nor when therewith stood appended, an application cast under Section 5 of the Limitation Act, explicating, therein the good and sufficient cause, which precluded or deterred the decree holders, to, earlier thereto hence beget compliance with the imperative condition precedent, as, prescribed in the apposite decrees. Conspicuously, when there is no automatic or deemed extension, of, the apt period, rather when a verdict vis-a-vis it, is statutory enjoined to be pronounced.

4. For the foregoing reasons, the instant petition is allowed and the impugned orders are set aside. No order as to costs. All pending applications also stand disposed of . Records be sent back forthwith.

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

Mohinder Singh (since deceased) through his legal heirs .....Petitioners/Landlord.

Versus

Gian Chand and others .....Respondents/tenant.

Civil Revision No. 48 of 2013.
Reserved on : 25th June, 2018.
Decided on : 29th June, 2018.

Himachal Pradesh Urban Rent Control Act, 1987- Section 14(2)(i), (ii)(a), (ii)(b) & (iii) - Petitioner-landlord seeking eviction of respondents-tenants on grounds of arrears of rent, subletting, change of user, alterations and additions etc. – Rent Controller dismissing eviction petition and his order upheld by Appellate Authority – Petition against – High Court found that (i) vacant land was given by petitioner to respondent No. 1 for construction of building as he himself had no means (ii) respondent No.1 was to arrange entire funds of his own towards construction (iii) respondent No.1 was also permitted to induct tenants over certain portions in built up structure (iv) money spent by respondent No.1 on construction was to be adjusted within a period of about eight years against rent received by respondent No. 1 from tenants inducted by him – High Court upheld findings of Rent Controller/Appellate Authority that it was a 'building contract' inter se petitioner and respondent No.1 – And no relationship of landlord/tenant existed between them – Petition dismissed. (Paras- 8 to 10)

For the Petitioners :	Mr. Arvind Sharma, Advocate.
For Respondents No.1 to 3:	Mr. B.S. Chauhan, Sr. Advocate with Mr. Munish Dhatwalia, Advocate.
For other respondents:	Nemo.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The landlord's (petitioner herein), petition for eviction, of the respondents herein, from, the demised premises, on the apt grounds of (a) arrears of rent, (b) subletting or

change of user, (c) and, additions and alternation, was, concurrently dismissed, by, both the learned courts below. The landlord is aggrieved therefrom, hence, has therefrom instituted, the, instant civil revision petition before this Court.

2. Briefly stated the facts of the case, are ,that Sh.Gian Chand, respondent No.1, is, a building contractor and he wanted suitable accommodation in Rohru town for the storage of building material and housing his labour. As such, he contacted the petitioner and vide agreement of 6.10.2003, agreed to construct a building for the petitioner on his land comprised in Khasra No.408 to 410 of Rohru Bazar. The entire amount on the said construction was to be spent by respondent No.1 Gian Chand. Under the said agreement, multi storeyed building was to be constructed on the said land, wherein, a godown was to be there on the first floor and two shops and godown on the second floor and two shops and godown on the second floor. Whereas third floor was to be entirely residential. Further, respondent No.1 was to pay a sum of Rs.5,000/- per month as rent to the petitioner on and w.e.f. 1.10.2003. It has been alleged that this agreement of 6.10.2003, has not been complied with by respondent No.1. In violation of the said agreement, he has constructed one shop in the first floor and sublet it to Sh. Bala Ram, respondent No.2 and his wife Smt. Hira, respondent NO.3 and they are running their business n the said shop. The three rooms immediately in the back of the said shop has been sublet by respondent No.1 to Sh. Dharminder, respondent No.4. It is further averred that respondent No.1 in breach of the said agreement, has constructed three shops, one small room and two godown on the second floor. He has sublet one such shop to Sh. Jagmohan and Sh. Govind Singh (respondent No.5 and respondent No.6 respectively) and they are running their business in the name and style of M/s J.K. Jewellers. The second shop has been let out to Sh. Jia Lal, respondent NO.7 and he is doing business in the name and style of Jia Electronic and watch service. The third shop in the second floor, has been sublet by respondent No.1 to Saleem, respondent No.8, who is running his ready made garments shop. The small room is in the possession of respondent No.1 himself and two godown-cum-rooms in the second floor have been sublet by respondent No.1 in favour of Sh. Prem Raj Tegta, respondent No.9 and Sh. Narinder Tegta, Respondent No.10. However, they have further sublet the said shops in favour of Sh. Krishan Thakur, respondent No.11, who is running a shop in the name and stuyle of M/s Krishna Tailor and Sh. Amit Kumar respondent No.12, who runs video mixing lab there. It is alleged that respondent No.1, thus has made material additions and alterations contrary to the agreement of 6.10.2003 and thereby impaired its value and utility. He has sublet the shops and rooms in favour of respondents No.2 to 12 without his written consent. Respondent No.1 has also not paid the rent at the rate of Rs.5000/- per month on and w.e.f. 1.10.2003 till 1.11.2005, total sum whereof comprised Rs.1,47,500/-, in terms of the agreement and thus, he is in the arrears thereof. Hence the petition for eviction.

3. The respondent No.1, in his reply, filed to the eviction petition, has taken preliminary objections qua estoppel and maintainability. On merits, it has been averred that the petitioner wanted to construct a building on the aforesaid land. He was not having sufficient funds with him. He approached respondent No.1, and, request him that he should construct a building from his own funds. Pursuant thereto, two affidavits, one on 5.3.2002 and another on 30.12.2002 were executed by the petitioner in his favour. Respondent No.1 constructed a multi storeyed building on the aforesaid land of the petitioner from his own funds and not a single paisa was spent by the petitioner. He had agreed vide clause 7 of the agreement of 30.12.2002 that respondent No.2 would be at liberty to rent out shops to anyone he liked and after the completion of 8 years and 4 months, the sitting tenants, were agreed to be treated as the tenants of the petitioner. When the amount on the construction exceeded three lacs, the petitioner agreed t give one shop in the upper floor and one godown in the lower storey to him on rental of Rs.3000/- per month till the amount of Rs.3 lacs was adjusted against it. The other allegations regarding his being in the arrears of rent or having made additions and alterations, in the building have been denied by him.

4. Respondents No.2 to 10 have filed a joint reply to the eviction petition, wherein, they have taken preliminary objections qua cause of action and maintainability. On merits, it has been averred that respondent No.1, has built a multi storeyed building with the consent and permission of the petitioner. Respondent No.1 took huge amount from these respondents as advance and with the help of that money, built the aforesaid construction. He inducted these respondents except respondent No.2 Sh. Bala Ram and Sh. Govind, respondent No.6, in the shops/godowns as mentioned in the petition, as tenants, on different dates vide separate rent notes. They are the lawful tenants of respondent No.1 and cannot be evicted at the instance of the petitioner. As per them, the petitioner wants to take control of the building on account of dispute with respondent No.1 and for this reason, he has filed the instant petition.

4. The landlord/petitioner herein filed rejoinder(s) to the reply(ies) of the tenants/respondents herein, wherein, he denied the contents of the reply(ies) and re-affirmed and re-asserted the averments, made in the petition.

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

1. Whether the petitioner is entitled for the arrears of rent as prayed for?OPP.
2. Whether respondent No.1 has further subletted the premises to respondents No.2 to 10 and has violated terms and conditions of agreement dated 6.10.2003 and entitled for vacant possession of the premises, as prayed for? OPP
3. Whether respondent No.1 has changed the nature of the premises, as alleged?OPP
4. Whether the respondent No.1 has done over writing over the affidavit dated 30.12.2002, as alleged?OPP
5. Whether the present petition is barred by the act, conduct and deeds of the petitioner, as alleged?OPR-1
6. Whether the petition is bad for want of better particulars?OPR-1
7. Whether the petitioner has violated the terms and conditions of the affidavits dated 5.3.2002 and 30.12.2002, as alleged?OPR-1
8. Whether the petition is not maintainable, as alleged?OPR 2 to 10.
9. Whether the petitioner has o cause of action to the present petition?OPR 2 to 10.
10. Whether the petitioner is not the landlord of the premises, as alleged? OPR 2 to 10.
11. Relief.

6. On an appraisal of evidence, adduced before the learned Rent Controller, the learned Rent Controller, hence, dismissed the petition of the landlord/petitioner herein herein. In an appeal, preferred therefrom, by, the landlord/petitioner herein, before, the learned Appellate Authority, the Appellate Authority dismissed the appeal and affirmed the order(s) recorded by the learned Rent Controller.

7. Now the landlord(s)/petitioners herein have instituted the instant Civil Revision Petition, before this Court, for hence assailing the findings recorded, in its impugned order, by the learned Appellate Authority.

8. Affidavits, respectively borne in Ex. RA and RB, and, respectively sworn on 5.3.2002, and, on 30.12.2002, by the landlord one Mohinder Singh, make a clear display qua his engaging respondent Gian Chand, as a contractor, for raising construction, of, the apt building, wherein the demised premises hence exist. The engagement hence by Mohinder Singh, of Gian

Chand as a contractor, arose, from his not possessing sufficient funds, for, carrying out the relevant construction. In pursuance to the relevant contract, borne in Ex.PW1/A, and, in pursuance to the affidavits, respectively borne in Ex.RA and in Ex.RB, one Gain Chand, respondent No.1 herein, uncontrovertedly expended money, for his raising the apposite construction, on the vacant land, owned and possessed by Mohinder Singh. The relevant part, of, the aforesaid exhibits, makes a clear display, of the amount expended by one Gain Chand, for his carrying out construction, of, a multi storeyed building, upon the vacant land, owned and possessed by one Mohinder Singh, being adjusted, within, a period of eight years and four months, commencing since 6.10.2003 whereon Ex.PW1/A, hence, stood executed. Even though, in the aforesaid exhibits, it is also specifically earmarked that a sum of Rs.3000/- per mensem, being encumbered as rent, upon, respondent No.1 one Gain Chand, (a) yet the aforesaid per mensem quantum, of rent, is enjoined therein, to be adjusted, against, a sum of Rs. 3 lacs, uncontrovertedly expended by aforesaid Gain Chand, for his carrying construction, of a building, upon, the vacant land, owned and possessed by the landlord, (b) besides a period of eight years and four months, is, spelt therein to be likely to be consumed, for hence adjusting, the, aforesaid amount, expended by one Gain Chand, for raising construction, of, a building, upon, the vacant land owned, and, possessed by Mohinder Singh. The effect(s), of, the aforesaid, prescribed mode, of, adjustment, of a sum of Rs.3 lacs, expended by one Gian Chand, for raising construction, of a building, upon, the vacant land owned and possessed by the petitioner herein, by apposite contractual encumbrance(s), upon, Gian Chand, hence embodying per mensem quantum, of, rent borne, in a sum of Rs.3000/- per mensem, (c) and, of, the apposite contractual adjustment, of, the necessary expenses, hence, imperatively consuming a period of eight years, and, four months, (d) is, qua this Court being constrained, to conclude qua hence the aforesaid contractual adjustment, of the expenses incurred, by Gain Chand, for the latter, rather raising construction of a building, upon, the vacant land owned, and, possessed by one Mohinder Singh, landlord, (e) tantamounting qua the respondent(s) being construable not to be a tenant, and, natural corollary thereof, being the apt petition, for, his eviction from the demised premises, being at this stage, not, maintainable against him. The reason being the definition, of, a tenant encapsulated, as, in clause (j) of Section 2 of the H.P. Urban Rent Control Act (hereinafter referred to as the Act), as, stands extracted hereinafter:-

> "(j) "tenant" means any person by whom or on whose account rent is payable for a residential or non residential building or rented land and includes a tenant continuing in possession after termination of the tenancy,....."

(i) unveiling qua though its including, any person legally obliged to or through an authorised agent, hence make attornments of rent, qua his landlord, and, vis-a-vis the apt residential or non-residential building. However, the deeper intrinsic nuance thereof, is, (ii) qua actual tenderings, of, rent by a person, vis-a-vis, his landlord, and, qua any residential or non-residential building, being imperative for a person or entity, being hence construable to be a tenant. However, evidently hereat, no actual tenderings or defrayments of rent nor attornment of rent, has yet being made, by one Gian Chand to one Mohinder Singh. Even if, Gian Chand had raised construction, upon, the vacant land owned and possessed by one Mohinder Singh, and, even though there are recitals borne in Exts. PW1/A, Ex.RA and in Ex. RB, qua expenses being evidently incurred, by one Gian Chand, to raise construction, upon, the vacant land owned and possessed, by one Mohinder Singh, (iii) yet with the aforesaid expenses being contractually agreed to be adjusted against rent quantified, at Rs.3000/- per mensem, hence yet the aforesaid adjustment, through, quantifications, of, a rent borne in a sum of Rs.3000/- per mensem, is, neither any actual tendering or defrayment or physical attornment, of, rent by Gian Chand, to Mohinder Singh. Consequently, Gian Chand, yet cannot, be construed to be a tenant, rather the contractual adjustment of apt construction expenses, through, rent is merely an arrangement, for liquidating the expenses incurred or for setting off, the expenses incurred, by Gian Chand, and, never acquire any, colour of Gian Chand, being construable to be a tenant. Even otherwise, the actual or physical attornment of rent, by Gian Chand, would, only occur on expiry of a period of eight years and four months, since, the execution of Exts. PW1/A, EX.RA,

and, of Ex. RB, hence, the extant petition is premature. Since, the instant petition, is cast, without yet a period of eight years and four months, hence expiring, (i) thereupon, the instant eviction petition, is, prematurely cast, (ii) whereas, it being preferable, only, after elapse of eight years and four months, since the apposite execution, of, the relevant contract inter se both, (iii) whereat the expenses, incurred for raising construction, of, a building on the vacant land owned and possessed by Mohinder Singh, would stand adjusted besides completed, (iv) and, thereafter actual or physical attornment of apt rent, would occur, inter se the tenant, and, the landlord, thereupon, reiteratedly at this stage the instant petition, is premature and as such, it is not maintainable.

11. The above discussion unfolds qua the conclusions arrived by both the learned Courts below are based upon a proper and mature appreciation of evidence on record. While rendering the apposite findings, both the learned Courts below have not excluded germane and apposite material from consideration.

12. In view of above discussion, the present petition is dismissed and the verdicts impugned hereat are affirmed and maintained. All pending applications also stand disposed of. No order as to costs.

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

M/S Bindal Engineering Works .....Petitioner.
Versus
Som Nath .....Respondent.

C.R No. 187 of 2016
Reserved on: 26.6.2018
Decided on: 29.6.2018.

Himachal Pradesh Urban Rent Control Act, 1987- Section 11- Cutting off or withholding essential supply or service – Restoration of – Entitlement – Petitioner seeking restoration of electricity to the accommodation in his possession, which the person alleged to be the landlord had snapped without sufficient cause – Rent Controller allowing petition and directing landlord to restore electricity – In appeal, Appellate Authority allowing appeal of landlord and dismissing petition on ground that relationship of landlord and tenant not established by petitioner – Revision against – High Court found that petitioner had not filed any receipt showing payment of rent either to alleged landlord or to his predecessor 'M' – Petitioner simply relying upon letter of 'M' that he (petitioner) was misusing electricity in the premises – Held, existence of relationship of landlord-tenant is a condition precedent for applicability of Section 11 of Act – Only a tenant can seek restoration of essential supply or service under Act – As petitioner failed to establish his possession as a tenant, High Court dismissed revision - Order of Appellate Authority upheld.

(Paras-6 and 7)

For the Petitioner: Mr. P.P Chauhan, Advocate.
For the Respondent(s): Mr. Satyan Vaidya, Sr. Advocate with Mr. M.P Kanwar, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J

The learned Rent Controller-1, Kasauli, District Solan, H.P., pronounced, an affirmative order, upon, an application cast before him, by the petitioner herein, under the

provisions of Section 11, of, the H.P Urban Rent Control Act, with a prayer therein, for the non-applicant/respondent, being directed, to restore the electricity connection, in the rented premises. The respondent being aggrieved therefrom, hence preferred, an appeal before the learned Appellate Authority-iii, Solan, District Solan, H.P., whereupon the latter Court, after allowing the landlord's appeal, hence, declined relief to the tenant, hence, the instant petition before this Court.

2. The petitioner/tenant would be entitled, to obtain an affirmative direction, upon, his application, cast under the provisions of Section 11 of the H.P Urban Rent Control Act, 1987, provisions whereof, are, extracted hereinafter, only upon his prima-facie establishing, by adducing cogent material, displaying qua his being a tenant, under his landlord, in, the relevant premises.

> **'11. Cutting off or withholding essential supply or service-(1) No landlord either himself or through any person purporting to act on his behalf shall, without just and sufficient cause cut off or withhold any essential supply or service enjoyed by the tenant in respect of the building or rented land let out to him.**
>
> **(2) If a landlord contravenes the provisions of sub-section (1), the tenant may make an application to the controller complaining of such contravention.**
>
> **(3) If the controller is satisfied that the essential supply or service was cut off or withheld by the landlord with a view to compelling the tenant to vacate the premises or to pay an enhanced rent, the Controller may pass an order directing the landlord to restore the amenities immediately pending the inquiry referred to in sub-section(4).**
>
> **Explanation-An interim order may be passed under this sub-section without giving notice to the landlord.**
>
> **(4) If the Controller, on inquiry, finds that the essential supply or service enjoyed by the tenant in respect of the building or rented land was cut off or withheld by the landlord without just and sufficient cause he shall make an order directing the landlord to restore such supply or service.**
>
> **(5) The Controller may, in his discretion, direct that compensation, not exceeding one hundred rupees,-**
>
> **(a) be paid to the landlord by the tenant, if the application under subsection (2) was made frivolously or vexatiously:-**
>
> **(b) be paid to the tenant by the landlord, if the landlord had cut off or withheld the supply or service without, just and sufficient cause.**
>
> **Explanation-1 In this section, "essential supply or service" includes supply of water, electricity, lights in passages and on staircases, conservancy and sanitary service.**
>
> **Explanation-II For the purposes of this section, withholding any essential supply or service shall include acts or omissions attributable to landlord on account of which the essential supply or service is cut off by the local authority or any other competent authority."**

3. The definition of, a, tenant, as, borne in Section 2, of the H.P Urban Rent Control Act, 1987, is extracted hereinafter, upon reading(s) whereof, it is concludable, qua, a person claiming tenancy, vis-a-vis, any premises, his being enjoined to prove qua his paying rent qua his landlord. Consequently, it was also imperative, for the petitioner, to, prima-facie, prove qua his tendering or liquidating rent either to one Malkiat Singh or to the respondent herein.

> **"Tenant means any person by whom or on whose account rent is payable for a residential or non-residential building or rented land and includes a**

tenant continuing in possession after termination of the tenancy, a deserted wife or a tenant who has been or is entitled to be in occupation of the matrimonial home or tenanted premises of husband, a divorced wife of tenant who has a decree of divorce in which the right of residence in the matrimonial home or tenanted premises has been incorporated as one of the condition of the decree of divorce and in event of the death of such person such of his heirs as are mentioned in Schedule-I to this Act and who were ordinarily residing with him or carrying on business in the premises at the time of his death, subject to the order of succession and conditions specified, respectively in Explanation-I and Explanation-II to this clause, but does not include a person placed in occupation of a building or rented land bits tenant, except with the written consent of the landlord or a person to whom the collection of rent or fees in a public market cart stand or slaughter house or of rents for shops has been farmed out or leased by the Municipal Corporation or a Municipal Council or a Nagar Panchayat, or a Cantonment Board."

4. The learned Rent Controller recorded, an, affirmative verdict, upon, the apposite application, on the solitary score, of, the petitioner holding possession, upon, a part of the relevant plot. However, apart therefrom, he has visibly rather omitted to record any findings, vis-a-vis, the trite factum of the petitioner herein, being a tenant, vis-a-vis, the relevant plot, tenancy whereof, being, concludable, to, arise only upon his further establishing, the trite factum, of, his paying rent, to, the respondent, or, to one Malkiyat Singh (i) Even the aforesaid finding, was, grooved merely upon the petitioner contending, of, in the year 1984, the predecessor-in-interest of one Malkiyat Singh rather letting out the premises, to, his predecessor-in-interest. Consequently, the aggrieved hence preferred an appeal, before the learned Appellate Authority, and, the learned Appellate Authority, recorded findings, in dis-concurrence, with, the verdict recorded by the learned Rent Controller.

5. The learned counsel for the petitioner, has contended, with, vigor qua with the learned Appellate Authority, in paragraph 14, of, its verdict, paragraph whereof, is extracted hereinafter, hence making a conclusion, of, the learned Rent Controller concerned, though failing to determine, the, trite factum of (a) existence, of, a validly constituted relationship, of, a landlord, and, tenant, inter-se Malkiyat Singh or the respondent, vis-a-vis, the applicant, (b) and his also omitting, to, make the relevant inquiry, (c) thereupon it was befitting, for the learned Appellate Authority, to, make an order of remand, vis-a-vis, the learned Rent Controller concerned, for, enabling the latter, to, make, an apt decision, whereas his apt failings, rather his proceeding, to, delve into the merits of the case, has, sequelled gross mis-carriage of justice.

"14. The intention of the legislature is to provide quick relief to the tenant if an essential supply or service is cut off or withheld without sufficient cause by the landlord. But it is to be remembered that the relief contemplated under the said provision is to be granted only to a tenant as defined under the Act. Hence before granting the interim relief the Court must be satisfied, prima facie not only that the essential supply or service has been cut off without sufficient cause but also that the applicant is a tenant as defined under the Act. In the present case, before passing the order, the Court issued notices to the respondent and the respondent has disputed this fact that petitioner is a tenant of Malkiyat Singh or the respondent, therefore, it was obligatory on the part of the Rent Controller to enquire this fact whether relationship of landlord or tenant exist between the parties or not."

6. However, for the reasons', to be assigned hereinafter, the aforesaid contention of the learned counsel, for the petitioner, is, rudderless given (a) with the learned Appellate Authority, though, delving into the entire material, existing on record, also, its bearing in mind,

the trite factum, of, essentiality of the petitioner rather establishing the trite rubric qua evident existence, of, a validly constituted relationship, of, landlord, and, tenant inter-se one Malkiyat Singh, and, the respondent, vis-a-vis, the petitioner, (b) AND, on his delving into therewith apt material, his also dispelling the vigor, of the reasons' assigned by the learned Rent Controller, anviled solitarily, upon, the petitioner purportedly, holding possession, on, a part of the plot, rather, is, neither an inapposite endeavor, nor, is stained with any vices of illegality or impropriety, (c) thereupon, it was reiteratedly apt for the learned Appellate Authority, to, delve, into the merits of the case, dehors the aforesaid stray pronouncement, borne in paragraph 14 supra, and, also with apt therewith material being available on record, for enabling it, to, therefrom therefrom gauge, and, fathom qua, there, existing a validly constituted relationship, of landlord and tenant, inter-se one Malkiyat Singh, and, the respondent herein, vis-a-vis, the petitioner herein, and, thereafter, hence to make both valid, and, befitting conclusions, as, find occurrence in the impugned verdict.

7. The relevant material, as, alluded, to, by the learned Appellate Authority, is, comprised, in a forged rent agreement, drawn, on 30.7.2014, and, as, purportedly executed inter-se Malkiyat Singh, and, the petitioner, (a) however, for want of placing on record, the, apposite rent receipts, and, (b) theirs making an apt display, of, the petitioner tendering rent, to Malkiyat Singh, rather constrained it, to, conclude, of there existing no validly constituted relationship of landlord, and, tenant inter-se, one Malkiyat Singh, and, the petitioner. Contrarily, the learned Rent Controller, had merely on anvil, of, a, letter dated 17.4.2016, scribed by Malkiyat Singh, and, his averring therein, the misuser of electricity, by the respondent, had hence concluded, of, there coming into being, a, relationship of tenant, inter-se, the petitioner, and, one Malkiyat Singh,(c) besides assumingly, even if the FIR registered, at the instance of Malkiyat Singh, was merely an endeavor to, falsely implicate the petitioner, also, if the letter of 17.4.2016, may be construable, qua thereunder hence tenancy being created, inter-se Malkiat Singh, and, the petitioner, and, also inter-se the petitioner, and, one Somnath, the respondent herein, yet creation of any tenancy(s) thereunder, was enjoined to be proven strictly, in consonance, with the apposite clause V(a), of Clause 2, whereas, with the apt condition precedent borne therein, vis-a-vis, the lessee, being dis-empowered to sell transfer, assign or otherwise part, with the possession qua the whole or any of the industrial plot, except, with the previous apposite permission, being granted, by the authority concerned, AND (i) since compliance therewith, stood not meted, hence, the bar constituted thereunder, is squarely attracted, against, both the lessee, and, against the petitioner, (ii) thereupon even if assumingly, the purported possession, of the petitioner, is construable, to be in his capacity, of, a sub lessee, under, the apposite lessees, yet, with the aforesaid capacity, of, the petitioner's, purportedly holding possession, of, any part, of, the relevant premises, cannot yet don color, of, any validly constituted apt statutory relationship, (iii) whereas, for the petitioner being construable, to be tenant, under, one Malkiyat Singh, and, Under Som Nath, enjoined surfacings, of evidence qua a validly constituted relationship, of, tenant and landlord, erupting inter-se them. Consequently, for the reasons, afore-stated, any invalid purported relationship, of, landlord, and, tenant inter-se the petitioner, vis-a-vis, one Malkiyat Singh, and, Som Nath, cannot, be construed to be empowering, the, petitioner, to, either claim qua his being tenant, in the relevant premises, (iv) nor he can claim, the, apposite relief, given affordings thereof, vis-a-vis him, necessarily requiring his establishing qua his being a tenant, under, his purported landlord(s).

8. In view of above, I find no merit in this petition, and, the same is accordingly dismissed, and, the impugned order is maintained and affirmed. Records be sent back. All pending applications stand disposed of accordingly.

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

Sh. Sain Ram Jhingta .....Petitioner.
Versus
Parwinder Kumar Chopra & another ....Respondents.

Cr.MMO No. 127 of 2014.
Reserved on :19th June, 2018.
Decided on : 29th June, 2018.

Code of Criminal Procedure, 1973- Sections 372 Proviso 378 (1)(a) and 482– Appeal against acquittal by victim – Forum thereof – On victim's complaint, police filing Kalandra whereupon accused was charged, tried and acquitted by trial court of offence under Section 427 of I.P.C. – Victim filing revision before Court of Additional Sessions Judge, who affirmed judgment of trial court – Petition against – Held, offence being under Section 427 of I.P.C. was bailable as well as non-cognizable, as such, Section 378(1)(a) was not attracted and appeal against acquittal, if any, was required to be filed before High Court with its leave – Revision before ASJ itself was not maintainable – Petition dismissed. (Para-9)

For the Petitioner: Mr. Ramesh Kumar Sharma, Advocate.
For the Respondents: Mr. G.C. Gupta, Senior Advocate with Ms. Meera Devi, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

Through the instant petition, cast under the provisions of Section 482 of the Cr.P.C., the complainant/petitioner herein, seeks quashing, of, the verdict recorded by the learned Additional Sessions Judge-II, Shimla, camp at Rohru, H.P., upon, Cr. Revision Petition No. RBT-7-R/10 of 14/12, whereunder, he affirmed the order of acquittal pronounced, upon, the accused, by, the learned trial Magistrate concerned.

2. Briefly stated that facts of the case are that the complainant had rented out one shop to Sh. Surender Kumar in the year 2004, on monthly rent of Rs.3000/- for one year and later on, it was increased to Rs.3500/- per month. This shop is being used as tea stall. Sh. Surender Kumar was died and the shop was being run by the accused. The accused had unauthorizedly installed two water tanks of plastic and two wash basin in his shop, which are causing damage to the building by leakage of water. The complainant requested the accused to remove the water tank and wash basin, but of no avail. The accused had also extended the roof for his wrongful gain, which is causing danger to the building. With the aforesaid averments, an application was addressed to the Magistrate concerned and it was sent to police station concerned for taking appropriate action. The police investigated into the allegations.

3. On conclusion of the investigations, into the offences, allegedly committed by the accused, a Kalandra was prepared by the Investigating Officer concerned, and, stood filed before the learned trial Court.

4. Notice of accusation, stood put, to the accused by the learned trial Court, for theirs committing an offence punishable under Section 427 of the IPC. In proof of the prosecution case, the prosecution examined five 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, they claimed innocence, and, pleaded false implication.

5. On an appraisal of the evidence on record, the learned trial Court, returned findings of acquittal upon the accused/respondent herein, for theirs purportedly committing an

offence punishable under Sections 427, of, the IPC. In a Criminal Revision Petition preferred therefrom, by the complainant/petitioner herein, before, the learned Addl. Sessions Judge concerned, the latter affirmed, the findings of acquittal, recorded in the judgment, pronounced, by the learned trial Court.

6. The complainant/petitioner herein stands aggrieved, by the findings recorded by the learned Addl. Sessions Judge concerned, bearing concurrence, vis-a-vis, the findings of acquittal, recorded qua the accused, by the learned trial Court.

7. 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.

8. The apt provisions, borne in Section 372 of the Cr.P.C., provisions whereof stand extracted hereinafter, confer a right upon the victim/complainant, to prefer an appeal against an order of acquittal, rendered by the court concerned.

> "**S. 372. No appeal to lie unless otherwise provided**-No appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code or by any other law for the time being in force:
>
> {Provided that the victim shall have a right to prefer an appeal against any order passed by the Court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation, and such appeal shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such Court.}"

The mandate of the above referred provisions, is, to be read in conjunction, with, the provisions of Section 378, of the Cr.P.C., provisions whereof stand extracted hereinafter:-

> "**378. Appeal in case of acquittal**.(1) Save as otherwise provided in sub- section (2) and subject to the provisions of sub- sections (3) and (5), the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court [2] or an order of acquittal passed by the Court of Session in revision.]
>
> (2) If such an order of acquittal is passed in any case in which the offence has been investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or by any other agency empowered to make investigation into an offence under any Central Act other than this Code, the Central Government may also direct the Public Prosecutor to present an appeal, subject to the provisions of sub- section (3), to the High Court from the order of acquittal.
>
> (3) No appeal under sub- section (1) or sub- section (2) shall be entertained except with the leave of the High Court.
>
> (4) If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court.
>
> (5) No application under sub- section (4) for the grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of six months, where the complainant is a public servant, and sixty days in every other case, computed from the date of that order of acquittal.
>
> (6) If in any case, the application under sub- section (4) for the grant of special leave to appeal from an order of acquittal is refused, no appeal from that order of acquittal shall lie under sub- section (1) or under sub- section (2)."

In clause (a) to sub section (1) of Section 378, of the Cr.P.C., an, empowerment is conferred, upon, the District Magistrate, (i) to make a direction, upon, the Public Prosecutor, to present an appeal before the Court of Sessions, against an order of acquittal, rendered by the learned trial

Court, vis-a-vis, cognizable and non bailable offence. However, clause (b) to sub-section (1) of Section 378 of the Cr.P.C., rather carves an exception, vis-a-vis, the mandate of clause (a) to sub-section (1) of Section 378 of the Cr.P.C., inasmuch, as the statutory empowerment bestowed under clause (a) of sub-section (1) of Section 378 of the Cr.P.C., *(ii)* upon, the District Magistrate, to direct the Public Prosecutor concerned, to present an appeal before the Court of Sessions, against an order of acquittal rendered by the learned trial Court, vis-a-vis, the cognizable and non-bailable offence, standing excepted, by, the mandate of clause (b) of sub-section (1) of Section 378 of the Cr.P.C. Hereat, the apt statutory exception, borne in clause (b) of sub-section (1), of Section 378, vis-a-vis, the mandate comprised, in clause (a) to sub-section (1) of Section 378 of the Cr.P.C., is, obviously construable, qua its appertaining, vis-a-vis, the mandate comprised in Section 372 of the Cr.P.C., *(iii)* given, the mandate, of, clause (a) to sub-section (1) of Section 378 of the Cr.P.C., singularly, appertaining tot he statutory empowerment, of the District Magistrate, to direct the Public Prosecutor, to present an appeal to the Court of Session, against, an order of acquittal rendered, by the learned trial Court, vis-a-vis, cognizable and non-bailable offence. In other words, when the apt portion of clause (b) of sub section (1) of Section 378 of the Cr.P.C., carrying the coinage "not being an order under clause (a)" thereof, hence carries the connotation qua obviously, and, visibly its embodying, an exception to the mandate of clause (a) of sub-section (1), of, Section 378 of the Cr.P.C., (iv) thereupon, when hereat, the District Magistrate had not directed, the Public Prosecutor, to, prefer an appeal before the court of Sessions, against, the order of acquittal pronounced by the learned trial Court, (v) thereupon, with the victim/complainant,hence, obviously falling outside the mandate of clause (a) to sub-section (1) of Section 378 of the Cr.P.C., and, when as a natural corollary thereof, with clause (b) of sub-section (1) of Section 378 of the Cr.P.C., rather operating as an exception, vis-a-vis, the mandate borne, in , clause (a) to sub-section (1) of Section 378 of the Cr.P.C., and, also its attraction hereat hence being aroused, (vi) thereupon, the concomitant effect thereof, is, dehors the State not filing, any appeal, against, the order of acquittal, before the Court of Sessions, rather it being incumbent, upon, the victim/complainant, to assail the order of acquittal, by his preferring, an appeal, before this Court, cast under clause (b) of sub-section (1) of Section 378 of the Cr.P.C. However, the victim/complainant, did not, avail the apt statutory remedy, rather he proceeded to assail the order, of acquittal, rendered by the learned trial Court, by his preferring a Criminal Revision Petition, before the court of Sessions, criminal revision petition whereof, was, not under the apt statute, either preferable nor maintainable therebefore.

9. Be that as it may, even the mandate of sub-section (3), and, its making a prescription qua preferment of an appeal, by the aggrieved, within, the ambit of clause (b) of sub-section (1) of Section 378 of the Cr.P.C., rather enjoining, the High Court, to maintain the apt appeal, only, upon its preceding thereto, granting the apposite leave, to the victim/complainant, (i) thereupon, too, the preferment of a criminal revision petition, before the learned Additional Sessions Judge concerned, against, the order of acquittal rendered by the learned trial Court, was a grossly inappropriate mode. The further sequel thereof, is, qua the institution, of, the instant petition, cast, under the provisions of Section 482 of the Cr.P.C., by the victim, before this Court, being in gross derogation of the apt statutory mandate borne, in clause (b) to sub-section (1) of Section 378 of the Cr.P.C., and, also is in blatant derogation, of, mandate of sub-section (3) of Section 378 of the Cr.P.C., rendering, it, hence, to be grossly not maintainable before this Court. Consequently, when the availment, of, the provisions, of, section 482 of the Cr.P.C., is only upon prior thereto, the apt statutory modes or mechanisms, being availed or resorted to, by the victim/complainant, whereas, the apt statutory mode(s) or mechanism(s), prior thereto, rather remaining unavailed, by the victim/complainant, thereupon, the availment, of the extraordinary residuary jurisdiction, of, this Court, by the victim/complainant, by his casting a petition under Section 482 of the Cr.P.C., is a gross abuse, of, the process of Court.

10. Dehors the above, even on merits, both the learned Courts below, have made an in-depth analysis, of the evidence on record, comprised in the testification borne, in the cross-examination of the complainant, wherein, he has acquiesced qua the factum, of, his not providing any water connection to the accused, vis-a-vis, the demised premises. Similarly, PW-2 in his

cross-examination, has acquiesced to the aforesaid factum. Furthermore, the effects, of, the aforesaid acquiescences, of, the victim/complainant, is, obviously, of, his not providing the basic amenity, of, water vis-a-vis the demised premises, hence, when availability thereof, was imperative, for, enabling the accused, to hence successfully run his commercial activity, in the demised premises, (i) hence, installation of water tanks, by the accused, cannot be, construed to be laid with any apposite mens rea, (ii) more so, when the sequelling damage, to, the building of the landlord, comprised, in the purported leakage of water , from, the water tanks onto the slab, is, dispelled by PW-4, by his, in his cross-examination, making a testification, of the apposite dampness or gathering of moisture, on the slab, rather being a sequel of heavy rains, (iii) imperatively also with the reading of the testification of PW-5, borne in his cross-examination, unveiling, of his not detecting any leakage from the water tanks, and, from the wash basin, as installed by the accused, in the tenanted commercial premises nor hence any consequent damage being caused to the building, by the accused. In aftermath, the aforesaid pronouncement made by PW-5 in his testification, does obviously torpedo, the charge framed against the accused. The effect of the aforesaid discussion is that the appreciation of evidence, by both, the learned courts below, hence, not suffering from any perversity or absurdity.

11. For the foregoing reasons, there is no merit in the instant petition, and, it is dismissed accordingly. The impugned orders/judgements are maintained and affirmed. All pending applications also stand disposed of. Records, if any, received, be sent back forthwith.

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

Yash Pal .....Petitioner.

Versus

Principal Secretary (Art, Language & Culture) to the Government of Himachal Pradesh & others ....Respondents.

CWP No. 9615 of 2013.
Reserved on : 25th June, 2018.
Decided on : 29th June, 2018.

Constitution of India, 1950- Articles 14 and 16- Promotion – Petitioner, a Surveyor with respondents No.1 to 4, challenging promotion of Respondent No.5 as Junior Engineer on ground that petitioner was regularized as Surveyor prior to regularization of Respondent No. 5 as 'draftsman' and he (petitioner) ought to have been promoted first – R & P Rules however stipulating only 'draftsman' as feeder category for promotion to post of Junior Engineer – Petitioner did not fall in the category – Held, Petitioner cannot claim promotion to post of Junior Engineer – Petition dismissed. (Para-4)

For the Petitioner:	Mr. Onkar Jai Rath, Advocate.
For Respondent No.1 & 2:	Mr. Hemant Vaid, Addl. A.G. with Mr. Vikrant Chandel and Mr. Yudhveer Singh Thakur, Dy. A.Gs.
For Respondent No.3 & 4:	Mr. K.D. Sood, Sr. Advocate with Mr. Mukul Sood, Advocate.
For Respondent No.5:	Mr. Hemant Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The petitioner herein, is, aggrieved by the impugned order, of, 13.11.2013, whereunder, the contesting respondents, hence, promoted respondent No.5, to the promotional

post, of, Junior Engineer. The grievance reared by the petitioner, is, squarely grooved, in, the factum of the apposite seniority list, carrying, depictions of respondent No.5 being senior to the petitioner, being false and erroneous, inasmuch, (i) the initial appointment of the petitioner occurring in the year 1994, (ii) whereas, the initial appointment of respondent No.5, occurring, on 24.06.1995; (iii) AND, with respondent No.5 rendering employment under the respondents w.e.f. 24.06.1995 upto 1996, and, thereafter his standing reengaged, in, the year 1998. (iv) The services of the petitioner being regularized, on 1.4.1998, (v) whereas, the services of respondent No.5 being regularised w.e.f. 1.1.2002. The apposite seniority list, is, borne in Anexure P-5. Since, both, the petitioner, and, respondent No.5., constituted, the purported apposite feeder category, of, surveyors, for theirs hence being considered, for promotion, to the promotional post of J.E., carried in, the establishment of the respondents, thereupon, it is imperative, to, mete an appropriate adjudication, vis-a-vis, the aforesaid espousal reared before this Court, by the learned counsel appearing, for the petitioner.

2. In setting at rest, the aforesaid contention, as, addressed before this Court by the learned counsel appearing, for the petitioner, it is appropriate, to allude to the reply thereto meted, by respondents No.1 to 4. In, the preliminary submissions meted by respondents No.1 to 4, vis-a-vis, the aforesaid averments, cast in the writ petition, (a) a forthright contention is reared, of the petitioner being engaged, as an extra labourer along with other daily waged person, during December, 1994, (b) and his from December, 1994 upto 31.12.1999, hence serving, as, a labourer in different capacities, like, as Beldar, Mason, Carpenter and Supervisor. Muster roll in respect thereof, are appended therewith, as Annexure R-2 to R-6. Apparently, hence, the initial appointment, of, the petitioner was never, in the capacity, of, a Surveyor. Contrarily, the initial appointment or engagement, of respondent No.5, by the contesting respondent, was visibly as a draftsman, and, engagement whereof, rather occurred, in, the Month of July, 1995, under, an appointment letter issued, in the month of July, 1995, letter whereof is appended as Annexure R-3, with, the amended reply furnished, to, the amended writ petition. Furthermore, respondent No.5, while, serving, as, a draftsman, under respondents No.1 to 4, he, also as displayed, by Annexure R-4 to R-6, held the additional charge, of, Junior Engineer.

3. The effect of the aforesaid unrebutted averments, set forth, in the reply meted, by, respondents No.1 to 4, to the apposite therewith aforesaid averments cast in the writ petition, obviously also undermine the vigour of the contention, of the petitioner, of, his since the day of his engagement, in the year 1994, by respondents No.1 to 4, his being reckonable, as senior to respondent No.5, given, the latter being subsequently, engaged, in the year 1995.

4. Furthermore, the learned counsel appearing, for the petitioner has contended with vigour (a) that even otherwise, with the services of the petitioner being regularized, against, the post, of, a surveyor in the year 1998, (b) whereas, the services of respondent No.5 being, subsequent thereto on 1.1.2002, hence regularized against the post, of, a draftsman, thereupon, on anvil of Annexure R-1, carrying the aforesaid erroneous depictions, he contends, that the petitioner, has a right superior, to respondent No.5, for his being considered, for promotion to the post of J.E. However, in making the aforesaid submission, the learned counsel, for the petitioner, has, not borne in mind the apposite portrayals, occurring in the apposite R&P Rules, comprised in Annexure R-5/14, (c) whereunder, a prescription is borne of promotion, to the promotional post, of, Junior Engineer being permissible to be singularly made, from, the apposite feeder category, comprising only of draftsman. Since, the displays occurring in Anexure R-5/14, hold their clout, at the time contemporaneous, to the promotional post of J.E., hence falling vacant, thereupon, the mandate thereof, is, required to be applied, vis-a-vis, the respective candidatures, of, respondent No.5, and, of the petitioner. Since, respondent No.5, fell in the apposite contemplated feeder category of draftsman, whereas, apparently the petitioner did not fall in the apposite, in, vogue thereat, hence feeder category, of draftsman, rather when he fell in the category, of, surveyor, (d) hence, the mere factum of the petitioner, being requlatised, in the category of surveyor, prior, to the regularization, of, respondent No.5, in, the category, of, draftsman, is, insignificant, as the category of surveyor, whereagainst, the petitioner was regularised, prior to the regularization, of, respondent No.5, in the apposite category, of,

draftsman, is, irrelevant, vis-a-vis, his aspiring for the promotional post, nor hence enables the petitioner, to, aspire to compete alongwith respondent No.5, for his being considered, for, promotion to the promotional post, of, Junior Engineer. Moreover, the petitioner has not challenged the regularization, of respondent No.5, as, a draftsman nor also he has made any challenge qua the initial appointment, of respondent No.5, as, a draftsman. The petitioner has failed to place on record any material, to, erode the efficacy, of, Annexure R-3, Annexure whereof, is, the appointment letter issued, to respondent No.5, carrying displays therein qua respondent No.5, standing, appointed as a draftsman, on a contractual basis, AND, even dehors any casting, of, any valid challenge thereto, the same is irrelevant, given, the petitioner not falling in the apposite feeder category, appertaining to the promotional post.

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

Chet Ram & another ...Review Petitioner.

IN

CWP No.2135/2016

Titled as:

Gram Panchayat Thunag ...Writ Petitioner

Versus

State of Himachal Pradesh & others ...Respondents.

Civil Review No.7 of 2018
Reserved on: 13.6.2018
Date of Decision: July 17, 2018

Code of Civil Procedure, 1908- Order 47 Rule 1- Review – When permissible and at whose instance? – Held, Review will be maintainable (i) on discovery of new and important matter or evidence which after due diligence was not within knowledge of petitioner or could not be produced by him (ii) mistake or error apparent on face of record or (iii) any other sufficient reasons – Minor mistakes of inconsequential import, is not a sufficient reason for review (iv) any person aggrieved from a decree or order can seek review thereof – Further held, A writ Court can exercise power of review on asking of a stranger, if Court finds error committed to be grave and palpable resulting into miscarriage of justice. (Paras- 20,22, 23 and 26)

Constitution of India, 1950- Article 226- Review of order passed under Article 226– Necessary parties - State Govt. re-organizing areas falling under Thunag and Bali Chowki Tehsil and creating new sub-division (Civil) and Janjehli – Gram Panchayat Thunag (Petitioner) filing writ and that review petitioner (Chet Ram) was added as a party under Order 1 Rule 10 of C.P.C. – Petition disposed of by High Court as per nature - Gram Panchayat Thunag then filing second writ and assailing Notification dated 4.1.2018 – Review petitioner seeking review of judgment dated 4.1.2018 and headquarter of SDO(Civil) at Janjehli on number of grounds – And also that there is error apparent in judgment dated 4.1.2018 as he was a necessary party to aforesaid second writ petition but was not so impleaded– Writ petitioner denying allegation and contending that Thunag was centrally located and best suited for establishment of office of SDO (Civil) – And review petitioner was not a necessary party to second writ as no relief was prayed against him – On facts, held review petitioner was not a necessary party as his no personal right was affected & adjudicated upon in earlier writ - His non-joining as a party to Writ did not give rise to patent error leading to any miscarriage of justice or affected anyone of his rights – Earlier writ was found

having been decided on basis of material placed by parties on record and not in abstract – Review Petition dismissed. (Para-41)

Jurisprudence- Ratio decidendi – What is? Held, Ratio of any decision must be understood in the background of the facts of that case and the case is only an authority what it actually decides and not what follows from it – The Court should not place reliance on decisions without discussing as to how the factual situation fits in with fact situation on the decision on which reliance is placed. (Para-17)

Cases referred:

Vidur Impex and Traders Private Limited & others v. Tosh Apartments Private Limited & others, (2012) 8 SCC 384

Kamlesh Verma v. Mayawati & others, (2013) 8 SCC 320

Shivdeo Singh & others v. State of Punjab & others, AIR 1963 SC 1909 (Five-Judge Bench

Usha Bhakti v. State of Uttar Pradesh & others, (2014) 7 SCC 663

Board of Control for Cricket in India & another v. Netaji Cricket Club & others, (2005) 4 SCC 741

M/s Thungabhadra Industries Ltd. v. The Government of Andhra Pradesh, AIR 1964 SC 1372

State of Rajasthan & another v. Surendra Mohnot & others, (2014) 14 SCC 77

Asha Ram & another v. State of H.P. & others, 2015 (Suppl.) Him L.R. 2354

Shayra Bano v. Union of India, (2017) 9 SCC 1

For the Petitioner:	Mr. Shrawan Dogra, Senior Advocate with Ms Nishi Goel, Advocate.
For the Respondents:	Mr. Sanjeev Kuthiala, Advocate, for respondent-writ petitioner.
	Mr. Ashok Sharma, Advocate General, with Mr. Ajay Vaidya, Sr. Additional Advocate General, Mr. Ranjan Sharma, & Mr. Nand Lal Thakur, Additional Advocate Generals, for the respondents-State.

The following judgment of the Court was delivered:

Sanjay Karol, ACJ

Shri Chet Ram, the present review petitioner, who was not a party to the original writ petition, seeks review of the judgment dated 4.1.2018, passed in CWP No.2135 of 2016, titled as *Gram Panchayat, Thunag vs. State of H.P. & others*, whereby Notifications, issued by the Chief Secretary to the Government of Himachal Pradesh, dated 27.06.2016 (Annexure P-9), creating a new Sub-Division (Civil), known as "Janjehli" by re-organizing certain areas of Tehsil Thunag and Tehsil Bali Chowki, and dated 21.4.2016 (Annexure P-10), creating a Sub-Tehsil at Chhatri, stand quashed.

2. Facts, leading to filing of the present Review Petition, briefly, are stated as under.

3. Gram Panchayat, Thunag, filed a writ petition, being CWP No.1272 of 2016, titled as *Gram Panchayat, Thunag & another vs. State of Himachal Pradesh & others* (referred to as the first petition). In the said petition, review petitioner filed an application under Order 1 Rule 10 of the Code of Civil Procedure (CMP No.4977 of 216), which was allowed and he was ordered to be impleaded as a party.

4. While disposing of such petition on 12.7.2016, the Court, holding the petition to be premature, took note of the averments made by the State to the effect that "*it is submitted that while opening new Govt. Offices at any place all aspects are being kept in mind and no unilateral decision or proposals are being taken. However, it is submitted that no notification has been issued by the Govt. about the functioning of Sub Divisional Office (C) at Janjehli, so far"* and *"In this context it is submitted that no notification has been passed by the Himachal Pradesh Govt. so far regarding*

opening of new SDM cum SDO (C) office at Thunag or Janjehli. So the question of unilateral decision to open this office does not arise at all".

5. Subsequently, on 10.8.2016, the very same writ petitioner filed another petition, being CWP No.2135 of 2016, titled as *Gram Panchayat, Thunag vs. State of Himachal Pradesh & others* (referred to as the second petition), assailing the notifications dated 27.6.2016, creating a new Sub-Division (Civil) at Janjehli and dated 21.4.2016, creating a Sub-Tehsil at Chhatri, which petition was allowed vide judgment dated 4.1.2018, subject matter of the present review petition.

6. Before we record and deal with the respective submissions made by the learned counsel, we deem it appropriate to notice the averments made by the parties, in their respective pleadings, so filed in the instant review petition.

7. The review petitioner sets out himself to be an agriculturist and a person actively remaining in public domain, holding several public offices. In paragraph-12 of the review petition, it stands averred that decision of the Government in establishing the office of SDO (C) at Janjehli was based on valid consideration, also with resultant effect thereof, being (a) central geographical location; (b) existence of 31 Government offices; (c) suitability for the purposes of civil administration; (d) smooth functioning of the office for about one and a half year; (e) registration of more than 400 vehicles/issuance of equal number of driving licences; (f) conduct of Assembly Elections of Seraj Constituency; (g) despite Seraj Constituency being a hilly and snowbound area, connectivity to Janjehli remained unobstructed, save and except for 3-4 hours during heavy snowfall; (h) better bus connectively; (i) topographical advantage of future expansion; (j) larger number of commercial establishments; (k) holding of District level 'Kuthah Fair' and close proximity of famous 'Shikari Devi Mata Temple', drawing tourists and devotees in huge number. Also, in paragraph-13 of the review petition, it stands averred that non-impleadment of the review petitioner as a party, in the light of order passed in the first petition itself, is an error apparent on the face of record.

8. The writ petitioner, with vehemence, controverts such averments by *inter alia* averring that there is absence of any mistake or error apparent on the face of record or reasons sufficient enough to recall the order. Also the review petitioner, who is affiliated to a particular political party, has filed the instant petition, by mis-stating facts. Writ petitioner, who is *dominus litis*, chose not to array the review petitioner as a party, since no relief was claimed against him, nor is he an affected party. Also, averments made in paragraph-12 of the review petition, are factually incorrect inasmuch as (a) Thunag, unlike Janjehli, is geographically and topographically, being centrally located, is best suited for establishment of office of SDO (C); (b) in Thunag, there are more than 171 commercial establishments; (c) there are more than 110 Government/public offices; (d) 'Shikari Mata Temple' is situate in Gram Panchayat Pakhiyar which does not form the area comprising of Gram Panchayat, Janjehli; (e) Buses to Janjehli emanate from Thunag and only pass through Janjehli; (f) Thunag is not exposed to the vagaries of the weather; (g) Decision to establish the office of SDO(C) at Janjehli was based solely on political considerations; (h) at the time of disposal of first petition, officers representing the State failed to apprise the Court of subsequent developments.

9. On 27.6.2016, the Chief Secretary to the Government of Himachal Pradesh, issued notification, carving out a new Sub-Division (Civil), known as Janjehli, by re-organizing certain areas of Tehsil Thunag and Tehsil Bali Chowki of District Mandi, Himachal Pradesh. Vide another notification dated 21.4.2016, issued by the State, one Sub-Tehsil, known as Chhatri was created. Obviously, said fact was not brought to the notice of the Court, at the time of disposal of first petition.

10. Equally opposing the review petition, State has filed its response, stating that (a) with the passing of the judgment in the second petition, State withdrew the quashed notifications, for the reason that there were agitations, *dharnas* and demonstrations by the general public; (b) on 11.2.2018, Government issued two notifications creating Sub-Tehsil at Chhatri and Sub-Division Office (Civil) with Headquarters at Thunag with the SDO (C), sitting at

Janjehli for 4 days in a month; (c) further, "..... after discussion and consensus with the representatives of the agitating public to resolve this issue and maintain balance between the demands of public of Thunag and Janjehli areas, the Government vide notification No.Per(A-IV)-B (15)-3/1979(2007)-II dated 20.3.2018, has decided that the Sub Divisional Officer (Civil) Thunag shall sit for 12 days instead of 4 days with its camp office at Janjehli in a month. ....."; and (d) "..... this decision has been taken after discussion and consensus with the representatives of the agitating public of Janjehli area in a meeting held with Hon'ble Chief Minister to resolve this issue and maintain balance between the demands of public of Thunag and Janjehli areas in which the present applicant/proposed respondent has also participated in the deliberations....**...".**

11. Evidently, averments made by the writ petitioner and the State stand un-rebutted by the review petitioner.

12. It is a matter of record that as on date, office of new Sub-Tehsil Chhatri, stands created and notified and that the headquarters of the office of the Sub-Divisional Officer (Civil) are based at Thunag, with the said officer visiting and officiating as such from Janjehli, 12 days in a month.

13. We now take note of the submissions made by Mr. Shrawan Dogra, learned Senior Counsel, appearing for the review petitioner. He submits that (a) having noticed that the review petitioner stood impleaded as a party in the first petition, the Court itself ought to have impleaded him as a party in the second petition. Only whereafter, the case should have been decided. This itself is an error apparent on the face of record, as the review petitioner was deprived of placing certain documents in opposition to the petition and also putting across his perspective to the entire controversy in issue; (b) Since interest of the review petitioner stands adversely affected, his locus is unassailable, for he is on a better footing than that of a stranger, who also can exercise such right; (c) findings returned by the Court in paragraphs 9 and 11 are as a result of misconception of facts and law. Also, same are based on incorrect and wrong appreciation of material on record.

14. Mr. Sanjeev Kuthiala, learned counsel, appearing for the writ petitioner, argues that (a) review petitioner, who is a stranger to the proceedings, in view of provisions of Order 1 Rules 3, 9 and 10 of the Code of Civil Procedure, was not required to be impleaded as a party, for he is neither a necessary nor a proper party; (b) the writ petitioner being *dominus litis,* entitled to array only necessary and interested parties, correctly chose not to implead him as a party; (c) in any event, review petitioner, claiming himself to be a public spirited person, being aware of the pendency of the second petition, chose not to exercise his right by taking steps for joining as a party, just as he had so done in the first petition; (d) there is neither any illegality nor any infirmity in the impugned judgment, for the same is based on proper and complete appreciation of material adduced on record by the parties. Otherwise also, there is no error apparent on the face of record; and (e) the averments made in the review petition are factually incorrect and that review petitioner is guilty of *suppressio veri suggestio falsi* and as such review petition deserves to be dismissed.

15. On similar lines, learned Advocate General, has made his submissions opposing the review petition. Also, pointing out the existing arrangement of the Sub-Divisional Officer (Civil) sitting both at Thunag and Janjehli on periodical basis.

16. Learned counsel have cited certain decisions in support of their case.

17. It is a settled proposition of law that ratio of any decision must be understood in the background of the facts of that case and the case is only an authority for what it actually decides, and not what logically follows from it. The court should not place reliance on decisions without discussing as to how the factual situation fits in with the fact-situation of the decision on which reliance is placed. {*Dr. Subramanian Swamy v. State of Tamil Nadu and others,* (2014) 5 SCC 75 (Para-47)}

18. While appreciating several decisions cited at the Bar or as we have ourselves researched, we have kept the same in mind.

19. The Apex Court in *Vidur Impex and Traders Private Limited & others v. Tosh Apartments Private Limited & others,* (2012) 8 SCC 384, has laid down the principles, to be born in mind, for determining who is a necessary or a property party to the lis. The said principles are culled out as under.

a. The Court can, at any stage of the proceedings, either on an application made by the parties or otherwise, direct impleadment of any person as party, who ought to have been joined as plaintiff or defendant or whose presence before the Court is necessary for effective and complete adjudication of the issues involved in the suit.

b. A necessary party is the person who ought to be joined as party to the suit and in whose absence an effective decree cannot be passed by the Court.

c. A proper party is a person whose presence would enable the Court to completely, effectively and properly adjudicate upon all matters and issues, though he may not be a person in favour of or against whom a decree is to be made.

d. If a person is not found to be a proper or necessary party, the Court does not have the jurisdiction to order his impleadment against the wishes of the plaintiff.

e. In a suit for specific performance, the Court can order impleadment of a purchaser whose conduct is above board, and who files application for being joined as party within reasonable time of his acquiring knowledge about the pending litigation.

f. However, if the applicant is guilty of contumacious conduct or is beneficiary of a clandestine transaction or a transaction made by the owner of the suit property in violation of the restraint order passed by the Court or the application is unduly delayed then the Court will be fully justified in declining the prayer for impleadment.

20. The principles, on which "any person" "aggrieved from a decree or order", can seek review thereof, is now well settled. It has to be on the basis of statutory right under Order 47 Rule 1 and that being discovery of a new and important matter or evidence, which after exercise of due diligence was not within the knowledge or could be produced at the time of passing of the order, on account of (a) some mistake or error apparent on the face of record; or (b) for any other sufficient reason.

21. These principles can be culled out as under:

(A) Source

(i) The Court of review has only limited jurisdiction circumscribed by the definitive limits fixed by the language used in Order 47 Rule 1 of the Code of Civil Procedure. {*Moran Mar Basselios Catholicos & another v. Most Rev. Mar Poulose Athanasius & others,* AIR 1954 SC 526 (Para-32) (Three-Judge Bench}.

(ii) Review proceedings are not by way of an appeal. {*Meera Bhanja (Smt.) v. Nirmala Kumari Choudhury (Smt.),* (1995) 1 SCC 170 (Para-8) (Two-Judge Bench)}.

(iii) Review is a creation of statute. { *Patel Narshi Thakershi & others v. Shri Pradyumansinghji Arjunsinghji,* (1971) 3 SCC 844 (Three-Judge Bench); and *Lily Thomas v. Union of India,* (2000) 6 SCC 224 (Para-52) (Two-Judge Bench) (Para-52)}.

(B) Grounds

(iv) Review is permissible only when circumstances of "substantial and compelling character" make it necessary to do so. {*Sajjan Singh & others v. State of Rajasthan & others,* AIR 1965 SC 845 (Para-21) (Five-Judge Bench); *Lily Thomas (supra)*; {*M/s Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi,* (1980) 2 SCC 167 (Para-8) (Three-Judge Bench)}.

(v) Review is permissible only where there is glaring omission and patent mistake and like grave error has crept in by judicial fallibility. {*Northern India Caterers (supra)* (Para-8)}.

(vi) Error apparent on the face of record has to be decided on the facts of each case, for an erroneous decision, by itself, does not warrant review. {*Akhilesh Yadav v. Vishwanath Chaturvedi & others,* (2013) 2 SCC 1 (Para-1) (Two-Judge Bench); and *Dr. Subramanian Swamy v. State of Tamil Nadu and others,* (2014) 5 SCC 75 (Para-52) (Two-Judge Bench)}.

(vii) Error apparent is not which has to be fished out and searched. It must be an error of inadvertence. The power of review can be exercised for correction of a mistake but not to substitute a view. The mere possibility of two views on the subject is not a ground for review. {(*Lily Thomas (supra)* (Para-58)}.

(C) Error/Mistake

(viii) In *Hari Vishnu Kamath v. Ahmad Ishaque & others,* AIR 1955 SC 233 (Seven-Judge Bench), the Court expounded as to what can be an "error of law", "apparent on the face of record", in the following terms (Para-23):

> "that no error could be said to be apparent on the face of the record if it was not self-evident, and if it required an examination or argument to establish it. This test might afford a satisfactory basis for decision in the majority of cases. But there must be cases in which even this test might break down, because judicial opinions also differ, and an error that might be considered by one Judge as self -evident might not be so considered by another. The fact is that what is an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case." (Emphasis supplied)

(ix) "Mistake apparent form the record" is different from "an error apparent on the face of record". {(*ITO v. Ashok Textiles Ltd.,* AIR 1961 SC 699) (Three-Judge Bench)}.

(x) The 'mistake apparent on the face of record' must be obvious and patent. It must not be such, which can be established by long-drawn process of reasoning. {*T.S. Balaram v. Volkart Bros,* (1971) 2 SCC 526 (Para-5) (Two-Judge Bench)}. Such mistake should be "quite obvious" {*Commissioner of Central Excise, Balapur, Mumbai v. RDC Concrete (India) Private Limited,* (2011) 12 SCC 166 (Para-21) (Two-Judge Bench)}.

(xi) There is a difference between a mere erroneous decision and a decision which could be characterized as vitiated by 'error apparent'. {*Sasi (Dead) through Legal Representatives v. Aravindakshan Nair & others,* (2017) 4 SCC 692 (Two-Judge Bench)}.

(D) Sufficient Reason

(xii) "Any other sufficient reason" must mean a reason sufficient on grounds, at least analogous to those specified in the Rule. {*Moran Mar Basselios Catholicos (supra)* (Para-32)}.

(xiii) Non-existence of a fact, leading to passing of an order, resulting into miscarriage of justice, is a reason sufficient enough for reviewing the same. {(*Lily Thomas (supra)*}.

(xiv) "Sufficient reason" would include misconception of fact or law by a Court or even an advocate. {*Board of Control for Cricket in India & another v. Netaji Cricket Club & others,* (2005) 4 SCC 741 (Para-90) (Two-Judge Bench)}.

(E) Power

(xv) While rectifying a mistake, an erroneous view of law or a debatable point cannot be decided. So also, incorrect application of law can also not be corrected. {*ITO v. Ashok Textiles Ltd.,* AIR 1961 SC 699) (Three-Judge Bench}.

(xvi) Discovery of new material to be considered with great caution and order or review should not be granted very lightly. *{Dr. Somayajulu, Secretary v. Attili Appala Swamy and others,* 2015) 2 SCC 390) (Para-20) (Three-Judge Bench)}. In a review petition, Court is not to reappreciate the evidence and reach at a different conclusion, even if it is so possible. {*Kerala SEB v. Hitech Electrothermics & Hydropower Ltd.,* (2005) 6 SCC 651 (Para-10) (Two-Judge Bench)}.

(xvii) Review is not rehearing of original matter. *{Jain Studios Ltd. v. Shin Satellite Public Co. Ltd.,* (2006) 5 SCC 501 (Para-11) (Single-Judge)(Chamber Judge)}.

22. We notice that the aforesaid principles also stand crystallized by the Apex court in *Kamlesh Verma v. Mayawati & others,* (2013) 8 SCC 320, as under:

"20. Thus, in view of the above, the following grounds of review are maintainable as stipulated by the statute:

20.1 When the review will be maintainable:-

(i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the petitioner or could not be produced by him;

(ii) Mistake or error apparent on the face of the record;

(iii) Any other sufficient reason.

The words any other sufficient reason has been interpreted in Chhajju Ram vs. Neki, 1922 AIR(PC) 112 and approved by this Court in Moran Mar Basselios Catholicos vs. Most Rev. Mar Poulose Athanasius & Ors., 1955 1 SCR 520, to mean a reason sufficient on grounds at least analogous to those specified in the rule. The same principles have been reiterated in *Union of India vs. Sandur Manganese & Iron Ores Ltd. & Ors.*, (2013) 8 SCC 337.

20.2 When the review will not be maintainable:-

(i) A repetition of old and overruled argument is not enough to reopen concluded adjudications.

(ii) Minor mistakes of inconsequential import.

(iii) Review proceedings cannot be equated with the original hearing of the case.

(iv) Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.

(v) A review is by no means an appeal in disguise whereby an erroneous decision is re-heard and corrected but lies only for patent error.

(vi) The mere possibility of two views on the subject cannot be a ground for review.

(vii) The error apparent on the face of the record should not be an error which has to be fished out and searched.

(viii) The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition.

(ix) Review is not maintainable when the same relief sought at the time of arguing the main matter had been negatived."

23. The aforesaid principles stand laid down, in the backdrop of different legislations.

24. However, we are of the considered view that in exercise of our power under Article 226 of the Constitution of India, nothing precludes us from exercising the power of review, which inheres in every Court of plenary jurisdiction, to prevent miscarriage of justice or to correct grave and palpable errors committed by it (Para-8). {(*Shivdeo Singh & others v. State of Punjab & others,* AIR 1963 SC 1909 (Five-Judge Bench)}.

25. We may not be misunderstood to mean that the principles culled out (supra), are not required to be adhered to. Definitely, exercise of power, under Article 226 of the Constitution, must be within the principles so enunciated {*Usha Bhakti v. State of Uttar Pradesh & others,* (2014) 7 SCC 663 (Two-Judge Bench)}, but then, what is important and significant is as to whether the judgment, subject matter of review, inter alia, has resulted into miscarriage of justice or not.

26. It is in this backdrop, we proceed to deal with the contentions raised by the learned counsel, clarifying that we have not gone into the question as to whether the provisions of Order 1 of the Code of Civil Procedure would be applicable or not. We also clarify that we are in agreement with the submission made by Mr. Shrawan Dogra, Senior Advocate, that even on the asking of a stranger, a Writ Court can exercise power of review, if the Court finds the error committed to be grave, palpable, resulting into miscarriage of justice.

27. Also, it is in this backdrop, we notice, that the Apex Court in *Board of Control for Cricket in India & another v. Netaji Cricket Club & others,* (2005) 4 SCC 741, was dealing with a case where conduct of the party weighed heavily, for the statement made by the counsel, having material bearing on the outcome of the case, was not brought to the notice of the Court, and the Court laid down the principles in Para-90 of the Report, as under:

> "90. Thus, a mistake on the part of the court which would include a mistake in the nature of the undertaking may also call for a review of the order. An application for review would also be maintainable if there exists sufficient reason therefor. What would constitute sufficient reason would depend on the facts and circumstances of the case. The words 'sufficient reason' in order 47, Rule 1 of the Code is wide enough to include a misconception of fact or law by a court or even an advocate. An application for review may be necessitated by way of invoking the doctrine "*actus curiae neminem gravabit*"."

28. However, in an earlier decision, the Apex Court in *M/s Thungabhadra Industries Ltd. v. The Government of Andhra Pradesh,* AIR 1964 SC 1372, observed as under:

> "What, however, we are now concerned with is whether the statement in the order of September 1959 that the case did not involve any substantial question of law is an "error apparent on the face of the record". The fact that on the earlier occasion the court held on an identical state of facts that a substantial question of law arose would not per se be conclusive, for the earlier order itself might be erroneous. Similarly, even if the statement was wrong, it would not follow that it was an "error apparent on the face of the record", for there is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterised

> as vitiated by "error apparent". A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. We do not consider that this furnishes a suitable occasion for dealing with this difference exhaustively or in any great detail, but it would suffice for us to say that where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out."

29. The first issue, which arises for consideration, is as to whether the review petitioner was a necessary party before the Court or not. In our considered view, not so, for as we notice, from the record, that even in the first petition, he had simply filed an application for impleadment and the petition was disposed of, not on the basis of material placed or assistance rendered by him, but on the basis of stand taken by the State. We are of the considered view that simply because he stood impleaded as a party in the first writ petition, in the order 12.7.2016, disposing of such petition, that fact *ipso facto* would not confer any right of impleadment upon him as a party, for no personal right of the review petitioner stood affected or adjudicated. In any event, it is not the case of the review petitioner that the State had colluded with the writ petitioner or that it had not adequately protected the interests of the residents of the area. Also, no personal right of the review petitioner stands affected.

30. As we notice from the material placed on record by the writ petitioner as also the review petitioner, it cannot be said the finding returned by this Court, by not impleading the review petitioner as a party, gives rise to a patent error, which in turn has caused miscarriage of justice or affected anyone of his rights. Review petitioner claims himself to be a public spirited person, for he has remained in public life. It is not that the second writ petition came to be filed or decided overnight. This petition was filed on 10.8.2016 and decided only on 4.1.2018. He does not claim that he was not aware of pendency of the same. Also, it is not his pleaded case that people of the area, including him, had no means of knowing about such fact. The writ petitioner had been repeatedly pursuing the matter, resisting setting up of the office of SDO(C) at Janjehli, desiring the same to be set up at Thunag, which fact, the review petitioner was totally aware of, yet he chose not to take steps of getting himself impleaded as a party just as he had chosen to do so in the first petition.

31. As a Court of original jurisdiction (Writ Court), we called for the record of the first petition and noticed that the review petitioner had simply filed a four-page application, seeking impleadment as a party. No pleadings or material, of any value, was placed on record by him. Such petition came to be disposed of on the basis of averments made by the State in its response, which fact we have already taken note of, by reproducing the judgment rendered in the first petition.

32. Under these circumstances, review petitioner, who perhaps was waiting in the wings, cannot be allowed to argue that he was a necessary or a proper party and that he ought to have been impleaded by the writ petitioner in the writ petition.

33. It is true that the power of review is statutory in nature. Equally true that it is based on the parameters prescribed under the procedural law. But then, in our considered view, we repeat, that there is an exception to this principle and that being the power of review exercised by the High Court in a writ jurisdiction, which cannot be subjected to procedural law, for what is required to be seen is as to whether justice is met or not and the order passed has resulted into miscarriage of justice or not, and that ex-facie there is error, which is apparent on the face of record.

34. State, which was represented by the learned Advocate General, had filed its response on 28.10.2016. The Court, only after appreciating the entire material on record, returned its findings. Here, we may clarify that we are not impressed with the submissions made at the Bar. Jurisprudentially, we may only observe that primary jurisdiction of this Court, in exercising power of review, cannot be subjected to procedural laws, for such power is inherent

and emanates from the plenary jurisdiction under the Constitution. The principle stands clearly expounded by the Apex Court in {*Shivdeo Singh (supra)* and *Lily Thomas (supra)* (Para-52 – 'law has to bend before justice'; and *State of Rajasthan & another v. Surendra Mohnot & others,* (2014) 14 SCC 77 (Two-Judge Bench)}, which unambiguously are clear on this aspect and it is in this backdrop that we have arrived at the conclusion that it is not open for the review petitioner to urge that he was a necessary or proper party to the proceedings and, as such, it cannot be said that the decision rendered in his absence is illegal, erroneous, requiring reconsideration.

35. We are of the considered view that findings returned in Paras 9 & 11, rendered in the second petition, are not in abstract. They are based on material placed on record by the parties, i.e. the writ petitioner and the State. The State admitted (in para-3 of the response) that "various representations were received to open the new Sub Division at Thunag and not at Janjehli" and there were "various office building situated at Thunag". Also, people had been representing since the year 2015.

36. It is in this backdrop, we are not inclined to agree with the submissions made by the learned Senior Counsel, for such findings were not returned on the basis of mis-conception of fact or law by the Court, or for the reasons sufficient enough, entitling the review petitioner to seek review of the judgment in question. We have carefully gone through the pleadings of the second petition and our findings are purely based thereupon, which stands fully appreciated.

37. We have fully considered and appreciated the material placed on record in the present petition, and only thereafter have arrived at our conclusions.

38. Contention that to choose situs for setting up office of the SDO (C) is the sole prerogative of the State is not disputed, but then we have already held, if such action does not meet the test laid under Article 14 of the Constitution of India, Writ Court, unhesitatingly, on the asking of the writ petitioner, would quash the same. {*Asha Ram & another v. State of H.P. & others,* 2015 (Suppl.) Him L.R. 2354}

39. What is illegal, irrational and arbitrary is now well settled. Any decision affecting the public at large has to be based on sound principles of law. {*Shayra Bano v. Union of India,* (2017) 9 SCC 1(Constitution Bench)}.

40. We may record the stand taken by the State, as re-affirmed by the learned advocate General, that in terms of the existing arrangement, SDO(C) posted at Thunag shall, for 12 days, discharge his duties sitting at Janjehli.

41. Thus, in our considered view, there is neither any mistake nor error apparent on the face of record or sufficient reason so as to take in its sweep, a ground analogous to those specified in the statutory provisions. There is no material error, manifest on the face of the order, undermining its soundness or resulting into miscarriage of justice. Review is not an appeal in disguise, entitling the party to be reheard, simply because the party wants a decision to be otherwise. The review petition, being devoid of merit, is dismissed.

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

Sahil Prashar .....Petitioners.

Versus

State of H.P. & Ors. .....Respondents.

CWP No. 1414 of 2018.
Decided on: 3.7.2018.

Constitution of India, 1950- Articles 14, 15 and 226- Admission to Medical Colleges – State quota seats – Regulations requiring that the candidate should have passed atleast two out of four

examinations from Schools situated within State of Himachal Pradesh for admission against State quota seats – Petitioner though 'bonafide Himachali' had not passed requisite examinations from Schools in Himachal Pradesh - Petitioner applying for admission to MBBS/BDS courses against State quota seats – Application rejected by the University – Petition against – Petitioner assailing aforesaid regulation as unreasonable and arbitrary – Held, By prescribing condition of having qualified atleast two examinations from 1995-96 onwards, an effort has been made to ensure that students of the State get a chance of seeking admission in such courses – State had taken conscious decision after taking into consideration various aspects like topography of State, social status, financial conditions of the people and educational facilities available in the State – Condition not unreasonable – Petition dismissed - **Shivam Sharma Vs. State of H.P. & ors., CWP No. 1353 of 2018** referred to and relied upon. (Paras- 6 and 11)

Cases referred:

Gagan Deep vs. State & connected matters, 1996(1) Sim. L. C. 242

Dr. Kriti Lakhina & ors. Vs. State of Karnataka & ors., 2018 SCC Online SC 324

For the petitioner:	Mr. Rajiv Rai, Advocate.
For the respondents:	Mr. Ashok Sharma, AG with Mr. Narinder Guleria and Mr. Vikas Rathore, Addl. AGs for respondents No. 1 & 2. Mr. Neel Kamal Sharma, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Justice Dharam Chand Chaudhary, J (Oral).

Counseling for MBBS/BDS courses consequent upon declaration of the result of the National Eligibility-cum- Entrance Test (UG-2018) (NEET-UG-2018) is being conducted these days. The petitioner allegedly a bonafide Himachali, however, having not passed two examinations out of the four indicated below item No. IV (A) 1 under the head ***"Eligibility and Qualifications"*** on declaration of the result has applied online vide application Annexure P-8 for admission against the State Quota seats i.e. 85%. His application has, however, been rejected and he has not been called for counseling. He has, therefore, filed the present writ petition on the grounds inter alia that the condition of passing two examinations out of 4 from the Schools situated within the territory of Himachal Pradesh is not only unreasonable, illegal and discriminatory but un-Constitutional also. According to him, when the State is not able to provide employment to all its citizens within the territory of Himachal Pradesh, making provision of such criteria is arbitrary and illegal. According to him, under compulsion he had to undergo his studies in 8th and 10th standard from Sofia Convent School situated on Chandigarh-Shimla road at Kalka in Haryana. He passed his 10+1 and 10+2 examinations from DAV Senior Secondary School, Panchkulla, H.P. His father was unemployed and as such, the family including the petitioner was dependent upon his grandfather, initially a Hawker at Panchkulla, Kalka and Parwanoo and subsequently started running General Merchant Shop in rented accommodation at Kalka. The family for some time resided at Kalka and sometimes in Parwanoo in rented accommodation. His father has now purchased a house at Parwanoo in the year 2013. The said house could only be furnished during the year 2015-16 and now the family has finally shifted there. His father was appointed as B.Ed. teacher on contract basis in the year 2003 and posted, as such, at Jogindernagar in District Mandi. The family including the petitioner could not be shifted there in view of meager salary of his father. Therefore, it is under these circumstances, the petitioner did his schooling from the schools situated at Kalka and Panchkulla (Haryana).

2. The application registered as CMP No. 5791 of 2018 has been filed along with the Writ Petition for a direction to the respondents to allow the petitioner to appear for counseling, however, in view of the judgment of this Court in ***Gagan Deep vs. State*** & connected matters,

1996(1) Sim. L. C. 242 and on hearing learned counsel representing the petitioner and learned Advocate General for the respondent-State, the prayer for interim relief was declined.

3. Since the judgment of this Court in Gagan Deep's case (supra) has attained finality and as nothing to the contrary has been brought to our notice by learned counsel representing the petitioner, therefore, the respondents have not intended to file response nor the same is required.

4. On hearing learned counsel for the petitioner at length and also Sh. Ashok Sharma, learned Advocate General assisted by Sh. Narinder Guleria and Sh. Vikas Rathore, learned Addl. Advocate Generals, it would not be improper to conclude that the petitioner is not entitled to the relief sought in this writ petition for the reason that the condition of two examinations was introduced as one of the eligibility conditions by the respondents long back during the academic session 1994-1995. Such eligibility criteria under item No. IV (A) 1 in the Prospectus (Annexure P-5) for the academic session 2018-19, reads as follows:

> "**IV. ELIGIBILITY AND QUALIFICATIONS**
>
> (A) For State Quota Seats :
>
> 1. Children of Bonafide Himachali/Domicile/Himachal Govt. employees and employees of autonomous bodies wholly or partially financed by the Himachal Pradesh Government who qualified the NEET-UG-2018 will only be eligible to apply ONLINE for admission to MBBS/BDS Courses through counselling in Government Medical/Dental Colleges including State Quota seats in Private un-aided Medical/Dental Colleges situated in Himachal Pradesh. They should have passed at least two exams out of the following examinations from the recognized schools or colleges situated in the State of Himachal Pradesh and affiliated to ICSE/CBSE/H.P. Board of School Education or equivalent Boards/Universities established by law in India.
>
> (a) Middle or equivalent
>
> (b) Matric or equivalent
>
> (c) 10+1 or equivalent
>
> (d) 10+2 or equivalent"

5. A Division Bench of this Court in Gagandeep's case cited supra has held as under:

> "18. Looking to the material placed before us and the contentions of the learned Counsel for the parties, it is clear that students studying in the Schools, Institutions, Colleges situated in the State of Himachal Pradesh form a separate class while the students falling to the category of the petitioners, form a distinct class. Contention that there are many good Schools in Shimla and a few other places with good educational facilities, is hardly convincing. Assuming that there are some such schools, they are far behind the schools outside the State. Moreover, they can be counted on finger tips. Except for bare contention, no material has been placed before us to assess the standard of education and the percentage of appearance and selection to the Medical Courses. A few schools cannot be made the basis for assuming that the standard of education in all the School, Institutions and Colleges in the State is as high as in Schools, Institutions and Colleges located outside the State. What is the requirement of the State which maintains the Medical Colleges and what should be the sources of recruitment for admission, is primarily for the State to decide. The eligibility criteria has to be the result of the past experience and the requirement of the State. Of course, the State action should not transgress.

19. Second facet of this question is whether laying down of this kind of criteria is constitutionally permissible; whether it is arbitrary and unjust causing hardship to the petitioners? We answer all these questions against the petitioners. By now, such kind of reservations have been held constitutionally permissible in series of decisions by the apex Court and this Court. Similarly, question of hardship or that the State could have extended this kind of benefit to the candidates passing these examinations from the Institutions and Colleges situated in Himachal Pradesh in a different and better way, do not make the provision unconstitutional, unjust or harsh.

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27. The third facet for sustaining the eligibility is equally efficacious when it is pointed out by the respondents that although quite a large number of persons have qualified medical degree from the State Medical College, yet people are deprived of medical facilities in rural and far flung areas of the State since the doctors do not want to go to such areas and they flee the State to avoid postings in such areas. Although bond amount has been increased, yet that has not given the desired results. State Government is spending lacs of rupees on a student for doing the medical course but the amount is going into the drawings since they are not prepared to remain in the State and serve the people.

28. The fourth facet is about the arbitrariness, un-justness and hardship being caused to the petitioners by the eligibility criteria. Having up-held the institutional preference and accepting the submission of the learned Advocate General that the candidates studying in Schools, Colleges and Institutions situated in the State of Himachal Pradesh form a separate category and are entitled to protection to enable the them to secure and admissions in the medical institutions as compared to the petitioners and similarly placed candidates falling in different group with better facilities and chances to appear in the institutions located in the States they are studying, nothing much remains for examination of this question, more particularly, in view of the latest decision of the apex Court reported in of Anant Madaan Vs State of Haryana and others,(1995)2 SCC 135 upholding reservation of 85 percent seats to MBBS/BDS courses on the basis of candidate's education for preceding three years in the state and rejecting the contention of the reservation being arbitrary, discriminatory and causing hardship. It is necessary to quote paras 8 and 9 of this judgment:

> "8.In view of the above facts, we have to consider whether the condition requiring a candidate to have studied in 10th and 10+2 classes in a recognized Institute in Haryana, can be considered as arbitrary or unreasonable. It is by now well settled that preference in admissions on the basis of residence, as well as institutional preference, is permissible so long as there is no total reservation on the basis of residential or institutional preference. As far back as in basis 1955, in the case of D.P Joshi Vs. State the of Madhya Bharat, this Court making a distinction between the place of birth and residence, upheld a preference on the basis of residence in educational institutions."
>
> "9. In the case of ***Jagdish Saran (Dr.)*** v. ***Union of India***, this Court reiterated that regional preference or preference on the ground of residence in granting to medical colleges was not arbitrary or

> unreasonable so long as it was not a wholesale reservation on this basis. This Court referred to various reasons of why such preference may be required. For example, the residents of a particular region may have very limited opportunities for technical education while the region may require such technically qualified persons. Candidates who were residents of that region were more likely to remain in the regions and serve their regions if they were preferred for admission to technical institutions in the State, particularly medical colleges. A State which was short of medical personnel would be justified in giving preference to its own residents in medical colleges as these residents, after qualifying as doctors, were more likely to remain in the State and give their services to their State. The Court also observed that in the case of women students, regional or residential preference may be justified as their parents may not be willing to send them outside the State for medical education. We, however, need not examine the various reasons which have impelled this Court to uphold residential or institutional preference for admission to medical colleges. The question is settled by the decision this Court in Pradeep Jain (Dr) Vs. Union of Inida. This Court has observed in that judgment: (SCR p. 981: SCC p. 687, para 19):
>
> We are, therefore, of the view that certain percentage of reservation on the basis of residence requirement may legitimately be made in order to equalize opportunities for medical admissions on a broader basis and to bring about real and not formal, actual and not merely legal, equality. The percentage of reservation made on this count may also include institutional reservation for students passing the PUC or pre-medical examination of the same university or clearing the qualifying examination from the school system of the educational hinterland of the medical college in the State....."
>
> This Court held in that case that reservation to the extent of 70%, on this basis would be permissible. This percentage of reservation was subsequently increased to 85% by this Court in the case of Dinesh Kumar (Dr) Vs. Motilal Nehru Medical College. This Court in that case directed an entrance examination on an all-India basis for the remaining 15% of seats."
>
> Consequently, all the submissions raised by the petitioners on this aspect of the case are rejected."

6. Even in the order dated 29.6.2018 passed by this Court in CWP No. 1353 of 2018 titled Shivam Sharma Vs. State of H.P. & ors and its connected matters, the following observations qua this aspect of the matter has been made:

> "5. The respondent-State, while prescribing the eligibility criteria for seeking admission for MBBS/BDS courses in the State from 1995-96 onwards, had taken a conscious decision after taking into consideration various aspects like topography of the State, social status, financial and economic conditions of the people and educational facilities had ensured that the students from the State get a chance of seeking admission in such courses. An effort has been made to bring them to compete with the students having studied in better institutions outside the State with better facilities and exposure. The fact that the students of this State were not getting medical education outside the State and as regards medical/dental colleges situated in the State, it is the students belonging to and studied in other States/Universities and Colleges managed to get admissions in MBBS/BDS courses in the State, therefore, the condition of passing at least two examinations out of four at school level was prescribed long back in the year 1995-96. The decision so taken was held as legal and valid even by a Division

Bench of this Court also in ***Gagandeep vs. State of H.P.*** and connected matters, (***1996) 1 S.L.C. 242.*** .....

6. The provisions qua prescribing the condition of passing two examinations out of four from the schools situated in the State of Himachal Pradesh except for in CWP No. 1414 of 2018 is not under challenge in these writ petitions and rightly so because such eligibility criteria has been held legal and valid by a Division Bench of this Court in Gagandeep's case (supra)."

7. The law so laid down has attained finality as learned counsel representing the petitioner has failed to bring to our notice any decision contrary to the decision of this Court in Gagan Deep's case, cited supra.

8. In ***Dr. Kriti Lakhina & ors. Vs. State of Karnataka & ors., 2018 SCC Online SC 324,*** the following criteria for seeking admission in Post Graduate Courses was under challenge:

"2.1. No candidate shall be admitted to a professional educational institution unless the candidate possesses the following qualifications or eligibility to appear for the entrance test namely:

(a) He is a citizen of India who is of Karnataka origin and has studied MBBS/BDS degree in a medical/dental college situated in Karnataka or outside Karnataka, and affiliated to any university established by law in India recognized by Medical Council of India and the Government of India."

9. The above criteria was quashed and set aside by the Hon'ble Apex Court being violative of Article 14 of the Constitution of India with the observation that the same if allowed to remain in force and made applicable for seeking admission to **Post Graduate Medical Courses** would amount to compromise with the excellence besides being detrimental to the interest of the Nation also. The relevant extract of this judgment reads as follows:

"13. Relying on the aforesaid reasons in Jagadish Saran v. Union of India, a three-Judge Bench of this Court in Pradeep Jain case held that excellence cannot be compromised by any other consideration for the purpose of admission to postgraduate medical courses such as MD/MS and the like because that would be detrimental to the interests of the nation and therefore reservation based on residential requirement in the State will affect the right to equality of opportunity under Article 14 of the Constitution...." In Magan Mehrotra v. Union of India and Saurabh Chaudri v. Union of India also, this Court has approved the aforesaid view in Pradeep Jain case that excellence cannot be compromised by any other consideration for the purpose of admission to postgraduate medical courses such as MD/MS and the like because that would be detrimental to the interests of the nation and will affect the right to equality of opportunity under Article 14 of the Constitution.

11. Mr Mariarputham is right that in Saurabh Chaudri v. Union of India this Court has held that institutional preference can be given by a State, but in the aforesaid decision of Saurabh Chaudri, it has also been held that decision of the State to give institutional preference can be invalidated by the court in the event it is shown that the decision of the State is ultra vires the right to equality under Article 14of the Constitution. When we examine sub-clause (a) of Clause 2.1 of the two Information Bulletins, we find that the expression "A candidate of Karnataka origin" who only is eligible to appear for entrance test has been so defined as to exclude a candidate who has studied MBBS or BDS in an institution in the State of Karnataka but who does not satisfy the other requirements of sub-clause (a) of Clause 2.1 of the Information Bulletin for PGET-2014. Thus, the institutional preference sought to be given by sub-clause

(a) of Clause 2.1 of the Information Bulletin for PGET-2014 is clearly contrary to the judgment of this Court in Pradeep Jain case.

12. To quote from para 22 of the judgment in Pradeep Jain case: (SCC p. 693) "22. ... a certain percentage of seats may in the present circumstances, be reserved on the basis of institutional preference in the sense that a student who has passed MBBS course from a medical college or university, may be given preference for admission to the postgraduate course in the same medical college or university...."

13. Sub-clause (a) of Clause 2.1 of the two Information Bulletins does not actually give institutional preference to students who have passed MBBS or BDS from colleges or universities in the State of Karnataka, but makes some of them ineligible to take the entrance test for admission to postgraduate medical or dental courses in the State of Karnataka to which the Information Bulletins apply."

10. The Apex Court, therefore, has emphasized that for seeking admission to Post Graduate Medical Courses any such criteria should not be followed. The present, however, is not the case of seeking admission to Post Graduate Medical Courses and rather in MBBS/BDS courses. Therefore, the ratio of this judgment is hardly of any help to the case of the petitioner.

11. Being so, since the petitioner has not passed two examinations out of the four as indicated hereinabove from the schools situated in the State of Himachal Pradesh and is also not entitled to any exemption under clause 2 & 3 of item No. IV (A), therefore, he cannot seek admission against State quota seats i.e. 85%. The writ petition, being devoid of any merits, as such, is dismissed so also the pending application(s), if any.

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

State of Himachal Pradesh .....Appellant

Versus

Rattan Lal & others .....Respondents

Cr. Appeal No. 409 of 2010
Decided on : 03.07.2018

Indian Penal Code, 1860- Sections 323, 427, 452, 504 & 506/34- Appeal against acquittal – Accused were tried and acquitted by Trial Court on allegations that they trespassed in house of 'S' made assault and caused simple injuries to her and her daughter-in-law 'K' – State submitting that acquittal is based on wrong appreciation of evidence- On facts, High Court found statements of 'S' and 'K' contradictory to each other on material particulars – Presence of eye-witnesses 'R' and 'B' on spot at the time of occurrence doubtful - There was previous enmity between parties and cases were already pending in Courts – Even eye-witnesses had dispute with accused 'R' regarding path and that was also pending before SDM – Held, on basis of such evidence Trial Court was justified in recording judgment of acquittal against accused – Appeal dismissed – Acquittal upheld. (Paras- 9 to 15 & 17)

Case referred:

C. Magesh and Ors. v. State of Karnataka, (2010) 5 SCC 645

For the Petitioner: Mr. S.C. Sharma and Mr. Dinesh Thakur, Additional Advocate Generals with Mr. Amit Kumar Dhumal, Deputy Advocate General.

For the Respondent: Mr. K.B. Khajuria, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (*oral)*

Appellant-State, being aggrieved and dissatisfied with the judgment of acquittal dated 10th February, 2010, recorded by learned Judicial Magistrate 1st Class, Court No. 2, Ghumarwin, District Bilaspur, whereby learned Trial Court held the respondents-accused (hereinafter referred to as 'accused') not guilty of having committed offences under Sections 323 and 427 of the Indian Penal Code (for short, 'IPC') read with Section 34 of the IPC and accordingly acquitted them, has approached this Court by way of instant proceedings, seeking therein conviction of accused for having committed aforesaid offences under the aforesaid provisions of law, after setting aside the judgment of acquittal recorded by the learned trial Court.

2. Precisely, the facts of the case, as emerge from the record, are that complainant, namely, Soma Devi (PW-2) got recorded her statement under Section 154 of the Code of Criminal Procedure (for short 'Cr.P.C.') (Ext. PW-2/B) alleging therein that on 09.08.2005, at about 8.00 a.m., accused Rattan Lal started digging land adjacent to the house of the complainant. Since digging was being carried out indiscriminately without leaving any space for use and flow of water etc., complainant requested him to leave some space between her house and the proposed house of accused Rattan Lal. On this, all accused persons i.e. Rattan Lal, Arun Kumar and Manoj Kumar started abusing the complainant and also assaulted her. Complainant in order to save herself from the clutches of the accused, went inside her house. However, accused persons followed her and entered into her house by breaking the door and thereafter attacked her with Kulhari (axe). Kanta Devi, who happens to be the daughter-in-law of the complainant, made an attempt to rescue her mother-in-law, however, she was also given blows on her legs with bamboo stick and as a result thereof, she suffered injuries. Allegedly, accused Manoj Kumar hurled stones inside the house of the complainant. On the basis of the aforesaid report, a formal FIR Ext. PW-10/A came to be registered against the respondents-accused. After completion of investigation, police presented the challan in the competent Court of law.

3. Learned trial Court after satisfying itself that a *prima-facie* case exists against the accused, charged them for having committed offences punishable under Sections 452, 323, 427, 504 & 506 of IPC read with Section 34 IPC, to which they pleaded not guilty and claimed trial.

4. Subsequently, learned trial Court, on the basis of evidence collected on record by the persecution, held the accused not guilty of having committed offences punishable under the aforesaid provisions of law and accordingly, vide judgment dated 10th February, 2010 acquitted them. In the aforesaid background, State has approached this Court in the instant proceedings, seeking therein conviction of the accused after setting aside judgment of acquittal recorded by the learned trial Court.

5. Mr. Amit Kumar Dhumal, learned Deputy Advocate General, while referring to the impugned judgment recorded by the learned trial Court, vehemently argued that the judgment of acquittal passed by the learned trial Court is not sustainable in the eyes of law, as the same is not based upon the proper appreciation of the evidence and as such, the same deserves to be quashed and set aside. While referring to the evidence led on record by the prosecution, Mr. Dhumal, strenuously argued that the prosecution has successfully proved beyond reasonable doubt that on the date of alleged incident, accused unauthorizedly entered into the house of the complainant and thereafter, gave her beatings mercilessly, as a result of which, she as well as her daughter-in-law (PW-3) Kanta Devi suffered injuries. Mr. Dhumal further contended that if the impugned judgment, in the light of the evidence adduced on record, is carefully examined, it can be safely concluded that the said judgment is the result of mis-reading, mis-appreciation and mis-construction of evidence by the learned trial Court, while ascertaining guilty of the accused. With the aforesaid submissions, learned Deputy Advocate General contended that the impugned judgment of acquittal being contrary to the evidence available on record is not sustainable and the accused deserve to be convicted for having committed offences punishable under Sections 323 & 427 of IPC read with Section 34 IPC.

6. Mr. K.B. Khajuria, learned counsel representing the accused, while supporting the impugned judgment of acquittal, vehemently argued that there is no illegality and perversity in the impugned judgment passed by the learned trial Court and as such, the same deserves to be upheld. He further contended that bare perusal of the statements having been made by the prosecution witnesses, nowhere suggests that on the day of alleged incident complainant and her daughter-in-law (PW-3) Kanta Devi were given beatings by the accused. While refuting the aforesaid contentions having been made by the learned Deputy Advocate General, Mr. Khajuria, invited attention of this Court to the statements of the prosecution witnesses to demonstrate that none of the prosecution witnesses was able to state specifically that at what time and under what circumstances, accused entered into the house of the complainant and thereafter gave beatings to her and her daughter-in-law (PW-3) Kanta Devi. He further contented that as per material available on record, property in question is still joint inter-se the parties and as such, the learned trial Court rightly came to the conclusion that no case has been made out under Section 452 IPC against the accused. He further stated that the prosecution has failed to associate any independent witness in order to support its case. While referring to the statements of the complainant and her daughter-in-law PW-3 Kanta Devi, Mr. Khajuria made serious effort to prove that due to prior enmity inter-se the parties, accused were falsely implicated in the prosecution case and they were rightly acquitted by the learned trial Court.

7. I have heard learned Counsel for the parties and have gone through the record carefully.

8. After having carefully perused the evidence adduced on record by the prosecution, viz-a-viz the impugned judgment, this Court is not inclined to agree with the contention of Mr. Amit Kumar Dhumal, learned Deputy Advocate General, that there is mis-reading, mis-appreciation and misconstruction of evidence. Rather, this Court is convinced and satisfied that the prosecution has not been able to prove its case beyond reasonable doubt that on the alleged date of incident, accused unauthorizedly entered into the house of the complainant and thereafter, gave beatings to her and her daughter-in-law (PW-3) Kanta Devi. Though, in the instant case, the prosecution, with a view to prove its case, examined as many as 10 witnesses, but the statements of complainant (PW-2) Soma Devi and PW-3 Kanta Devi are material for proper adjudication of the case.

9. PW-2 Soma Devi deposed that on 9th August, 2005, at about 8.00 a.m., accused Rattan Lal, who happened to be her son, indiscriminately started digging foundation of her house and when she inquired as to why he was doing so, accused Rattan Lal not only started abusing her, but also gave her beatings. It has also come in the statement of PW-2 Soma Devi that when accused Rattan Lal was abusing her, her daughter-in-law, i.e. PW-3 Kanta Devi, came on the spot and tried to rescue her from the clutches of the accused, but they also gave beatings on the legs of her daughter-in-law with bamboo sticks. It has further come in the evidence of PW-2 Soma Devi that she and PW-3 Kanta Devi went inside their house in order to save themselves from the clutches of the accused and closed the door, however, the accused appeared with sticks and Kulhari (axe) and broke open the door and came inside the house. She also deposed that she filed complaint Ext PW-2/A to the Gram Panchayat and complaint Ext.PW-2/B to the police. However, PW-1 Om Prakash, who was Up-Pradhan of Gram Panchayat, Dadhol, no where stated that complaint Ext. PW-2/A was filed by complainant PW-2 Soma Devi to Gram Panchayat.

10. PW-3 Kanta Devi deposed that she, after having heard noise, went outside her house and found that accused Rattan Lal was assaulting her mother-in-law Soma Devi with Kulhari (axe). She further deposed that she came to rescue her mother-in-law and caught hold of Kulhari (axe). But, in the meantime, she was also given beatings by accused Arun Kumar.

11. If the statements of PW-2 and PW-3 are read in conjunction, this Court finds favour with the contention of Mr. Khajuria, learned Counsel for the accused, that there are material inconsistencies and contradictions, as have been noticed above. PW-2 Soma Devi nowhere stated that she was attacked with Kulhari (axe) and sticks, while she was outside her house, rather she very candidly stated that when she came inside her house and bolted the door

from inside, all the accused entered into their house forcibly after breaking the door and thereafter, they assaulted her with Kulhari (axe). She further stated that she was rescued by her daughter-in-law Kanta Devi (PW-3) from the clutches of the accused. But if the statement of PW-3 Kanta Devi is perused, she has given altogether different version by stating that she, after having heard noise, went inside her house and found that her mother-in-law PW-2 Kanta Devi was being attacked with Kulhari (axe) by accused Rattan Lal.

12. PW-4 Ramesh Kumar, who happened to be the son of the complainant, also gave altogether different version. He stated that he had gone to work in his field and found that accused were giving beatings to his mother and wife. This witness has also stated that accused Rattan Lal was armed with Kulhari (axe) and accused Arun was having

stick in his hand and when he came on the spot, he saw that his mother and wife had gone inside their house and accused were forcibly breaking the door. Allegedly, alleged incident occurred first outside the house and thereafter inside the house of complainant, but PW-4 has nowhere disclosed/stated that how he came on the spot when he was working in the fields. He has also not stated that he after having been informed by somebody reached at the spot.

13. PW-5 Banta Singh, who at the relevant time was working in the house of Hem Raj, stated that when he heard noise from the house of Ramesh Chand and Rattan Lal, he alongwith Tilak Raj went to the spot and found that accused Rattan Lal, Manoj and Arun Kumar were giving beatings to the complainant. He also stated that when Kanta Devi came to rescue the complainant, she was also given beatings by the accused persons. Thereafter, Kanta Devi and Soma Devi went inside their house. PW-2 Soma Devi and PW-3 Kanta Devi have nowhere stated in their statements that at the time of alleged incident, any other person except them, was present on the spot. Thus, the claim put forth by PW-4 Ramesh Kumar and PW-5 Banta Singh, does not appear to be trustworthy.

14. PW-6 Tilak Raj also claimed that at the relevant time, he was in the house of Hem Raj. He further stated that when he heard noise from the house of accused Rattan Lal, he alongwith Banta Singh, went to the spot and found that accused Rattan Lal was carrying Kulhari (axe) and accused Arun was having stick in his hand. He further stated that accused Rattan Lal was assaulting his mother with Kulhari (axe), however, complainant went inside her house. He also stated that accused Manoj Kumar was pelting stones.

15. On close scrutiny of aforesaid statements having been made by the material prosecution witnesses, it is evident that there are material contradictions and inconsistencies in their statements. Thus, this Court is of the opinion that the learned trial Court has rightly given no much relevance to their statements. Admittedly, the complainant party and the accused persons are closely related to each other as they are the members of one and the same family and are having still joint property, as has been concluded by the learned trial Court on the basis of the material on record. Cross-examination conducted by the learned defence Counsel clearly suggests that there is prior enmity between the complainant and accused Rattan Lal and there is/was dispute pending inter-se them in the competent court of law. Similarly, PW-5 Banta Singh and PW-6 Tilak Raj, who were sought to be cited as independent witnesses by the prosecution, also admitted in their cross-examination that they had dispute with accused Rattan Lal on account of a path and in this regard, matter is pending in the competent Court of law. PW-5 Banta Singh though in his cross-examination denied that he, Dhyani Ram and Tilak Raj etc. had filed a complaint before S.D.M, but admitted that this complaint was filed regarding path. The aforesaid submissions clearly suggests that PW-6 Banta Singh and PW-6 Tilak Raj were interested witnesses, as such, the learned trial Court has rightly not placed much reliance on their statements. Otherwise also, these witnesses are the chance witnesses because admittedly, they had no occasion to see the alleged incident. Though, they claimed that they were present on the spot, but in their examinations-in-chief they have stated that when they came on the spot after hearing cries, by that time, the complainant as well as her daughter-in-law Kanta Devi had gone to their house and bolted the door.

16. In the case at hand, entire story put forth by the prosecution appears to be untrustworthy and full of contradictions. 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 also placed on Judgment passed by the Hon'ble Apex Court in ***C. Magesh and Ors. v. State of Karnataka***, (2010) 5 SCC 645, wherein it has been held as under:-

> *"45. It may be mentioned herein that in criminal jurisprudence, evidence has to be evaluated on the touchstone of consistency. Needless to emphasise, consistency is the keyword for upholding the conviction of an accused. In this regard it is to be noted that this Court in the case titled Suraj Singh v. State of U.P., 2008 (11) SCR 286 has held:- (SCC p. 704, para 14)*
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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."*

17. Consequently, in view of the detailed discussion made herein above as well as the law laid down by the Hon'ble Apex Court, this Court sees no reason to interfere with judgment dated 10th February, 2010, passed by learned Judicial Magistrate 1st Class, Court No.2, Ghumarwin, District Bilaspur, Himachal Pradesh in Case No. 168/2 of 2005, which is accordingly upheld. In result, appeal fails and is accordingly dismissed. Bail bonds furnished by accused are discharged. Pending applications, if any, are disposed of.

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

Brij Lal ……Petitioner.
Versus
Sanjay Kumar & Others ……Respondents.

CMPMO No. 173 of 2017.
Decided on: 4th July, 2018.

Code of Civil Procedure, 1908- Order XXXIX Rules 1 and 2- Temporary injunction – Grant of – Plaintiff claiming possession over suit land by way of shed constructed by him some 40 years before- Defendants claiming their own possession over suit land by averring that it fell in their share during partition – Trial Court dismissing application of plaintiff seeking temporary prohibitory injunction against defendants – Appeal also dismissed by First Appellate Court – Petition against – Rapat Rojnamcha placed on record clearly shows that possession of entire land

except the suit land was delivered to defendants in partition proceedings – Rojnamcha clearly demonstrating that shed over suit land was in possession of plaintiff – Held, plaintiff may be a trespasser, but he can be evicted in accordance with law – Petition allowed – Orders of Lower Courts set aside – Parties directed to maintain status quo qua nature and possession of suit land during pendency of suit. (Paras-4 to 6)

For the Petitioner : Mr. Ajay Sharma, Advocate
For the respondents: Mr. V.S. Rathore, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. (oral).

Heard. The bone of contentions in the present lis is an old shed allegedly constructed by the petitioner herein (plaintiff in the trial Court) about 40 years ago, over the land bearing Khasra No.1116/1, measuring 0-01-21 hectares, situated in Mohal Dhial, Mauza and Tehsil Dharamshala, District Kangra. He allegedly obtained a contract of Jhol (liquor) and the shed allegedly was constructed by him to set-up the unit of Jhol over the land in question. The suit land ultimately was purchased by one Shanti Lal, the predecessor-in-interest of respondents-defendants. In the demarcation of the land amongst the co-sharers the same fell into the share of said Shanti Lal. While the claim of the petitioner-plaintiff is that the possession of the suit land could not be delivered to said Shri Shanti Lal on account of the same, by way of construction of shed, was in his possession, the respondents-defendants claim that the possession thereof was also delivered to them by the revenue staff along with others.

2. Both Courts below, on consideration of the given facts and circumstances and also the documents available on record has concluded that neither there exists any prima facie case in favour of the petitioner-plaintiff nor the balance of convenience lies in his favour. Also that the comparative mischief in the event of the interim injunction as sought is granted would be greater to the respondents-defendants as compared to the petitioner-plaintiff. The application for interim injunction filed along with the suit as such has been dismissed by learned trial Court. Learned lower appellate Court has dismissed the appeal and affirmed the order passed by learned trial Court.

3. On hearing learned counsel on both sides and going through the records, admittedly, the suit land in partition fell into the share of Shanti Lal, the predecessor-in-interest of the respondents-defendants, however, the material available on record at this stage is not sufficient even to form an opinion, prima facie that the possession of the suit land over which the shed is in existence was delivered to the predecessor-in-interest of the defendants by the revenue agencies after partition of the suit land.

4 On the other hand, the record amply demonstrates that the petitioner-plaintiff is in possession of the shed in question, reference in this behalf can be made to Rapat Rojnamcha No. 464, dated 15.6.2009. The same was entered in Rapat Rojnamcha concerned, on the receipt of the warrant of possession. The reading of this document reveals that except for the land, over which the shed has been constructed, which, as per this document was found to be in possession of the petitioner-plaintiff, the possession of the remaining land was given to the respondents-defendants. As regards the land beneath the shed, the petitioner-plaintiff had given an undertaking to settle the issue qua possession thereof on demarcation of the land.

5. Anyhow, the fact remains that the shed in question was found at the time of delivery of possession of the land to the respondents-defendants consequent upon the partition thereof amongst the co-sharers, in possession of the petitioner-plaintiff. The entry in Rapat Rojnamcha No.431, dated 21.5.2015 reveals that though the possession of the land bearing khasra No.1115/3 and 1116/1 (the land in dispute) total measuring 0-03-20 hectares, had to be delivered to the respondents-defendants, however, the possession of the land bearing Khasra No.

1115/3 measuring 0-01-99 hectares, could only be delivered to them. Meaning thereby that the disputed land underneath the shed is still in the possession of the petitioner-plaintiff. True it is that he has no title in the suit land and his status qua the suit land is that of a tress-passer. However, as per the law well settled at this stage, a tress-passer cannot also be dispossessed by way of force and rather in in accordance with due process of law. The respondents-defendants, therefore, if so advised, may dispossess the petitioner-plaintiff from the suit land under the due process of law, including filing of counter claim in the pending suit before the trial Court, in accordance with law.

6. Both Courts below have not considered the material particularly the two Rapat Rojnamcha in its right perspective while dismissing the application filed along with the suit for the grant of interim injunction. The impugned order as such is quashed and set aside. Consequently, the parties on both sides are directed to maintain status quo qua the nature and possession of the land in dispute i.e. Khasra No.1116/1, measuring 0-01-21 hectares, situated in Mohal Ghial, Mauza and Tehsil Dharamshala, District Kangra and the shed in existence thereon during the pendency of the suit in the trial Court.

7. The parties, through learned counsel representing them are directed to appear in the trial Court on ***2nd August, 2018***. Record be sent back along with a copy of this judgment forthwith so as to reach there well before the next date.

The observations hereinabove shall remain confined to the disposal of this petition and have no bearing on the merits of the case. The petition is accordingly allowed and disposed of. Pending application, if any, shall also stand disposed of.

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

Panch Ram ....Petitioner.
Versus
State of Himachal Pradesh and another ....Respondents.

CWP No. 2520 of 2012.
Reserved on 18.4.2018
Decided on: 4.7.2018

Himachal Pradesh Village Common Land Vesting and Utilization Act, 1971- Section – 2(c) **Himachal Pradesh Utilization of Surplus Area Scheme, 1974-** Clause 11 **– H.P. Ceiling on Land Holdings Act, 1972 (Ceiling Act)-** Section 15**-** Grant of Patta – Cancellation of – Challenge thereto – Allotment of land to petitioner was cancelled by State on ground that he was in Government job at the time of allotment, and not entitled for grant as per the Act - Further, before vestment of said land in State of Himachal Pradesh one 'C' was in its possession and he had purchased said land from the then Ruler – Petitioner arguing that no opportunity of being heard was given to him before cancelling grant and order is illegal – High Court found that petitioner was granted land as per the Scheme, framed under Ceiling Act – Himachal Pradesh Village Common Land Vesting and Utilization Act has no applicability and provisions thereof could not have been invoked to cancel grant – Harmonious reading of the Scheme and Ceiling Act, no where shows that a person in Government job is not entitled for allotment of land – Petition allowed – Order of Competent Authority set aside. (Paras-9 to 12)

For the petitioner. Mr. M.L.Sharma, Advocate.
For respondents. Mr. Desh Raj Thakur, Additional Advocate General with Mr. Kamal Kant, Dy. Advocate General.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.

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

"1. To quash the order dated 22.9.87 passed by respondent No.2 regarding cancellation of the grant of land comprising Khasra Nos. 264/12 and 279/24/3, measuring 5-1 Bighas, situate in Mauja Rampur Majri, Hadbast No.156, Tehsil Paonta Sahib, District Sirmaur, HP having been passed illegally and in violation of the principles of natural justice as also the Constitutional provision enshrined in Article 300-A.

2. To send for the records of the case.

3. To award the costs of the petition in favour of the petitioner.

4. Any other relief to which the petitioner may be found entitled in the facts and circumstances of the case."

2. The case of the petitioner is that he being landless person belonging to Scheduled Caste category was sanctioned Patta, Annexure P-1, of land comprising khasra Nos. 264/12 and 279/24/3 measuring 5-1 bighas, situate in Lohagarh estate, Mauja Rampur-Majari, Tehsil Paonta Sahib,District Sirmaur, HP under the Surplus Area Scheme, 1974 subject to deposit of token money amounting to Rs. 242.25 and further subject to the terms and conditions as were contained in the Scheme. As per the petitioner, he deposited the requisite amount of Rs.242.25 for the grant of Patta, vide receipt dated 29.9.1975 Annexure P-2. Further as per the petitioner, pursuant to the grant of said Patta, mutation of the land stood sanctioned in the year 1975, on the basis of which, he became owner of the land in issue, though possession of the same was not delivered to him by Halqua Patwari, as physical possession of the land was with someone else.

3. On 22.9.1987, the allotment of the Patta in favour of the petitioner was cancelled on the ground that as on the date of allotment of land, petitioner was in government job, therefore, he was not entitled for allotment of land under the Himachal Pradesh Utilisation of Surplus Area Scheme, 1974.

4. According to the petitioner, he was appointed as 'Work-Mistry' on temporary basis on 31.12.1973 in Giri Project Division No.1, Himachal Pradesh State Electricity Board, Girinagar and he was appointed on the said post on regular basis w.e.f. 3.10.1980. Even otherwise, in the Scheme under which land stood allotted to him, there was no such stipulation that a person who was in government job was not entitled to the surplus land. It was further the case of the petitioner that pursuant to the payment of the token money, he stood recorded as absolute owner of the land and before passing the impugned order, neither any notice was issued to him nor was he heard in the matter and thus he was condemned unheard. In this background, he filed this petition praying for the reliefs, enumerated above.

5. In the reply so filed to the writ petition, the respondent-State inter alia justified its act on the ground that the land in issue was wrongly allotted to the petitioner. According to the State, before the vestment of the said land in Government under the Himachal Pradesh Ceiling on Land Holdings Act, 1972, the same was under possession of one Chuhara son of Sh. Sahab Ditta, who was recorded as 'Gairmaurusi Lagan Mashkuk' in the revenue records and he had purchased the said land from Smt. Rani Kalindra Devi. Further according to the State, father of the petitioner was alive at the time of allotment of the land and the petitioner was a regular government employee in Bhawa Project when the land was allotted to him. It is also mentioned in the reply of the State that as per paragraph 2(c) of Himachal Pradesh Village Common Lands Vesting and Utilization Act, 1974, the definition of the landless person excluded person like the petitioner from the same and therefore, there was no illegality in the act of the respondent-State, which stood challenged by way of writ petition.

6. The averments made in preliminary objections of the reply, so filed by the respondent-State are being reproduced hereinbelow:-

> *"That the present petition is bad due to delay and latches and is not maintainable because after having examined the report dated 4.2.1985 of Collector, Paonta Sahib regarding cancellation of Patta No. 783 of the land comprised in Khasra No. 405/279/24 and 264/12 measuring 5-1-0 bighas situated at mauza Rampur Majari issued to the petitioner as a landless person by the Collector, Paonta Sahib in the year 1975, the case was tried and heard by associating the petitioner in the said hearing by the Deputy Commissioner, Sirmaur and same was rightly decided on 20.5.1985 whereby Patta of the aforementioned land was cancelled because the land in question had wrongly been allotted to the petitioner and therefore the said land has rightly been reverted to the Govt. vide mutation No. 608 dated 19.8.1989. It is submitted that prior to the vestment of the above mentioned land in Govt. under the H.P. Ceiling on Land Holdings Act, 1972, it was in possession of Sh. Chuhara S/o Sh. Sahab Ditta who was recorded as "GAIRMAURUSI LAGAN MASHKUK" in the revenue record and he had purchased the said land from Smt. Rani Kalindra Devi. Moreover, father of the petitioner was alive at the time of allotment of said land to the petitioner and the petitioner himself was a regular Govt. employee in Bhawa Project while the land in question was allotted to him. As per paragraph-2 (c) of H.P. Village Common Lands Vesting and Utilization Act, 1974, the definition of landless person is as under:-*
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> *"Landless person means a person who, holding no land for agricultural purposes, whether as an owner or a tenant, earns his livelihood principally by manual labour on land and intends to take the profession of agriculture and is capable of cultivating the land personally; provided that a person whose father is alive or whose annual income from all sources exceeds Rs. 3000/- shall not be deemed to be a landless person". Therefore, it was proved on record that patta No.783 was wrongly issued to the petitioner as neither he was eligible to get such land allotted in his favour nor the land in question could have been allotted to him as the said land was purchased by Shri Chuhara prior to its vestment in Govt. under H.P. Ceiling on Land Holdings Act, 1972 and possession of Shri Chuhara was recorded as "GAIRMAURUSI LAGAN MASHKUK" in the revenue record. Thus the claim of the petitioner is baseless and is not tenable in the eyes of law. Hence the petition deserves to be dismissed in the interest of justice."*

7. I have heard learned counsel for the petitioner as also learned Additional Advocate General for the respondent-State.

8. Factum of the grant of Patta to the petitioner under the provisions of the Himachal Pradesh Utilization of Surplus Area Scheme, 1974 is not in dispute. The factum of the petitioner having paid the amount as was determined by the State for allotment of the said land is also not in dispute. Annexure P-3 appended with the petition demonstrates that petitioner was not regularly engaged as Work-Mistry in Giri Project Division No.1, HPSEB, Girinagar when the Patta was so allotted to him, because as per this Annexure P-3, the services of the petitioner as such were regularized only w.e.f. 3.10.1980, though he was serving as such w.e.f. 31.12.1973.

9. Be that as it may, a perusal of the impugned order demonstrates that the Patta granted to the petitioner was cancelled, inter alia, on the ground that the land was in possession of one Chuhara and further that the petitioner was in government job and was not included in the definition of landless person. Further Annexure P-7 appended with the petition, which is a communication addressed to the petitioner by Deputy Commissioner, Sirmaur demonstrates that the Patta which was allotted by the government was cancelled in the year 1985 on the ground that the petitioner was in government job and thus he was not entitled for the same in his capacity of a government servant.

10. At the cost of repetition, I reiterate that in the preliminary objections so filed to the petition by the respondent-State, the cancellation of Patta has been justified by the State by relying upon the provisions of Himachal Pradesh Village Common Lands Vesting and Utilization Act, 1974 by relying upon the definition of landless person in that Act. As already discussed above, in the present case, grant of Patta was made in favour of the petitioner under the provisions of the Himachal Pradesh Utilization of Surplus Area Scheme, 1974, the Patta was not allotted under the provisions of Himachal Pradesh Village Common Lands Vesting and Utilization Act, 1974. In fact a perusal of the Himachal Pradesh Utilization of Surplus Area Scheme, 1974 demonstrates that this scheme nowhere refers to the provisions of Himachal Pradesh Village Common Lands Vesting and Utilization Act, 1974. In the definition clause of the Scheme, the 'Act' means the Himachal Pradesh Ceiling on Land Holdings Act, 1972 and 'Allottee' means a person who is allotted or is deemed to have been allotted land under this Scheme. Clause 2 of the definitions of the Scheme defines 'eligible person' to be a person, who is eligible for allotment of surplus land under Section 15 of the Act i.e. the Himachal Pradesh Ceiling on Land Holding Act, 1972. For ready reference Section 15 of the Himachal Pradesh Ceiling on Land Holding Act, 1972 is quoted hereinbelow:-

> *"Disposal of surplus area- (1) the surplus area which has vested in the State Government under Section 11 shall be at the disposal of the State Government.*
>
> *(2) The State Government may, by notification in the Official Gazettee, frame a scheme for utilising the surplus area vested in the State Government by allotment-*
>
> *(a) to a landless person or any other eligible person; or*
>
> *(b) for allotment of a site to a handicapped or houseless person for the construction of a house; and the allottee shall pay amount-*
>
> *(I) for the land allotted to him at the rate of ninety-five times the land revenue and rates and cesses, thereof;*
>
> *(ii) for building, structure or tube-well, if any, at 50% of the market price of such building, structure or tube-well:*
>
> *Provided that if the holding or part thereof comprising surplus area is not assessed to land revenue, the land revenue on such and shall be construed to be assessed as on similar land in the estate and if not available in the estate then on the adjoining estate or estates, as the case may be:*
>
> *Provided further that the waste land shall be treated as 'banjar' land for the purposes of assessment of land revenue and determination of the amount.*
>
> *[(2-A) for making the allotment of the surplus land under sub-section (2), the first preference among landless persons shall be given to the members of the Scheduled Castes and Scheduled Tribes.*
>
> *(3) Any scheme framed by the State Government under sub-section (2), may provide for the terms and conditions on which the land comprised in surplus area is to be allotted.*
>
> *(4) The State Government may, by notification in the Official Gazettee, add to, amend, vary or revoke any scheme made under this section."*

11. Clause 11 of the Himachal Pradesh Utilization of Surplus Area Scheme, 1974, which deals with the allotment is also quoted hereinbelow:-

> *"Condition of allotment.- The allotment shall be subject to the following terms and conditions:*
>
> *(a) the allottee shall be liable to pay allow Government dues, including land revenue, rates and rents, from the date he takes possession of the land.*
>
> *(b) The allottee shall be liable to pay for that land an amount as prescribed in section 15 of the Act;*

(c) The allottee shall become full owner of the land allotted to him when all payments due in respect of such land have been made either in lumpsum or on payment of first instalment of such dues, as the case may be;

(d) the allottee shall not transfer his rights in the land allotted to him to any person within a period of 20 years from the date of taking over the possession after allotment and in the event of violation of the provisions the land granted to him shall be liable to be resumed by the State Govt. and no further allotment of land shall be made to him thereafter.

Provided that the allottee may transfer the land by way of mortgage without possession in favour of a Primary Agricultural Cooperative Credit Society, a bank as defined in the H.P. Agricultural credit Operations and Miscellaneous Provisions (Banks) Act, 1972 (Act No. 7 of 1973) for the purpose of issuing loans for development of such land, purchase of bullocks, seed, fertilizers etc. required for bringing the land under cultivation etc.

(e) the land allotted under this scheme shall not be subject to fragmentation by way of partition, transfers or by any other mean; and

(f) the Revenue Officer shall record the conditions laid down in sub para (d) and (e) above in the mutation orders to be passed by him. His orders shall further be recorded in the remarks column of the jamabandi in which the mutation pertaining to the land is incorporated."

12. A perusal of Section 15 of the Himachal Pradesh Ceiling on Land Holding Act, 1972 as also the condition of allotment as contained in the Himachal Pradesh Utilization of Surplus Area Scheme, 1974 do not demonstrate that there was any bar that person who was in government job was not entitled for grant of Patta under the Himachal Pradesh Utilization of Surplus Area Scheme, 1974. In fact a harmonious reading of Section 15 of the Act as also the Clauses of the Scheme demonstrate that there was no embargo contained either in the Act or in the Scheme that a person who was in government job was not entitled for the allotment of land under the Scheme. This very important aspect of the matter has been completely ignored by the respondent-State while passing the impugned order. Authority concerned further erred in not appreciating that the provisions of the Himachal Pradesh Village Common Lands Vesting and Utilization Act, 1974 were not applicable in the facts of the case because the land was not allotted to the petitioner under the provisions of the said Act. When the Patta was not allotted under the provisions of the Act supra its provisions could not have been invoked to hold the petitioner as ineligible for grant of Patta. Therefore, in my considered view the impugned act of the respondent-State is *per se* illegal and in contravention of the Himachal Pradesh Ceiling on Land Holdings Act, 1972 as also the the Himachal Pradesh Utilization of Surplus Area Scheme, 1974and is liable to be quashed and set aside.

13. In view of the above discussion, this petition is allowed and order vide which the Patta granted to the petitioner has been cancelled is quashed and set aside with all consequential effects. No order as to costs.

With these observations, the writ petition is disposed of, so also pending applications, if any.

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

Pavnesh Kumar ..Petitioner

Versus

Madho Ram now deceased through his LRs and others. ..Respondents

CMPMO No. 146 of 2018
Decided on: 04.07.2018

Code of Civil Procedure, 1908- Order XXII Rules 4 and 9- Suit for permanent prohibitory injunction – Death of defendants – Substitution of LRs - Whether after death of defendant(s), cause of action survives and substitution of legal representatives of those defendants, can be ordered? – In a suit for permanent prohibitory injunction 'M' (D1) and 'N' (D4) died, during pendency of suit – Trial Court dismissing application for substitution of their legal representatives on ground of delay and that suit was at final stage of arguments – Petition against – Held, if decree of injunction is passed then the same can ultimately be executed even against the legal representatives of deceased judgment debtor – Maxim "actio personalis moritur cum persona" is limited to certain class of cases only – Trial Court went wrong in dismissing application filed for substitution of legal representative on ground of delay or that suit was at the stage of final arguments – Rather it was to decide the question of abatement of suit, if any, or condonation of delay caused in filing such applications – Petition allowed – Order of Trial Court set aside – Matter remanded for decision on application afresh in the light of observations made in the order.

(Paras-3 to 6)

For the petitioner: Mr. Sanjay Jaswal, Advocate.
For the respondents: Nemo.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)

Heard further.

2. Order dated 18.01.2018 (Annexure P-6), whereby learned Civil Judge (Junior Division), Court No.1, Dharamshala has dismissed two applications filed for substitution of legal representatives of deceased defendants No. 1 and 4 in pending Civil Suit No.72/2014, is under challenge in this petition.

3. The matter besides on merits has also been heard on the question that in a suit for permanent prohibitory injunction, the legal representatives of a deceased defendant against whom there are no allegations of causing interference in the property in dispute need substitution or not. Such legal question, has been decided by the Apex Court in ***Prabhakara Adiga*** V. ***Gowri and others, (2017) 4 SCC 97***. The relevant extract of the judgment reads as follows:-

> "24. In Kathiyammakutty Umma v. Thalakkadath Kattil the High Court of Kerala has observed that where a decree for injunction is obtained against a sole judgment-debtor, restraining him from obstructing the plaintiff in erecting a fence on the boundary of his property, the decree can be executed against the legal representatives of the judgment-debtor, if he dies.
>
> 25. In our considered opinion the right which had been adjudicated in the suit in the present matter and the findings which have been recorded as basis for grant of injunction as to the disputed property which is heritable and partible would enure not only to the benefit of the legal heir of decree-holders but also would bind the legal representatives of the judgment-debtor. It is apparent from section 50 CPC that when a judgment- debtor dies before the decree has been satisfied, it can be executed against legal representatives. Section 50 is not confined to a particular kind of decree. Decree for injunction can also be executed against legal representatives of the deceased judgment-debtor. The maxim "actio personalis moritur cum persona" is limited to certain class of cases as indicated by this Court in Girijanandini Devi v. Bijendra Narain Choudhary (supra) and when the right litigated upon is heritable, the decree would not normally abate and can be enforced by LRs. of decree-holder and against the judgment-debtor or his legal representatives. It would be against the public policy to ask the decree-holder to litigate once over again against the legal representatives of the judgment-debtor

when the cause and injunction survives. No doubt, it is true that a decree for injunction normally does not run with the land. In the absence of statutory provisions it cannot be enforced. However, in view of the specific provisions contained in section 50 CPC, such a decree can be executed against legal representatives."

4. The answer, therefore, is that in a suit for injunction, if ultimately decree passed, the same can even be executed against the legal representatives of deceased judgment debtor(s).

5. Now, if coming to the merits of the case, defendant No.1 Madho Ram, as per application registered as CMA No. 27/14 (Civil Suit No. 72/14) had expired on 1.8.2017 during the pendency of the suit in the trial Court and defendant No.4 Nand Kishore on 15.02.2016. Death certificate with respect to death of defendant No.1 has not been placed on record. Learned trial Court has dismissed both the applications being belated and also that the suit by that time was at the stage of hearing final arguments. As a matter of fact, the application on the death of defendant No.1 Madho Ram has been filed in the trial Court well within the period of limitation, in case the date of death is taken as 01.08.2017. No doubt, there is delay in filing the application for substitution of legal representatives of deceased defendant No.4 Nand Kishore and there seems to be no application filed under Order 22 Rule 9 CPC and Section 5 of the Limitation Act for setting aside the abatement, if any, of the suit on the death of the said defendants and condonation of delay as occurred in filing the same. However, irrespective of it, the application should have not been dismissed being belated on the ground that the suit was at the stage of final arguments. The question of substitution of LRs and abatement of the suit on the death of defendants were to be decided by the trial Court as they died during the pendency of the suit.

6. The law on the point is no more *res-integra* as it is held so by this Court in a recent judgment passed in ***RSA No. 335 of 2016*** titled ***Sh. Swaroop Singh (since deceased) through his LRs*** v. ***Manohar Lal and others***, decided on ***11.04.2018.*** Being so, the impugned order is quashed and set aside. There shall be a direction to the trial Court to decide the applications filed for substitution of legal representatives of deceased defendants No.1 and 4 in accordance with law and also the observations hereinabove in this judgment. The petitioner-plaintiff through learned counsel representing him is directed to appear in the trial Court on ***8th August, 2018***. The trial Court thereafter shall proceed further in the matter after securing presence of the defendants. The record be returned forthwith along with a copy of this judgment.

7. The petition is allowed and stands disposed of. Pending application(s), if any, shall also stand disposed of.

****

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

Shri Rajinder Singh Sablaik .....Appellant.

Vs.

Smt. Pritmi Devi and others .....Respondents.

FAO No.: 443 of 2010
Reserved on: 11.05.2018
Date of Decision: 04.07.2018

Motor Vehicles Act, 1988- Section 166- Claim application – Grant of compensation – Claimant seeking compensation for bodily injuries suffered by him in a motor accident – Claims Tribunal granting compensation to the tune of Rs.17,000/- with interest – Appeal against – Claimant arguing that he had suffered fracture of frontal bone of right side and one chip was found lying in brain – And because of head injury his vision had become weak and there was loss of memory as well – Petitioner also seeking medical reimbursement of Bills – High Court found that (i) though

there was head injury but its effect on claimant's vision and memory was not got proved by him from medical evidence (ii) there was no evidence qua medical expenses incurred by him – Held, claimant was not entitled for compensation towards medical expenses and alleged loss of vision/disability on account of injuries to brain – However, in view of nature of injuries, compensation towards pain and sufferings enhanced from Rs. 10,000/- to Rs. 35,000/- with interest – Appeal partly allowed – Award modified. (Paras – 13 to 16)

For the appellant: Mr. G.C. Gupta, Senior Advocate, with Ms. Meera Devi, Advocate.
For the respondents Mr. K.B. Khajutia, Advocate, for respondents No. 1 and 2.
Mr. Raman Sethi, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *:*

By way of this appeal, the appellant has challenged the award dated 24.09.2010, passed by the learned Motor Accident Claims Tribunal, Shimla in M.A.C.C. No. 26-S/2 of 2006, vide which, learned Tribunal has granted the following relief in favour of the claimant, i.e., the appellant before this Court:

> *"38. In view of the findings recorded on aforesaid issues, the petition is allowed. The petitioner is awarded an amount of* Rs.*17,000/- alongwith interest @ 9% per annum from the date of filing of the petition till the amount of compensation is paid. The respondents No. 1 and 2 are held jointly and severally liable, but the respondent No. 3 being insurer of the bus in question is held liable to indemnify respondents No. 1 and 2 qua the amount of compensation and, as such, directed to deposit the same in this Tribunal in favour of the petitioner. The parties are left to bear their own costs.*

2. Brief facts necessary for the adjudication of this appeal are that the appellant preferred a petition under Section 166 of the Motor Vehicles Act, 1988 before the learned Motor Accident Claims Tribunal, praying therein that he be granted compensation to the tune of Rs.15,00,000/- on account of injuries suffered by him in a motor vehicle accident, which took place on 20th January, 2006. As per the appellant, on the date in issue, at around 1:15 p.m., the appellant/claimant (hereinafter referred to as "the claimant") while he was on his way in an official vehicle bearing registration No. HP-03-2315 from Palampur to Shimla, a bus bearing registration No. HP-23-3899 came from the opposite side, which was being driven by respondent No. 2 in a rash and negligent manner and the same hit the vehicle in which the claimant was travelling at a place near Bhota, as a result of which, the claimant, as also the driver of the vehicle, in which the claimant was travelling, suffered injuries. According to the claimant, he suffered injuries in his forehead, fracture of middle finger of his left hand, as also a sharp cut on the thumb of right hand. Accordingly, he filed a claim petition praying for compensation to the tune of Rs.15,00,000/- on account of injuries suffered by him in the motor vehicle accident.

3. On the basis of the pleadings of the parties, learned Tribunal framed the following issues:

> *"(i) Whether the petitioner suffered injuries due to rash and negligent driving of Bus No. HP-23-3899 by respondent No. 2? OPP.*
>
> *(ii) Whether the accident occurred due to rash and negligent driving of vehicle No. HP-03-2315 by its driver? OPR-1.*
>
> *(iii) If issues No. 1 or 2 are proved in affirmative, to what amount of compensation the petitioner is entitled to and from whom? OPP.*
>
> *(iv) Whether the petition is bad for non-joinder of necessary parties? OPR-1.*
>
> *(v) Whether the petition is not maintainable? OPR-1.*

(vi) Whether the respondent No. 2 was not holding valid and effective driving licence at the time of accident? OPR-3.

(vii) Whether the vehicle in question was being driven in contravention of the terms and conditions of the Insurance Policy? OPR-3.

(viii) Relief."

4. On the basis of evidence led by the respective parties, the said issues were answered in the following terms by the learned Tribunal:

"Issue No. 1:	*Yes.*
Issue No. 2:	*No.*
Issue No. 3:	*Yes, as mentioned in the operative part of the award.*
Issue No. 4:	*No.*
Issue No. 5:	*No.*
Issue No. 6:	*No.*
Issue No. 7:	*No.*
Relief:	*The petition is allowed as per the operative part of the award."*

5. While deciding issue No. 3 (wrongly referred to as issue No. 2 in the impugned award above para-22), learned Tribunal held the claimant to be entitled to compensation to the tune of Rs. 17,000/-. This compensation was so granted by the learned Tribunal in favour of the claimant under the following headings:

"(i)	*Expenditure on medicine and treatment:*	*Rs. 2,000/-.*
(ii)	*Loss on account of medical leave:*	*Rs. 5,000/-.*
(iii)	*Pain and suffering and loss of amenities:*	*Rs. 10,000/-*
	Total:	*Rs. 17,000/-"*

6. While deciding the said issue, learned Tribunal held that PW-3, Dr. Raj Kumar had testified that on 22.01.2006, the claimant was referred for C.T. Scan by Professor, K.S. Jaswal and he conducted the C.T. Scan of the head of the claimant and on such examination, he found that there was evidence of breaking in cortex of inner table of frontal bone of right side. Learned Tribunal held that this witness in his cross-examination stated that he could not tell what were the effects of the injuries and he had admitted that the petitioner/claimant was not entirely treated by him. Regarding prescription slip Ex. PW2/A, learned Tribunal held that the same had not been proved in accordance with law, as the petitioner has not examined the doctor who treated him. Learned Tribunal also held that prescription slip Ex. PW2/M and X-ray form Ex. PW2/Q were also not proved in evidence as the doctor who treated the petitioner and issued prescription slip Ex. PW2/M has not been examined. It also held that the contention of the claimant that one bone was found fractured and chip was still lying in the brain, was not substantiated by the testimony of the doctor and in fact PW-3 had not supported the version of the claimant. It also held that the claimant had not substantiated by way of any evidence the factum of his vision having become weak or his having lost memory on account of head injury. Learned Tribunal also held that though the petitioner has claimed that he spent Rs. 15,000 to Rs. 20,000/- on his treatment, but the said contention was not supported by any evidence. Learned Tribunal also held that what stood proved from the records was the factum of the claimant being lifted from Primary Health Centre, Bhota to Indira Gandhi Medical College, Shimla in a taxi against payment of Rs. 2,000/-, which stood reimbursed to him by the Government and that there was evidence of breaking in cortex of inner table of frontal bone of right side as per the opinion Ex. PW3/A and that an amount of Rs. 1000/- was spent on X-ray charges, out of which some amount stood reimbursed. Learned Tribunal also held that record also substantiated that claimant remained on medical leave for eight days on account of his having suffered injuries.

Thereafter, learned Tribunal went on to hold that the claimant had not suffered any permanent disability and accordingly the claimant was held entitled to compensation to the tune of Rs. 17,000/-under the heads which have already been mentioned hereinabove.

7. Feeling aggrieved, the claimant has filed this appeal.

8. I have heard the learned Senior Counsel for the appellant as also learned counsel for the respondents and have gone through the records as also the award passed by the learned Motor Accident Claims Tribunal, Shimla.

9. Records demonstrate that appellant before this Court deposed before the learned Tribunal as PW-2. In his examination-in-chief, he has deposed about the mode and manner in which the accident took place. He thereafter stated that he came to Shimla in a taxi by paying Rs. 2,000/- to the driver and he undertook his medical treatment in Indira Gandhi Medical College, Shimla. He further deposed that on 21.01.2006, his C.T. Scan was conducted by Dr. Raj. His one bone was found fractured and one chip was found lying in the brain. He further stated that he took treatment for one month and also took medicine for one month. He tendered in evidence copy of prescription slip of PHC Bhota Ex. PW2/A, X-ray form Ex. PW2/B and C.T. Scan form Ex. PW2/C. He also tendered in evidence cash memos of medicines etc., i.e., Ex. PW2/H to Ex. PW-2/Q. He further deposed that due to head injuries, his vision has become weak and there was loss of memory. He also stated that he remained under continuous tension as a result of the brain injury and chip lying in the brain. He further stated that he has spent about Rs. 15,000 to Rs. 20,000/- on his treatment and he remained on medical leave for 15 days.

10. There is on record a prescription slip issued by PHC, Bhota, which is Ex. PW2/A. There is also on record C.T. Scan form Ex. PW2/B issued by the Medical Department of Himachal Pradesh, on the back side of the same, there is a report of the result which is Ex. PW3/A. There is also on record Ex. PW2/C, which is X-Ray form. It is not in dispute that both Ex. PW2/B and Ex. PW2/C stand issued in Indira Gandhi Medical College, Shimla.

11. A perusal of the impugned award demonstrates that what weighed with the learned Tribunal while allowing the claim petition of the claimant only to the extent of Rs. 17,000/- was that no substantive evidence was produced by the claimant on record from which it could be inferred as to what were the actual medical expenses incurred by the claimant and whether actually the claimant had suffered either any disability or any loss in vision or in memory, as alleged? What further weighed with the learned Tribunal was the fact that though the prescription slips as also the C.T. Scan form and reports were placed on record by the claimant, yet they were not proved in accordance with law.

12. In ***Sanjay Kumar*** Vs. ***Ashok Kumar and another***, (2014) 5 Supreme Court Cases 330, Hon'ble Supreme Court has reiterated that in routine personal injury cases, compensation will be awarded only under heads (i), (ii)(a) and (iv), as culled out in para-6 of the judgment passed by the Hon'ble Supreme Court in ***Raj Kumar*** Vs. ***Ajay Kumar,*** (2011) 1 SCC 343. Paras-6 and 7 of the said judgment (Raj Kumar *supra*) are quoted hereinbelow:

> *"6. The heads under which compensation is awarded in personal injury cases are the following :*
>
> *Pecuniary damages (Special Damages)*
>
> *(i) Expenses relating to treatment, hospitalization, medicines, transportation, nourishing food, and miscellaneous expenditure.*
>
> *(ii) Loss of earnings (and other gains) which the injured would have made had he not been injured, comprising :*
>
> *(a) Loss of earning during the period of treatment;*
>
> *(b) Loss of future earnings on account of permanent disability.*
>
> *(iii) Future medical expenses.*
>
> *Non-pecuniary damages (General Damages)*

(iv) Damages for pain, suffering and trauma as a consequence of the injuries.

(v) Loss of amenities (and/or loss of prospects of marriage).

(vi) Loss of expectation of life (shortening of normal longevity). In routine personal injury cases, compensation will be awarded only under heads (i), (ii)(a) and (iv). It is only in serious cases of injury, where there is specific medical evidence corroborating the evidence of the claimant, that compensation will be granted under any of the heads (ii)(b), (iii), (v) and (vi) relating to loss of future earnings on account of permanent disability, future medical expenses, loss of amenities (and/or loss of prospects of marriage) and loss of expectation of life.

7. Assessment of pecuniary damages under item (i) and under item (ii)(a) do not pose much difficulty as they involve reimbursement of actuals and are easily ascertainable from the evidence. Award under the head of future medical expenses - item (iii) -- depends upon specific medical evidence regarding need for further treatment and cost thereof. Assessment of non-pecuniary damages - items (iv), (v) and (vi)-- involves determination of lump sum amounts with reference to circumstances such as age, nature of injury/deprivation/disability suffered by the claimant and the effect thereof on the future life of the claimant. Decision of this Court and High Courts contain necessary guidelines for award under these heads, if necessary. What usually poses some difficulty is the assessment of the loss of future earnings on account of permanent disability - item (ii)(a)."

13. Coming to the facts of the present case, learned Tribunal has awarded compensation to the tune of Rs. 2000/- for expenditure on medicine and treatment. This has been done so by the learned Tribunal by holding that the claimant had not placed on record documents to substantiate that he had incurred expenditure to the tune of Rs. 15,000/- to Rs. 20,000/-, as was in fact claimed by him. It is also not in dispute that the claimant was a Government servant when he met with the accident and he was entitled for medical reimbursement.

14. Now, it is a matter of record that no medical reimbursement was sought by the claimant. This fact stands proved from the statement of RW-3 Sh. H.L. Sharma, who was posted as Senior Accountant in the Himachal Pradesh Agro Industries Corporation, Shimla, wherein the claimant was posted as Chief Finance Officer. A perusal of the statement of RW-3 demonstrates that the claimant was on official tour to Chamba w.e.f. 13.01.2006 to 20.01.2006 and he remained on medical leave w.e.f. 13.01.2006 to 28.01.2006 and he had not claimed any medical reimbursement for the period w.e.f. 13.01.2006 to 28.01.2006 from the Corporation. In this view of the matter, when there was no evidence led by the claimant to substantiate that he had incurred expenditure to the tune of Rs. 15,000 to Rs. 20,000/-, there is no infirmity with the findings returned by the learned Tribunal in this regard. Similarly, it cannot be said that learned Tribunal erred in not awarding the compensation when injury to the head stood duly proved on record. In my considered view, though the factum of injury on head having been suffered by the claimant in the accident in issue was not in dispute, but yet it was for the claimant to have had proved it through the statements of the doctors, who examined and treated him, as to what was the effect of head injury, which was suffered by the claimant. In the absence of there being the testimony of the experts on record in this regard, learned Tribunal was not bound to compensate the claimant on conjectures and surmises. Besides this, it has also come on record that the claimant had not suffered any loss of future earnings, as in his cross-examination, the claimant has admitted that his pay increased with the passage of time.

15. As far as grant of damages for pain, suffering and trauma as a consequence of injuries is concerned, in my considered view, the amount which has been awarded in this regard by the learned Tribunal, is on the lower side. Though the effect of head injury suffered by the claimant could not be proved by him by placing on record substantive evidence, yet it is a matter

of record that the claimant had suffered head injuries on account of the accident and he also remained hospitalized. Therefore, in my considered view, as far as the compensation awarded to the claimant under the head of pain and suffering and loss of amenities is concerned, the same requires enhancement and the same is ordered to be enhanced from Rs. 10,000/- to Rs. 35,000/- with interest, as awarded by the learned Tribunal.

16. Accordingly, in view of my findings returned herienabove, this appeal is disposed of by modifying the award dated 24.09.2010 passed by the learned Motor Accident Claims Tribunal in M.A.C.C. No. 26-S/2 of 2006 to the extent that the claimant/appellant shall be entitled for an amount of Rs. 35,000/- under the head pain and suffering and loss of amenities alongwith interest as awarded by the learned Tribunal.

The appeal stands disposed of in above terms, so also miscellaneous applications, if any.

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

Bhagwati Devi and another ...Petitioners.

Versus

Union of India and others ...Respondents.

CWP No. 1205 of 2001
Reserved on 02.07.2018
Decided on : 5th July, 2018.

Constitution of India, 1950- Article 226- CCS (Pension) Rule (Liberalised Pensionary Award)- Rule 4 – Family pension – Grant of - 'B' son of petitioners employed with Para Military Forces died in 1998 in a terrorist attack – Family pension used to be paid to his widow's ('S') but after sometime, she remarried – Parents of 'B' asserting claim to family pension after remarriage of 'S' but request declined by Govt.- Petition against – State resisting petition on ground that Pension Rules do not entitle, parents for family pension – And 'S' after re-marriage is being paid ordinary family pension as per aforesaid Rules – However, Pension Rules also providing for dependent pension for parents when government servant dies as a bachelor or as widower without reference to their pecuniary circumstances – Held, Family pension is intended to all the dependents of the deceased – When widow is disqualified on re-marriage, other members are eligible for family pension – After re-marriage 'S' may not be in a position to look after parents of deceased – Thereafter, parents are entitled for family pension subject to limits mentioned in Pension Rules – Petition allowed. (Paras-9 & 13)

Case referred:

Neon Laboratories Limited vs. Medical Technologies Limited and Others (2016) 2 SCC 672

For the Petitioners : Mr. K. B. Khajuria, Advocate.

For the Respondents : Mr. Shashi Shirshoo, Central Government Counsel, for respondents No. 1 to 4.

Ms. Ranjana Parmar, Senior Advocate, with Ms. Rashmi Parmar, Advocate, for respondent No.5.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

The petitioners are the mother and father of late Sh. Balbir Singh, who in the year 1995 was enrolled in Assam Rifles and unfortunately died in an encounter in terrorist attack on 7.4.1998. Earlier to that, Balbir Singh had got married with one Saroj Kumari, respondent No.5 on 2.12.1996 and after his death, it was she, who was being paid the family pension. However, respondent No.5 solemnized the marriage with one Ravinder Singh and according to the petitioners, this dis-entitled her to the family pension which then ought to have been paid to them. It is in this background that they filed the instant petition for the grant of following reliefs:

> "(i) *To quash and set-aside the impugned orders Annexures P-1 to P-3 and to consider and grant full family pension to the petitioners and in the alternative part of the family pension may very kindly be ordered to be granted to the petitioners in the interest of law and justice.*
>
> *(ii) Rule 4 of LPA Pension Rules may very kindly be summoned from the respondents and the same may very kindly be struck down in the interest of law and justice."*

2. The official respondents have opposed the petition by filing reply wherein it is submitted that as per the provisions of CCS Rules and various judgments of the Hon'ble Supreme Court, parents are not entitled to pension in the event of death of any employee of Para Military Forces. The son of the petitioners was enrolled in Assam Rifles and was killed on 7.4.1998 at Nagaland. After his death, all his pensionary benefits of Rs.8,66,859/- have been paid to Saroj Kumari, respondent No.5. The respondent No.5 was also paid Rs.82,500/- of his i.e. Balbir Singh share of Assam Rifles Group Insurance Scheme benefits. Thereafter, Saroj Kumari was granted Rs.3050/- as Liberalised Pensionary Award and after her re-marriage, she was granted ordinary family pension of Rs.1275/- to which she was entitled as per Rule 4 of CCS (Pension) Rule (Liberalised Pensionary Award). On merits, the factum of re-marriage of Saroj Kumari was admitted. However, it was reiterated that as per the provisions, referred to above, she was entitled to initially Liberalised Pensionary Award and after re-marriage to the grant of ordinary family pension under the CCS (Pension), Rules and pension as aforesaid.

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

3. Mr. K.B. Khajuria, learned counsel for the petitioners has vehemently argued that the widow on account of re-marriage had incurred a disqualification and, therefore, the parents of the deceased personnel would become eligible for grant of family pension. According to him, the provisions in the Liberalised Pensionary Awards were framed with a view to render financial assistance to the family of the deceased Armed Force Personnel on whom they were dependent for their survival. Therefore, in such circumstances, it was the parents of the deceased Armed Force Personnel, who would be entitled to the family pension.

4. The submissions made by learned counsel for the petitioners are vehemently opposed by the respondents by urging that it is respondent No.5, who alone is entitled to the pension notwithstanding the fact she has got re-married.

5. In order to appreciate this contention, one will have to refer to the provisions contained in Liberalised Pensionary Awards as it is not in dispute that the instant case would be governed by the said Awards.

6. The Government of India has framed Liberalised Pensionary Awards (for short LPAs) in the case of death/disability as a result of attack by or during action against extremists, anti-social elements etc. effective from 01.01.1986, copy whereof has been annexed by the official respondents with their reply as Annexure R-1. The Government of India, Ministry of Personnel,

Public Grievances and Pension, Department of Pension and Pensioners' Welfare, O.M. No.2/6/87-PIC-(ii), dated 7th August, 1987 deals with the following subject:

> "Liberalised Pensionary Awards in the case of death/disability as a result of (I) attack by or during action against extremists, anti-social elements, etc., and (ii) action against enemy in International War or Border Skirmishes – modifications on the recommendations of the Fourth Central Pay Commission."

7. In terms of the aforesaid O.M., the earlier O.M. dated 9.11.1984 has been modified to the following effect:-

> **"A. Family Pension:**
>
> 3.1. The existing distinction with reference to basic pay at the time of the death of the Government servant for grant of family pension will be dispensed with. In all cases of death of Government servants while performing duties as a result of attack by or during action against extremists, dacoits, smugglers and anti-social elements, etc., the widow will be entitled to family pension equal to last pay drawn by the deceased Government servant. The said family pension shall be admissible to the widow until her re-marriage/death. During this period children's allowance and children's education allowance will not be admissible.
>
> 3.2. In the event of re-marriage of the widow, ordinary family pension under C.C.S. (Pension) Rules, 1972 will be admissible to her from the date following the date of her re-marriage. From the said date children will be allowed children's allowance as specified in paragraph 3.5.
>
> 3.3. If the Government servant is not survived by widow but is survived by child/children only, all children together shall be eligible for family pension at the following rates and also draw in addition the Children's Allowance specified in para 3.5:-

	Basic pay of Government servant on the date of death	Monthly family pension
(i)	Not exceeding Rs.1,500 ...	50% of basic pay.
(ii)	Exceeding Rs.1,500 but not exceeding Rs.3,000	40% of basic pay subject to a minimum of Rs.750.
(iii)	Exceeding Rs.3,000.	30% of basic pay subject to a minimum of Rs.1,200 and maximum of Rs.2,500.

> The above family pension shall be payable to the children for the period during which they would have been eligible for family pension under the C.C.S. (Pension) Rules, 1972. The family pension shall be paid to the seniormost eligible child at a time on the lines on which family pension is granted under the C.C.S. (Pension) Rules, 1972."

8. Likewise, dependent pension under the Award is mentioned in para 3.4 and reads thus:

> "3.4. Where the Government servant dies as a bachelor or as a widower without children, pension will be admissible to parents without reference to their pecuniary circumstances at 3/4th of pay last drawn by the Government servant for both parents and at 3/4th of this rate for a single parent. On the death of one parent dependent pension at the latter rate will be admissible to the surviving parent."

9. Identical and rather pari-materia provisions as contained in sub section (4) of Section 4 of the consolidated orders on LPAs, contained in GOI, Department of Pension and Pensioners Welfare O.M. No.33/5/89-P & P.W.(K), dated 9th April, 1990 as modified by O.M. No. 45/22/97-P & PW(C) dated 3rd February, 2000, came up for consideration before the learned

Single Judge of Kerala High Court in Panchami vs. Union of India 2013 (2) KerLT 393 : 2013 (2) KerLJ 724 and it was held that on a reading of the aforesaid O.M. it was found that the family pension is intended to all the dependents of the deceased. Hence, when one member is disqualified (widow), other members are eligible for family pension. Since on re-marriage of the widow, she is residing with her new husband at the new residence and it can therefore be reasonably expected that she may not be in a position to look after the parents of the deceased. On disqualification of the widow on re-marriage, the parents are eligible for LPA subject to the limits mentioned in sub section (4). However, at the same time, it was clarified that since a sum is being paid to the widow as ordinary family pension on re-marriage, the same can be deducted from the LPA which was granted to the widow initially. The parents are thus eligible for the balance amount of the LPA subject to the limits mentioned i.e. 75% for parents of the pay last drawn by the deceased government servant.

10. At this stage, it shall be apposite to refer to the relevant observations as contained in the aforesaid judgment which reads thus:

> *"**(2**.) The learned counsel for the petitioners submits that as per sub-s. (4) of S. 4 of the consolidated orders on LPA [GOI, Department of Pension and Pensioners Welfare, O.M. No. 33/5/89-P & P.W.(K), dated the 9th April, 1990 as modified by O.M. No. 45/22/97-P & PW(C) dated the 3rd February, 2000], the parents are eligible for 75% of the pay last drawn by the deceased and a single parent is eligible for 60% of the pay last drawn without reference to the pecuniary circumstances of the parents provided the government servant dies as a bachelor or as a widower without children. S. 4 of the consolidated orders on L.P.A. reads as follows:*
>
> > *4. Benefit to the family in the event of the Death of the Government Servant – family pension under categories 'D' & 'E'.*
> >
> > *1) If the Government servant is survived by the widow, she will be entitled to family pension equal to the pay last drawn by the deceased Government servant. The said family pension shall be admissible to her for life or until her remarriage.*
> >
> > *2). In the event of remarriage of the widow, family pension will be allowed at the rates of family pension and subject to the conditions laid down for family pension under the CCS (Pension) Rules, 1972 from the date following the date of her marriage.*
> >
> > *3). If the Government servant is not survived by widow but is survived by child/children only, all children together shall be eligible for family pension at the rate of 60% basic pay, subject to a minimum of Rs.2500/- Children's Allowance, asadmissible now, stands abolished.*
> >
> > *The above family pension shall be payable to the children for the period during which they would have been eligible for family pension under the CCS (Pension) Rules, 1972. The family pension shall be paid to the senior most eligible child at a time on the lines on which family pension is regulated under the CCS (Pension) Rules, 1972.*
> >
> > *4). Where the Government servant dies as a bachelor or as a widower without children, dependant person will be admissible to parents without reference to the pecuniary circumstances at 75% of the pay last drawn by the deceased Government servant for both parents and 60% of the pay last drawn by the deceased Government servant for a single parent. On the death of one parent dependant pension at the latter rate will be admissible to the surviving parent.*
>
> *(**3.)** The learned counsel for the petitioners placing reliance upon the decision reported in Padmavathy Amma v. Union of India & Ors.,2009 4 KerLT 456 , submits that upon disqualification of one member the other dependent family*

members are eligible for the family pension. The operative portion of the said decision reads as follows:

> *4. According to me, the decision in Kunhami's case (supra) is squarely applicable in this case and the respondents, therefore, cannot legally canvass the position that incurring of disqualification by the widow on account of re-marriage would not make the mother of the concerned deceased personnel eligible for the grant of family pension. The provisions under the Regulations were framed with a view to render financial assistance to the family of the deceased Armed Force Personnel on whom they were dependent for their survival. Admittedly, in this case, after the death of the concerned person, family pension was granted to the primarily eligible person, who is his widow. She was drawing pension and thereafter on account of her re-marriage she incurred disqualification to continue to draw the pension. It is only thereafter that the petitioner who is the mother of the deceased Unni Pillai applied for family pension. Indisputably, mother of a deceased Armed Force Personnel is an eligible family member to draw family pension. Going by the decision of this Court in Kunhami's case (supra) rendered relying on the decision of the Hon'ble Apex Court in S.K. Mustan Bee v. The General Manager South Central Railway & Anr. reported in (JT 2002 SC 50), the said reason cannot be assigned to deny family pension to a person like the petitioner. So also, no provision was brought to my notice under the Army Regulations by the respondents which would permanently disentitle ordisqualify other surviving, eligible family members for the grant of family pension on the death or disqualification of the 'family pensioner' subject to the order of priority. In short, the respondents cannot assign the ground that the primarily eligible person viz., the widow was originally sanctioned the family pension and was drawing the same and therefore, the next eligible family member is ineligible to claim family pension even subsequent to the incurring of disqualification by such 'family pensioner'. Accordingly, Ext.P6 is quashed. Since the sole objection raised for granting family pension to the petitioner was thus found unmerited and untenable, there cannot be any further impediment for the grant of family pension to her. Therefore, there shall be a direction to the respondents to sanction family pension including arrears due, to the petitioner within three months from the date of receipt of a copy of this judgment.*

(4). On a reading of the aforesaid OM, it is found that the family pension is intended for all the dependents of the deceased. Hence, when one member is disqualified (widow), other members are eligible for family pension. Since on re-marriage of the widow, she is residing with her new husband at the new residence, it can be reasonably expected that she may not be in a position to look after the parents of the deceased. On disqualification of the widow on re-marriage, the parents are eligible for LPA subject to the limits mentioned in sub-Section (4). Since a sum is being paid to the widow as ordinary family pension on re-marriage, the same can be deducted from the LPA which was granted to the widow initially. The parents are eligible for the balance amount of the LPA subject to the limits mentioned i.e., 75% for parents and 60% for a single parent, of the pay last drawn by the deceased government servant. Therefore, I direct the 1st respondent to release pension to the petitioners within three months from the date of receipt of a copy of this judgment. This writ petition is disposed of as above."

11. Thus, it would be seen from the above, that the issue in hand is squarely covered by the aforesaid judgment more particularly when the private respondent has not been able to show any contrary law on the subject. Moreover, the learned counsel for the private respondent has not been able to convince much less persuade this Court to take different view than the one taken by the Kerala High Court.

12. It is apposite to record herein that the Hon'ble Supreme Court in its decision in case titled ***Neon Laboratories Limited vs. Medical Technologies Limited and Others (2016) 2 SCC 672,*** has observed that every High Court must give due deference to the law laid down by the other High Courts. It is apt to reproduce para 7 of the judgment, which reads thus:

> *"7. The primary argument of the Defendant-Appellant is that it had received registration for its trademark ROFOL in Class V on 14.9.2001 relating back to the date of its application viz. 19.10.1992. It contends that the circumstances as on the date of its application are relevant, and on that date, the Plaintiff-Respondents were not entities on the market. However, the Defendant-Appellant has conceded that it commenced user of the trademark ROFOL only from 16.10.2004 onwards. Furthermore, it is important to note that litigation was initiated by Plaintiff-Respondents, not Defendant-Appellant, even though the latter could have raised issue to Plaintiff-Respondents using a similar mark to the one for which it had filed an application for registration as early as in 1992. The Defendant- Appellant finally filed a Notice of Motion in the Bombay High Court as late as 14.12.2005, in which it was successful in being granted an injunction as recently as on 31.3.2012. We may reiterate that every High Court must give due deference to the enunciation of law made by another High Court even though it is free to charter a divergent direction. However, this elasticity in consideration is not available where the litigants are the same, since Sections 10 and 11 of the CPC would come into play. Unless restraint is displayed, judicial bedlam and curial consternation would inexorably erupt since an unsuccessful litigant in one State would rush to another State in the endeavour to obtain an inconsistent or contradictory order. Anarchy would be loosed on the Indian Court system. Since the Division Bench of the Bombay High Court is in seisin of the dispute, we refrain from saying anything more. The Plaintiff-Respondents filed an appeal against the Order dated 31.3.2012 and the Division Bench has, by its Order dated 30.4.2012, stayed its operation."*

13. In view of the aforesaid discussion, I find merit in this petition and the same is accordingly allowed and the petitioners are held entitled for the balance amount of LPA to the extent of 75% of the pay last drawn by the deceased Balbir Singh. Since the entire amount has been wrongly paid to the widow as ordinary family pension, then on re-marriage the same will have to be deducted from the LPA which was granted to the widow initially. The respondents are directed to release the pension to the petitioners within three months from the date of receipt of a copy of this judgment.

The petition 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 SURESHWAR THAKUR, J.

Bhupinder Kumar ....Petitioner.

Versus

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

Cr. Revision No. 24 of 2016
Decided on : 5.7.2018

Code of Criminal Procedure, 1973- Sections 397 and 401- **Indian Penal Code, 1860-** Section 379 – Revision – Petitioner-accused challenging concurrent findings of Lower Courts holding him guilty of committing theft of angle iron – Petitioner contending that conviction is based on wrong appreciation of evidence – There is no evidence that complainant is owner of angle iron in question – High Court found that complainant was the owner of shop – Accused was caught red handed by complainant while lifting angle iron from his commercial establishment and uploading them on a Rehari – Stolen property was recovered from him – Ownership of complainant qua stolen property was never disputed during trial – Held, accused was rightly convicted of offence of theft – However, in peculiar circumstances, sentence reduced to two months simple imprisonment with fine – Revision partly allowed – Sentence modified. (Paras- 10 to 13)

For the petitioner: Mr. A.K. Dhiman, Advocate.
For the respondent: Mr. Mr. Hemant Vaid, Addl. A.G. with Mr. Y.S. Thakur & Mr. Vikrant Chandel, Dy. A.Gs., for the respondent.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

The instant revision petition stands directed, against, the concurrently recorded verdicts, of, conviction, upon, the petitioner, for, his committing an offence punishable under Section 379 Indian Penal Code, and, whereafter, he was sentenced to undergo simple imprisonment, for a period of six months, and, to pay a fine of Rs. 1000/-, and, in default of payment of fine, he stood sentenced, to undergo further simple imprisonment, for, a period of one month.

2. The facts relevant to decide the instant case are that on 13.1.2011 at 5.45 A.M, a telephonic information was conveyed to police station Dharampur about a theft of angle iron having taken place at Dharampur and one person Bhupinder Kumar (Accused) having been apprehended by the local people on the basis of which rapat Ext. PW3/A was entered in the daily diary and a police party headed by PW-5 ASI Choli Ram accompanied by other police officials was dispatched to the spot. When the police party reached the spot where complainant Kapil Goel filed a complaint Ext. PW-1/A with the police in which it had been stated that he runs a shop known as Kapil Expo Traders Pvt. Ltd. at Dharmpur Bazar and for the last 14-15 days the angle, channel and pati kept outside the Sudhir Building were being stolen by somebody. He did not disclosed this fact to anybody and started sleeping in a truck on the road to apprehend the thief. Today i.e. on 13.1.2011 at about 5 A.M. he heard some noise and saw that Bhupinder Kumar (Accused) was loading three angle irons on his rehri. Earlier also the theft of angle irons has taken place and necessary action be taken against accused Bhupinder kumar. This rukka Ext. PW-1/A was sent to the police station through C. Sunil Kumar on the basis of which FIR Ext. PW-3/A was registered and investigation was pressed into action. The three angle irons and the rehri were taken into possession on the spot vide memo Ext. PW-1/B. Spot map Ext. PW-5/A was prepared and photograph Ext. P-1, Ext. P-3 to Ext. P-5 were got snapped. The accused person had been apprehended on the spot by the complainant and was arrested at 8.40 A.M. vide arrest memo Ext. PW-4/A. During the course of investigation the accused person gave a disclosure statement under Section 27 of the Indian Evidence Act Ext. PW-2/A stating that he had used a plier and a iron rod to commit theft and can get them recovered. Acting on the said information the recovery of plier Ext. P-3 and road Ext. P-2 were got effected vide memo Ext. PW-2/B and were sealed with seal N and the sample of the seal was separately taken on a piece of cloth which is Ext. PW-2/C. The photograph of the recovery Ext. P-2 was got snapped. The accused person was subsequently released on bail by the order of the Court. After the completion of entire investigation the present challan was filed in the Court.

3. The accused was charged by the learned trial Court, for his committing, an offence punishable, under Section 379 Indian Penal Code. In proof of the charge, the prosecution

examined 5 witnesses. On conclusion of recording of 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.

4. On an appraisal of evidence on record, the learned trial Court, recorded findings of conviction, against, the accused/petitioner herein.

5. The accused/petitioner, is, aggrieved by the concurrently recorded judgments of conviction by both the learned Courts below. The learned counsel appearing for the accused/petitioner has concertedly and vigorously contended, qua, the concurrently recorded findings of conviction, by both the learned courts below, standing not based, on a proper appreciation, by them, of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation, by them, of the material on record. Hence, he contends qua the findings of conviction being reversed by this Court, in, the exercise of its appellate jurisdiction, and, theirs being replaced by findings of acquittal.

6. On the other hand, the learned Additional Advocate General has with considerable force and vigour, contended that the findings of conviction recorded, by, the learned Courts below, standing based, on a mature and balanced appreciation of evidence, on record, and, theirs not necessitating interference, rather theirs meriting vindication.

7. 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.

8. The convict/accused, has, allegedly stolen, from, the commercial premises of the complainant, three angle irons, and, during the process of his stealing, the, aforestated stolen property, from, the commercial establishment, of the complainant, he was caught red handed, by PW-1, and, thereafter, a, report was lodged with the police station concerned. PW-1 in his testification, borne in his examination-in-chief, has qua the aforesaid factum, hence rendered, a, candid echoing, and, importantly, during the course his being subjected to, cross-examination, by the learned defence counsel, the latter omitted to put apposite suggestions, to him, for ensuring, any, denial emanating from PW-1, vis-à-vis, the aforestated factum. The effect thereof, is, qua the accused acquiescing, qua, the aforesaid factum, occurring in the examination-in-chief of PW-1. Furthermore, during, the course of PW-1, rendering, his testification, testification whereof, is, borne in his examination-in-chief, he identified the convict, to be the person, who stood caught red handed, during the process, of, his stealing angle irons, from, the commercial establishment, of the complainant. Even, the efficacy, of, the aforesaid articulations, made by PW-1, also stand established, given the learned defence counsel while holding him, to cross-examination, rather omitting to mete any appropriate suggestions, to him, for hence eliciting, any, apposite denial thereto. The effect thereof, is of the convict hence acquiescing qua the factum, of, his being the person, who stood caught red handed by PW-1, while, his pilfering the angle irons, from, the commercial establishment of the complainant.

9. since complainant had caught, the, convict red handed, in, his pilfering angle irons, from his commercial establishment, and, thereafter, a FIR, was lodged with the police station concerned, (i) thereupon, also with, a, display of the custody, of, stolen property, being at the relevant time, hence held by the convict, and, wherefrom, its, recovery stood effectuated, through, memo borne in Ext. PW-1/B, (ii) hence with the apt effectuation, of, the apposite recovery(s) hence standing proven, (iii) thereupon, there was no necessity for the Investigation Officer concerned, to prior thereto, record any apt disclosure statement, nor any absence of recording thereof, would, constrain this Court, to bely the sanctity, of PW-1/B, whereunder the apt recovery, stood effectuated, from the person, of the convict. The effect whereof, is, qua the recovery memo, borne in Ext. PW-1/B, rather corroborating the testification of PW-1.

10. Be that as it may, even the tools, which were utilized by the convict, for ensuring his pilfering, the, angle irons, from, the commercial establishment of the complainant, were, held in his custody, at the relevant time, and, recovery(s) thereof were efficaciously proven, to, occur

through, memo borne, in, Ext. PW-2/A. The effect thereof, is, qua Ext. PW-2/B, also firmly corroborating, the efficacy, of, Ext. PW-1/A, and, also the testification, of, PW-1.

11. The learned counsel for the convict has contended with much vigor, that, with the prosecution, not, placing on record, any firm material, in display, of the complainant holding ownership, of the stolen property, hence, in absence thereof, no firm conclusion being formable, qua, the complainant being owner thereof nor hence it being appropriate for this Court, to, convict the accused qua the offence charged. The aforesaid submission cannot be accepted, (i) given there being no apt meteing(s) either to PW-1 or to the complainant, by the learned defence counsel, while his holding, them to cross examination, of, any suggestion therewhom, with, any displays, therein, of, the convict being the owner, of the purported stolen property, (ii) rather when, hence, the accused acquiesces, qua, the complainant being owner thereof, (iii) thereupon the, prosecution, was not enjoined, to, prove, the factum of the complainant, holding ownership, of, the stolen property.

12. 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 appellate Court, does not, suffer, from any perversity or absurdity of mis-appreciation and non-appreciation of evidence on record. The impugned verdicts, are, hence affirmed and maintained.

13. However, the learned counsel for the petitioner/ convict prays, at this stage, to reduce the sentence of imprisonment imposed upon the petitioner/convict. He submits that the aforesaid submission, may be amenable to acceptance, given the convict, being the sole bread earner of his family. The aforesaid submission is accepted. The sentence of imprisonment imposed upon the petitioner/ convict is reduced, from, six month simple imprisonment, to, **two months**' simple imprisonment. Fine of Rs. 5000/- is also, imposed upon the petitioner/convict. In default of payment of fine, the convict shall further undergo simple imprisonment, for, a period one month. The period of detention already undergone by him, is ordered to be set off, from the sentence of imprisonment, imposed, upon him.

14. Consequently, the sentence(s) of imprisonment imposed upon the convict, is modified to the extent above. Records be sent back forthwith.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, ACJ AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Shri Gulshan Chauhan .....Petitioner.

Vs.

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

CWP No.: 690 of 2018
Reserved on 15.06.2018
Date of Decision: 5.7.2018

Constitution of India, 1950- Article 14- Grant of licence to run liquor vend(s) – Challenge thereto by unsuccessful bidder – State deciding to grant licence(s) to run liquor vends in State and inviting bids – 'Announcement' making it clear that all allotments of vends or renewal of licences shall be subject to confirmation by Excise and Taxation Commissioner – Said Authority was also empowered to sell privileges by any of the modes stipulated therein and considered expedient in the interest of revenue – Held, allocation of licence in respect of liquor vend regarding which petitioner was the highest bidder, in favour of private respondent No.7 alongwith other unallotted vends, cannot be said to be arbitrary – Decision was taken by official respondents in interest of revenue of State. (Para-)

Constitution of India, 1950- Article 14- Sale of privilege by way of auction – Highest bid – Effect – Held, mere submission of highest bid, does not confer any right on bidder – Authority has right not to accept highest bid and even to prefer a tender other than the highest bid, if there exist good and sufficient reasons – Petitioner was highest bidder in respect of liquor vend 'Gumma' – His Bid had not yet been accepted by Competent Authority - Many other vends in that area remained unallotted as Contractors did not opt for such vends "exclusively" – Department deciding to club allotted as well unallotted vends in common pool including vend at 'Gumma' in order to generate more revenue – Competent Authority then negotiating with petitioner and respondent No. 7 and allotting liquor vend at 'Gumma' and other unallotted vends to Respondent No. 7, as he out bidded petitioner – Petitioner challenging allotment of licence in respect of 'Gumma' vend, on ground that he was highest bidder – Further held, his highest bid was never accepted by Competent Authority – Allotted and unallotted vends were clubbed in interest of revenue of State – Decision of Competent Authority not shown to be arbitrary – Petition dismissed. (Paras- 27 to 30 and 33)

Constitution of India, 1950- Articles 19(1)(f) and 47- Right to trade – Business in liquor – Held, No person has a fundamental right to do business in liquor – State has exclusive privilege in that regard – But when State decides to sell such privilege, then it must act fairly - It cannot escape rigors of Article 14. (Para-28)

Cases referred:

State of Orissa and others Vs. Harinarayan Jaiswal and others, (1972) 2 SCC 36
State of M.P. Vs. Nandlal Jaiswal, (1986) 4 Supreme Court Cases 566
Kuldeep Singh Vs. Govt. of NCT of Delhi, (2006) 5 Supreme Court Cases 702

For the petitioner:	Mr. B.C. Negi, Senior Advocate, with Mr. Nitin Thakur, Advocate.
For the respondents:	Mr. Ashok Sharma, Advocate General, with Mr. Ajay Vaidya, Senior Additional Advocate General, Mr. Ranjan Sharma and Ms. Rita Goswami, Additional Advocate Generals, for respondents No. 1 to 3. Mr. Suneet Goel, Advocate, for respondent No. 4.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge:

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

"(i) Issue a writ of mandamus directing the respondent-authorities to grant license to the petitioner with respect to Unit No. 98 Gumma in which the petitioner succeeded so that selling of liquor may be started without any further delay.

(ii) That the selling of liquor from the vends is to be started from 1st April, 2018 and as such, the respondent-authorities may kindly be directed not to impose any penalty/recover any amount for the period for which sale could not be undertaken by the petitioner and further the loss incurred by the petitioner on day to day basis may kindly be ordered to be recovered/adjusted from the private respondents.

(iii) That issue a writ of mandamus directing the respondent-authorities to place on record the allotment letter issued in favour of the private respondent with respect to the liquor vend at Gumma.

(iv) That issue a writ of certiorari to quash the allotment letter issued in favour of the private respondent with respect to the liquor vend at Gumma.

(v) Call for the records pertaining to the case at hand.

(vi) Direct the respondent authorities to pay the cost of the petition.

(vii) Such other order, which this Hon'ble Court deems fit and proper, may also be passed in favour of the petitioner, in the interest of justice and fair play."

2. Facts necessary for the adjudication of this petition are as under:

Government of Himachal Pradesh has come out with *"Announcements For The Allotment Of Retail Excise Vends By Draw Of Lots For The Year 2018-19*". The process of allotment of Liquor Units in the State of Himachal Pradesh for the year 2018-19 was initiated as per said Announcements. Petitioner applied for allotment of liquor vend in Gumma, District Shimla, H.P. amongst others in the name of *Gulshan Chauhan Rajinder Singh & Company* on 15th March, 2018. Draw of lots was held on the same day. Petitioner was highest bidder for Unit No. 98. He was asked by the respondent-authorities to deposit 5% of the total value of the bid amount of Rs.1,68,52,690/-. Petitioner deposited 5% of the same, i.e., Rs.8,50,000/- vide receipt/DD No. 949515. This was done on 16th March, 2018.

3. Thereafter, as per the petitioner, he made arrangements to provide for a liquor vend by hiring premises on rent, for which he invested huge amount. This was followed by issuance of a public notice dated 22.03.2018 by the respondent-authorities, which pertained to unallotted vends. This was followed by issuance of Annexure P-4 dated 26.03.2018, vide which, respondent-authorities announced a schedule for allotment of unallotted vends. The date fixed for this purpose was 27th March, 2017 and the same was to be done at 3:00 p.m. in the office of Additional Excise and Taxation Commissioner (South Zone), Shimla. This was followed by issuance of another public notice (Annexure P-5) by the respondents-authorities on 29.03.2018, in which it was categorically mentioned that the said notice pertained to left over excise vends, which were now to be allotted by way of negotiations.

4. Further as per the petitioner, on 29th March, 2018, respondent-authorities contacted him telephonically and informed him that negotiations with regard to unsold liquor vends were to take place on 30th March, 2018 and that the petitioner could also participate in the same. Accordingly, petitioner attended the negotiations, which were so held on 30th March, 2018. The private respondent at the time of negotiations, in breach of laid down norms, made a bid, wherein he of his own, collectively put forth a bid for both sold and unsold liquor vends. The offer, which was so made by the private respondent, included Gumma liquor vend, qua which the petitioner was the highest bidder. According to the petitioner, the said collective bid was made by the private respondent of his own and there was no provision for making any such bid in the 'Announcements' Annexure P-1. According to the petitioner, in these circumstances, he also agreed to take unsold liquor vends at Jubbal and Kuthera and made a communication in this regard to the respondents-authorities on 31.03.2018. As per the petitioner, respondents-authorities coerced him to take all seven Units for which bid stood made by the private respondent. According to the petitioner, respondents-authorities could auction the liquor vends in consonance with any of the methods prescribed in Clause 1.2 of the Announcements.

5. The grievance which thus stood raised by the petitioner in the petition was that the act of the private respondent of offering a bid by including the "already sold vends" and the act of the respondents-authorities accepting such an illegal offer of the private respondent was *per se* bad in law and also in violation of the 'Announcements' so made by the respondent-State.

6. The stand of the respondents- authorities in the reply so filed on the affidavit of the Excise and Taxation Commissioner, Government of Himachal Pradesh was that though Unit No. 98, i.e., Gumma, District Simla was allotted to the petitioner for a total value of Rs.1,68,52,690/-, however, in the said District, Summer Kot, Kuthara, Jubbal, Chailla and Sainj, Khara Pathar and Deori Ghat Units remained unallotted. Further as per the respondents-authorities, it had become impossible to allot these unsold Units and revenue loss to the State exchequer appeared inevitable. Under these circumstances, after taking into consideration the factors of viability of each pending Unit and possibility of their allotment in combination with other Units, process of negotiation was resorted and Unit No. 98, i.e., Gumma was clubbed with

unallotted Units as also Unit No. 71, i.e., Batar-Gallu. Further as per the respondents-authorities, original value of these Units was Rs.13,08,07,918/- and after clubbing the above mentioned Units, the total value of clubbed Units was Rs.14,76,60,608/- and the private respondent offered a bid of Rs.10,91,25,073/- in the process of negotiation and it is in this background that all Units stood allotted to respondent No. 4. According to the State, this entire exercise was undertaken to prevent any loss of revenue to the exchequer and in fact the allotment which had been made in favour of the petitioner was not yet confirmed. Further, the stand of the State was that mode of negotiation to allot/sell the vends/Units was required to be resorted exclusively by the Financial Commissioner in the revenue interest of the State, which Financial Commissioner was legally authorized and competent. On these basis, respondent-State justified its action.

7. In its reply filed by respondent No. 4, besides defending the act of the respondent-State, it also assailed the locus of the petitioner in maintaining the writ petition, on the ground that the petitioner had participated in the process of allotment of unsold liquor vend in issue even during the stage of negotiations, allotment made pursuant to which stood assailed by way of present petition.

8. We have heard the learned counsel for the parties, as also learned Advocate General. We have also gone through the entire contemporaneous record, which has been so produced before the Court by the State from time to time.

9. Before proceeding any further, it is relevant to take note of the "Announcements", which have been so made by the Excise and Taxation Department for allotment of retail vends of country liquor, foreign liquor and country fermented liquor in Himachal Pradesh for the financial year 2018-2019. A copy of the "Announcements" is appended with the petition as Annexure P-1. We will refer to few relevant Clauses of the said "Announcements", which in our considered view, are relevant for the purpose(s) of adjudication of this petition. The Introductory Chapter of the said "Announcements" contains that liquor licences shall be granted subject to the provisions of the Himachal Pradesh Excise Act, 2011 and the Rules framed thereunder.

10. Clause 1.2 of the said Chapter provides as under:

> *"1.2 The Excise and Taxation Commissioner-cum-Financial Commissioner (Excise), Himachal Pradesh, reserves the right to sell all or any of the licenses by allotment or by auction or by private contract or by calling tenders or by negotiations or by draw of lots or by renewal or by any other arrangement (including combination of the foregoing modes), which he may consider expedient in the interest of revenue. For this purpose, the mode of grant of these licenses may be changed by the Excise and Taxation Commissioner, whenever necessary before the actual grant of the license. The excise & Taxation Commissioner may also modify the procedure contained in these terms and conditions to give effect to such mode of grant of license after determining Registration fee, Excise duties or any other levy, in such manner as he may deem fit."*

11. Clause 1.3 of the said Chapter provides that all the allotments of the vends/units or renewal of licences of the vends/units shall be subject to the confirmation by the Excise & Taxation Commissioner-cum-Financial Commissioner (Excise), Himachal Pradesh, who reserves the right to reject any allotment/renewal without assigning any reason for doing so. For ready reference, said Clause is also being quoted hereinunder:

> *"1.3 All the allotments of the vends / units or renewal of licences of the vends/units shall be subject to the confirmation by the Excise & Taxation Commissioner-cum-Financial Commissioner (Excise), Himachal Pradesh, who reserves the right to reject any allotment/ renewal without assigning any reason for doing so."*

12. Chapter-II of the said Announcements deals with the provisions of the procedure for allotment on application and by draw of lots. Clause 2.19 of the same provides as under:

"In case there is no applicant for a particular vend/unit, the Collector (Excise) shall take necessary steps for the resettlement of such vend/unit. Firstly, the applicants present shall be informed of all those vend in respect of which no application has been received. The Collector (Excise) shall invite offers from all the present applicants for such vends on the prescribed application form and on receipt of the same, the process of allotment in respect of these vends shall be resorted to as per the procedure. In case there still remain some vends in respect of which no application is received, the Excise and Taxation Commissioner-cum-Financial Commissioner (Excise) shall decide the mode or manner of allotting such vend(s)/unit(s) as per Para 1.2." *(Emphasis supplied)*

13. Clause 2.27 of the same provides as under:

"2.27 If the confirmation from the Excise & taxation Commissioner-cum-Financial Commissioner (Excise) is not received by 31st March, the Collector (Excise) may assume that the Financial Commissioner (Excise) has accorded confirmation for allotment. *(Emphasis supplied)*

14. Clause 2.40 of the same provides as under:

"2.40 The complete process of draw of lots shall be videographed."

15. Coming to the facts of the present case, it is not in dispute that petitioner was the highest bidder qua liquor vend Unit No. 98 at Gumma and in lieu of his having been found as such, the said petitioner had deposited the requisite amount, i.e., 5% of the bid amount on 16th March, 2018. There is on record as Annexure P-4 a public notice which was issued by the Excise & Taxation Commissioner, Government of Himachal Pradesh, vide which, said authority invited applications for allotment of left over retail units/vend of country liquor as also foreign liquor for the year 2018-2019 in the State of Himachal Pradesh. The date and time of allotment of vend/draw of lots as per Annexure P-4 was 27.03.2018 at 3:00 p.m. at the venue which so stood mentioned in the Public Notice.

16. There is also on record another Public Notice Annexure P-5, again issued by the Excise and Taxation Commissioner dated 29.03.2018 under the following heading:

"NOTICE FOR THE NEGOTIATION OF LEFT OVER EXCISE VENDS OF COUNTRY LIQUOR (L-14/L-14A) AND FOREIGN LIQUOR (L-2) FOR THE YEAR 2018-19 IN THE STATE OF HIMACHAL PRADESH"

It was mentioned in the said Public Notice that in continuation of Public Notice dated 26.03.2018 (Annexure P-4), it is further notified for the information of general public that remaining liquor licences in form L-2, L-14 and L-14A in the Districts so mentioned in the Public Notice shall be allotted by the mode of negotiation as per schedule prescribed in the said Public Notice for the year 2018-2019. Further perusal of the Public Notice demonstrates that for the purpose(s) of Shimla District, negotiations were to be held on 30.03.2018 at 11:30 a.m. in the office of Excise and Taxation Commissioner, Block No. 30 SDA Complex Kasumpti, Shimla, Himachal Pradesh.

17. It is a matter of record that when said negotiations took place on 30.03.2018, petitioner was not only present, but he also participated in the course of negotiation.

18. The proceedings of the meeting which was held on 30.03.2018 are on record alongwith the reply filed by respondent No. 4 as Annexure R4/E. The same are being reproduced hereinunder for ready reference:

"PROCEEDINGS OF ALLOTMENT OF UN-ALLOTTED EXCISE UNITS THROUGH NEGOTIATION IN RESPECT OF DISTRICT SHIMLA HELD ON 30.03.2018"

In pursuance to the Public Notice number 7-765/2017-EXN-10377-10407 dated 20.03.2018 of the Excise and Taxation Commissioner, Himachal Pradesh, Shimla, process of negotiation of allotment of un-allotted excise units in respect of District Shimla Himachal Pradesh was undertaken on 30.03.2018 by the

Committee in the office of the Excise and Taxation Commissioner, Himachal Pradesh which was headed by the Excise and Taxation Commissioner, Himachal Pradesh. The Negotiation process of 25 units remaining unsold after 1st , 2nd, 3rd and 4th rounds of the allotment was started at around 5.30 p.m. The AETC, Shimla read out the details of the leftout units. These units are shown in the Annexure-A (Colum 3).

Initially 83 bids were received for 19 single units. Thereafter clubbing of unallotted units was done with certain allotted units the detail of which is annexed at Annexure B. Proposals were invited and the same were recorded as per details given in Annexure B.31 bids were received for 14 clubbed units. Unallotted units worth Rs.341602405/- were clubbed with 9 allotted units worth Rs.152690431/-. Against the total RED of Rs.494292836/-, Rs.401920779/- was received in the aforesaid bid. The highest bids have been recorded at Col. No. 8 of Annexure A. Against the total RED of 163,50,75,000/-, Rs.1513954272 has been received which is 7.38% short.

Sh. Hem Pal Kalta offered his bids for 7 units out of which two are allotted units namely Gumma and Batargalu and rrest 5 unallotted units namely Chhaila, Kharapathar, Jubbal, Kuthara and Summerkot. The bid money offered was Rs.10,34,25,072 against the original RED of 147660608. The original allottee of Gumma unit was asked to give his bid for the aforesaid combination. But he offered his bid only for Chhaila and Gumma for an amount of Rs.5,18,00,000/- against the original RED of Rs.57450187.

Today dated 31.03.2018 the original allottee of Gumma unit Sh. Gulshan Chauhan, appeared before the E.T.c. and offered to buy Kutara and Jubbal (both unalloted units) at an RED of Rs.18500000 against the original RED of 36728525. The comparison offered by the aforesaid licences is as below:

Name of the Bidder Hem Kalta

Unit	Bid Offered	RED
Gumma	16852690	16852690
Chhaila	26023194	40597497
Kutara	10286300	16047148
Jubbal	13256864	20681377
Total	66419048	94178712

Name of the Bidder Gulshan Chauhan

Unit	Bid Offered	RED
Gumma	16852690	16852690
Chhaila	34947310	40597497
Kutara	18500000	16047148
Jubbal		20681377
Total	70300000	94178712

However the bid offered by Sh. Gulshan Chauhan is higher as compared to the bid offered by Sh. Hem Pal Kalta but he offered to buy two more units namely Summerkot and Kharapathar @Rs.29428222/- (Original RED

25909514). No bid has been received in case of Kharapathar Unit, whereas in case Summerkot a bid of Rs.1,24,22,127/- has been offered. Both the aforesaid bidders appeared in person before the E.T.C. and in the interest of justice and Government revenue both bidders were asked to revise their bids in writing for the aforesaid 4 units. Sh. Inder Kalta submitted revised bid for Rs. 8,47,00,000/- on behalf of Sh. Hem Pal Kalta & Co. Sh. Gulshan Chauhan refused to submit any bid for the aforesaid units despite being given ample time.

Revised Bids

Name of the Bidder Hem Kalta

Unit	Bid Offered	RED
Gumma	16852690	16852690
Chhaila	34947310	40597497
Kutara	10286300	16047148
Jubbal	14056864	20681377
Total	76143164	94178712

Name of the Bidder Gulshan Chauhan

Unit	Bid Offered	RED
Gumma	16852690	16852690
Chhaila	34947310	40597497
Kutara	18500000	16047148
Jubbal		20681377
Total	70300000	94178712

It is pertinent to mention here that bid offered by Sh. Hem Kalta in respect of 7 units namely Gumma, Chhaila, Kutara, Jubbal, Batargalu, Kharapathar & Summerkot amount of Rs.10,91,25,072/- whereas the bid for the aforesaid units given by Sh. Gulshan Chauhan amount to Rs.10,83,90,428/-. The bid given by Sh. Hem Pal Kalta is higher by Rs.7,34,644/-. The original RED of these units is Rs.14,76,60,608/-.

The original allottee of Badiara unit Sh. Hans Raj appeared before the E.T.C. today and he showed ignorance about the negotiation. He offered the bid of Rs.3,25,00,000/- for the clubbed units Badiara, Thana & Batwari against total RED of Rs.3,79,05,767/-. The earlier offer for the unit was Rs.3, 20,00,000/- given by Sh. Rakesh Negi.

A bid of Rs.45,00,000/- was offered by Sh. Manohar Singh for Kharkujubbar Unit against the RED of Rs.84,87,857/-. However today requested in writing that his bid may not be considered. The second highest bid of Rs.41,00,000/- was revised by sh. Vinod Kumar, today to Rs.45,00,000/- and he conveyed his willingness to run the unit.

Yesterday, a bid was received for Kufri and Raighat (Clubbed unit) @Rs.3,90,00,000/- from Sh. Rakesh Kumar. But today he gave a written request to withdraw his offer.

The above observations are summed up in the table given below:-

Sr. No	No. of Units	RED	RED realised	Remarks
1.	99	1635075000		
2.	68 Units Allotted in First Round	1112033393	1112033393	Nil
3.	31 Un allotted units Regrouped to 25 units	523041507	402742906	-120298701
	93	1635075000	1514776299	-120298701

Thus the highest revenue which can be generated through RED for the year, 2018-19 for District Shimla is Rs.151,47,76,299/- which is Rs.12,02,98,701/- (7.35%) short of the total value of Rs.163,50,75,000/-"

19. A perusal of the said proceedings demonstrates that during the process of negotiation of allotment of unallotted excise units in respect of District Shimla, which was so undertaken on 30.03.2018 by a Committee so constituted by the Excise and Taxation Commissioner, which Committee was headed by the said authority, private respondent offered his bid for seven units out of which, two were allotted units, namely, Gumma and Batargalu. The bid amount, which was so offered by the private respondent for these seven units was Rs.10,34,25,072/- against the original RED of Rs.147660608. Proceedings also demonstrate that the original allottee of Gumma unit, i.e., the present petitioner was asked to give his bid for the aforesaid combination, but he offered his bid only for Chhaila and Guma for an amount of Rs.5,18,00,000/- against the original RED of Rs.57450187/-. Proceedings also demonstrate that on 31.03.2018, the petitioner again appeared before the Excise & Taxation Commissioner and offered to buy Kutara and Jubbal, both unallotted units by offering an amount of Rs.18500000 against the original RED of Rs.36728525/-. It is apparent from the perusal of the said proceedings that whereas on one hand, respondent No. 7 made a bid of an amount of Rs.10,91,25,072/- in respect of seven units, the bid given by the present petitioner for the same units was Rs.10,83,90,428/-, i.e., less by Rs.7,34,644/- as compared to respondent No. 7.

20. The point which has been raised for the purpose of adjudication by the petitioner in the present writ petition is as to whether an already successfully bidded liquor vend could have been permitted to be put for the purpose of negotiation at the time of auctioning "left over excise vends" without there being any express mentioning in the Public Notices concerned that during the course of negotiation, if need so arises, such like liquor vends could also be considered for the purpose of fresh allotment alongwith unsold vends.

21. Before proceeding further, it is pertinent to point out at this stage that though as on the date when negotiations took place, which are subject matter of the present writ petition dated 30.03.2018, the petitioner was the successful bidder as far as liquor vend No. 98 for Gumma is concerned, but his bid had not yet been accepted by the Excise and Taxation Commissioner in terms of Announcements Annexure P-1.

22. In ***State of Orissa and others*** Vs. ***Harinarayan Jaiswal and others***, (1972) 2 SCC 36, the Hon'ble Supreme Court has held that the Government is the guardian of the State's revenue and is expected to protect the financial interests of the State. Relevant portion of the said judgment is extracted hereinbelow:

"... It was next urged that having had recourse to the auction method once, the Government was precluded from either calling for tenders or to sell by negotiation. The High Court has accepted that contention. We are unable to agree with the High Court in its conclusion. Neither the provisions of the Act nor the order issued by the Government lend any support to such a conclusion. Once the Government declines to accept the highest bid, the auction held became useless. Similar is the effect

when the Government refused to accept the highest tender. That left the Government free to have recourse to other methods. The power given to the Government by the Act to sell the exclusive privilege in such other manner as it thinks fit is a very wide power. That power is unrestricted. It undoubtedly includes the power to sell the privileges in question by private negotiation.

It was urged that before adopting the method of selling the privileges by private negotiation. The Government is required by S. 29 (2) (a) to make an order that the, privileges in question will be sold by private negotiation. The Government has failed to make such an order. Hence the sales effected are invalid. We, are, unable to accept these contentions. In the cases of public auctions or in the case of calling for tenders, orders from the Government directing its subordinates to notify or hold the auctions or call for tenders is understandable. Public auctions as well as calling for tenders are done by subordinate officials. Further due publicity is necessary in adopting those methods. TOP require the Government to make an order that it is going to sell one or more of the privileges in question by negotiating with some one is to make a mockery of the law. If the Government can enter into negotiation with any person, as we think it can, it makes no sense to require it to first make an order that it is going to negotiate with that person. We must understand a provision of law reasonably. Section 29 (2) (a) does not speak of any order. It says that "the State Government may by general or special order direct". The direction contemplated by that provision is a direction to subordinate officials. It is meaningless to say that the Government should direct itself."

23. In ***State of M.P.*** Vs. ***Nandlal Jaiswal,*** (1986) 4 Supreme Court Cases 566, Hon'ble Supreme Court has held that no one can claim against the State the right to carry on trade or business in liquor and the State cannot be compelled to part with its exclusive right or privilege of manufacturing and selling liquor, but when the State decides to grant such right or privilege to others, the State cannot escape the rigour of Article 14.

24. In ***Kuldeep Singh*** Vs. ***Govt. of NCT of Delhi***, (2006) 5 Supreme Court Cases 702, the Hon'ble Supreme Court has reiteriated that the citizen has no fundamental right to carry on business in liquor and it is the State that has the exclusive privilege in a case of this nature. Hon'ble Supreme Court further went on to hold that though it was true that some licences had been granted, but the same cannot by itself be a ground to issue a writ of mandamus, particularly in view of the fact that the party has no legal right in respect thereof. While referring to the advertisement in question in the same very case, Hon'ble Supreme Court also held that appellants therein could not have had any legitimate expectation that they would invariably be grated a licence to deal in liquor.

25. A Division Bench of this Court in ***Sarita Devi*** Vs. ***Secretary, Excise and Taxation Department & others***, CWP No. 1673 of 2017, decided on 16th August, 2017, while dealing with the history of alcoholism and the paradox in right of the State to deal in the trade of liquor has held as under:

"22. History, social and legislative, dealing with the issue of alcoholism, best stands traced by Hon'ble the Supreme Court of India in P.N. Kaushal & others vs. Union of India & others, (1978) 3 SCC 558. The Court viewed the impact of alcohol on temperance on a given society. The paradox in the State indulging in the trade of liquor stands reiterated in the following terms:

"42. ... ... Further, Article 47 charges the State with promotion of prohibition as a fundamental policy and it is indefensible for Government to enforce prohibitionist restraints on others and itself practice the opposite and betray the constitutional mandate. It suggests dubious dealing by State power. Such hollow homage to Article 47 and the Father of the nation gives diminishing credibility mileage in a democratic polity."

23. By culling out the principles of law laid down by the Apex Court in its several decisions, moreso, in earlier Constitution Bench (Five Judges) in Har Shankar and others v. The Dy. Excise ad Taxation Commr. and others, (1975) 1 SCC 737, the Constitution Bench (Five Judges) in Khodey Distilleries Ltd. & others vs. State of Karnataka & others, (1995) 1 SCC 574 summarized the law relevant for the issue as under:

"(a) The rights protected by Article 19 (1) are not absolute but qualified. The qualifications are stated in clauses (2) to (6) of Article 19. The fundamental rights guaranteed in Article 19 (l) (a) to (g) are, therefore, to be read along with the said qualifications. Even the rights guaranteed under the Constitutions of the other civilized countries are not absolute but are read subject to the implied limitations on them. Those implied limitations are made explicit by clauses (2) to (6) of Article 19 of our Constitution.

(b) The right to practise any profession or to carry on any occupation, trade or business does not extend to practising a profession or carrying on an occupation, trade or business which is inherently vicious and pernicious, and is condemned by all civilised societies. It does not entitle citizens to carry on trade or business in activities which are immoral and criminal and in articles or goods which are obnoxious and injurious to health, safety and welfare of the general public, i. e. , res extra commercium, (outside commerce). There cannot be business in crime.

… …

(d) Article 47 of the Constitution considers intoxicating drinks and drugs as injurious to health and impeding the raising of level of nutrition and the standard of living of the people and improvement of the public health. It, therefore, ordains the State to bring about prohibition of the consumption of intoxicating drinks which obviously include liquor, except for medicinal purposes. Article 47 is one of the directive principles which is fundamental in the governance of the country. The State has, therefore, the power to completely prohibit the manufacture, sale, possession, distribution and consumption of potable liquor as a beverage, both because it is inherently a dangerous article of consumption and also because of the directive principle contained in Article 47, except when it is used and consumed for medicinal purposes.

(e) For the same reason, the State can create a monopoly either in itself or in the agency created by it for the manufacture, possession, sale and distribution of the liquor as a beverage and also sell the licences to the citizens for the said purpose by charging fees. This can be done under Article 19 (6) or even otherwise.

… …

(g) When the State permits trade or business in the potable liquor with or without limitation, the citizen has the right to carry on trade or business subject to the limitations, if any, and the State cannot make discrimination between the citizens who are qualified to carry on the trade or business.

(h) The State can adopt any mode of selling the licences for trade or business with a view to maximise its revenue so long as the method adopted is not discriminatory. … …"

26. Further, while dealing with the State's right to contract in the trade of liquor and fairness in dealing with the same, this Court held as under:

"25. In Ramana Dayaram Shetty vs. International Airport Authority of India & others, (1979) 3 SCC 489, the Apex Court held that it is a well settled principle of administrative law that an executive authority must rigorously be held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them. The

Government, in a welfare State is the regulator and dispenser of special services and provider of a large number of benefits, including licences, but they all share one characteristic. The Court further held that "The State need not enter into any contract with anyone, but if it does so, it must do so fairly without discrimination and without unfair procedure. This proposition would hold good in all cases of dealing by the Government with the public, where the interest sought to be protected is a privilege. It must, therefore, be taken to be the law that where the Government is dealing with the public, in granting largesse or licences, it cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norm which is not arbitrary, irrational or irrelevant.

26. It is a settled principle of law that if the Government departs from standards, which are structured by rational, relevant and nondiscriminatory factors, unless it is shown that the departure is not arbitrary, in fact based on some valid principle, which in itself was not irrational, unreasonable or discriminatory, the action is liable to be struck down.

27. The Apex Court in Raunaq International Ltd. vs. I.V.R. Construction Ltd. & others, (1999) 1 SCC 492 observed as under:

"9. The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are of paramount importance are commercial considerations. These would be: (1) The price at which the other side is willing to do the work; (2) Whether the goods or services offered are of the requisite specifications; (3) Whether the person tendering has the ability to deliver the goods or services as per specifications. When large works contracts involving engagement of substantial manpower or requiring specific skills are to be offered, the financial ability of the tenderer to fulfil the requirements of the job is also important; (4) the ability of the tenderer to deliver goods or services or to do the work of the requisite standard and quality; (5) past experience of the tenderer, and whether he has successfully completed similar work earlier; (6) time which will be taken to deliver the goods or services; and often (7) the ability of the tenderer to take follow up action, rectify defects or to give post contract services. Even when the State or a public body enters into a commercial transaction, considerations which would prevail in its decision to award the contract to a given party would be the same. However, because the State or a public body or an agency of the State enters into such a contract, there could be, in a given case, an element of public law or public interest involved even in such a commercial transaction.

10. What are these elements of public interest? (1) Public money would be expended for the purposes of the contract; (2) The goods or services which are being commissioned could be for a public purpose, such as, construction of roads, public buildings, power plants or other public utilities. (3) The public would be directly interested in the timely fulfilment of the contract so that the services become available to the public expeditiously. (4) The public would also be interested in the quality of the work undertaken or goods supplied by the tenderer. Poor quality of work or goods can lead to tremendous public hardship and substantial financial outlay either in correcting mistakes or in rectifying defects or even at times in redoing the entire work - thus involving larger outlays of public money and delaying the availability of services, facilities or goods. e.g. A delay in commissioning a power project, as in the present case, could lead to power shortages, retardation of industrial development, hardship to the general public and substantial cost escalation."

28. In Food Corporation of India vs. M/s Kamdhenu Cattle Feed Industries (1993) 1 SCC 71, the Court observed as under:

"7. In contractual sphere as in all other State actions, the State and all its instrumentalities have to conform to Art, 14 of the Constitution of which nonarbitrariness is a significant facet. There is no unfettered discretion in public law: A public authority possesses powers only to use them for public good. This imposes the duty to act fairly and to adopt a procedure which is 'fair play in action'. Due observance of this obligation as a part of good administration raises a reasonable or legitimate expectation in every citizen to be treated fairly in his interaction with the State and its instrumentalities, with this element forming a necessary component of the decision-making process in all State actions. To satisfy this requirement of non-arbitrariness in a State action, it is, therefore, necessary to consider and give due weight to the reasonable or legitimate expectations of the persons likely to be affected by the decision or else that unfairness in the exercise of the power may amount to an abuse or excess of power apart from affecting the bona fides of the decision in a given case. The decision so made would be exposed to challenge on the ground of arbitrariness. Rule of law does not completely eliminate discretion in the exercise of power, as it is unrealistic, but provides for control of its exercise by judicial review."

29. In State of M.P. & others vs. Nandlal Jailwal & others, (1986) 4 SCC 566, it is held that when State decides to grant right of privilege, it cannot escape the rigors of Article 14 of the Constitution. It cannot act arbitrarily and on its own will. It must comply with equality clause while granting exclusive grant of privilege for selling liquor. Further grant of sale of liquor would essentially be a matter of economic policy."

27. While dealing with the rights of bidder, this Court has held as under:

"33. What are rights of a bidder stands reiterated by the Apex Court in Meerut Development Authority vs. Association of Management Studies & another, (2009) 6 SCC 171 in the following terms:

"27. The bidders participating in the tender process have no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to notice inviting tenders in a transparent manner and free from hidden agenda. One cannot challenge the terms and conditions of the tender except on the above stated ground, the reason being the terms of the invitation to tender are in the realm of the contract. No bidder is entitled as a matter of right to insist the Authority inviting tenders to enter into further negotiations unless the terms and conditions of notice so provided for such negotiations."

28. It is so well-settled in law and needs no restatement at our hands that disposal of the public property by the State or its instrumentalities partakes the character of a trust. The methods to be adopted for disposal of public property must be fair and transparent providing an opportunity to all the interested persons to participate in the process.

29. The Authority has the right not to accept the highest bid and even to prefer a tender other than the highest bidder, if there exist good and sufficient reasons, such as, the highest bid not representing the market price but there cannot be any doubt that the Authority's action in accepting or refusing the bid must be free from arbitrariness or favoritism."

34. It is a settled principle of law that with the submission of the highest bid, no right is conferred upon the bidder. [Uttar Pradesh Avas evam Vikas Parishad & others vs. Om Prakash Sharma, (2013) 5 SCC 182].

35. In Tata Cellular vs. Union of India, (1994) 6 SCC 651 the Court observed as under:

> *"70. It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness of favoritism. However, it must be clearly stated that there are inherent limitation in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down."*

36. In Haji T.M.Hassan Rawther (supra), the Apex Court clarified that the State owned or public owned property is not to be dealt with at the absolute discretion of the executive. Certain precepts and principles have to be observed. Public interest is the paramount consideration. One of the methods of securing the public interest when it is considered necessary to dispose of a property is to sell the property by public auction or by inviting tenders. Though that is the ordinary rule, it is not an invariable rule. There may be situations where there are compelling reasons necessitating departure from the rule but then the reasons for the departure must be rational and should not be suggestive of discrimination. Appearance of public justice is as important as doing justice. Nothing should be done which gives an appearance of bias, jobbery or nepotism."

28. Case laws referred to hereinabove demonstrate that it is well settled law that as against the State, no one can claim the right to carry on trade or business in liquor and further that the State cannot be compelled to part with its exclusive right or privilege of manufacturing and selling liqour, subject to the rider that when the State decides to grant such right or privilege to others, the State cannot escape the rigour of Article 14 of the Constitution of India, meaning thereby that when the State decides to grant such right to others, the State has to act in a fair manner and it cannot be permitted to act arbitrarily.

29. Coming to the facts of this case, it is a matter of record that there were certain unallotted vends, for the allotment of which by way of negotiation, Public Notices stood issued inviting public at large that said unallotted vends shall be allotted by way of negotiations on 30.03.2018. It is also a matter of record that in the process of the said negotiations, the private respondent while bidding for five unallotted vends also made a bid for two vends, including Unit No. 98 vis-a-vis which earlier successful bids stood made, though the said bids were not yet confirmed. It was in the course of said negotiations in which the petitioner as also respondent No. 7 participated that respondent No. 7 outbidded the petitioner. This Court is not oblivious to the fact that as far as Unit No. 98 is concerned, the petitioner had already made a successful bid for the same on 15.03.2018 and his bid was pending acceptance of the Excise and Taxation Commissioner. This Court is also not oblivious of the fact that Public Notices Annexures P-4 and P-5 were only for "allotment of unallotted vends" and there was no mention in the said Public Notices that the vends qua which successful bids were already pending approval of Excise and Taxation Commissioner, such vends could also be taken into consideration in the course of negotiations to be so undertaken for the allotment of unsold vends. Be that as it may, the fact of the matter still remains that the bid of the successful bidder had not been accepted by the competent authority, i.e., the Excise and Taxation Commissioner, who as per Announcements Annexure P-1 was having the right to reject the bid without assigning any reason. It is but obvious that in the course of negotiations, which so took place on 30.03.2018 for allotment of unallotted vends, respondent No. 7 while putting forth his bid for five unallotted Units, simultaneously also made his bid with regard to two already successfully bidded Units, which

includes Unit No. 98 for amount of Rs.10,34,25,072/-. In our considered view, respondent No. 7 did so taking into consideration his business prospects and probably what weighed with the said respondent was the fact that in case the Department allotted him two already bidded vends, then it would make business sense for him to make a bid for at least five of the unallotted vends.

30. We do not find from the contemporaneous record that at the time when the negotiations were so going on any objection in this regard was raised by the petitioner. We say so for the reason that even as per the petitioner, the first objection in this regard which was so raised, was raised vide Annexure P-6, dated 31.03.2018.

31. Though an objection has also been taken with regard to the maintainability of the petition on the ground that as the petitioner unsuccessfully participated in the negotiations, he cannot be now permitted to assail the same, however, we are not detaining ourselves with this issue and we are proceeding to decide the larger issue itself.

32. Proceedings of the meeting which took place on 30.03.2018 demonstrate that for the five unallotted vends and two already bidded vends, whereas respondent No. 7 made a bid for an amount of Rs.1091,25,672/-, the petitioner made a bid of Rs.10,83,90,428/-, though the same did not include the vend at Jubbal. Thus, in all, by accepting the bid of respondent No. 7, respondent-State successfully allotted five unallotted Units alongwith two already bidded for Units and in return gained an exchequer of Rs.10,91,25,072/- as against an offer of Rs.10,83,90,428/- in this regard from the petitioner.

33. We have already referred to the judgment of Hon'ble Supreme Court in ***State of Orissa and others*** Vs. ***Harinarayan Jaiswal and others*** (supra), wherein Hon'ble Supreme Court has held that the Government is the guardian of the State's revenue and is expected to protect the financial interests of the State. Now, incidentally in the present case, there is no allegation of colourable exercise of powers or malafides, substantiated by any record against the respondent-State. All that the petitioner has argued is this that when the already bidded for vends were not mentioned in the Public Notices Annexures P-4 and P-5, then the act of the respondent-State of grouping said vends also for the purpose of negotiations alongwith unallotted vends is an arbitrary act and an act in violation of the Announcements for the year 2018-2019. Though it is matter of record that Annexures P-4 and P-5 only referred to "unallotted vends", however, it is also a matter of record that vends qua which petitioner was the highest bidder had yet not been allotted in favour of the petitioner, in view of the fact that the bid of the petitioner had yet not been accepted in terms of the Announcements by the respondent No. 2. Therefore, taking into consideration the fact that petitioner has no fundamental right in the trade of liquor and that it is the State that has the exclusive privilege to carry on business in liquor, we do not find the act of respondent No. 2 of allowing already bidded vends to be a part of negotiations which took place on 30.03.2018, to be an arbitrary act for the reason that this exercise was undertaken by the said respondent in the interest of the State, as by permitting the said vends to be re-negotiated alongwith unallotted vends, respondent-authority was able to garner more revenue in favour of the State.

34. No other point has been urged.

35. In view of the discussion held hereinabove, as we do not find any merit in the present petition, the same is accordingly dismissed. No order as to costs.

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

Raj Kumar ...Plaintiff

Versus

Ashwani Kumar and others ...Defendants

OMPs No. 128 of 2014 & 341of 2017 in
Civil Suit No. 2 of 2014
Reserved on: 11.04.2018
Date of order: 05.07.2018

Code of Civil Procedure, 1908- Section 10- **Himachal Pradesh Court Fees Act, 1968–** Section 7(iv)(c)- Stay of subsequent suit – Requirements to be proved – Plaintiffs filing suit in High Court for declaration claiming succession to estate of 'K' on basis of Will dated 28th December, 2010 – Also seeking decree of permanent prohibitory injunction against defendants – Defendant No. 3 filing application under Section 10 of Code seeking stay of suit on ground that a suit involving same parties and same subject matter was already pending before Civil Judge (Jr. Division) Kangra – Plaintiff admitting pendency of suit interse the parties at Kangra but resisting stay of suit on ground that market value of suit property was beyond the pecuniary jurisdiction of Civil Judge (Jr. Div.), Kangra – Defendant No.3 however submitting that suit filed in High Court was overvalued in order to avoid jurisdiction of Civil Judge – High Court found that suit filed by defendant No.3 in the Court of Civil Judge (Jr. Div.) Kangra was also a suit for declaration and injunction – She was claiming succession to part of estate of 'K' by virtue of Will dated 20th June, 2013 as widow of 'K' – She was seeking relief of prohibitory injunction only – Relief of possession was sought in alternative in event of her dispossession during pendency of suit – Held, both suits fell within Section 7(iv)(c) of Act – Plaintiffs were not required to assess valuation of suit for Court fees and jurisdiction ad valorum – The suit filed by plaintiff in High Court was held to be overvalued and in fact, was maintainable before Civil Judge – Parties and subject matter in both suits were same – In peculiar circumstances, High Court transferred suit pending before it, to Civil Judge (Jr. Div.), Kangra with direction to try and dispose of both suits together in accordance with law. (Paras-19 to 25)

Cases referred:

National Institute of Mental Health & Neuro Sciences versus C. Parameshwara, (2005) 2 Supreme Court Cases 256

ASPI Jal and another versus Khushroo Rustom Dadyburjor, (2013) 4 Supreme Court Cases 333

Sathappa Chettiar versus Ramanathan Chettiar, AIR 1958 Supreme Court 245

Meenakshisundaram Chettiar versus Venkatachalam Chettiar, AIR 1979 Supreme Court 989

Tara Devi versus Sri Thakur Radha Krishna Maharaj through Sebaits Chandeshwar Prasad and Meshwar Prasad and another, AIR 1987 Supreme Court 2085,

Suhrid Singh alias Sardool Singh versus Randhir Singh and others, (2010) 12 Supreme Court Cases 112 and 2010 (2) Civil Court Cases 510 (SC)

Devasharay Singh versus Saroj Kumar @ Saroj Singh, 2008 (4) Civil Court Cases 523 (Patna)

DAV Boys Senior Secondary School and others versus DAV College Managing Committee, (2010) 8 Supreme Court Cases 401

For the plaintiff: Mr. Rajiv Jiwan, Advocate.

For the defendants: None for defendant No. 1
Defendant No. 2 already ex-parte.
Mr. Ajay Sharma, Advocate, for defendant No. 3.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge.

OMP No. 128 of 2014 has been preferred under Section 10 of Code of Civil Procedure (hereinafter referred to as 'CPC') by defendant No. 3 for staying present suit mainly on the ground that Civil Suit No. 166/2013, previously filed in the Court of learned Civil Judge (Junior Division) (II) Kangra, titled as Rama Devi versus Raj Kumar etc. is pending between the same parties with respect to the same subject matter and parties are duly represented through their counsel in the said suit.

2. In reply to the said application, filing of Civil Suit No. 166/2013 prior to filing present suit and pendency thereof in the Court of Civil Judge (Junior Division) (II) Kangra is not disputed but it is submitted that the said suit is not maintainable in the said Court for lacking inherent pecuniary jurisdiction to try the said suit for actual and correct value of the suit property. It is contended that decree for possession has also been prayed in the Civil Suit filed by defendant No. 3, but, no proper court fee has been affixed as required to be paid for that relief and, thus, that Civil Suit is under valued and cannot be permitted to continue despite filing of the same prior in time.

3. **OMP No. 341 of 2017** has been preferred on behalf of the plaintiff seeking transfer of Civil Suit No. 166/2013, titled Rama Devi versus Raj Kumar and others pending before learned Civil Judge (Junior Division) (II) Kangra to this court and to try the same alongwith present suit (Civil Suit No. 2 of 2014) in this Court on the ground that the present suit filed for declaration of ownership of plaintiff on the basis of Will is not maintainable in the Court of learned Civil Judge for lack of pecuniary jurisdiction as the value of the property involved for declaration is ₹ 91 lacs, which is much more than ₹ 35 lacs and for which value, only this Court is having pecuniary jurisdiction.

4. It is also canvassed that present suit in the High Court is for larger relief, which is not permissible before learned Civil Judge, Kangra for want of pecuniary jurisdiction and plaintiff cannot be precluded from advancing his claim on the ground that suit filed before learned Civil Judge, Kangra is prior in time and even, in case of preferring counter claim by plaintiff at Kangra, this suit would have been liable to be transferred to the High Court. Further, as the Court of learned Civil Judge, Kangra and High Court are not having concurrent jurisdiction, thus, in view of the ratio of law laid down by the apex Court in case titled as **National Institute of Mental Health & Neuro Sciences versus C. Parameshwara,** reported in **(2005) 2 Supreme Court Cases 256,** relied upon in **ASPI Jal and another versus Khushroo Rustom Dadyburjor,** reported in **(2013) 4 Supreme Court Cases 333,** the suit at Kangra is liable to be transferred to this High Court instead of staying the suit.

5. This application has been resisted by defendant No. 3 on the ground that the suit filed in this Court is over valued as for suit for declaration, court fee required to be affixed is not *ad valorem* court fee on the value of the property involved with respect to declaration especially for a declaration on the basis of Will, but, a fixed court fee, as provided under Section 7 (iv) (c) of the H.P. Court Fee Act, 1968 (hereinafter referred to as 'Court Fee Act') and, therefore, transfer of Civil Suit No. 166/2013 from the Court of learned Civil Judge (Junior Division) (II), Kangra to this Court has been opposed.

6. It is argued on behalf of defendant No. 3 that it is basic principle that suit is to be filed in the lowest rung having the jurisdiction to try the same, but, based on the pecuniary jurisdiction and in a suit for declaration with respect to Will, not filed by the executant, court fee is not to be affixed on the basis of value of the property involved in the Will, rather, fixed court fee is required to be paid for filing a declaratory suit under Section 7 (iv) of the Court Fee Act and no court fee for alternative relief is required to be paid and, therefore, for prayer, in alternative, for passing a decree for possession by defendant No. 3 in the suit filed at Kangra, no court fee is required to be affixed. It is further submitted that in case suit at Kangra is transferred to this

High Court, the right of defendant No. 3 to assail the findings of the trial Court, if necessary, would be prejudicially affected, as it would not be possible for her to assail the judgment passed by this Court in the apex Court for want of necessary means and capability for doing so.

7. It is undisputed that both the suits are related to one and the same property. Plaintiff is claiming his right on entire property on the basis of registered Will, dated 28th December, 2010, executed by deceased-Kewal Krishan whereas defendant No. 3 is claiming her right on the part of property as legally wedded wife of deceased-Kewal Krishan on the basis of Will, dated 20th June, 2013, executed by deceased-Kewal Krishan in favour of the plaintiff and defendants No. 1 and 3.

8. Kewal Krishan had expired on 7th July, 2013. Civil Suit No. 166 of 2013 was filed before learned Civil Judge (Junior Division) (II), Kangra on 17th October, 2013 whereas Civil Suit No. 2 of 2014 was filed in the Court on 26th December, 2013. Parties to the suit are substantially the same in both the civil suits.

9. Perusal of plaints in both the suits, available on record, reflects that defendant No. 3 has filed Civil Suit No. 166/2013 at Kangra for permanent prohibitory inunction against the plaintiff and defendants No. 1 & 2 for restraining them to interfere in the property falling in her share and also in bus transport business being run by her with further prayer for decree of declaration to the effect that Will, dated 28th December, 2010 is null and void as the same has been cancelled on 22nd February, 2012, by the executant of the Will, with alternative prayer for possession, if dispossessed during pendency of the suit, whereas present suit has been filed for declaration in favour of the plaintiff on the basis of Will, dated 28th December, 2010 with prayer for declaration that cancellation deed, dated 22nd February, 2012 is void and also for declaration that Will, dated 20th June, 2013 set up by defendant No. 3 is forged, fabricated and not binding on the parties and also for consequential declaration that plaintiff is successor to the estate of deceased-Kewal Krishan by virtue of testamentary succession. Prayer for permanent prohibitory and mandatory injunction against the defendants from interfering in peaceful possession in the right and title of the plaintiff has also been made.

10. Section 7 of Chapter III of Court Fee Act deals with computation of fee payable in certain suits. Section 7 (iv) (c) of Court Fee Act deals with computation of fee for a declaratory decree and consequential relief. It provides that in a suit for declaration with consequential relief, the plaintiff shall state the amount at which he values the relief sought and court fee shall be fixed accordingly subject to condition that minimum court fee in each case shall be ₹ 13/-. Second proviso to Section 7 (iv) of Court Fee Act provides that in suit coming under sub-clause (c) of Section 7 (iv) of Court Fee Act, in case where the relief sought is with reference to any property, such valuation shall not be less than the value of the property calculated in the manner provided for by paragraph (v) of this Section. Paragraph (v) of Section 7 of the Court Fee Act provides affixation of fee according to the value of subject matter in the manner prescribed in this paragraph.

11. It is case of the plaintiff that as the consequential relief sought in present plaint is testamentary succession of the property in suit, therefore, second proviso to paragraph (iv) of Section (7) read with sub-clause (c) shall be applicable in the present case and the court fee is payable according to the valuation of the entire property in suit, as has been calculated by the plaintiff.

12. No doubt, it is settled law, as held by the apex Court in cases titled as **Sathappa Chettiar versus Ramanathan Chettiar,** reported in **AIR 1958 Supreme Court 245,** and **Meenakshisundaram Chettiar versus Venkatachalam Chettiar,** reported in **AIR 1979 Supreme Court 989,** followed in **Tara Devi versus Sri Thakur Radha Krishna Maharaj through Sebaits Chandeshwar Prasad and Meshwar Prasad and another,** reported in **AIR 1987 Supreme Court 2085,** that in a suit for declaration with consequential relief falling under Section 7 (iv) (c) of Court Fee Act, the plaintiff is free to make his own estimation of the reliefs sought in the plaint and such valuation, both for purposes of court fee and jurisdiction, has to be

ordinarily accepted and it is only in cases where it appears to the Court, on a consideration of the facts and circumstances of the case, that valuation is arbitrary, unreasonable and the plaint has been demonstratively wrongly valued, the Court can examine the valuation and can revise the same.

13. It is also settled by the apex Court in case titled as **Suhrid Singh alias Sardool Singh versus Randhir Singh and others,** reported in **(2010) 12 Supreme Court Cases 112** and **2010 (2) Civil Court Cases 510 (SC),** that where a person, who is non-executant of a deed, but, is in possession and sues for declaration that deed is null and void and it is not binding on him or his share, he has to merely pay a fixed court fee and where the suit is for declaration and consequential relief of possession or injunction, court fee thereon is governed by Section 7 (iv) (c) of the Court Fee Act. The apex Court has distinguished the suit by the executant for avoiding the deed and suit by a person other than executant for avoiding the deed by seeking declaration that the deed executed by another person is invalid, void and non est, illegal and not binding on the plaintiff. It has been held that when a suit is brought by the executant for avoiding the deed, he has to sue for cancellation of the deed and, thus, he shall be liable to pay the court fee on the valuation of the deed whereas if the person, who is not the executant of the deed, wants to avoid it, he has to sue for a declaration that deed executed by executant is invalid, void and non est, illegal and he is not bound by it and in such a situation, the plaintiff, who is a non-executant and is in possession of the suit property, has to merely pay a fixed court fee prescribed under Court Fee Act and if the non-executant is not in possession and seek not only a declaration that the deed is invalid, but, also consequential relief of possession, he has to pay *ad valorem* court fee, as provided under Section 7 (iv) (c) read with second proviso to paragraph (iv) of the Court Fee Act.

14. Plaintiff, in the present case, is not executant of the deeds sought to be declared null and void and the consequential relief sought by him is not for possession, rather, he is claiming the suit property in his possession as, in the suit, prayer for permanent prohibitory injunction against the defendants from interfering in the peaceful possession in the right and title of the plaintiff has been made, but, the said prayer is not a consequential relief. Therefore, applying the ratio of law laid down in **Suhrid Singh alias Sardool Singh's case (supra),** plaintiff has to pay only fixed court fee and not *ad valorem* court fee.

15. Consequential declaration sought by the plaintiff is that he is successor of the estate of deceased-Kewal Krishan by virtue of testamentary succession, i.e. Will, dated 28th December, 2010. The main declaration sought by the plaintiff is that Will, dated 28th December, 2010 is the last Will of the testator and cancellation deed thereof, dated 22nd February, 2012 is not valid and is void as having been executed under coercion, threat, undue influence. Further declaration sought by the plaintiff is that Will, dated 20th June, 2013, set up by defendant No. 3 is forged, fabricated and not binding on the parties.

16. It would also be relevant to refer judgment of the Patna High Court passed in case titled as **Devasharay Singh versus Saroj Kumar @ Saroj Singh,** reported in **2008 (4) Civil Court Cases 523 (Patna),** wherein it has been observed that against a deed of transfer, two sorts of reliefs can be sought, the first is a declaration that a deed may be cancelled or avoided, whereas the other is a declaration that a deed is void *ab initio,* having no legal consequence and not binding on the plaintiff and if the plaintiff seeks a relief for cancellation of a deed, he has to pay *ad valorem* court fee as per valuation of the deed, but, if he seeks a relief for declaring the deed to be void *ab initio* and not binding upon him, a fixed declaratory court fee would be sufficient.

17. Further, the consequential declaration with regard to testamentary succession on the basis of Will, dated 28th December, 2010 is mock and spurious as the said declaration is already inclusive of the declaration sought by the plaintiff in the main prayer. In case of granting of prayer for declaration with regard to Will(s), as prayed in plaint, succession in favour of plaintiff will automatically follow even without any decree passed with regard to prayer pretended to be consequential relief. Therefore, it cannot be said that present suit is for declaratory decree and consequential relief. The prayer by the plaintiff appears to be clever phraseology to bring the suit

under the ambit and scope of second proviso to paragraph (iv) of Section 7 of the Court Fee Act so as to overvalue the suit for ousting the jurisdiction of other Courts except High Court to hear and decide the lis.

18. For aforesaid reason also, I find that present suit, being a suit for mere a declaratory decree and, thus, provisions of paragraph (v) of Section 7 of the Court Fee Act are not attracted for valuation of the suit property for affixing the court fee.

19. In view of above discussion, plea of the plaintiff, that the suit is to be evaluated on the basis of the value of the suit property in the manner as provided under paragraph (v) of Section 7 of the Court Fee Act, is not sustainable and, thus, learned Civil Judge (Junior Division) (II), Kangra has pecuniary jurisdiction to try the present suit and is competent to decide the same.

20. Plea of plaintiff with regard to payment of court fee for alternative prayer of possession sought by defendant No. 3 in the civil suit at Kangra is not tenable. Defendant No. 3 (plaintiff therein) has pleaded that in case defendants therein forcibly dispossess her from the property, upon which she is claiming her right, during the pendency of that suit, a decree for possession be passed in her favour. In my opinion, there may be two eventualities for praying decree for possession in alternative, i.e. in case the plaintiff fails to prove possession and if defendant forcibly dispossesses the plaintiff during pendency of suit. At the time of filing suit, in case of plea of failure of plaintiff to prove possession, court fee may have to be paid, but, not in another eventuality. Moreover, payment of court fee for alternative prayer may be considered at the time of final disposal of suit, if occasion arises for the same. Therefore, in suit preferred by defendant No. 3, for alternative prayer, as made, no separate court fee is liable to be affixed, at this stage.

21. Alternative prayer in suit at Kangra is not a distinct and separate prayer and in case, plaintiff is dispossessed from suit property falling in her share, in that eventuality, the Court will be required to consider as to whether defendant No. 3 (plaintiff in the suit at Kangra) is entitled to the said prayer. It is not an additional prayer to the rest of the prayers. Therefore also, no separate or additional court fee for this alternative prayer in suit at Kangra is required to be paid, at this stage.

22. Plaintiff herein is seeking transfer of suit filed in the Civil Court, Kangra to this Court for trying the same alongwith present suit whereas defendant No. 3, who is plaintiff in the suit filed in Civil Court, Kangra, is praying for staying of present suit, being latter in time, seeking converse declaration to the same documents, which were subject matter of the civil suit at Kangra.

23. In present suit, plaintiff is asserting his right on the entire property of deceased-Kewal Krishan on the basis of Will, dated 28th December, 2010 by claiming the same to be his last Will with further declaration that cancellation of the said Will vide cancellation deed, dated 22nd December, 2012 is not valid and subsequent will, dated 20th June, 2013 is forged and fabricated and is not binding upon him and as such, he has succeeded entire estate by testamentary succession. Further, decree for permanent prohibitory and mandatory injunction has also been sought restraining the defendants from interfering in his peaceful possession in his right and title in the suit land.

24. So far as suit of defendant No. 3 filed in Civil Court, Kangra, is concerned, the same has been filed asserting a right on the part of property falling in her share on the basis of Will, dated 20th June, 2013, seeking decree for permanent prohibitory injunction against defendants therein (plaintiff and defendants No. 1 & 2 in present suit) from interfering in her share and transferring the land or getting the mutation of the same attested in their favour or transferring to someone else, withdrawal of money from the bank account, interfering in plying of buses with route, disposal of buses with route or creating any hindrance to the plaintiff for applying new routes and cutting the trees etc. Defendant No. 3 has also sought declaration that will, dated 28th December, 2010 stands cancelled vide cancellation deed, dated 22nd February,

2012 and thus, mutation attested on the basis of the said Will is null and void and that Will, dated 20th June, 2013 is the last legal and valid Will of deceased-Kewal Krishan. An alternative relief for possession has also been prayed in case the defendants therein succeed to dispossess the plaintiff during pendency of suit.

25. Suit filed by defendant No. 3 is prior in time. The documents assailed and relied upon by respective parties in accordance with their interests therein are common and to prove and disprove those documents and the pleadings of the parties, witnesses required to be examined will also be common. Therefore, present plaintiff might have filed counter claim to the civil suit filed by defendant No. 3, but, he has preferred to file present suit in this Court, may be under bona fide belief, based on legal advise, for want of pecuniary jurisdiction for value of property, as claimed in the plaint, or possibility of overvaluing the suit for bringing the same in pecuniary jurisdiction of this Court can also not be ruled out. But, fact remains that in present suit also, fixed court fee was payable. Considering all facts and circumstances, instead of staying the present suit, which is subsequent in time, it would be in the interest of justice to try both the suits after clubbing the same together at one place.

26. Parties to the suit at Kangra and at Shimla are identical with different status. Defendant No. 3 herein is plaintiff at Kangra whereas plaintiff and defendants No. 1 & 2 are defendants there. Plaintiff and defendant No. 1 in present suit are residents of Jammu whereas defendants No. 2 and 3 are residents of Amritsar and Kangra, respectively. Jammu and Amritsar are nearer to Kangra than Shimla. Witnesses, which would be necessary to be examined by parties, also belong to the area nearer to Kangra in comparison to Shimla.

27. The apex Court in case titled as **DAV Boys Senior Secondary School and others versus DAV College Managing Committee,** reported in **(2010) 8 Supreme Court Cases 401,** while discussing the principles for transfer of suit, has observed as under:

> "9. Transfer of suits under Sections 24 and 25 have been considered by this Court in various decisions. In *Maneka Sanjay Gandhi v. Rani Jethmalani, (1979) 4 SCC 167,* this Court stated: (SCC p. 169, para 2)
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> > "2. Assurance of a fair trial is the first imperative of the dispensation of justice and the central criterion for the court to consider when a motion for transfer is made is not the hypersensitivity or relative convenience of a party or easy availability of legal services or like mini grievances. Something more substantial, more compelling, more imperilling, from the point of view of public justice and its attendant environment, is necessitous if the Court is to exercise its power of transfer. *This is the cardinal principle although the circumstances may be myriad and vary from case to case.*" (emphasis supplied)
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> 10. .....
>
> 11. In *Kulwinder Kaur vs. Kandi Friends Education Trust, (2008) 3 SCC 659,* this Court considered various tests to be applied in respect of transfer of suits under Sections 24 and 25 of the Code and in para 23 observed thus: (SCC p. 664)
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> > "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." (emphasis is original)

12. .....In order to maintain fair trial, this Court can exercise this power and transfer the proceedings to an appropriate Court. The mere convenience of the parties may not be enough for the exercise of power but it must also be shown that trial in the chosen forum will result in denial of justice. Further illustrations are, balance of convenience or inconvenience to the plaintiff or the defendant or witnesses and reasonable apprehension in the mind of the litigant that he might not get justice in the Court in which suit is pending. The above-mentioned instances are only illustrative in nature. In the interest of justice and to adherence of fair trial, this Court exercises its discretion and order transfer in a suit or appeal or other proceedings."

28. By applying the aforesaid principles to the facts and circumstances of the present case, transferring of the case to the Court of Civil Judge (Junior Division) (II), Kangra will not have adverse impact on right of either of the parties and each of them, if occasion arises, shall be entitled to assail the same in the appellate Court, as permissible under law, and the said course will be available for either of them in case the dispute is adjudicated in the lowest Court having jurisdiction for the same. Trial of both suits, after clubbing them, will definitely save energy, time and money of both the sides and it would be easier and beneficial for both of them to complete the joint trial of both suits at Kangra.

29. In view of above discussion, it would be appropriate to transfer present suit pending in this Court to the Court of Civil Judge (Junior Division) (II), Kangra, H.P., who shall try and dispose of both the suits together in accordance with law.

30. Appearing parties through their respective counsel are directed to remain present before the trial Court on **7th August, 2018.** Registry shall ensure transfer of the entire record of present suit to the said Court immediately and shall also inform the transfer of the suit to defendants No. 1 and 2 through registered post.

31. Both the applications are disposed of in above terms.

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

Sarita Devi ....Petitioner.
Versus
Rishi Dhiman ....Respondent.

CMPMO No.: 60 of 2018.
Decided on: 05.07.2018.

Constitution of India, 1950- Article 227- **Code of Civil Procedure –** Order XVIII Rule 4- Evidence by way of Affidavit and cross-examination of such witnesses – Procedure explained – Plaintiff's witness tendering his evidence by way of affidavit – Counsel of defendant showing his inability to cross-examine witness on the very same date, affidavit is tendered and seeking time – Trial Court not acceding to this request and closing cross-examination – Petition against –

Plaintiff submitting before High Court that as per usual practice adopted by Courts opposite party is to cross-examine witness on day affidavit is tendered and there is no perversity in order of Trial Court – Held, this practice if being followed, is not reasonable – Petition allowed – Order of Trial Court set aside – Matter remanded with direction to it to afford opportunity to defendant to cross-examine witness of plaintiff. (Paras-6 and 9)

For the petitioner : Mr. Naveen Awasthi, Advocate.
For the respondent : Mr. Naveen K. Bhardwaj, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

By way of this petition filed under Article 227 of the Constitution of India, petitioner has laid challenge to order dated 17.10.2017, passed by learned Additional District Judte (III), Kangra in case HMA No. 7-D/III/2012.

2. Grievance of the petitioner is that no proper opportunity was given to him to cross examine plaintiff witness Rishi Dhiman by the learned trial Court. Record demonstrates that the case was listed before the learned trial Court on 17.10.2017 for recording evidence of the plaintiff. On the said date, PW Rishi Dhiman tendered his evidence by way of affidavit. Record further demonstrates that learned trial Court recorded the statement of Rishi Dhiman to the effect that his affidavit be read as his statement, which was exhibited as PW1/A. With regard to opportunity of cross examination, the following stands recorded by the learned trial Court:-

"xx Cross by Sh. V.K. Vashishth Adv for respondent

-opportunity given-Nil-"

3. Thereafter learned trial Court passed the following order:-

"One PW Rishi Dhiman present and his statement recorded. Petitioner evidence closed by the petitioner vide separate statement recorded. Be listed for respondent evidence on 30-10-2017. Steps be taken within 5 days."

4 On the strength of the said record, learned Counsel for the petitioner has argued that reasonable opportunity was not granted by the learned trial Court to the petitioner to cross examine PW Rishi Dhiman because it was practically impossible for the petitioner to have had cross examined Rishi Dhiman on the very same date, when his evidence by way of affidavit was not tendered in the Court. According to the learned Counsel for the petitioner, in such like situation, where a party tenders evidence by way of affidavit, the Court has to grant some reasonable time to the other party to go through the said affidavit and then cross examine the said witness. This, having not been done in the present case, has led to great injustice to the petitioner, as per his learned Counsel.

5. On the other hand, learned Counsel for the respondent has submitted that this is the general practice which is adopted and there was no perversity in the order.

6. Having heard learned Counsel for the parties and perused the records, in my considered view, there is merit in the contention of learned Counsel for the petitioner. This Court is not concerned whether it is usual practice or not that on the date fixed for recording of statement of the witnesses, when affidavit is tendered in examination-in-chief , then on the same date, cross examination of the witness has to be done. The issue is whether such practice is reasonable or not. In my considered view, the answer is in negative. When a witness, as a substitute of recording examination-in-chief in the Court, tenders his or her evidence by way of affidavit, then prudently, the other party requires some reasonable time to go through the same before it can cross examine the said witness. This situation can be addressed by either providing the copies of the affidavit in advance to the other party, i.e. at least a week before the date of evidence in the Court and if such affidavits are tendered on the date of evidence itself, then, by

deferring the matter for cross examination by granting reasonable and sufficient time in this regard to the other party.

7. In view of above discussion, in my considered view, the impugned order is liable to be quashed and set aside because it cannot be said that reasonable opportunity was granted by the learned trial Court to the defendant to prepare for the purpose of cross examination of the plaintiff witness(s).

8. At this stage, learned Counsel for the petitioner apprised the Court that he had also filed an application for review of the impugned order before the learned Court below. In view of orders passed in the present petition, he shall be at liberty to withdraw the said application.

9. Accordingly, present petition is allowed and the impugned order dated 17.10.2017, passed by the learned Additional Sessions Judge-III, Kangra at Dharamshala, in HMA No. 7-D/III/2012, is quashed and set aside. Parties through their learned Counsel are directed to appear before the Court of learned Additional Sessions Judge-III, Kangra at Dharamshala on 06.08.2018, on which date, learned Court below shall fix a date for giving an opportunity to the present petitioner to cross examine PW Rishi Dhiman. Petition stands disposed of in above terms, so also pending miscellaneous application(s), if any.

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

Tara Wati & Others .....Appellants.
Versus
Suman & Others .....Respondents.

RSA No. 380 of 2017.
Decided on: 5th July, 2018.

Code of Civil Procedure, 1908- Order XXII Rules 3, 4 and 9 – Substitution of legal representatives of deceased party – Effect of, in not taking such steps – Held, if application for substitution of legal representatives of a deceased party is not filed, within prescribed time, suit/appeal will abate – Abatement is automatic – Question of abatement is to be decided by that Court where the suit or appeal was pending at the time of death of a party – If factum of death went un-noticed and the Court decides the suit/appeal, such decree is a nullity and can be challenged even at the execution stage – As the First Appellate Court had decided appeal without taking note of death of 'S' (D10) which had taken place when appeal was pending before it, the decree of First Appellate Court is held nullity and set aside – Matter remanded to First Appellate Court to allow plaintiffs to file application for substitution etc. and then decide question of abatement of appeal. (Paras-4 to 7)

Cases referred:
Jaswant Singh versus State of Himachal Pradesh and others, 2015(2) Shim.L.C. 674
Jagan Nath and others v. Ishwari Devi, 1988(2) Shim.L.C. 273
Karam Chand and others v. Bakshi Ram and others, 2002(1) Shim.L.C. 9
Gurnam Singh (dead) versus Gurbachan Kaur, (2017) 13 SCC 414

For the Petitioner: Mr. Ramakant Sharma, Advocate
For the respondent: Mr. B.L. soni &Aman Parth Sharma, Advocates for respondents No.1 to 3, 4(i) to 4(iii), 7 to 9.
Ms. Megha Kapur Gautam, Advocate vice Ms. Kiran Mehta, Advocate for respondent No.5.

Mr. Yogesh Kumar, Advocate vice Mr. Arun Sehgal, Advocate for respondent No.14.
None for respondents No.6, 11 and 15 and respondents No.13 and 16 already exparte.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. (oral).

Respondent No.12 is duly served, however, there is no appearance on their behalf, hence proceeded against exparte.

2. In this appeal, an application registered as CMP No.8 of 2018 has been filed under Order 1 Rule 10 CPC for deletion of the name of respondent No.10, who has expired on 22.2.2013 i.e. during the pendency of the appeal in the lower appellate Court. The application is supported by death certificate Annexure A-1. The record available, at this stage, reveals that deceased respondent No.10 (defendant No.11 in the trial Court) has not only contested the suit but also the appeal in learned lower appellate Court. The appeal, however, came to be decided without taking note of her death and substitution of her legal representatives as well as deciding the question of abatement of the proceedings, if any.

3. As a matter of fact, on the death of respondent-defendant Sheela Devi and for want of requisite steps, the appeal before learned lower appellate Court stood abated automatically, however, only qua deceased respondent or as a whole, is a question which could have been considered and adjudicated by that very Court. Anyhow, the factum of death of deceased respondent Sheela Devi went unnoticed and learned lower appellate Court has decided the appeal without substitution of her legal representatives and deciding the question of abatement of the appeal. In view of the law laid down by this Court, as and when the question of abatement of the suit or appeal arises, the same can only be gone into and decided by the Court where the suit or appeal was pending at the time of death of a party. It has been held so by this Court in ***Jaswant Singh*** versus ***State of Himachal Pradesh and others, 2015(2) Shim.L.C. 674*** while placing reliance on the ratio of the judgments rendered by Co-ordinate Benches of this Court in ***Jagan Nath and others*** v. ***Ishwari Devi, 1988(2) Shim.L.C. 273*** and ***Karam Chand and others*** v. ***Bakshi Ram and others, 2002(1) Shim.L.C. 9***.

4. On the death of a party to the suit or appeal and for want of consequential steps, suit/appeal abates because abatement is automatic after the expiry of the period prescribed for filing an application to set aside the same or substitution of legal representatives of deceased party. In the case in hand, respondent No. 10, Sheela Devi had expired on 22.2.2013 during the pendency of the appeal in the lower appellate Court. Whether the appeal in the lower appellate Court had abated as a whole or not is a question which could have been decided by learned lower appellate Court alone. The limitation prescribed for taking consequential steps and setting aside the abatement stands expired long back.

5. Not only this, but the apex Court in a recent judgment in ***(2017) 13 SCC 414, Gurnam Singh*** (dead) by legal representatives and others versus ***Gurbachan Kaur*** (dead) by legal representatives, has reiterated the legal principles already settled further by holding that a decision in favour and/or against a dead person renders such decision nullity. The Apex Court has went one step further by holding that the decree passed without taking note of a death of a party to the lis or deciding the question of abatement and substitution of legal representatives can be challenged at any time including at its execution stage. This judgment reads as follows:

> 15) The question, therefore, is whether the impugned judgment/order is a nullity because it was passed by the High Court in favour of and also against the dead persons. In our considered opinion, it is a nullity. The reasons are not far to seek.
>
> 16) It is not in dispute that the appellant and the two respondents expired during the pendency of the second appeal. It is also not in dispute that no steps

were taken by any of the legal representatives representing the dead persons and on whom the right to sue had devolved to file an application under Order 22 Rules 3 and 4 of the Code of Civil Procedure,1908 (for short, 'the Code') for bringing their names on record in place of the dead persons to enable them to continue the lis.

17) The law on the point is well settled. On the death of a party to the appeal, if no application is made by the party concerned to the appeal or by the legal representatives of the deceased on whom the right to sue has devolved for substitution of their names in place of the deceased party within 90 days from the date of death of the party, such appeal abates automatically on expiry of 90 days from the date of death of the party. In other words, on 91st day, there is no appeal pending before the Court. It is "dismissed as abated".

18) Order 22 Rule 3(2) which applies in the case of the death of plaintiff/appellant and Order 22 Rule 4(3) which applies in the case of defendant/respondent provides the consequences for not filing the application for substitution of legal 6 representatives by the parties concerned within the time prescribed. These provisions read as under:-

Order 22 Rule 3(2)

"Where within the time limited by law no application is made under sub-rule (1) the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff."

Order 22 Rule 4(3)

"Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant."

Xxx xxx xxx

xxx xxx xxx

21) It is a fundamental principle of law laid down by this court in Kiran Singh case, that a decree passed by the Court, if it is a nullity, its validity can be questioned in any proceeding including in execution proceedings or even in collateral proceedings whenever such decree is sought to be enforced by the decree-holder. The reason is that the defect of this nature affects the very authority of the Court in passing such decree and goes to the root of the case. The principle, in our considered opinion, squarely applied to this case because it is a settled principle of law that the decree passed by a court for or against a dead person is a 'nullity'."

6. In view of the legal as well as factual position discussed supra, this Court is left with no option except to hold that the judgment and decree passed by learned lower appellate Court, without substitution of legal representatives of a dead person is nullity, hence not legally sustainable.

7. Consequently, the judgment and decree passed by learned lower appellate Court being nullity is quashed and set aside. The case is remanded to the lower appellate Court with a direction to allow the appellant to take consequential steps on the death of respondent No.10, Sheela Devi and thereafter to decide the question of substitution of her legal representative(s), if any, and also the question of abatement of the appeal after affording the parties due opportunity of being heard. The appeal thereafter be decided afresh, in accordance with law. The parties through learned Counsel representing them are directed to appear before learned lower appellate Court on ***10th August, 2018***.

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

An authenticated copy of this judgment be sent to learned lower appellate Court for record/compliance.

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

Shri Yaseen ...Petitioner
Versus
Mohd. Gulzar ...Respondent

CMPMO No. 245 of 2017
Reserved On : 8.3.2018
Date of decision: 5.7.2018

Himachal Pradesh Urban Rent Control Act, 1987- Section 14(2)(i), Proviso III and Section 21(5) – Deposit of 'amount due' with Rent Controller – When permissible ? Held, under Section 21(5) a tenant can deposit 'arrears of rent' with controller under given circumstances only- Section 21(5) does not speak of deposit of 'amount due' as determined by Controller to avoid eviction on ground of non-payment of rent – Therefore, tenant as a rule has to pay or tender 'amount due' to the landlord within 30 days of order to avoid eviction – In exceptional circumstances and on proof of his having made sincere, serious and genuine efforts to make the payment to landlord, deposit of amount with Controller within 30 days from order can be made – **Hans Raj Khimta Vs. Smt. Kanwaljeet Kaur alias Sardami Babli Latest HLJ 2016 (HP) 303** referred to and relied upon – Since, Appellate Authority had merely passed interim stay on execution of eviction order, petition disposed of with direction to it to decide the said issue afresh during final adjudication of appeal.

Cases referred:
Hans Raj Khimta Vs. Smt. Kanwaljeet Kaur alias Sardami Babli Latest HLJ 2016 (HP) 303
Priya Bala Ghosh and others Vs. Bajranglal Singhania and another, 1992 (1) RCR 313 (SC)

For the Petitioner: Mr.Bhupinder Gupta, Senior Advocate with Mr.Janesh Gupta, Advocate.
For the Respondent: Mr.V.S. Chauhan, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur Judge

Instant petition has been filed against impugned order dated 18.3.2017 passed by learned Appellate Authority (Additional District Judge, Shimla) camp at Rohru under Section 24(2) of H.P. Urban Rent Control Act (herein after referred to as the Act in short) in CMP No. 22-R/6 of 2017 in appeal registered as F No. 6/2017, whereby learned Appellate Authority after distinguishing judgment of this Court passed in ***Hans Raj Khimta Vs. Smt. Kanwaljeet Kaur alias Sardami Babli*** reported in ***Latest HLJ 2016 (HP) 303***, has stayed operation of order passed by Rent Controller, assailed in the appeal.

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

3. Petitioner-landlord had filed an eviction petition against respondent-tenant on the grounds of arrears of rent as well as bonafide requirement for personal use. Learned Rent

Controller had passed eviction order against respondent-tenant on both grounds with further direction to respondent-tenant to deposit arrears of rent in the sum of Rs. 1,79,523/- within a period of 30 days from the date of order i.e. 9.12.2016.

4. As per record, on 6.1.2017, an application bearing date 5.1.2009 was presented on behalf of respondent-tenant before the Rent Controller, which was ordered to be listed on 7.1.2017 after checking and report by the office. There was undated affidavit filed in the application, which appears to have been attested by Notary on 7.1.2017. Respondent-tenant had also got his statement recorded before the Rent Controller on 7.1.2017, whereupon Rent Controller had passed an order on that very day i.e. 7.1.2017, disposing of the application by allowing deposit of arrears of rent and rent for the month of January, 2017 by respondent-tenant with direction to Naib Nazir of the Court to deposit the cheque dated 7.1.2017 amounting to Rs. 1,74,369/- and to create FDR in the name of landlord in whose favour the cheque was issued by respondent-tenant. It was also directed that respondent-tenant shall inform petitioner-landlord about deposit of rent immediately. Thereafter notice returnable on 17.1.2017 was also ordered to be issued to landlord to receive the rent.

5. On 10.01.2017, petitioner-landlord had filed Execution Petition No. 2/10 of 2017 under Section 26 of the Act before the Rent Controller, stating therein that respondent-tenant had failed either to tender or to pay the arrears to the petitioner-landlord within 30 days from the date of order and had also refused to vacate the premises on request made by petitioner-landlord.

6. On 16.1.2017, respondent-tenant preferred an appeal against eviction order dated 9.12.2017 along with an application under Section 5 of Limitation Act for condonation of delay in filing the appeal and the said appeal was ordered to be registered on 17.1.2017. On 15.3.2017, petitioner-landlord represented himself through counsel and filed reply to application under Section 5 of Limitation Act, whereafter the application was considered and disposed of being infructuous with findings that respondent-tenant had applied for copy of order dated 9.12.2016 on the same day and it was prepared on 23.12.2016 and the appeal was within limitation from the date of preparation of copy of order.

7. Petitioner-landlord had contested the interim stay application filed with the appeal under Section 24(2) of the Act, refuting the grounds taken in the application and specifically stated that respondent-tenant had failed to pay the rent to landlord within 30 days from the date of order and no intimation had been given to landlord regarding deposit of the same, if any, in the court, as per mandatory requirement under the Act as well as in consonance with pronouncement of this High Court in *Hans Raj Khimta's* case reported in Latest HLJ 2016 (HP) 303. Aforesaid application for interim stay was considered and decided on 18.3.2017 by returning findings that notice was given to the landlord within 30 days from the date of decision and first step had been followed by the tenant and therefore, law laid down by this High Court in Hans Raj Khimta's case was not applicable in the facts and circumstances in hand and operation of impugned eviction order was ordered to be stayed during pendency of the appeal.

8. In instant petition, order dated 18.3.2017 granting interim stay in favour of tenant after distinguishing the judgment in Hans Raj Khimta's case is under challenge. By referring pronouncement in Hans Raj Khimta's case, it is contended that respondent-tenant had only alternative to pay the rent to land owner directly and the respondent-tenant had failed to make payment of arrears of rent to land owner within 30 days and thus even if it is considered that he had deposited arrears of rent within 30 days before the Rent Controller, he will not have protection of 3rd proviso to Section 14(2) of the Act.

9. Relying upon copy of challan dated 9.1.2017 placed on record as Annexure P-4, it is also contended that even deposit of amount due in the Court was also beyond statutory period of 30 days, as period of 30 days had expired on 8.1.2017. It is also contended that despite taking categorical stand that tenant had not tendered/paid the arrears of rent to

petitioner-landlord within stipulated period, disentitling him from getting stay of execution of eviction order, learned Appellate Authority had wrongly stayed the eviction order. It is submitted on behalf of landlord that no material was placed on record with regard to alleged contention of tenant that tenant and landlord were not in talking terms with each other and landlord had refused to receive the amount due, constraining tenant to deposit the amount due in the Court and no notice had ever been given by tenant to landlord expressing his intention to pay amount due to the landlord within 30 days before passing the order of eviction.

10. It is also stated in grounds raised by landlord that entertaining appeal and application for interim stay along with it, without taking up application under Section 5 of Limitation Act first, seeking condonation of delay in filing appeal filed beyond its statutory period and also continuing with proceedings in appeal without condoning delay in filing the appeal, learned Appellate Authority has committed material illegality and irregularity, rendering the impugned order incapable of being sustained.

11. Petition has been resisted by and on behalf of tenant by contending that landlord had avoided receipt of amount of arrears of rent payable to him in pursuance to the eviction order dated 9.12.2016 and had been trying to frustrate the right of tenant available under 3rd proviso to Section 14(2)(i) of the Act and thus tenant had no other option except to approach the Rent Controller by filing an application to deposit the arrears of rent in the Court and as such the tenant had filed such application in the Court within time of 30 days along with cheque issued for payment of arrears of rent along with rent form the month of January, 2017. Reliance has been put upon affidavit filed and statement made by tenant on 7.1.2017 in support of application filed to deposit the rent in the Court. According to him tenant had approached the court well within stipulated period and his application was allowed before expiry of 30 days on 7.1.2017, as 30 days had to expire on 8.1.2017. It is further argued that deposit of cheque/amount tendered by tenant in the Court in the treasury on a later date beyond 30 days, but after tendering the same by tenant within prescribed period, is an internal matter of the office of Rent Controller, for which tenant cannot be penalized. Applicability of judgment in Hem Raj Khimta's case is also disputed in the facts and circumstances of the case stating that in present case Rent Controller had issued notice to landlord on the very same date when amount was tendered in the court on 7.1.2017 within 30 days of eviction order.

12. Section 14 of the Act provides eviction of tenant on various grounds including eviction for arrears of rent under sub Section (2) of the Act. In first proviso to this sub Section, opportunity has been provided to tenant to get the proceedings for eviction terminated by making payment of arrears of rent as provided in the said proviso. 3rd proviso provides an opportunity to tenant to make eviction order ineffective on payment of amount due by the tenant within a period of 30 days, for which his eviction is ordered. In any case, if tenant opted not to make payment of amount due within 30 days, but to assail the eviction order, he is free to do so.

13. Section 21(1) of the Act confers a right upon tenant to deposit the rent in the Court, where landlord does not accept any rent tendered by tenant within the time referred to in Section 20 of the Act.

14. Manner to tender rent has been prescribed in Section 21 of the Act, which reads as under:-

> *"21 (1) Where the landlord does not accept any rent tendered by the tenant within the time referred to in Section 20 or refuses or neglects to delivery a receipt referred to therein or where there is a bonafide doubt as to the person or persons to whom the rent if payable, the tenant may deposit such rent with the Controller in the prescribed manner.*
>
> *(2) The deposit shall be accompanied by an application by the tenant containing the following particulars namely;-*

(a) the building or rented land for which the rent is deposited with a description sufficient for identifying the building or rented land;

(b) the period for which the rent is deposited;

(c) The name and address of the landlord or persons claiming to be entitled to such rent: and

(d) Such other particulars as may be prescribed.

(3) On such deposit of the rent being made, the Controller shall send in the prescribed manner a copy or copies of the application to the landlord or persons claiming to be entitled to the rent with an endorsement of the date of the deposit.

(4) If an application is made for the withdrawal of any deposit of rent, the Controller shall, if satisfied that the applicant is the person entitled to receive the rent deposited, order the amount of the rent to be paid to him in the manner prescribed:

Provided that no order for payment of any deposit of rent shall be made by the Controller under this sub-section without giving all persons named by the tenant in his application under sub-section (2) as claiming to be entitled to the payment of such rent an opportunity of being heard and such order shall be without prejudice to the rights of such persons to receive such rent being decided by a court of competent jurisdiction.

(5) If at the time of filing the application under sub-section (4), but not after the expiry of thirty days from receiving the notice of deposit, the landlord or the person or persons claiming to be entitled to the rent complains to the Controller that the statements in the tenant's application of the reasons and circumstances with led him to deposit the rent are untrue, the Controller, after giving the tenant an opportunity of being heard, may levy on the tenant a fine which may extend to an amount equal to two months rent if the Controller is satisfied that the said statements were materially untrue and may order that a sum out of the fine realized be paid to the landlord as compensation.

(6) The Controller may, on the complaint of the tenant and after giving an opportunity to the landlord of being heard, levy on the landlord a fine which may extend to an amount equal to two months rent, if the Controller is satisfied that the landlord, without any reasonable cause, refused to accept rent through tendered to him within the time referred to in Section 20 and may further order that a sum out of the fine realized be paid to the tenant as compensation."

Section 20 of the Act reads as under:-

"Section 20(1). Every tenant shall pay rent within the time fixed by contract or in the absence of such contract, by the fifteenth day of the month next following the month for which it is payable.

(2) Every tenant who makes payment of rent to his landlord shall be entitled to obtain forthwith from the landlord or his authorized agent a written receipt for the amount paid to him duly signed by the landlord or his authorized agent.

(3) If the landlord or his authorized agent refuses or neglects to deliver to the tenant a receipt referred to in sub-section (2), the Controller may, on an application made to him in this behalf by the tenant within two months from the date of payment and after hearing the landlord or his authorized agent, by order, direct the landlord or his authorized agent to pay to the tenant, by way of damages, such sum not exceeding double the amount of rent paid by the tenant and the

costs of the application and shall also grant a certificate to the tenant in respect of the rent paid."

15. Section 24 of the Act provides for filing of appeal by any person aggrieved by order passed by Rent Controller before the Appellate Authority, notified by the State and also empowers the Appellate Authority to grant stay during pendency of appeal. Relevant provision reads as under:-

"Section 24 (1) (a) The State Government may, by a general or special order, by notification, confer on such officers and authorities, as it thinks fit, the powers of Appellate Authorities for the purposes of this Act, in such area or in such classes of cases as may be specified in the order.

(b) Save as otherwise provided in this Act, any person aggrieved by an order passed by the Controller, except the orders for the recovery of possession made by the Controller in accordance with the procedure prescribed under Section 16, may within fifteen days from the date of such order or such longer period as the appellate authority may allow for reasons to be recorded in writing, prefer an appeal in writing to the Appellate Authority having jurisdiction. (in computing the period of fifteen days, the time taken to obtain a certified copy of the order appealed against shall be excluded)."

16. It is no longer resintegra that period of 30 days provided in 3rd proviso of Section 14(2) (i) of the Act to deposit the amount cannot be absurd or enlarged beyond 30 days by Rent Controller or Appellate Authority and even in case where stay has been granted against order of eviction of Rent Controller and period of 30 days would start from the passing of eviction order by Rent Controller. (See ***1993(1) RCR 290 (SC), 1994 Supplement Shimla L.C. 242, ILR Himachal Series 1982, 279***)

17. The Apex Court in ***Smt.Priya Bala Ghosh and others Vs. Bajranglal Singhania and another, 1992 (1) RCR 313 (SC)*** has observed that law has to be broadly construed, because it is not intended to trap the tenant into a situation so that the landlord can evict him and there may be several situations which may arose and necessitate the remittance of rent by tenant through alternative mode.

18. Section 21 of the Act is applicable in those cases where there is refusal to accept any rent as provided under Section 20 of the Act and there is no specific provision for depositing the amount due in the Court under 3rd proviso of Section 14(2) of the Act. However, there may be several situations as observed by the Apex Court in *Smt.Priya Bala Ghosh's* case Supra, where landlord may avoid receipt of amount due within 30 days so as to frustrate the right of tenant, provided under the aforesaid 3rd proviso, resulting into compulsion of tenant to deposit the rent in the court within 30 days and in such a situation Section 21 of the Act may not be strictly applicable, but principles of Section 21 of the Act broadly shall be applicable in case of payment under 3rd proviso of Section 14(2) of the Act. Provisions of Section 21 of the Act unambiguously indicates that deposit of rent by tenant in the Court is an exception and for this reason only, it is provided in 21 (5) of the Act that in case statement in tenant's application for reasons and circumstances, allowing him to deposit the rent, are found untrue, the Rent Controller after giving the tenant an opportunity of being heard may levy a fine, which may be to the extent of amount equal to two months' rent and to pay the said fine to the landlord as compensation. Therefore, in a case of deposit of amount due by tenant under 3rd proviso of Section 14 of the Act in the Court, instead of making payment to the landlord, there must be cogent and convincing material on record to establish that amount was duly tendered by the tenant to landlord within 30 days of passing of eviction order and there was refusal of landlord to accept the same. Payment/deposit of amount due under 3rd proviso takes away the right of landlord to evict the tenant accrued after adjudication of the petition filed by landlord without assailing the same by tenant. As held in *Hans Raj Khimta's* case, this proviso speaks about payment of amount, but

not deposit of the same in the court. Deposit in the Court, being exception, must be allowed only after strict proof of failure of making payment on account of act and conduct of landlord.

19. Section 24(2) of the Act empowers the Appellate Authority to grant stay during pendency of appeal. Power conferred on the Appellate Authority under this sub section is not subject to deposit of amount due under 3rd proviso to Section 14 of the Act. The Appellate Authority can grant stay during pendency of appeal independent of compliance of provisions of 3rd proviso to Section 14(2) of the Act. Tenant has a right to assail eviction order passed against him in appeal and to apply for grant of stay during pendency of appeal under Section 24 of the Act, irrespective of deposit of amount due under 3rd proviso of Section 14(2) of the Act. Tenant has an option to terminate the execution of eviction order passed for arrears of rent by depositing amount due within 30 days of passing of eviction order, but at the same time, he has a right to file an appeal without resorting to provisions of 3rd proviso of Section 14(2) of the Act. Therefore, the Appellate Authority may or may not grant stay without or with deposit of amount due to be paid by tenant under 3rd proviso of Section 14(2) of the Act, as deposit or non deposit of amount due under 3rd provision of Section 14(2) of the Act is immaterial for exercising the powers under Section 24(2) of the Act. Appellate Authority may or may not direct the tenant to deposit the arrears of rent at the time of grant of stay during pendency of appeal, but that is not inhibited by the provisions of 3rd proviso of Section 14(2) of the Act.

20. Ratio of law laid down in Hans Raj Khimta's case is not that amount under 3rd proviso of Section 14(2) of the Act cannot be deposited in the Court in any eventuality, but for language of 3rd proviso of Section 14(2), the Court has held that for payment of amount due under this proviso, tenant has to tender the amount to landlord directly and it was held that in given facts and circumstances of that case, provisions of Section 21 of the Act, cannot be invoked, as there was neither any tender by the tenant nor any refusal by landlord in accepting the rent. It was further observed that it was not the case of the tenant that after depositing the amount in the Court, an intimation was sent to landlord, rather, no request was made to landlord for withdrawal of the same and it was only after expiry of statutory period of 30 days, when the landlord filed an application for execution, he learnt that amount stood deposited in the Court. Therefore, as per ratio of law laid down in Hans Raj Khimta's case, deposit of amount in the Court under 3rd proviso of Section 14 of the Act under exceptional circumstances, is not prohibited.

21. Under 3rd proviso of Section 14(2) of the Act, it is provided that if the tenant pays the amount due within a period of 30 days from the date of order, he shall not be evicted, as a result of order passed by Controller for eviction on the ground of non-payment of rent due from him. As discussed above, it is now settled that 3rd proviso speaks about payment of amount by the tenant and not deposit of the same by him in the Court. There is no specific provision dealing with the situated in which tenant can deposit the amount due under this proviso, instead of making payment to the tenant. However, Section 21 of the Act provides deposit of rent by the tenant in case landlord does not accept any rent tendered by tenant within the time referred to in Section 20 of the Act. This Section does not provide deposit of amount in the Court, where amount could not have been paid for exceptional circumstances beyond the control of tenant, like the landlord refuses to accept any rent tendered by tenant under 3rd proviso of Section 14(2) of the Act. However, as discussed above, in exceptional circumstances, tenant can deposit the amount in the Court, in case he is able to make out the ground for such deposit, but uncertainly there must be clinching evidence that he had made sincere, serious and genuine efforts to make the payment to the landlord within 30 days from the date of order of his eviction, as provide under 3rd proviso of Section 14(2) of the Act. Making of payment to landlord under this proviso within 30 days, is a rule and deposit of such rent in the Court is exception and for making out an exception there must be pressing circumstances in favour of the tenant, which required to be brought on record and proved by him. Whether such exceptional circumstances exist in present case or not is a matter of fact.

22. Absence of any express provision for deposit of amount in the Court under 3rd proviso of Section 14(2) of the Act makes intention of legislature very clear that emphasis under this provision is for payment within 30 days to the landlord and therefore, strict interpretation of provisions of this proviso is warranted, meaning thereby that unless exceptional circumstances are made out, the tenant must have to make payment to the landlord within 30 days.

23. In present case, Appellate Authority has passed the interim order staying the operation of eviction order during pendency of appeal and in the said order he has based his finding on reasons for grant of such interim order on submissions of learned counsel for tenant claiming that landlord was refusing to take arrears of rent and the said arrears of rent had been deposited with the Rent Controller. For substantiating these submissions, statement of tenant dated 7.1.2017 recorded by Rent Controller and order passed by Rent Controller on 7.1.2017 along with record report of Process Server was also placed on record and on the basis of these documents and oral submissions, Appellate Authority had concluded that notice to the landlord had been given within 30 days from the date of decision and thus first step had been followed by tenant and accordingly ratio of law laid down in *Hans Raj Khimta's* case was considered not to be applicable in the facts and circumstances of the case.

24. Landlord has referred an application bearing date 5.1.2009 for deposit of amount due in the Court, affidavit filed in its support and statement dated 7.1.2017 made by tenant in the Court in support thereof and also copy of challan, whereby arrears of rent were tendered by Rent Controller for deposit on 10.1.2017. Perusal of record of application dated 5.1.2009 filed to deposit amount due in the Court also depicts that as per report of concerned dealing assistant notice to landlord was issued on 11.1.2017. In application (on which date was typed as 5.1.2009), simple averments are that tenant wanted to deposit arrears of rent along with rent of month of January in the Court within one month from the date of order of eviction. This application was filed on 6.1.2017, which was ordered to be listed after report on 7.1.2017. It appears that thereafter an affidavit was sworn by tenant stating therein that he was not in talking terms with landlord and wanted to deposit the rent in the Court and in his deposition made on 7.1.2017 in the Court, tenant had stated that he intended to tender the rent in the court for the reasons that landlord was not in talking terms with him nor did he accept the same, whereas tenant was ready and willing to make the payment. The application is silent about the reasons for which the tenant intended to deposit the amount in the Court instead of making the payment thereof to landlord. The application was filed on 6.1.2017, whereas affidavit in support thereof, improving the reasons for tendering the rent in the Court, was sworn on 7.1.2017 and on the very same day statement of tenant was also recorded by the Rent Controller.

25. Application as well as affidavit and statement of tenant is completely silent about the fact that amount due was ever tendered to landlord as provided under 3rd proviso of Section 14(2) of the Act, much less anything stating about the date and time of such tender. The Appellate Authority, on the basis of contents of order dated 7.1.2017 passed by Rent Controller, has also considered the plea of tenant that notice about the deposit was also given to the landlord. There is no notice or oral averments with regard to any such notice issued by tenant to the landlord for making payment of amount due. The order dated 7.1.2017 depicts only passing of order to issue notice to landlord to receive the rent/amount due deposited by tenant in the Court and it is a fact, as evident from record that even the said notice was issued only on 11.1.2017, which was received back with undated report of Process Serving Agency, stating therein that landlord was not found at home, but his nephew Ishan was found there, who had informed that landlord was out of station. Thereafter, on 3.2.2017, notice was again issued for the next date i.e. 30.3.2017, which was served upon landlord. However, these notices also did not contain any reference of deposit of rent by tenant in the Court and also lacks about any information /direction to landlord to receive any such rent/amount due deposited by tenant in the Court. These summons only contains the title of case/application along with number thereof, address of landlord, next date of hearing and stamp of concerned Superintendent Grade-II with his initial. In these notices, no other information transmitted to the landlord. It is

pertinent to note that 30 days after passing of eviction order dated 9.12.2016 had expired on 8.1.2017.

26. Perusal of record transpires that at the time of allowing deposit of amount in the Court, the Rent controller, in its order, dated 7.1.2017, has mentioned that he had asked the counsel for the tenant as to why the amount had not been paid in favour of the landlord whereupon the counsel for the tenant had stated that tenant was ready to tender the rent in favour of landlord, but, the landlord was not in talking terms with the tenant and had not received the rent. Thereafter, the Rent Controller had recorded the statement of the tenant to that effect. No such or any other reason was assigned at the time of filing of the application to deposit the amount due in the Court. Only, it was stated that tenant had been asked to deposit the arrears of rent and thus, he wanted to deposit the same in the Court. The response of the counsel for the tenant as well as statement of tenant recorded in accordance with the response of the counsel that landlord was not receiving the rent despite tendering the same to him is not substantiated from the record. Despite that, on the basis of same, the Rent Controller concluded that tenant intended to tender the amount due within thirty days to landlord, but, for his refusal for acceptance, tenant was depositing the same in the Court. Observation of Rent Controller that applicant accompanying the affidavit substantiate the plea of tenant is also contrary to the record. There is nothing on record to establish and corroborate the statement of tenant and to establish on record that landlord had not received the rent.

27. The appellate authority has relied upon aforesaid order, dated 7.1.2017, passed by Rent Controller allowing the application to deposit the amount due in the Court, statement of tenant made before the Rent Controller, submissions of counsel for the tenant and also report of the Process Server for holding that ratio of law laid down in Hans Raj Khimta's case is not applicable; that notice was issued by the tenant to landlord for receiving the rent; landlord was refusing to accept the same; and on giving notice to landlord within thirty days from the date of decision, first step has been followed by the tenant. Whereas it emerges from record that no notice, either by tenant or by the Rent Controller, was issued to the landlord within thirty days of passing of the order to deposit the amount due. In fact, tenant has not issued any notice and notice by Rent Controller was issued on 11.1.2017. Perusal of notices issued on 11.1.2017 by the office of Rent Controller reflects that these notices do not contain any information with regard to deposit of amount by the tenant in the Court. As these notices were not issued within thirty days nor tendered to landlord during that stipulated period, the report of Process Server thereon that landlord was not found at home is inconsequential for deciding the issue in dispute in present case.

28. Finding of the appellate authority, that Hans Raj Khimta's case is not applicable, is also misconceived. Ratio of law laid down in Hans Raj Khimta's case is that payment of amount due to the landlord under 3rd proviso of Section 14 (2) of the Act, is rule and deposit of the same in the Court is exception and for exercising the exception, a case is to be made out on the basis of substantial, probable and reliable evidence on record adopting strict interpretation of the rule. Therefore, in every case, where such issue arises, Hans Raj Khimta's case is relevant.

29. As discussed above, the appellate authority has not taken into consideration the entire facts and circumstances at the time of passing of impugned order, but, may be for the reason that at that time, he was considering the interim stay application on the basis of material placed before him; better course to him would have been, before confirming the interim stay and also returning its findings with regard to applicability of Hans Raj Khimta's case, to requisition the entire record and to pass the order accordingly.

30. Failure to make payment within 30 days shall make the eviction order passed for arrears of rent enforceable, subject to right of tenant to file an appeal against such eviction order, whereas, payment of amount due under 3rd proviso excludes the right of landlord to evict the tenant for such arrears of rent. Appellate authority is competent to grant interim stay with

respect to eviction order under challenge in appeal without insisting for deposit of amount and tenant also has right to file appeal without depositing the amount due and in such a situation, appellate authority may or may not insist for deposit of amount for grant of interim stay. However, in present case interim stay has been granted on the ground that amount due has been paid in terms of 3rd proviso of Section 14 (2) of the Act. It is undisputed that tenant has preferred an appeal against the eviction order and landlord has also filed Execution Petition. Any finding in favour of either party would prejudice the right of another party in pending appeal preferred by tenant.

31. Therefore, instead of returning findings on merits as to whether tenant has made payment of amount due as prescribed in 3rd proviso of Section 14(2) of the Act or not, matter is disposed of with observation that impugned order passed by Appellate Authority in the interim application shall not be considered as final verdict on the issue and its findings shall be confined only to the disposal of said interim stay application preferred by tenant being passed on the basis of limited material placed before appellate Court and the Appellate Authority shall decide the said issue afresh during final adjudication of the appeal without being influenced by anything and obviously, on the basis of material already placed on record, but keeping in view the ratio of law laid down by the Courts, as discussed supra and also, considering the entire material already on record, but not made available before the said Authority at the time of disposing of interim stay application.

32. Parties are directed to appear before Appellate Authority at Rohru on **18th July, 2018,** which shall decide the appeal including the issue raised in present petition in light of the observations made hereinabove, as expeditiously as possible, keeping in view the order of seniority of the appeal viz-a-viz other pending appeals.

33. Petition is disposed of in aforesaid terms.

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

Chandra Shekhar Singh ... Petitioner

Versus

State of Himachal Pradesh ... Respondent

CrMP(M) No. 816 of 2018
Decided on July 6, 2018

Code of Criminal Procedure, 1973- Section 438- Pre-arrest bail – Grant of – Petitioner apprehending arrest in case registered against him for offences under Sections 13(1)(e) and 13(2) of Prevention of Corruption Act and Section 120-B of I.P.C. – Allegations against him are that he enmassed assets disproportionate to known sources of his income – He allegedly purchased land benami in the name of 'P' and raised Villa over it – Petitioner/accused contending that incriminatory documents have already been taken into possession during search conducted at his residence and he had also joined investigation – State resisting bail on ground of seriousness of offences – Further, investigating agency had to recover some more documents – On finding that petitioner had joined the investigation and incriminatory documents had also been taken into possession, petitioner/accused was ordered to be enlarged on pre-arrest bail subject to conditions. (Paras- 7 to 12)

Cases referred:

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

Prasanta Kumar Sarkar versus Ashis Chatterjee and another (2010) 14 SCC 496

For the petitioner	:	Mr. Ashwani Pathak, Senior Advocate with Mr. V.S. Rathour, Advocate.
For the respondent	:	Mr. S.C. Sharma and Mr. Dinesh Thakur, Addl. AG's with Mr. Amit Kumar, DAG. Kulbhushan Verma, Addl. SP, SV & ACB, Mandi and Inspector Manoj Kumar, SV & ACB, SIU-II, Shimla.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

Bail petitioner namely Chander Shekhar Singh, who is present in Court, apprehending his arrest in case FIR No. 03/18 dated 25.6.2018 under Sections 13(1)(e) and Section 13 (2) of Prevention of Corruption Act and Section 120B IPC, registered at Police Station SV & ACB, Kullu, Himachal Pradesh, has approached this Court in the instant proceedings filed under Section 438 CrPC, praying therein for pre-arrest bail.

2. Sequel to order dated 29.6.2018, whereby petitioner named herein above, was ordered to be enlarged on bail, in the event of his arrest in connection with aforesaid FIR, Mr. Kulbhushan Verma, Addl. SP, SV & ACB has 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. Close scrutiny of record/status report suggests that complaint No. 10/17 dated 29.7.2017 was registered by SIU (Special Investigation Unit) against bail petitioner, who at the relevant time was Managing Director, HP State Forest Development Corporation Limited, Shimla, on the allegations that above named person collected disproportionate assets more than his known source of income from illegitimate sources and by way of hatching criminal conspiracy with the help of one Parma Nand son of Ramu, resident of Tihri, Tehsil and District Mandi. During the course of investigation, investigating agency after having procured search warrant from the court of Special Judge, Kullu, Himachal Pradesh, searched house of the bail petitioner and person namely Parma Nand, wherein allegedly certain incriminating documents from the house of the bail petitioner were found. As per investigating agency, bail petitioner who is a non-Himachali, fraudulently purchased property in Himachal Pradesh in the name of Parma Nand in the year 1997, whereafter a villa came to be constructed on the aforesaid land in the year 2014. During investigation, person namely Parma Nand denied sale/purchase, if any, of land in question, in his name and alleged/claimed that neither there are his signatures on the documents used by the petitioner for obtaining permission, if any, under Section 118 of the Himachal Pradesh Tenancy and Land Reforms Act nor he ever authorized bail petitioner to purchase property in his name.

4. During investigation, it also emerged that neither application was moved to the Deputy Commissioner under Section 118 of the Tenancy and Land Reforms Act soliciting therein permission to purchase land in the State nor the Deputy Commissioner ever issued any such permission to the bail petitioner or Parma Nand, to purchase land in the State. In the aforesaid background, FIR detailed hereinabove, came to be lodged against the bail petitioner.

5. Mr. Ashwani Pathak, learned Senior Advocate duly assisted by Mr. V.S. Rathour, Advocate, while referring to the status report/record, vehemently argued that since bail petitioner has already joined the investigation in terms of order dated 29.6.2018 and he has handed over documents, if any, in his possession, no fruitful purpose will be served in case police is allowed to investigate him in custody. Mr. Pathak, learned Senior Advocate further states that as per own record of the investigating agency, documents have been already taken into custody by the investigating agency, which are being further verified and as such, bail petitioner deserves to be enlarged on bail. Mr. Pathak, learned Senior Advocate further states that house in question was constructed on the land, after having obtained requisite permission from the authorities

concerned, and as such, no case, if any, is made out against bail petitioner and he deserves to be enlarged on bail. Lastly, Mr. Pathak, learned Senior Advocate contends that bail petitioner is a local resident of area and he shall be available for investigation as and when required and there is no likelihood of his fleeing from justice.

6. Mr. Dinesh Thakur, learned Additional Advocate General, while fairly acknowledging factum with regard to joining of investigation by the bail petitioner pursuant to order passed by this Court, contends that keeping in view the gravity of the offence allegedly committed by the bail petitioner, he does not deserve to be enlarged on bail and petition deserves to be dismissed. Mr. Thakur, while refuting aforesaid submission made by the learned counsel representing the bail petitioner, contends that investigation clearly reveals that no prior permission under Section 118 of the Tenancy and Land Reforms Act, was taken by the bail petitioner from the competent authority and documents found from the house of the bail petitioner clearly suggest that he not only forged the document, rather, on the basis of forged documents, managed to have electricity and water connections installed. Mr. Thakur, learned Additional Advocate General further states that though investigating agency has recovered certain document, but few more documents, which are in the possession of the bail petitioner, are not being handed over to the police, as such, investigating agency is finding it difficult to complete the investigation. Mr. Thakur, learned Additional Advocate General, on the instructions of the Investigating Officer, states that though investigation is almost complete, but for want of certain documents, investigating agency has not arrived at a final conclusion. With the aforesaid submissions, Mr. Thakur, learned Additional Advocate General prayed for rejection of the bail application.

7. Having heard the learned counsel representing the parties and gone through the record, especially categorical statement made by the learned Additional Advocate General that bail petitioner has already joined the investigation and is fully cooperating, this Court is persuaded to agree with the contention of Mr. Pathak, learned Senior Advocate, that no fruitful purpose would be served in case custodial interrogation is allowed, as prayed for by the investigating agency. Though, record clearly suggests that certain incriminating documents have been found from the house of the bail petitioner, but, as per investigating agency, these are being verified and as such, this Court sees no force in the argument of Mr. Dinesh Thakur, learned Additional Advocate General that in the event of petitioner being enlarged on bail, he may tamper with the evidence and material collected on record, as such same deserves to be rejected at this stage. As far as commission of offence if any, under Section 118 of the Tenancy and Land Reforms Act is concerned, this Court is of the view that independent proceedings under aforesaid Act are required to be initiated and cannot be a ground to deny the bail to the bail petitioner. Moreover guilt, if any, of the bail petitioner is yet to be ascertained in accordance with law, by leading cogent and convincing evidence by the investigating agency, as such, it may not be fair to curtail his freedom for an indefinite period, especially when he has already joined the investigation. It has been repeatedly held by Hon'ble Apex Court and this court that freedom of an individual is of utmost importance and can not be curtailed for indefinite period, especially when guilt, if any, is yet to be proved. It is settled law that till such time guilt of a person is proved, he is deemed to be innocent.

8. 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.

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.

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.

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."

9. 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."

10. 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.

11. 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;

(ix) reasonable apprehension of the witnesses being influenced; and

(x) danger, of course, of justice being thwarted by grant of bail.

12. In view of above, bail petitioner has carved out a case for grant of bail and as such, order dated 29.6.2018 is made absolute subject to petitioner furnishing fresh bail bonds in the sum of Rs.2,00,000/- (Rs. Two Lakh) with one local surety in the like amount, to the satisfaction of the Investigating Officer, besides the following conditions:

(f) 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;

(g) He shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;

(h) 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

(i) He shall not leave the territory of India without the prior permission of the Court.

(j) He shall surrender passport, if any, held by her.

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

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.

The petition stands accordingly disposed of.

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

Dilbagh Singh alias Ashu ...Appellant.

Versus

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

Cr. Appeal No. 640 of 2017.
Reserved on: 27th June , 2018.
Date of Decision: 6th July, 2018.

Protection of Children from Sexual Offences Act, 2012- Section 4 – Penetrative sexual assault – Special Judge charged, tried and convicted accused of said offence on allegations that he committed penetrative sexual assault on victim in September, 2012 and April, 2013 – Appeal against – Act however came into force on and w.e.f. 14.11.2012 – And thus had no retrospective operation – No allegation in statement recorded under Section 164 Cr.P.C that she was sexually assault in April, 2013 – Held, Accused could have been tried for offences under Indian Penal Code for such misdemeanor – Appeal allowed – Conviction and final order of sentence set aside – Matter remanded to Special Judge for de novo trial. (Paras-3 and 4)

For the Appellant: Mr. N.S. Chandel, Advocate.

For the Respondent: Mr. Hemant Vaid, Addl. A.G. 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, against, the verdict of conviction pronounced, upon, the accused/apepllant, by the learned Special Judge, Kangra at Dharamshala, upon, Sessions Trial No. 20-K/VII/2014, vis-a-vis, the hereinafter extracted charges:-

> "That in the month of September, 2012 and March, 2013, you committed penetrative sexual assault with the victim at Jassaur Tika Pali, at different times and thereby committed an offence punishable under Section 4 Protection of Children from Sexual Offences Act, 2012 and within the cognizance of this Court.
>
> And I hereby direct that you be tried for the aforesaid offences."

2. A reading of the charge, does bring forth, the trite factum, qua, the penally inculpable misdemeanors, as, ascribed therein qua the accused, being, qua his, in, the month of September, 2012, and, in the month of March, 2013, hence subjecting the minor prosecutrix, to penetrative sexual assault, thereupon, his committing an offence punishable under Section 4 of

the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as the POCSO Act). The aforesaid forthright disclosures, hence, occurring in the charge, thereupon, enjoins, this Court, to allude, to the notification, whereunder, the POCSO Act, is brought into force. A reading of the notification bearing No. S.O.2705(E) of 9th November, 2012, makes a clear display qua the provisions of the Protection of Children From Sexual Offences Act, 2012, being brought into force w.e.f. 14.11.2012, and, with no explicit retrospectivity, being according to the provisions, of POCSO Act, (i) thereupon, the charge framed qua the penal misdemeanors, allegedly committed by the accused, upon, the minor prosecutrix, especially, the ones committed prior, to, the coming into force of the mandate, of, POCSO Act, being obviously hereat neither drawable nor theirs attracting, the mandate, of, Section 4, of the POCSO Act. Even, the ascription of penal misdemeanors, in the apposite charge, vis-a-vis, the accused, qua his, in the March, 2013, subjecting the minor prosecutrix, to penetrative sexual assault, is, in gross dis-concurrence to her statement, borne in Ex.PW1/B, (ii) statement whereof stands recorded, by her, before the Judicial Magistrate concerned, wherein there, is no, ascription qua the accused qua his on 6.4.2013, subjecting her to penetrative sexual assault, rather an echoing occurs qua thereat merely a frustrated attempt being made, by the accused. Consequently, in respect of the latter event also even if it stood assumingly committed, at a time, when the provisions of POCSO Act , were in force, yet any charge qua it, of hence, the accused subjecting the minor prosecutrix, to penetrative sexual assault, is amenable to falter, it visibly bearing dis-concurrence with the recitals, borne in Ex.PW1/B.

3. Contrarily, when the accused was amenable for his being charged, for his committing, offences, borne, in the provisions of the Indian Penal Code, (I) whereas, his being charged, under, thereat inapplicable provisions, inasmuch, of the POCSO Act, (ii) thereupon, his being charged, under, the inappropriate penal provisions, besides his being tried, and, convicted, and, sentenced, also hence all are legal phenomena, which are enjoined to be quashed and set aside, (iii), given all being tainted, with, pervasive jurisdictional infirmities.

4. In summa, for the reasons stated hereinabove, the appeal is allowed, and, verdict impugned before this Court, is, quashed and set aside. The learned trial Court is directed to hold a denovo trial of the accused, vis-a-vis, the apposite offences, upon charges standing drawn under the apt therewith provisions borne, in, the Indian Penal Code. It is clarified that the evidence which is adduced, in respect of, inappropriately charged offences, though, may be discardable, yet it is open to the learned Public Prosecutor, and, also to the learned defence counsel concerned, to, upon the prosecution witnesses concerned, hence re-stepping into the witness box, upon the learned trial Court, holding, a denovo trial, and, theirs, during the course, of, rendering their testification, hence, reneging therefrom, to, hence confront them, with, their earlier statements recorded before the learned trial Court, upon, the latter holding the accused to trial qua inappropriate charges. The learned trial Court is directed to within six months from today, hence conclude the trial, upon, apposite charge(s) framed against the accused, under, the provisions of the Indian Penal Code, and, if deemed fit vis-a-vis, a charge qua the subsequent event of March, 2013, framed, under the POCSO Act. The parties are directed to appear before the learned Special Judge, Kangra at Dharamshala on 25th July, 2018.

5. Since, during the course of the trial, the accused/appellant herein was released on bail by this Court in pursuant to the orders rendered on 21.06.2013, in Cr.MP(M) No. 11032 of 2013, hence, when, there is no evidence on record that the accused/convict during the course of trial, whereat he was on bail, his hence tampering with prosecution evidence, hence, he is ordered to be released on bail subject to his furnishing personal bond, in the sum of Rs. one lac with one surety in the like amount to the satisfaction of the learned Sessions Judge, Kangra at Dharamshala, with, a further condition that she shall not tamper with the prosecution evidence, in any manner. Records be sent back forthwith.

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

Jalmi Ram and others ...Petitioners

Versus

The Land Acquisition Collector and another ...Respondents

CMPMO No. 237 of 2017
Decided on: 06.07.2018

Land Acquisition Act, 1894- Section 12(2) and 18(2)(b) – Refusal of Collector to make reference to District Judge – Justifiability – Land of petitioners was acquired for public purpose –Collector pronounced award on 28th May, 1999 - Petitioners filing application before Collector on 19th August, 2016 for making reference to District Judge for enhancement of compensation – Petitioners contending that their application was within limitation from date of knowledge of award – However, Collector refusing to make reference on ground that application was not within time – Petition against – State arguing that 'D', predecessor-in-interest of petitioners, had applied for copy of award of Collector in November, 2008 and thus award of Collector was known to him – And application for reference in 2016, thus is not maintainable – High Court found that CD Form was not bearing signatures of 'D' – It was filed by an Advocate, who is not shown to have been authorized by 'D' or petitioners to obtain copy of award – 'D' was shown to have died on 1st January, 2005- Therefore, question of obtaining copy of award by him in November, 2008 does not arise – Notice regarding deposit of amount was issued to petitioners on 14th July, 2016 – Held, this was the date on which the petitioners could be said to have knowledge of contents of award – Application for making reference was filed before Collector on 19th August, 2016 and thus was within limitation – Petition allowed – Collector directed to make reference to District Judge. (Paras-11 to 18)

Cases referred:

Bhagwan Das and others versus State of Uttar Pradesh and others, (2010) 3 Supreme Court Cases 545

Harish Chandra Raj Singh versus Land Acquisition Officer, AIR 1961 SC 1500

For the petitioners: Mr. Raj Kumar Negi, Advocate.

For the respondents: Mr. Shiv Pal Manhans and Ms. Rameeta Kumari,Additional Advocate Generals, with Mr. Raju Ram Rahi, Deputy Advocate General.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge. *(Oral)*

Instant petition has been filed against order, dated 24th January, 2017 passed by the Land Acquisition Collector, HPPWD, South Zone Winter Field, Shimla (hereinafter referred to as 'Land Acquisition Collector'), whereby he has refused to refer the application of the petitioners to District Judge for making a reference under Section 18 of the Land Acquisition Act (hereinafter referred to as 'the Act') for enhancement of the compensation awarded by the Land Acquisition Collector for acquisition of land for construction of Katolu-Ganvi-Jagori road in case No. SML-16/88 vide award, dated 28th May, 1999, on the ground that application was not filed within time prescribed under law.

2. The case of the petitioners is that the application was within time from the date of knowledge of the award to the land owners-petitioners whereas the stand of the respondents-State is that the award was passed in the year 1999 and the application for making reference was preferred on 19th August, 2016, i.e. after seventeen years of passing of the award.

3. Learned counsel for the petitioners submits that the compensation amount in pursuance to the award passed in the year 1999 was disbursed on 18th July, 2016 whereupon the petitioners came to know about the contents of the award and immediately thereafter, certified copy of award was applied on 20th July, 2016, which was attested and received on 27th July, 2016, whereafter application for making reference under Section 18 of the Act was moved to the Land Acquisition Collector on 19th August, 2016 and, therefore, the application preferred by the petitioners was well within the time available under law to the land owners-petitioners.

4. The said contention of the petitioners has been refuted by the respondents-State by claiming, on the basis of CD Form submitted on 2nd November, 2008 for obtaining copy of award passed by the Land Acquisition Collector, that Dwaroo Ram @ Mani Ram (father of petitioners No. 1 to 6) had received copy of award in the year 2008 and as such, the land owner was having knowledge of contents of the award in the year 2008 dis-entitling the petitioners to claim that they attained the knowledge of contents of the award only after disbursement of the amount of compensation in July, 2016.

5. Referring the statement of Dwaroo Ram @ Mani Ram made on 23rd April, 1999, before Land Acquisition Officer/Collector, it is also canvassed on behalf of the respondents-State that said Dwaroo Ram @ Mani Ram also remained associated in the acquisition proceedings in the year 1999.

6. The issue with regard to period available to the land owners for preferring application under Section 18 of the Act is not *res integra* and has been settled as long back in the year 2010 vide pronouncement of the apex Court in case titled as **Bhagwan Das and others versus State of Uttar Pradesh and others,** reported in **(2010) 3 Supreme Court Cases 545,** wherein one of the four issues decided is as under:

> *"6. The following questions arise for consideration, on the contentions urged:*
>
> *(a) .....*
>
> *(b) .....*
>
> *(c) Whether the period of six months under clause (b) of the proviso to Section 18 of the Act should be reckoned from the date of knowledge of the award of the Collector or from the date of award itself?*
>
> *(d) ....."*

7. After considering its earlier decisions, including the basic pronouncement in case titled as **Harish Chandra Raj Singh versus Land Acquisition Officer,** reported in **AIR 1961 SC 1500,** and also the provisions of law, it has been concluded by the apex Court in **Bhagwan Das's case (supra)** as under:

> *"28. The following position therefore emerges from the interpretation of the proviso to Section 18 of the Act :*
>
> *(i) If the award is made in the presence of the person interested (or his authorised representative), he has to make the application within six weeks from the date of the Collector's award itself.*
>
> *(ii) If the award is not made in the presence of the person interested (or his authorised representative), he has to make the application seeking reference within six weeks of the receipt of the notice from the Collector under Section 12(2).*
>
> *(iii) If the person interested (or his representative) was not present when the award is made, and if he does not receive the notice under Section 12(2) from the Collector, he has to make the application within six months of the date on which he actually or constructively came to know about the contents of the award.*
>
> *(iv) If a person interested receives a notice under Section 12(2) of the Act, after the expiry of six weeks from the date of receipt of such notice, he cannot claim the benefit of the provision for six months for making the application on the ground that*

the date of receipt of notice under Section 12(2) of the Act was the date of knowledge of the contents of the award."

8. Record of the Land Acquisition Collector has also been requisitioned wherein it is reported by the concerned Patwari and endorsed by the Kanungo in the Office of Land Acquisition Collector that award, dated 28th May, 1999 / 2nd June, 1999 was passed in the absence of petitioners and as per record, notice under Section 12 (2) of the Act was also not issued, however, Dwaroo was associated and present during the proceedings under Section 9 of the Act on 23rd April, 1999, but, there is nothing on record with regard to informing him about passing of the award.

9. As per report, notice under Section 37 (2) of the Act was issued to the petitioners after deposit of amount with the Collector and the amount was received by petitioners on 18th July, 2016. It is also reported that as per record, land owner-Dwaroo had received copy of award on 26th November, 2008 through Copying Agency and, therefore, at the time of preferring application for making reference, eight years had elapsed after receiving the copy of award by Dwaroo.

10. Considering the said report, Land Acquisition Collector has passed the impugned order and refused to make a reference to the District Judge. Hence, the present petition.

11. From the record, it is evident that land owners were not present at the time of passing of the award; no notice under Section 12 (2) of the Act was issued; notice under Section 37 (2) of the Act for disbursement of the amount of compensation was issued in the year 2016 and the amount was disbursed on 18th July, 2016.

12. The fact that Dwaroo Ram had received copy of award in November, 2008 has been disputed by the petitioners by filing a copy of death certificate of Dwaroo Ram @ Mani Ram alongwith jamabandi of land owned and possessed by Dwaroo Ram @ Mani Ram, mutated in favour of his legal heirs on 30th January, 2006. Statement showing compensation of each holdings of Village Ganvi has also been placed on record wherein Dwaroo Ram @ Mani Ram s/o Bhagsi has been shown as one of the claimants.

13. From the death certificate placed on record, which remained uncontroverted, it is apparent that Dwaroo Ram @ Mani Ram had expired on 1st January, 2005. Therefore, plea of respondents-State that Dwaroo Ram @ Mani Ram had received copy of award in the year 2008 is not sustainable, more particularly, when the CD Form, placed on record by the respondents-State, does not find mention name of Dwaroo Ram @ Mani Ram or his legal heirs as applicant(s) in the said form/application.

14. The said application has been filed by some Prem Paul, Advocate. There is nothing on record to verify that the said Prem Paul was an Advocate and was ever engaged by petitioners; and for whom he had applied for the copy of the award; and as to whether the said application was filed on behalf of the petitioners or on behalf of someone else for any other purpose. Purpose for which the copy had been applied has been shown as 'for execution', but, the fact remains that no such execution was ever preferred by the petitioners or anybody else on behalf of the land owners.

15. Association of Dwaroo Ram @ Mani Ram in proceedings conducted under Section 9 of the Act on 23rd April, 1999 also does not make any difference as it is admitted case of the respondents-State that award was passed in absence of the land owners and no notice under Section 12 (2) of the Act was ever issued. From the record, the only time when the petitioners were informed about passing of the award is 14th July, 2016, when notice under Section 37 (2) of the Act was issued to them and they received the compensation amount whereafter the application for reference was preferred on 19th August, 2016.

16. As per pronouncement of the apex Court in **Bhagwan Das's case (supra)**, the present case is covered by para 28 (iii) of the said judgment, which provides that if the person interested was not present when the award is made and if he does not receive notice under

Section 12 (2) of the Act from the Collector, he has to make application within six months of the date on which he actually or constructively came to know about the contents of the award.

17. In present case, contents of the award came to the actual or constructive knowledge of the petitioners in July, 2018 and, therefore, application preferred by them was will within the prescribed period of limitation.

18. For the aforesaid discussion, the impugned order is quashed and set aside and the respondents are directed to transmit the application preferred by the petitioners to the concerned District Judge for making a reference under Section 18 of the Act within three weeks from today.

19. Petition is disposed of alongwith all pending applications, if any, in aforesaid terms. No order as to costs.

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

Khem Singh (since deceased) through his legal representatives and others
.....Appellants/defendants.

Versus

Thakur Dass .....Respondent/Plaintiff.

RSA No. 158 of 2004.
Reserved on : 26th June, 2018.
Decided on : 6th July, 2018.

Specific Relief Act, 1963- Sections 38 and 40- Suit for permanent prohibitory injunction and damages – Plaintiff filing suit for permanent prohibitory injunction and damages against defendants on allegations that they interfered in his land and illicitly cut grass from there – Trial Court decreeing suit and First Appellate Court dismissing appeal of defendants – RSA – On facts, High Court found that factual position on the spot was not as per 'Aks Musabi' – Exact location of disputed lands of parties thus was not determinable as noticed by Local Commissioner in his report – Held, Lower Courts went wrong in holding interference by defendants over plaintiff's possession and decreeing his suit for injunction and damages – RSA allowed – Decrees of Lower Courts set aside – Suit dismissed. (Paras-7, 8, 10 and 11)

For the Appellants: Mr. G.R. Palsra, Advocate.
For Respondent: Mr. Vinod Thakur, 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 plaintiff's suit for rendition, of, a decree for permanent prohibitory injunction, qua the suit khasra number(s), was, hence decreed.

2. Briefly stated the facts of the case are that the the plaintiff has filed a suit for permanent prohibitory injunction and for damages amounting to Rs.500/- as against the defendants. It was alleged by the plaintiff that the land comprised in khasra No.184, measuring 10-4-1 bighas is recorded in the ownership and possession of the plaintiff. It was alleged that the defendants are strangers, who entered the suit land o 18.10.1998 and unlawfully cut the grass

from the suit land causing damage to the extent of Rs.500/-, hence, the suit for permanent prohibitory injunction, and, for recovery of damages.

3. The defendants contested the suit and filed written statement, wherein, it was pleaded that the defendants and the plaintiff are co-sharers of the suit land. Khasra No.184 is in the ownership and possession of the plaintiff and adjoining to that khasra number there is Khasra No.185, which is a Nallah and adjoining to it, is Khasra No.188, owned and possessed by the defendants. They pleaded that they had cut and removed the grass from their own land, comprised in Khasra No.188, but they never interfered in the land of the plaintiff comprised in Khasra No.184 since there is a Nalla in between the two lands as recorded in the revenue record. They denied having cut the grass from the suit land or caused any loss to the plaintiff and hence prayed for dismissal of the suit.

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

1. Whether the plaintiff is entitled to the relief of permanent prohibitory injunction as prayed for?OPP.
2. Whether the defendant after intruding into the suit land has cut and removed grass worth Rs.500/-?
3. Whether the plaintiff is entitled to recover a sum of Rs.500/- from the defendants, if issue No.2 is proved in affirmative? OPP
4. Relief.

5. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the plaintiff/respondent herein. In an appeal, preferred therefrom, by, the 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. Now the defendants/appellants herein, has instituted the instant Regular Second Appeal, before, this Court, wherein he assails the findings, recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission, this Court, on 16.07.2004, 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:-

a). Whether both the lower courts have misread, misinterpreted and mis construed the oral as well as documentary evidence of the parties, especially report of Local Commissioner, Ex.PW5/A and statements of PW-1, PW-3 and PW-5, which has materially prejudiced the case of the appellants?

Substantial question of Law No.1:

7. Khasra No. 184, is, uncontrovertedly owned and possessed by the plaintiff, whereas, Khasra No.188 is owned, and, possessed by the defendant. Though, in the revenue record, both khasra numbers, stand reflected to be segregated by khasra No.185, whereon a Nallah rather exists. However, upon perusing the report of the local commissioner, embodied in Ex.PW5/A, and, proven by PW-5, apparent manifestations, are, displayed therein qua (a) the Nallah borne, on Khasra No.185, upon, efforts, for, determination, of its exact location, on the spot, by making an apt reference, to the Aks Musabi, wherein, it is disclosed to be occurring 44 karams away, from, the adjoining thereto khasra number 184, and, Khasra No. 188, yet rather, on apt measurings thereof, on the spot, being carried, from its denoted place, in the Aks Musabi, it rather standing located, 32 karams, on, the western side, (b) qua the measurements, carried on the spot, for fixing the boundaries, of, khasra No.184, and, of Khasra No.188, khasra numbers whereof, are located, on, either side of the Nallah, Nallah whereof, is, borne on khasra No.185,(c)

hence unraveling qua there being apparent movements, and, dislocation(s), of, about 32 Karams qua boundaries of each of the relevant khasra numbers, vis-a-vis, their respectively denoted, locations in the Aks Musabi, (c), of, in case the fixation of boundaries of the contested khasra numbers, being made, on anvil, of actual measurements thereof, being carried on the spot, thereupon, the boundaries, of khasra numbers, occurring in the entire mohal, being disturbed, and, consequent thereto, litigations rather hence brewing. The aforesaid echoings made in Ex.PW5/A, obviously, do not firmly conclude, the core of the controversy, existing, inter se the parties at contest (i) that the Nallah borne, on Khasra No.185, Nallah whereof, segregates Khasra No.184, and, Khasra No.188, hence, holding on the spot, dimensions in consonance, with, the dimensions thereof, as, denoted in Aks musabi, (ii) rather with the inability of the demarcation officer to fix, boundaries thereof, concomitantly, renders erectable a conclusion, that, even the boundaries of the contested khasra numbers, remaining undetermined.

8. In aftermath, with lack of firm determination, on the spot, of, the exact location, of, the contested khasra numbers, thereupon, both the learned Courts below, were disabled, to firmly rest, a, conclusion qua any interference being made by the defendants, upon, khasra number 184, interferences whereof, are, comprised in theirs purportedly cutting grass therefrom. However, the learned Courts below, in sheer disregard, to the infirmities aforesaid, borne in Ex.PW5/A, though, it constituted the best evidence, for, locating the exact boundaries, of, the contested khasra numbers, (i) AND, only with want, of, any infirmities therein, it was rather thereon concludable, that the alleged interference(s) or invasion(s) purportedly made by the defendants, upon, suit khasra number, borne in Khasra No. 184, hence standing unflinchingly proven. (ii) Contrarily, despite, infirmities aforesaid being carried therein, both the learned courts below imputed credence, to the oral testification of PWs, who, rather however, were not experts in determining the boundaries, of, the suit kahsra numbers. Also it was grossly improper for the learned trial Court, to, on anvil, of, a deposition borne in the testification of DW-3, wherein, she unveils, of the defendants cutting grass, upon, the suit khasra number, despite hers being incapacitated, to, in the absence of any firm demarcation report, vis-a-vis, the aforesaid act, being hence evidently committed upon khasra No.184, rather to make any clear worthwhile deposition in respect thereto, to, hence mete sanctity, vis-a-vis, her oral testification, whereas, in the learned first appellate Court, hence, meteing credence thereto, has, committed, a, gross illegality, and, impropriety.

9. Be that as it may, the plaintiff's suit would succeed, only upon firm echoings, standing borne, in the best documentary evidence, comprised in the apt report, of the demarcating officer, report whereof, though is adduced, yet, for reasons aforestated, it being infirm, (i) nonetheless, even when any subsequent hereto, valid demarcation is held, of the contested suit khasra numbers, and, in course thereof, the boundaries with specificity and exactitude, of the contested suit khasra numbers, stands fixed, and, if thereafter any evident interferences, are made by the defendants, upon, the suit khasra numbers, it being yet open for the plaintiff, to institute a fresh suit. However, yet at this stage, for reasons aforestated, the concurrently recorded judgements and decrees, hence, warrant interference.

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

11. In view of the above discussion, the present Regular Second Appeal is allowed. In sequel, the judgements and decrees rendered by both the learned Courts below, are, set aside, and, the plaintiff's suit 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.

Sh. Kitish Kumar ....Petitioner/Plaintiff.

Versus

Procter & Gamble Home Products Pvt. Ltd. ....Respondent/Defendant.

CMPMO No. 107 of 2018.
Reserved on : 28th June, 2018.
Date of Decision: 6th July, 2018.

Code of Civil Procedure, 1908- Section 9- Model Standing Orders – Clause 16(g) and (h) – Jurisdiction of Civil Court – Delinquent workman filing suit and challenging findings recorded against him by Inquiry Officer after holding domestic inquiry – Delinquent also seeking temporary injunction - His application for stay dismissed by Trial Court and appeal against that order by First Appellate Court – Petition against – Petitioner/plaintiff submitting that relationship of employer and employee being result of contract, remedy before Civil Court is not barred - Held, delinquent voluntarily participated in domestic inquiry conducted in consonance with Model Standing Orders – He opted to redress his grievances through mechanism contained in Industrial Disputes Act – Hence further, remedy to aggrieved workman, if any, is under the Industrial Dispute Act –Suit for challenging Inquiry report not maintainable – Petition dismissed.

(Paras-6 and 7)

Cases referred:

Premier Automobiles Limited vs. Kamlakar Shantaram Wadke and Ors, 1988 (1) SCC 681

Rajasthan State Road Transport Corporation vs. Krishna Kant, (1995) 5 SCC 95

Rajasthan State Road Transport Corporation and others vs. Deen Dayal Sharma, (2010)6 SCC 697

For the Petitioner: Mr. Rajesh Kumar Parmar, Advocate.

For the Respondent: Mr. Rahul Mahajan, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

Through the instant petition, the aggrieved workman/petitioner herein, casts a challenge to the pronouncement recorded, on, 22.12.2017, by the learned Additional District Judge-I, Solan, upon Civil Misc. Appeal No. 14-S/14 of 2017, whereunder, he proceeded to affirm the order pronounced by the learned trial Judge, upon, CMA No. 77/6 of 2017, whereby, the relief of ad interim injunction claimed by the petitioner herein was declined, vis-a-vis, him.

2. In respect of the articles of charges formulated against the aggrieved workman, the inquiry officer concerned, held an indepth incisive inquiry, and, in his inquiry report, he, on consideration of the evidence existing before him, recorded a conclusion of the charges, borne in the charge sheet, of, 7.3.2017, being proven against the delinquent workman.

3. Hereat, it is imperative to extract the concluding, operative portion of the report, rendered by the inquiry officer:-

> "Thus the charges levied vide charge sheet dated 7.3.2017 against delinquent workman Katish Kumar falling under Clause 16(g) and (h) of the Model Standing Orders framed under the Industrial Employment Standing Order H.P. Rules, 1973 stand proved during the enquiry."

Wherein, there occurs a clear display of the apt charges, in respect whereof, affirmative findings were pronounced, by the inquiry officer, hence, standing formulated, under, Clause 16(g), and, (h), of, the Model Standing Order, framed, under the Industrial Employment Standing Order, H.P.

Rules, 1973. However, despite the inquiry report, carrying, in the operative part thereof the hereinabove apt extracted portion, yet the aggrieved workman chose, to, assail the findings recorded, by the Inquiry Officer, by his instituting a civil suit, and, also therewith, he, instituted an application, for grant of ad interim injunction, relief whereof, was concurrently declined, vis-a-vis, him, by both the learned trial Judge, and, by the learned Appellate Court, hence, the instant petition.

4. Consequently, the hereinabove apt extracted portion of the inquiry report, directly impinges upon the maintainability, of the civil suit, wherein, a challenge, is cast qua the affirmative findings, pronounced by the inquiry officer, upon the articles of charges, framed, against the aggrieved workman, conspicuously, in consonance, with, the Model Standing orders. The learned counsel appearing, for the plaintiff/petitioner herein, has contended that, dehors the applicability, of, the apt Model standing orders, vis-a-vis the workman, nonetheless, the apt mandate of the Hon'ble Apex Court, recorded, in a case titled as ***Premier Automobiles Limited vs. Kamlakar Shantaram Wadke and Ors***, reported in ***1988 (1) SCC 681***, the relevant portion whereof extracted hereinafter:-

> "The principles applicable to the jurisdiction of the civil Courts in relation to an industrial dispute may be stated thus:
>
> (1) If the dispute is not an industrial dispute, nor does it relate to enforcement of any other right under the Act, the remedy lies only in the civil Court.
>
> (2) If the dispute is an industrial dispute arising out of a right or liability of the Civil Court is alternative, leaving it to the election of the suit or concerned to choose his remedy for the relief which is competent to be granted in a particular remedy.
>
> (3) If the industrial dispute relates to the enforcement of a right or an obligation created under the Act, then the only remedy available tot he suitor is to gent an adjudication under the Act.
>
> (4) If the right which is sought to be enforced is a right created under the Act, such as chapter VA, then the remedy for its enforcement is either S.33C or the raising of an industrial dispute as the case may be."

more specifically, clause (1) thereof, being, attracted hereat, (a) thereupon the extant suit being maintainable, (b) also he places reliance, upon, paragraph No.35, of, the verdict of the Hon'ble Apex Court, rendered, in a case titled as ***Rajasthan State Road Transport Corporation vs. Krishna Kant,*** reported in ***(1995) 5 SCC 95***, the apt portion whereof is stands reproduced hereinafter:-

> "7. The policy of law emerging from Industrial Disputes Act and its sister enactments is to provide an alternative dispute resolution mechanism to the workmen, a mechanism which is speedy, inexpensive, informal and unencumbered by the plethora of procedural laws and upon appeals and revisions applicable to civil courts. Indeed, the powers of the courts and tribunals under the Industrial Disputes Act are far more extensive in the sense that they can grant such relief as they think appropriate in the circumstances for putting an end to an industrial dispute."

Thereupon, he contends that, since, the relationship of employer and employee, inter se, the aggrieved workman and his employer, came into existence, only under the general law of contract, (c) thereupon, the institution, of, a suit, cast under the provisions of the Specific Relief Act, being maintainable, dehors the dispute, as has, arisen inter se them,being also construable to be an industrial dispute.

5. However, the aforesaid contentions, reared before this Court, by the learned counsel, appearing for the petitioner herein/workman, warrant their imperative effacement, (i) given, even if, assumingly the relationship, of employer and employee, inter se, the petitioner and

the respondent herein, may have coming into being, under a contract, oral or express executed inter se both, also when hence the dispute, as nowat, has arisen, inter se them, being founded upon the apt derelicting breaches, being made by the workman, (ii) also, if, the purported breaches, as, made by the workman, may empower, him to raise an industrial dispute in respect thereof, and, also render him equipped, hence, to avail the mechanism(s), existing in the Industrial Disputes Act, (iii) nonetheless, the trite predominant factum, of the relationship of employer and employee, coming into being inter se both, under a contract, implied or express, executed inter se both, would not for further hereafter assigned reason, yet per se equip the workman to redress his grievance, by his casting a suit before the civil court.

6. Be that as it may, the stark and significant factum probandum, which evidently emerges, from, the material on record, and, is comprised, in the hereinabove apt extracted portion, borne in the operative part, of, the inquiry report, does contrarily, rest a firm conclusion, (i) that with the aggrieved workman, prior to his availing the remedy of his instituting the extant civil suit against the employer, rather acquiescingly participating in the inquiry, as, held, vis-a-vis, his purported delinquencies, and, with the apt charges framed, against him, bearing tandem, with, the apt Model Standing Order, framed, under the Industrial Employment Standing Order H.P. Rules 1973, (ii) all carrying hence, the, effects, of, his making a loud and candid display, of his acquiescing qua the attraction besides applicability, vis-a-vis, him, of, the Model Standing Order, as, framed under the Industrial Employment Standing Order H.P. Rules 1973. His apposite acquiescence(s) also carries the ensuing concomitant effect of the workman, within, the ambit of clause (2), of, the judgment, of the Hon'ble Apex Court rendered in a case titled as **Premier Automobiles Limited**' case (supra), rather, hence electing to redress, his grievance, through, a mechanism contained in the Industrial Dispute Act, (iii) especially when the holding, of, a domestic inquiry, under, the Model Standing Order, framed under the Industrial Employment Standing Order H.P. Rules 1973, is, an event or a legal phenomena, which, is concludable, to squarely, fall within, the apt mechanism(s) as contemplated, in the Industrial Disputes Act. With his hence electing, to, avail the apt mechanism, constituted under the Industrial Disputes Act, thereupon, the further remedy, to, the aggrieved workman, is also a remedy, as, encapsulated in the Industrial Dispute Act, and, with the plaintiff, rather choosing to assail the inquiry report, by his, casting a civil suit before the learned trial Court, has, hence obviously chosen a mismaneuvered, and, ill constituted remedy. Immense fortification, to the aforesaid inference, is derived, from, the apt portion, of, paragraph No.17, borne in the judgement of the Hon'ble Apex Court, rendered in a case titled as ***Rajasthan State Road Transport Corporation and others vs. Deen Dayal Sharma***, reported in ***(2010)6 SCC 697***, the apt portion whereof stands extracted hereinafter:-

> "17. In the instant case, the respondent who hardly served for three months, has asserted his right that the departmental enquiry as contemplated under the Standing Orders, ought to have been held before issuing the order of dismissal and in absence thereof such order was liable to be quashed. Such right, if available, could have been enforced by the respondent only by raising an industrial dispute and not in the civil suit. In the circumstances, it has to be held that the civil Court had no jurisdiction to entertain and try the suit filed by the respondent."

wherein it has been, with clarity, expostulated qua upon holding of a domestic inquiry, within, the contemplation, of the apt Standing Order, and, when upon culmination thereof, findings adversarial to the workman, are recorded, thereupon, the only mechanism available, for redressal by the aggrieved workman, being comprised, in his raising an industrial dispute, and, not by his casting a civil suit. Consequently, the orders impugned before this Court, do not suffer, from any infirmity.

7. For the foregoing reasons, the instant petition is dismissed and the orders impugned before this Court are maintained and affirmed. The parties are directed to appear before the learned trial Court, on 30th July, 2018. However, it made clear that the findings

recorded hereinabove shall have no bearing on the merits of the case. All pending applications also stand disposed of. Records be sent back forthwith.

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

Ishant Kumar … Petitioner
Versus
State of Himachal Pradesh … Respondent

CrMP(M) No. 734 of 2018
Decided on July 9, 2018

Code of Criminal Procedure, 1973- Section 439- Regular bail – Grant of – Petitioner/accused surrendered before High Court and prayed for bail in case registered for offences under Sections 376 and 506 of I.P.C. and Section 3(1)(w)(i) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 – The allegation was that the petitioner developed physical intimacy with prosecutrix on pretext of marriage but then refused to marry her – High Court found that (i) petitioner and prosecutrix were engaged and since then had been frequently meeting (ii) Alleged sexual abuse of prosecutrix took place on 2.11.2017, whereas FIR was registered on 4.6.2018, (iii) Prosecutrix found to be a married lady and thus there is force in argument of petitioner that since factum of prior marriage of prosecutrix came to his notice, he refused to marry her and (iv) Petitioner had joined investigation and his custody was not required – Regular bail granted subject to conditions. (Paras- 9 to 11 & 16)

Cases referred:
Sanjay Chandra versus Central Bureau of Investigation (2012)1 Supreme Court Cases 49
Prasanta Kumar Sarkar versus Ashis Chatterjee and another (2010) 14 SCC 496

For the petitioner Mr. Vinay Sharma, Advocate.
For the respondent Mr. S.C. Sharma and Mr. Dinesh Thakur, Addl. AG's with Mr. Amit Kumar, DAG.
ASI Subhash Kumar, PS Chamba (Sadar).

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

By way of instant petition filed under Section 439 CrPC, bail petitioner prayed for grant of regular bail in respect of FIR No. 138/18 dated 7.6.2018 under Sections 376 and 506 IPC and Section 3(1)(w) (i) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, registered at Police Station, Sadar, District Chamba, Himachal Pradesh.

2. On 13.6.2018, bail petitioner surrendered before this Court and was taken into custody, however this court subsequently ordered him to be released on bail, subject to his furnishing personal bonds in the sum of Rs. 25,000/- to the satisfaction of the learned Additional Registrar (Judicial).

3. Sequel to orders dated 13.6.2018 and 29.6.2018, ASI Subhash Kumar has 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.

4. Mr. Dinesh Thakur, learned Additional Advocate General, on instructions of the Investigating Officer, who is present in Court, fairly states that pursuant to directions contained in orders dated 13.6.2018 and 29.6.2018, bail petitioner has joined the investigation and is fully cooperating.

5. Close scrutiny of record/status report reveals that FIR detailed herein above came to be lodged against bail petitioner at the behest of the complainant-prosecutrix, who is 30 years old. She alleged that she was engaged with the bail petitioner, whereafter marriage was to be solemnized on 20.7.2018. Allegedly, after engagement, bail petitioner and complainant-prosecutrix started meeting each other and on 20.11.2017, bail petitioner took complainant-prosecutrix to Hotel Ashiana Regency at Julahkhri, Chamba, where he sexually assaulted the complainant-prosecutrix against her wishes. Allegedly, bail petitioner sexually assaulted the complainant-prosecutrix on various occasions against her wishes. However, on 4.6.2018, bail petitioner refused to marry complainant-prosecutrix, as a consequence of which, FIR mentioned herein above came to be lodged against the bail petitioner.

6. Mr. Vinay Sharma, learned counsel representing the bail petitioner, while referring to the record/status report vehemently argued that it stands duly proved on record that complainant-prosecutrix, who is thirty years old and had friendly relations with the bail petitioner and they have been meeting each other for a quite considerable time. Mr. Sharma, further contended that as per own statement given by complainant-prosecutrix, she was never compelled/forced by bail petitioner to have sexual relations with bail petitioner, rather, she after having developed intimate relations with the bail petitioner, willfully joined the company of bail petitioner. Mr. Sharma, further submitted that it is true that bail petitioner had agreed for marriage but since factum with regard to earlier marriage of complainant-prosecutrix with a person namely Munish came into his knowledge, he refused to marry her and as such, no case, if any, is made out against the bail petitioner under Sections 376 and 506 IPC and Section 3(1)(w)(i) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 and he deserves to be enlarged on bail. Lastly, Mr. Sharma contended that since bail petitioner has already joined investigation, no fruitful purpose would be served in case he is sent behind the bars because investigation is almost complete and nothing is required to be recovered from him. Mr. Sharma, learned counsel representing the bail petitioner further contended that since bail petitioner is a government employee, there is no likelihood of his fleeing from justice.

7. Mr. Dinesh Thakur, learned Additional Advocate General, while fairly acknowledging the fact that bail petitioner has joined the investigation and is fully cooperating, opposed the prayer made on behalf of the bail petitioner, for grant of bail and contended that keeping in view the gravity of offence allegedly committed by the bail petitioner, who is a policeman, he does not deserve to be enlarged on bail, rather, needs to be dealt with severely. Mr. Thakur, further submitted that though in the investigation conducted pursuant to order passed by this Court on 29.6.2018, it has emerged that complainant-prosecutrix is already married in the year 2015 to one Shri Munish, but that fact definitely does not give any licence to the bail petitioner to sexually assault complainant-prosecutrix, against her wishes, as such, prayer made in the instant petition deserves to be rejected outrightly.

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

9. Having carefully perused the material available on record, it is quite apparent that bail petitioner and complainant-prosecutrix had been meeting each other frequently after their engagement on 19.10.2017. It is also not in dispute that after alleged date of incident, i.e. 20.11.2017, complainant-prosecutrix kept meeting bail petitioner till 4.6.2018, on which date, FIR detailed herein above came to be lodged against the bail petitioner.

10. As has been noticed herein above, complainant-prosecutrix is a mature lady and it is not understood, that in case on 20.11.2017, she was sexually assaulted against her wishes, what prevented her from lodging report, if any, either with her parents, Gram Panchayat or

police. In the case at hand, she kept mum for almost nine months, whereafter FIR came to be lodged against bail petitioner. In the statement given to police, complainant-prosecutrix narrated incident dated 20.11.2017, but allegedly that incident took place at Ashiana Regency, which is not a residential hotel, rather a restaurant, as such, story put forth by complainant-prosecutrix does not appear to be probable. Apart from above, it has also come in the investigation that complainant-prosecutrix is a married woman and as such, there appears to be some force in the argument of the learned counsel representing the bail petitioner that since factum with regard to prior marriage of complainant-prosecutrix came into his notice, he refused to marry her.

11. Though, aforesaid aspects of the matter are to be considered and decided by the learned trial Court on the basis of evidence adduced on record by the prosecution but this court taking note of the facts and circumstances narrated herein above coupled with the fact that bail petitioner has already joined the investigation and is fully cooperating, sees no reason to allow prayer of investigating agency for custodial interrogation of the bail petitioner. Bail petitioner is a government employee and as such, there is no likelihood of his fleeing from justice, rather, he shall be available for investigation and trial, as and when required by the investigating agency. Moreover, this court can not lose sight of the fact that guilt, if any, of the bail petitioner is yet to be proved in accordance with law, as such, it may not be just and fair to curtail his freedom for indefinite period. By now, it is settled law that freedom of an individual is of utmost importance and same can not be curtailed for indefinite period, especially when guilt is yet to be proved.

12. 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.
>
> 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.
>
> 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."

13. 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."

14. 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.

15. 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;

(xi) reasonable apprehension of the witnesses being influenced; and

(xii) danger, of course, of justice being thwarted by grant of bail.

16. In view of above, bail petitioner has carved out a case for grant of bail and as such, present petition is allowed. Order dated 13.6.2018 is made absolute subject to petitioner furnishing fresh bail bonds in the sum of Rs.1,00,000/- (Rs. One Lakh) with one local 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 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.

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

17. 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. Copy dasti.

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

Master Ritik Verma (Minor) ..Appellant

Versus

Smt. Sunita Kashyap and others ..Respondents

FAO(MVA) No. 76 of 2018
Reserved on: July 3, 2018
Decided on: July 10 , 2018

Motor Vehicles Act, 1988- Section 166- Claim for bodily injuries – Permanent disability – Determination of quantum – Whether 2nd Schedule to the Act can be applied in a case of non-

earning person? – Claimant a boy aged 9 years suffered crush injuries on a right foot beside other injuries in a motor accident - There was permanent disability to the extent of 40% with respect to his right foot – Claims Tribunal by recourse to 2nd Schedule to Act assessing income of injured notionally at Rs.15,000/- per annum and taking into consideration disability to the extent of 40% granting compensation of Rs. 1,08,000/- towards loss of future income after applying multiplier of '18' – Claims Tribunal not granting additions towards future prospects or compensation towards loss of amenities – Appeal against by claimant – Held, there was loss of earning capacity of the petitioner – Further, he would face difficulties in getting a lucrative job because of permanent disability – Tribunal ought to have given additions towards future prospects as also compensation for loss of amenities – High Court allowed 40% increase towards future prospects and granted compensation of Rs.1 lac under head 'loss of amenities' – Compensation for pain and suffering also enhanced from Rs.50,000/- to Rs.1 lac - Appeal allowed – Award modified.

(Paras-14, 18 and 19)

Cases referred:

Mangla Ram Vs. The Oriental Insurance Company Ltd. & Ors. [Civil Appeal Nos. 24992500 of 2018 arising out of SLP(Civil) Nos. 2814142 of 2017], decided on 6.4.2018

Chandra Wati V/s Tek Chand & others, Latest HLJ 2014 (HP) 288

G. Ravindranath alias R. Chowdary vs. E. Srinivas & anr, AIT 2013 SC 2974

Ranjana Prakash and others vs. Divisional Manager and another (2011) 14 SCC 639

For the Appellant	:	Mr. B.S. Thakur, Advocate.
For the Respondents	:	Mr. Varun Chauhan Advocate vice Mr. Ajay Kochhar, Advocate, for respondents No.1 and 2. Mr. Jagdish Thakur, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:

By way of appeal at hand, appellant has challenged award dated 27.10.2017 passed by Motor Accident Claims Tribunal-4, Shimla in MAC Petition RBT No. 96-S/2 of 2014/11 titled Master Ritik Verma vs. Smt. Sunita Kashyap and others, whereby compensation to the tune of Rs.2,62,000//- has been awarded in favour of the claimant-appellant (hereinafter, 'claimant') and against respondent No. 3 i.e. Bajaj Allianz General Insurance Company Ltd. (hereinafter, 'Insurance Company') with interest at the rate of 7.5% per annum from the date of filing of petition till realization of the entire amount, on the ground of inadequacy.

2. Before adverting to the factual matrix of the case, it may be noticed that neither the insurance company (respondent No. 3) nor owner and driver of the vehicle i.e. respondents No. 1 and 2, who have been held liable, jointly and severally, to pay amount of compensation, have questioned the impugned award on any ground, as such, same has attained finality qua them. It is further worthwhile to mention that even aforesaid respondents have not filed cross-objections to the appeal and as such only question which needs to be determined in the appeal at hand is whether compensation awarded is adequate or not?

3. In nutshell, the facts for having bird's eye view, are that appellant-injured Master Ritik, who was studying in 4th standard, unfortunately met with an accident on 4.6.2010 while he was going for *Bhandara* in temple alongwith other school children. Respondent No. 2, while driving the vehicle bearing registration No. HP-52A-2958, Santro car, in a rash and negligent manner, came on wrong side of the road and hit Ritik, causing multiple injuries on the body and fracture in right leg and right foot was also crushed under the vehicle. An FIR about the incident was registered at Police Station, Dhalli vide FIR No. 99 dated 4.6.2010 under Sections 279 and 337 IPC. Injured remained admitted in the hospital with effect from 4.6.2010 to 1.7.2010 on account of injuries suffered by him. He suffered permanent disability to the extent of 40% as per

Exhibit PW-3/A. On account of the aforesaid injury suffered by the appellant, he preferred a claim petition under Section 166 of the Motor Vehicles Act for grant of compensation to the tune of Rs. 15,00,000/-. Claimant claimed that till the filing of the petition, he spent Rs. 85,000/- on medicines and other expenses incurred outside the home and a sum of Rs. 25,000/- for special diet as advised by the doctor and Rs. 12,000/- for petrol used in the vehicle for visiting the hospital. Claimant also claimed that he was unable to perform his day to day routine work on account of injury suffered by him and was attended upon by an attendant, on account of which, he paid Rs. 6,000/- to the attendant. Claimant prayed for compensation to the tune of Rs. 15,00,000/- alongwith interest at the rate of 9% per annum on account of injuries suffered by him in the accident from the date of filing of the petition till its realization.

4. Learned Tribunal below, on the basis of pleadings of the parties, framed following issues:

"1. Whether the petitioner sustained injury on his person on account of rash and negligent driving of respondent No. 2, as alleged? OPP.

2. Whether the petitioner is entitled for the grant of compensation, if so, then what should be the quantum and from whom? OPP.

3. Whether the petition is not maintainable in the present form, as alleged? OPR

4. Whether there is violation of terms and conditions of insurance policy, as alleged? OPR.

5. Whether the claimant himself was negligent and contributory to the accident, as alleged? OPR.

6. Relief."

5. Learned Tribunal below, on the basis of evidence led on record allowed the petition and awarded a sum of Rs. 2,62,000/- alongwith interest at the rate of 7.5% per annum, thereby holding claimant entitled to the compensation under following heads:

1.	Loss of future income come out to be Rs.6,000/- (15000 x 40/100 =6000) Compensation after multiplier of 18 as applicable = 60000 x 18	**Rs.1,08,000/-**
2.	Compensation on account of pain and suffering	**Rs.50,000/-**
3.	Compensation on account of Hospitalization Charges	**Rs.29,000/-**
4.	Compensation on account of attendant charges	**Rs.29,000/-**
5.	Compensation on account of transportation for coming and going to the hospital	**Rs.15,000/-**
6.	Compensation in lieu of the services rendered by the helper	**Rs.6000/-**

6. Being aggrieved and dissatisfied with the inadequate compensation awarded by the learned Tribunal below, claimant has approached this court in the instant proceedings, praying therein for modification and enhancement of the award.

7. Findings returned on issues No. 1, 2 and 3 are not in dispute, rather, have attained finality as insurer or the insured/owner/driver have not laid any challenge to the same as such, same are upheld. Onus to prove issues No. 3, 4 and 5 was on the respondents, however, they failed to discharge the onus by leading cogent and convincing evidence and as such, same were decided against them. Respondents being aggrieved, if any, with the findings returned on

issues No. 3 to 6, have not laid any challenge and as such, same have already attained finality against them.

8. Having carefully perused the pleadings vis-à-vis evidence available on record, this Court finds considerable force in the arguments of Mr. B.S. Thakur, learned counsel representing the claimant that Master Ritik, who at the relevant point of time was nine years old and studying in fourth standard, suffered multiple injuries in the accident. It stands duly proved on record that ill-fated vehicle bearing registration No. HP-52A-2958, Santro Car was being driven rashly and negligently by respondent No.2. Learned Tribunal below taking note of the fact that claimant suffered 45% permanent disability though arrived at a conclusion that injured has suffered locomotor permanent moderate disability to the extent of 40% in relation to his right foot, which has definitely affected his earning capacity, but failed to award any compensation on this count. Similarly, learned Tribunal below though arrived at a conclusion that the claimant is still experiencing pain and suffering due to pain and disability in his leg and is not leading a normal life, but omitted to award compensation on account of loss of future earning on account of permanent disability. Similarly, this Court is persuaded to agree with Mr. B.S. Thakur, learned counsel representing the claimant that a meager amount has been awarded on account of pain and suffering and no amount has been awarded on account of loss of amenities (and/or loss of prospects of marriage and loss of expectation of life).

9. It would be appropriate to take note of the following paragraphs of impugned award:

> "33. In the case in hand, it is contention of the petitioner that injured Ritik Verma has suffered 40% permanent disability and placed on record dis-ability certificate Ext. PW-4/A.
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> 34. In order to prove his case petitioner has examined Dr. Lokinder Sharma, Senior Orthopedic Surgeon, DDU Shimla as PW4. He has stated that on dated 12.9.2014 he examined injured Ritik Verma about 9 years old and on examination he found 40% permanent dis-ability and issued permanent dis-ability certificate Ext. PW-4/A, which bears his signature. No evidence has been led by the respondent to rebut the aforesaid plea of the petitioner that he has sustained 40% permanent disability due to the injuries sustained in the accident.
>
> 35. Since it has been proved on record that injured has suffered locomotor permanent moderate disability to the extent of 40% in relation to his right foot which has definitely affected his earning capacity. The petitioner is still experiencing pain and suffering due to in- jury/disability in his leg and is not leading a normal life. Thus keeping in view the principles laid down by Apex Court reported in ***Sarla Verma versus DTC 2009(6) SCC 126 and Hon'ble High Court of H.P. In 2010(1) HIM.L.J.266 Naina Thakur versus Punjab Workman Welfare College Members,*** the peti- tioner has been found to be disabled to the extent of 40%, so the net loss of earning capacity of the petitioner would be Rs.6000/-. (15000X40%). By re- lying upon the aforesaid authorities, cited supra, the multiplier of 18 is applicable in the present case. Keeping in view of age of injured i.e 9 years, the net loss of future income of petitioner on account of accident comes to Rs.1,08,000/- (6000 x 18= 1,08,000/-) can be awarded to the petitioner as compensation. He is held entitled to Rs.1,08,000/-, on account of loss and future in- come.
>
> 36. Keeping in view the discharge slip Ext. PW-3/B and disability certificate Ext. PW-3/A on record by the petitioner, coupled with the fact that the petitioner remained indoor patient at least for 29 days as evident from discharge slip Ext. PW-3/B. He had to spent money even on his attendant and other miscellaneous expenditure. Stay in the hospital thus entails expenditure. It may be well inferred that petitioner must have spent at least Rs. 1000/- per day. It thus shall

be convenient and in the interest of justice that a lump sum amount is awarded to the petitioner for 29 days @ of Rs. 1000/- per day, amounting to Rs. 29000/- on account of expenditure incurred by him while in the hospital. This Tribunal is of the opinion that petitioner is held entitled for Rs.29000/- under this head.

37. Though petitioner has not placed any receipt or document regarding transportation charges but keeping in view of the fact that the petitioner was taken to CHC Chail and thereafter to IGMC, Shimla and he remained admitted in IGMC, Shimla for 29 days and for that he might have arranged some vehicle and must have incurred some expenditure in this regard. The petitioner is awarded Rs.15000/- on the head for transportation charges. Further, the petitioner who was a small child and remained admitted in the hospital, might have been attended by others and as such, peti- tioner is also awarded Rs. 29000/- on account of attendant charges."

10. Though, having perused impugned award passed by the learned Tribunal below on account of loss of future income, this Court sees no illegality as far as awarding of compensation to the tune of Rs. 1,08,000/- is concerned, because admittedly on account of permanent disability suffered by the claimant to the extent of 40%, loss of earning capacity has rightly been calculated taking income of the injured to be Rs.15,000/- being a non-earning person, as set out in the 2nd Schedule to the Motor Vehicles Act, however, there appears to be force in the arguments of the learned counsel representing the claimant that in view of the latest law laid down by Hon'ble Apex Court in **Mangla Ram Vs. The Oriental Insurance Company Ltd. & Ors.** [Civil Appeal Nos. 24992500 of 2018 arising out of SLP(Civil) Nos. 2814142 of 2017], decided on 6.4.2018, , an addition of 40% of the actual income towards future prospects is also required to be made and as such, compensation awarded on account of loss of future prospects needs to be reassessed i.e. loss of earning capacity = Rs.6,000/- and 40% addition would be Rs.2400/- thus totaling to Rs. 8400/- and after applying multiplier of 18, the total loss of income comes to Rs. 1,51,200/-.

11. At this stage, it would be appropriate to take note of following paragraphs of judgment in **Mangla Ram**(supra):

"25. The next question is about the quantum of compensation amount t be paid to the appellant. The Tribunal noted the claim of the appellant that he was getting Rs.1500/per month towards his salary and Rs.600/per month towards fod allowance from Bhanwar Lal. The fact that the appellant had possessed heavy transport motor vehicle driving licence has not been doubted. The driving licence on record being valid for a limited period, cannot be the basis to belie the claim of the appellant duly supported by Bhanwar Lal, that the appellant was employed by him on his new truck.

Besides the said income, the appellant claimed to have earning of Rs.1000/per month from farming fields. In other words, e find that the Tribunal has not analysed this evidence in proper perspective. The Tribunal, however, pegged the loss of monthly income to the appellant at Rs.520/per month while computing the compensation amount on the finding that there was no convincing evidence about complete nonemployability of the appellant.

Further, no provision has been made by the Tribunal towards future prospects. The Tribunal, therefore, should have computed the loss of income on that basis. Additionally, the appellant because of amputation of his right leg would be forced to permanently use prosthetic leg during his life time. No provision has been made by the Tribunal in that regard. On these heads, the appellant is certainly entitled for enhanced compensation.

26. The next question is about the liability of insurer to pay the compensation amount. The Tribunal has absolve the insurance company on the finding that no premium was received by the insurance company nor any

insurance policy was ever issued by the insurance company in relation to the offending vehicle. The respondents no. 2 and 3 had relied on a Cover Note which according to respondent No.1 – Insurance Company was fraudulently obtained from the then Development Officer, who was later on sacked by respondent No.1 Insurance Company. The possibility of misuse of some cover notes lying with him could not be ruled out. The respondent Nos. 2 & 3 have relied on the decision of this Court in Rule (supra).

12. This Court is in agreement with the contention raised by Mr. Jagdish Thakur, learned counsel representing the insurance company that amount awarded by the Tribunal below on account of hospitalization charges, attendant charges, transportation charges and in lieu of services rendered by helper, are strictly in terms of the evidence led on record, because assessment made by the Tribunal below is purely based upon the bills placed on record by the claimant as such, this Court sees no reason to interfere with the same. However, having taken note of the fact that right foot of the claimant was crushed and he suffered 40% locomotor permanent moderate disability as stands duly proved on record, impugned award on account of shock, pain and suffering i.e. Rs. 50,000/- and discomfort appears to be on lesser side, especially when it stands duly proved on record that claimant having suffered multiple injuries remained admitted in hospital for twenty nine days.

13. A Coordinate Bench of this Court in case **Smt. Chandra Wati V/s Tek Chand & others**, Latest HLJ 2014 (HP) 288, while dealing with the question as to how to grant compensation in injury cases, has held as under:

> 14. I have gone through the impugned award. The Tribunal has awarded a meager amount while ignoring the injuries suffered by the claimant/victim and affect of the said injuries, which has made her life miserable and dependant throughout her life. The said injuries also destroyed her matrimonial home, snatched the amenities and charm of her life and she has to be dependent on others throughout her life. She has undergone pain and suffering and has to undergo it forever. Not only this, it has also affected her privacy.
>
> 15. Now, the question is how to grant compensation in such injury cases. The concept of granting compensation is outcome of Law of Torts. The Tribunals, while examining a case of an injured and awarding compensation to him/her, have to do some guess work, sympathetically, keeping in view the fate and physical frame of the injured/victim.
>
> 16. The Apex Court in case titled as R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others, reported in AIR 1995 SC 755, had discussed all aspects and laid down guidelines how a guess work is to be done and how compensation is to be awarded under various heads. It is apt to reproduce paras 9 to 14 of the judgment hereinbelow:
>
> > "9. Broadly speaking while fixing an amount of compensation payable to a victim of an accident, the damages have to be assessed separately as pecuniary damages and special damages. Pecuniary damages are those which the victim has actually incurred and which is capable of being calculated in terms of money; whereas non-pecuniary damages are those which are incapable of being assessed by arithmetical calculations. In order to appreciate two concepts pecuniary damages may include expenses incurred by the claimant: (i) medical attendance; (ii) loss of earning of profit up to the date of trial; (iii) other material loss. So far non-pecuniary damages are concerned, they may include: (i) damages for mental and physical shock, pain suffering, already suffered or likely to be suffered in future; (ii) damages to compensate for the loss of amenities of life which may include a variety of matters, i.e., on account of injury the claimant may not be able to walk, run or sit; (iii) damages for the loss of

expectation of life, i.e., on account of injury the normal longevity of the person concerned is shortened; (iv) inconvenience, hardship, discomfort, disappointment, frustration and mental stress in life.

10. It cannot be disputed that because of the accident the appellant who was an active practising lawyer has become paraplegic on account of the injuries sustained by him. It is really difficult in this background to assess the exact amount of compensation for the pain and agony suffered by the appellant and for having become a life long handicapped. No amount of compensation can restore the physical frame of the appellant. That is why it has been said by courts that whenever any amount is determined as the compensation payable for any injury suffered during an accident, the object is to compensate such injury "so far as money can compensate" because it is impossible to equate the money with the human sufferings or personal deprivations. Money cannot renew a broken and shattered physical frame.

11. In the case Ward v. James, 1965 (1) All ER 563, it was said:

> "Although you cannot give a man so gravely injured much for his "lost years", you can, however, compensate him for his loss during his shortened span, that is, during his expected "years of survival".
>
> You can compensate him for his loss of earnings during that time, and for the cost of treatment, nursing and attendance. But how can you compensate him for being rendered a helpless invalid? He may, owing to brain injury, be rendered unconscious for the rest of his days, or, owing to back injury, be unable to rise from his bed. He has lost everything that makes life worthwhile. Money is no good to him. Yet Judges and Juries have to do the best they can and give him what they think is fair. No wonder they find it wellnigh insoluble. They are being asked to calculate the incalculable. The figure is bound to be for the most part a conventional sum. The Judges have worked out a pattern, and they keep it in line with the changes in the value of money."

12. In its very nature whenever a Tribunal or a Court is required to fix the amount of compensation in cases of accident, it involves some guess work, some hypothetical consideration, some amount of sympathy linked with the nature of the disability caused. But all the aforesaid elements have to be viewed with objective standards.

13. This Court in the case of C.K. Subramonia Iyer v. T. Kunhikuttan Nair, AIR 1970 SC 376, in connection with the Fatal Accidents Act has observed (at p. 380):

> "In assessing damages, the Court must exclude all considerations of matter which rest in speculation or fancy though conjecture to some extent is inevitable." 14. In Halsbury's Laws of England, 4th Edition, Vol. 12 regarding non-pecuniary loss at page 446 it has been said :- "Non-pecuniary loss : the pattern. Damages awarded for pain and suffering and loss of amenity constitute a conventional sum which is taken to be the sum which society deems fair, fairness being interpreted by the courts in the light of previous decisions. Thus there has been evolved a set of conventional principles

> providing a provisional guide to the comparative severity of different injuries, and indicating a bracket of damages into which a particular injury will currently fall. The particular circumstances of the plaintiff, including his age and any unusual deprivation he may suffer, is reflected in the actual amount of the award. The fall in the value of money leads to a continuing reassessment of these awards and to periodic reassessments of damages at certain key points in the pattern where the disability is readily identifiable and not subject to large variations in individual cases."

17. The said judgment was also discussed by the Apex Court in case titled as Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another, reported in 2010 AIR SCW 6085, while granting compensation in such a case. It is apt to reproduce para-7 of the judgment hereinbelow:

> "7. We do not intend to review in detail state of authorities in relation to assessment of all damages for personal injury. Suffice it to say that the basis of assessment of all damages for personal injury is compensation. The whole idea is to put the claimant in the same position as he was in so far as money can. Perfect compensation is hardly possible but one has to keep in mind that the victim has done no wrong; he has suffered at the hands of the wrongdoer and the court must take care to give him full and fair compensation for that he had suffered. In some cases for personal injury, the claim could be in respect of life time's earnings lost because, though he will live, he cannot earn his living. In others, the claim may be made for partial loss of earnings. Each case has to be considered in the light of its own facts and at the end, one must ask whether the sum awarded is a fair and reasonable sum. The conventional basis of assessing compensation in personal injury cases - and that is now recognized mode as to the proper measure of compensation - is taking an appropriate multiplier of an appropriate multiplicand."

18. The Apex Court in case titled as Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited, reported in 2011 AIR SCW 4787 also laid down guidelines for granting compensation. It is apt to reproduce paras 8 & 9 of the judgment hereinbelow:

> "8. The compensation is usually based upon the loss of the claimant's earnings or earning capacity, or upon the loss of particular faculties or members or use of such members, ordinarily in accordance with a definite schedule. The Courts have time and again observed that the compensation to be awarded is not measured by the nature, location or degree of the injury, but rather by the extent or degree of the incapacity resulting from the injury. The Tribunals are expected to make an award determining the amount of compensation which should appear to be just, fair and proper.
>
> 9. The term "disability", as so used, ordinarily means loss or impairment of earning power and has been held not to mean loss of a member of the body. If the physical efficiency because of the injury has substantially impaired or if he is unable to perform the same work with the same ease as before he was injured or is unable to do heavy work which he was able to do previous to his injury, he will be entitled to suitable compensation. Disability benefits are ordinarily graded on the basis of the character of the disability as partial or total, and as temporary or permanent. No definite rule can be established as to what constitutes partial incapacity

in cases not covered by a schedule or fixed liabilities, since facts will differ in practically every case."

19. The Apex Court in case titled as Kavita versus Deepak and others, reported in 2012 AIR SCW 4771 also discussed the entire law and laid down the guidelines how to grant compensation. It is apt to reproduce paras 16 & 18 of the judgment hereinbelow:

"16. In Raj Kumar v. Ajay Kumar (2011) 1 SCC 343, this Court considered large number of precedents and laid down the following propositions:

"The provision of the motor Vehicles Act, 1988 ('the Act', for short) makes it clear that the award must be just, which means that compensation should, to the extent possible, fully and adequately restore the claimant to the position prior to the accident. The object of awarding damages is to make good the loss suffered as a result of wrong done as far as money can do so, in a fair, reasonable and equitable manner. The court or the Tribunal shall have to assess the damages objectively and exclude from consideration any speculation or fancy, though some conjecture with reference to the nature of disability and its consequences, is inevitable. A person is not only to be compensated for the physical injury, but also for the loss which he suffered as a result of such injury. This means that he is to be compensated for his inability to lead a full life, his inability to enjoy those normal amenities which he would have enjoyed but for the injuries, and his inability to earn as much as he used to earn or could have earned. The heads under which compensation is awarded in personal injury cases are the following: "Pecuniary damages (Special damages) (i) Expenses relating to treatment, hospitalisation, medicines, transportation,

nourishing food, and miscellaneous expenditure. (ii) Loss of earnings (and other gains) which the injured would have made had he not been injured, comprising: (a) Loss of earning during the period of treatment; (b) Loss of future earnings on account of permanent disability. (iii) Future medical expenses. Non-pecuniary damages (General damages) (iv) Damages for pain, suffering and trauma as a consequence of the injuries. v) (Loss of amenities (and/or loss of prospects of marriage). (vi) Loss of expectation of life (shortening of normal longevity). In routine personal injury cases, compensation will be awarded only under heads (i), (ii)(a) and (iv). It is only in serious cases of injury, where there is specific medical evidence corroborating the evidence of the claimant, that compensation will be granted under any of the heads (ii)(b), (iii), (v) and (vi) relating to loss of future earnings on account of permanent disability, future medical expenses, loss of amenities (and/or loss of prospects of marriage) and loss of expectation of life."

17. .....

18. In light of the principles laid down in the aforementioned cases, it is suffice to say that in determining the quantum of compensation payable to the victims of accident, who are disabled either permanently or temporarily, efforts should always be made to award adequate compensation not only for the physical injury and treatment, but also for

the loss of earning and inability to lead a normal life and enjoy amenities, which would have been enjoyed but for the disability caused due to the accident. The amount awarded under the head of loss of earning capacity are distinct and do not overlap with the amount awarded for pain, suffering and loss of enjoyment of life or the amount awarded for medical expenses."

20. Admittedly, the claimant/victim was a house wife, who was maintaining her family, domestic home, looking after cows and selling milk; her income was about Rs.5,000/- per month and was of the age of 55 years at the time of accident. This fact is not denied by the other side nor there is a rebuttal.

21. Even otherwise, a domestic wife is the backbone of a home, maintaining the domestic home and takes all steps to keep her husband, children and other family members united, in good health and joyous mood. If anyone has to engage a helper for domestic help, the minimum wages which has to pay, is not less than Rs.3,000/- per month plus clothing and food. She has not only been deprived of the income from domestic work, but also lost her income by maintaining cows and selling milk. It is unrebutted, as discussed by the Tribunal in the impugned award, that she has become permanently disabled, helpless, hapless and a burden on others, has to suffer 45% permanent disability throughout her life and has lost her income, which was about Rs.5,000/- per month. The Tribunal also held that due to her dependency on others, she engaged a helper, to whom she is paying Rs.1500/- per month. She has produced that lady Smt. Chinta as a witness, who has proved and stated that she is receiving Rs.1500/- per month from the claimant as wages.

22. The Tribunal awarded Rs.75,000/- under the head of pain and suffering, which is too meager, while taking the physical frame of the claimant and other factors in consideration and in view of the judgments of the Apex Court, referred hereinabove, read with the judgment of the Apex Court in case titled as Nizam's Institute of Medical Sciences versus Prasanth S. Dhananka & others, reported in 2009 AIR SCW 3563."

14. Applying the ratio of law laid down in the judgment supra and parameters laid down, this Court deems it fit to enhance amount awarded under head of pain and suffering to Rs. 1,00,000/- instead of Rs. 50,000/-.

15. The learned Tribunal below, while determining the compensation on account of injury suffered by claimant has taken note of judgment rendered by Hon'ble Apex Court in **G. Ravindranath alias R. Chowdary** vs. **E. Srinivas & anr**, AIT 2013 SC 2974, wherein it has been held that compensation in personal injury cases should be determined under the following heads:

Pecuniary damages (Special damages)

I. Expenses relating to treatment, hospitalization, medicines, transportation, nourishing food and miscellaneous expenditure.

II. Loss of earning (and other gains) which the injured would have made had he not been injured comprising: -

a) Loss of earning during the period of treatment.

b) Loss of future earnings on account of permanent disability.

III. Future medical expenses.

Non-pecuniary damages (General damages)

IV. Damages for pain and suffering and trauma as a consequence of the injuries.

V. Loss of amenities (and/or loss of prospects of marriage)

VI. Loss of expectation of life(shortening of normal longevity)

Under the head of "non-pecuniary damages" i.e. general damages, provision has also been made for loss of amenities (and/or loss of prospects of marriage and loss of expectation of life (loss of longevity). Though in the aforesaid judgment, Hon'ble Apex Court has held that in personal injury cases, compensation shall be awarded only under head-I, II a) and IV, as noticed herein above, however, Hon'ble Apex Court while holding above has carved out an exception by stating that compensation shall be granted under any of the heads (II)(b), (III), (V) and (VI), where there is specific medical evidence regarding loss of future income, on account of physical disability, medical expenses, loss of amenities and/or loss of prospects of marriage, loss of expectation of life.

16. It is not in dispute that claimant was 9 years old at the time of accident and his right foot was also crushed under the car. On account of injury suffered by claimant, he remained admitted in hospital for twenty nine days, as is evident from discharge slip, exhibits PW-1/A and PW-1/B. Similarly, Dr. Lokinder Sharma, Senior Orthopaedic Surgeon, DDU Shimla, PW-4, categorically deposed that he had examined injured Ritik Verma and on examination, he found 40% permanent disability and in this regard, he issued permanent disability certificate exhibit PW-4/A. Though learned Tribunal below taking note of the disability suffered by injured, returned definite finding that disability suffered by claimant has affected his earning capacity, but failed to award any amount on account of loss of income and life expectancy to the claimant on the ground that no evidence has been led on record.

17. This Court can not lose sight of the fact that on account of the permanent disability suffered by claimant, he would not be able to lead a normal life, this Court intends to agree with Mr. B.S. Thakur, that claimant would not be able to get a job in Army, para-military forces and as such, learned Tribunal below ought to have awarded adequate compensation on account of loss of amenities, loss of expectation of life and loss of prospects of marriage. Similarly, claimant may find it difficult to be selected for marriage on account of permanent disability suffered by him. Had he not suffered permanent disability, he would have greater chances of getting a lucrative job, which would have definitely enhanced his prospects of marriage.

Hence, having perused facts of the case vis-à-vis evidence available on record, this Court has no hesitation to conclude that learned Tribunal below, while determining compensation, has failed to appreciate material evidence available on record, in its right perspective and as such erred in not awarding any compensation on account of loss of amenities, loss of prospects of marriage and loss of expectation of life and as such, award needs to be modified accordingly. Otherwise also, the Hon'ble Apex Court in **Ranjana Prakash and others** vs. **Divisional Manager and another** (2011) 14 SCC 639, has held that amount of compensation can be enhanced by an appellate court, while exercising powers under Order 41 Rule 33 CPC. It would be profitable to reproduce following para of the judgment herein:-

> "Order 41 Rule 33 CPC enables an appellate court to pass any order which ought to have been passed by the trial court and to make such further or other order as the case may require, even if the respondent had not filed any appeal or cross-objections. This power is entrusted to the appellate court to enable it to do complete justice between the parties. Order 41 Rule 33 CPC can be pressed into service to make the award more effective or maintain the award on other grounds or to make the other parties to litigation to share the benefits or the liability, but cannot be invoked to get a larger or higher relief. For example, where the claimants seek compensation against the owner and the insurer of the vehicle and the tribunal makes the award only against the owner, on an appeal by the owner challenging the quantum, the appellate court can make the insurer jointly and severally liable to pay the compensation, alongwith the owner, even though the claimants had not challenged the non-grant of relief against the insurer."

18. Having perused material available on record, especially the disability suffered by the claimant in the accident, this Court deems it fit to award an amount of Rs. 1,00,000/- on account of loss of amenities and loss of expectation of life and/or loss of prospects of marriage.

19. Consequently, in view of aforesaid modification made herein above, appellant-claimant is held entitled to following amount under various heads:

1.	Loss of future income come out to be Rs.6,000/- (15000 x 40/100 =6000) plus loss of future prospects @ 40% of actual income (Rs.2400) = 8400/- Compensation after multiplier of 18 as applicable = 8400 x 18	**151200**
2.	Compensation on account of pain and suffering	**100000**
3.	Compensation on account of Hospitalization Charges	**29000**
4.	Compensation on account of attendant charges	**29000**
5.	Compensation on account of transportation for coming and going to the hospital	**15000**
6.	Compensation in lieu of the services rendered by the helper	**6000**
7.	Compensation on account of loss of amenities (and/or loss of expectation of life and loss of prospects of marriage)	**100000**
	Total	**4,30,200/-**

20. This Court however does not see any reason to interfere with the rate of interest awarded on the amount of compensation and as such, same is upheld.

21. Consequently, in view of detailed discussion made herein above and law laid down by the Hon'ble Apex Court, present appeal is allowed and award dated 27.10.2017 passed by Motor Accident Claims Tribunal-4, Shimla in MAC Petition RBT No. 96-S/2 of 2014/11, is modified to the above extent only.

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

Sohan Lal .....Petitioner.

Versus

Lekh Ram & others. ....Respondents.

CMPMO No. 98 of 2018
Decided on : 10.7.2018

Code of Civil Procedure, 1908- Order 1 Rule 10 – Impleadment of party, when can be made- In a suit for permanent prohibitory and mandatory injunction, defendants taking plea that suit was bad for non-joinder of 'B', their brother as suit land was jointly owned by them, 'B' and plaintiff – Plaintiff then filing application for impleading legal representatives of 'B' as co-defendants – Trial Court dismissing application on ground of having filed it belatedly – Petition against- Held, a

party can be impleaded to avoid multiplicity of litigation and for ensuring rendition of binding and effective decree upon all litigants concerned. (Para-2)

For the Petitioner: Mr. B.L Soni and Mr. Aman Parth Sharma, Advocate.
For the Respondents: Mr. Vijay Bhatia, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

The plaintiff/petitioner herein, instituted a suit for rendition of a decree, of, permanent prohibitory injunction, vis-a-vis, the suit Khasra Numbers, besides, also prayed for rendition, of, a decree, for mandatory injunction, vis-a-vis, the suit Khasra Numbers. The defendants/respondents herein, in, their written-statement contended, that the suit land is joint inter-se the plaintiff, and, the defendants. They also raised an objection qua the suit being bad for non-joinder, of, necessary parties, in as much as, as one of the brothers' of the defendants, who, also alongwith the parties at contest, though hence jointly owning the undivided suit property his rather, remaining unimpleaded, despite, his being both a proper, and, a necessary party, in the lis.

2. Even though the aforesaid objection, devolving, upon the suit, hence being bad for non-joinder, of, necessary parties, was taken at the earliest, yet, the plaintiff belatedly therefrom, instituted an application, cast under the provisions of Order 1 Rule 10 CPC, seeking therein a relief, of, adding in the array of defendants', the LRs of deceased Bagshi Ram, the brother of the defendants, who alongwith them, and, the plaintiff, is, espoused to be jointly owning the suit property, (i) thereupon, he was hence a necessary party, for effectively clinching, the entire gamut of the controversy engaging the parties at contest (ii) more importantly, for also ensuring rendition, of, an effective finding upon the issue appertaining to suit being bad, for non-joinder, of necessary parties.

3. Even though the aforesaid endeavor was belated, yet, the mere belated institution, of the aforesaid application, was, not sufficient, to, drive the learned trial Court, to, hence dismiss the application, (a) as, the mandate of Order 1 Rule 10 CPC, has a binding effect, and, also covers all stages of litigation, (b) especially when for covering, the menace of multiplicity of litigation, and, for smothering, the entire gamut, of, the controversy engaging the parties at lis, besides vis-a-vis the suit khasra Numbers, and, also for ensuring rendition of, a binding and effective decree, upon, all the litigants concerned (c) thereupon hence the addition of the aforesaid in the array of defendants, is, both just and necessary. The aforesaid trite principle, seems to be omitted, from, being borne in mind, by the learned trial Court, rather,the learned trial Court has misdirected itself and failingly concentrated, upon, the mere factum, of the application aforesaid, being instituted at an belated stage. Since the addition of the aforesaid in the array of the defendants, is, necessary, for enabling the learned trial Court, to, pronounce an effective, decision upon the issue appertaining, to the suit being bad for non-joinder of necessary parties, also when hence would cure the aforesaid initial lapses, if any, as made by the plaintiff, thereupon an affirmative order, was, enjoined to be recorded thereon.

4. In view of the above, there is merit in the petition, and, the same is accordingly allowed. The learned trial Court concerned, is, directed to decide the Civil Suit within a period of six months. All pending applications stand disposed of accordingly.

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

Tilak Raj, Contractor ...Petitioner

Versus

Chief Engineer (MZ) and another ...Respondents

Arb. Case No. 25 of 2018
Decided on: July 10, 2018

Arbitration & Conciliation Act, 1996- Sections 11(6), 12(1)&(5), 29(A) and Seventh Schedule – Appointment of arbitrator – Neutrality principle - Petitioner/contractor as per term of contract submitting arbitration claim to Chief Engineer and requesting him for appointment of arbitrator – Chief Engineer appointing Superintending Engineer (Arbitration) as Arbitrator – Appointment opposed by petitioner and Superintending Engineer also intimating Chief Engineer that in view of amendment in Section 12 of Act, he cannot act as arbitrator - Chief Engineer then appointing another Superintending Engineer, HP PWD as arbitrator – Arbitrator appointed subsequently could not complete proceedings within time as stipulated under Section 29-A of Act and requesting Chief Engineer to appoint another arbitrator – In the meanwhile, Contractor approaching High Court for appointment of arbitrator – Held, main purpose for amending Section 12 of Act by way of Amendment Act, 2015 is to provide for neutrality of arbitrator – Any person who has relationship with parties or counsel or subject matter of dispute falling under any of categories in Seventh Schedule, is ineligible for appointment as arbitrator, notwithstanding existence of any such arbitration clause in the agreement – In such circumstances, High Court can appoint Arbitrator as may be permissible – High Court itself appointed Arbitrator and asked him to enter into reference. (Paras-5 to 8)

Case referred:
Volestalpine Schienen GMBH v. Delhi Metro Rail Corporation Ltd., (2017) 4 SCC 665

For the Petitioner : Mr. H.R. Sidhu, Advocate.
For the Respondents : Mr. S.C. Sharma and Mr. Dinesh Thakur, Addl. AG's with Mr. Amit Kumar, DAG.

The following judgment of the Court was delivered:

Justice Sandeep Sharma, Judge(oral**)**

By way of instant petition filed under Section 11 of the Arbitration & Conciliation Act, 1996, prayer has been made on behalf of the petitioner for appointment of arbitrator to adjudicate the dispute *inter se* parties.

2. Undisputed facts as emerge from the record are that the petitioner being lowest bidder came to be awarded work namely "Up-gradation of Tandi, Karding, Lapchang and Peokar Road Km. 0/0 to 14/240 under PMGSY-Phase-VI additional Package No. HP-07-06 amounting to Rs. 1,68,98,029/-. Executive Engineer, Chenab Valley Division, HP PWD, Udaipur, District Lahul & Spiti, entered into an agreement with the petitioner vide agreement No. 97, dated 17.5.2007 (Annexure P-3). As per averments contained in the petition, work in question was to be completed within a period of twelve months, however since respondent No.2 failed to complete codal formalities, petitioner could not complete said work within the stipulated period. Subsequently, petitioner completed the work within a period of forty two months. Allegedly, on account of delay on the part of the respondents, petitioner suffered loss as stands mentioned in the petition. While invoking provisions of Clause 25 of the agreement No. 97, dated 17.5.2007, petitioner submitted his arbitration claim on 16.10.2015 and vide communication dated 16.4.2016 addressed to respondent No.1, prayed for appointment of an arbitrator. Acceding to aforesaid request made on

behalf of the petitioner, Superintending Engineer, Arbitration Circle,, HP PWD, Solan was appointed as an arbitrator to adjudicate the claim of the petitioner. However, the fact remains that vide communication dated 2.5.2016, petitioner objected to appointment of Superintending Engineer, Arbitration Circle, Solan, HPPWD as an arbitrator claiming that in terms of amendment to the provisions of Section 12 of the Act *ibid* an independent and impartial arbitrator is required to be appointed to adjudicate the claim of the petitioner. On 4.5.2016, Superintending Engineer, Arbitration Circle, HPPWD Solan conveyed to respondent No.1 that in view of amendment to Section 12 of the Act *ibid*, he can not enter into reference and some other suitable person may be appointed in his place. Since the Department failed to appoint an independent and impartial arbitrator in terms of amended provisions of Section 12 of the Act *ibid*, petitioner approached this Court by way of Arbitration Case No. 77 of 2016, wherein this Court vide judgment dated 2.9.2016, appointed on Shri Kartar Singh, Superintending Engineer, 1st Circle, HP PWD, Mandi, District Mandi, Himachal Pradesh as an arbitrator. Though in view of amended provisions contained in Section 12 of the Act *ibid*, aforesaid person could not be appointed as an arbitrator, however, he after having entered into reference sent a communication on 14.3.2018 clarifying that since his time limit for arbitration award has expired by the mandate of Section 29A of the Act, some other person may be appointed as an arbitrator. In the aforesaid background, petitioner has prayed for appointment of an independent and impartial arbitrator.

3. Respondents-State, in their reply have virtually admitted the averments contained in the petition and have prayed that either the time limit of present arbitrator may be extended or a new arbitrator may be appointed to adjudicate the dispute between the parties.

4. Having carefully perused the aforesaid provision of law, this Court is persuaded to agree with the contention of learned counsel for the petitioner that Superintending Engineer, 1st Circle, Mandi, Himachal Pradesh, can not be appointed as an Arbitrator in the instant case and some independent person, who has no direct or indirect control over the affairs of the respondents ought to have been appointed as an Arbitrator to adjudicate the dispute inter-se parties.

5. Hon'ble Apex Court in **Volestalpine Schienen GMBH** v. **Delhi Metro Rail Corporation Ltd**., (2017) 4 SCC 665, has held as under:-

> "14. From the stand taken by the respective parties and noted above, it becomes clear that the moot question is as to whether panel of arbitrators prepared by the Respondent violates the amended provisions of Section 12 of the Act. Subsection (1) and Sub-section (5) of Section 12 as well as Seventh Schedule to the Act which are relevant for our purposes, may be reproduced below:
>
> 8. (i) for sub-section (1), the following Sub-section shall be substituted, namely
>
> (1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances—
>
> (a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and
>
> (b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.
>
> Explanation 1.--The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.
>
> Explanation 2.--The disclosure shall be made by such person in the form specified in the Sixth Schedule.;

(ii) after Sub-section (4), the following Subsection shall be inserted, namely—

(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator: Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this Sub-section by an express agreement in writing. (emphasis supplied)

THE SEVENTH SCHEDULE

Arbitrator's relationship with the parties or counsel

1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.

2. The arbitrator currently represents or advises one of the parties or an affiliate of one of the parties.

3. The arbitrator currently represents the lawyer or law firm acting as counsel for one of the parties.

4. The arbitrator is a lawyer in the same law firm which is representing one of the parties.

5. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration.

6. The arbitrator's law firm had a previous but terminated involvement in the case without the arbitrator being involved himself or herself.

7. The arbitrator's law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties.

8. The arbitrator regularly advises the appointing party or an affiliate of the appointing party even though neither the arbitrator nor his or her firm derives a significant financial income therefrom.

9. The arbitrator has a close family relationship with one of the parties and in the case of companies with the persons in the management and controlling the company.

10. A close family member of the arbitrator has a significant financial interest in one of the parties or an affiliate of one of the parties.

11. The arbitrator is a legal representative of an entity that is a party in the arbitration.

12. The arbitrator is a manager, director or part of the management, or has a similar controlling influence in one of the parties.

13. The arbitrator has a significant financial interest in one of the parties or the outcome of the case.

14. The arbitrator regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator or his or her firm derives a significant financial income therefrom. Relationship of the arbitrator to the dispute

15. The arbitrator has given legal advice or provided an expert opinion on the dispute to a party or an affiliate of one of the parties.

16. The arbitrator has previous involvement in the case. Arbitrator's direct or indirect interest in the dispute.

17. The arbitrator holds shares, either directly or indirectly, in one of the parties or an affiliate of one of the parties that is privately held.

18. A close family member of the arbitrator has a significant financial interest in the outcome of the dispute.

19. The arbitrator or a close family member of the arbitrator has a close relationship with a third party who may be liable to recourse on the part of the unsuccessful party in the dispute.

Explanation 1.---The term "close family member" refers to a spouse, sibling, child, parent or life partner.

Explanation 2.--The term "affiliate" encompasses all companies in one group of companies including the parent company.

Explanation 3.--For the removal of doubts, it is clarified that it may be the practice in certain specific kinds of arbitration, such as maritime or commodities arbitration, to draw arbitrators from a small, specialized pool. If in such fields it is the custom and practice for parties frequently to appoint the same arbitrator in different cases, this is a relevant fact to be taken into account while applying the Rules set out above. (emphasis supplied)

15. It is a well known fact that the Arbitration and Conciliation Act, 1996 was enacted to consolidate and amend the law relating to domestic arbitration, inter alia, commercial arbitration and enforcement of foreign arbitral awards etc. It is also an accepted position that while enacting the said Act, basic structure of UNCITRAL Model Law was kept in mind. This became necessary in the wake of globalization and the adoption of policy of liberalisation of Indian economy by the Government of India in the early 90s. This model law of UNCITRAL provides the framework in order to achieve, to the maximum possible extent, uniform approach to the international commercial arbitration. Aim is to achieve convergence in arbitration law and avoid conflicting or varying provisions in the arbitration Acts enacted by various countries. Due to certain reasons, working of this Act witnessed some unpleasant developments and need was felt to smoothen out the rough edges encountered thereby. The Law Commission examined various shortcomings in the working of this Act and in its first Report, i.e., 176th Report made various suggestions for amending certain provisions of the Act. This exercise was again done by the Law Commission of India in its Report No. 246 in August, 2004 suggesting sweeping amendments touching upon various facets and acting upon most of these recommendations, Arbitration Amendment Act of 2015 was passed which came into effect from October 23, 2015.

16. Apart from other amendments, Section 12 was also amended and the amended provision has already been reproduced above. This amendment is also based on the recommendation of the Law Commission which specifically dealt with the issue of 'neutrality of arbitrators' and a discussion in this behalf is contained in paras 53 to 60 and we would like to reproduce the entire discussion hereinbelow:

> NEUTRALITY of ARBITRATORS
>
> 53. It is universally accepted that any quasi-judicial process, including the arbitration process, must be in accordance with principles of natural justice. In the context of arbitration, neutrality of arbitrators, viz. their independence and impartiality, is critical to the entire process. 54. In the Act, the test for neutrality is set out in Section 12(3) which provides
>
> 12(3) An arbitrator may be challenged only if—

(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality..."

55. The Act does not lay down any other conditions to identify the "circumstances" which give rise to "justifiable doubts", and it is clear that there can be many such circumstances and situations. The test is not whether, given the circumstances, there is any actual bias for that is setting the bar too high; but, whether the circumstances in question give rise to any justifiable apprehensions of bias.

56. The limits of this provision has been tested in the Indian Supreme Court in the context of contracts with State entities naming particular persons/designations (associated with that entity) as a potential arbitrator. It appears to be settled by a series of decisions of the Supreme Court (See Executive Engineer, Irrigation Division, Puri v. Gangaram Chhapolia MANU/SC/0001/1983 : 1984 (3) SCC 627; Secretary to Government Transport Department, Madras v. Munusamy Mudaliar MANU/SC/0435/1988 : 1988 (Supp) SCC 651; International Authority of India v. K.D. Bali and Anr. MANU/SC/0197/1988 : 1988 (2) SCC 360; S. Rajan v. State of Kerala MANU/SC/0371/1992 : 1992 (3) SCC 608; Indian Drugs & Pharmaceuticals v. IndoSwiss Synthetics Germ Manufacturing Co. Ltd. MANU/SC/0139/1996 : 1996 (1) SCC 54; Union of India v. M.P. Gupta (2004) 10 SCC 504; Ace Pipeline Contract Pvt. Ltd. v. Bharat Petroleum Corporation Ltd. MANU/SC/7273/2007 : 2007 (5) SCC 304) that arbitration agreements in government contracts which provide for arbitration by a serving employee of the department, are valid and enforceable. While the Supreme Court, in Indian Oil Corporation Ltd. v. Raja Transport (P) Ltd. MANU/SC/1502/2009 : 2009 8 SCC 520 carved out a minor exception in situations when the arbitrator "was the controlling or dealing authority in regard to the subject contract or if he is a direct subordinate (as contrasted from an officer of an inferior rank in some other department) to the officer whose decision is the subject matter of the dispute", and this exception was used by the Supreme Court in Denel Proprietary Ltd. v. Govt. of India, Ministry of Defence MANU/SC/0010/2012 : AIR 2012 SC 817 and Bipromasz Bipron Trading SA v. Bharat Electronics Ltd. MANU/SC/0478/2012 : (2012) 6 SCC 384, to appoint an independent arbitrator Under Section 11, this is not enough.

57. The balance between procedural fairness and binding nature of these contracts, appears to have been tilted in favour of the latter by the Supreme Court, and the Commission believes the present position of law is far from satisfactory. Since the principles of impartiality and independence cannot be discarded at any stage of the proceedings, specifically at the stage of constitution of the arbitral tribunal, it would be incongruous to say that party autonomy can be exercised in complete disregard of these principles-even if the same has been agreed prior to the disputes having arisen between the parties. There are certain minimum levels of independence and impartiality that should be required of the arbitral process regardless of the parties' apparent agreement. A sensible law cannot, for instance, permit appointment of an arbitrator who is himself a party to the dispute, or who is employed by (or similarly dependent on) one party, even if this is what the parties agreed. The Commission hastens to add that Mr. PK Malhotra, the ex officio member of the Law Commission suggested having an exception for the State, and allow State parties to appoint employee arbitrators. The

Commission is of the opinion that, on this issue, there cannot be any distinction between State and non State parties. The concept of party autonomy cannot be stretched to a point where it negates the very basis of having impartial and independent adjudicators for resolution of disputes. In fact, when the party appointing an adjudicator is the State, the duty to appoint an impartial and independent adjudicator is that much more onerous-and the right to natural justice cannot be said to have been waived only on the basis of a "prior" agreement between the parties at the time of the contract and before arising of the disputes.

58. Large scale amendments have been suggested to address this fundamental issue of neutrality of arbitrators, which the Commission believes is critical to the functioning of the arbitration process in India. In particular, amendments have been proposed to Sections 11, 12 and 14 of the Act.

59. The Commission has proposed the requirement of having specific disclosures by the arbitrator, at the stage of his possible appointment, regarding existence of any relationship or interest of any kind which is likely to give rise to justifiable doubts. The Commission has proposed the incorporation of the Fourth Schedule, which has drawn from the Red and Orange lists of the IBA Guidelines on Conflicts of Interest in International Arbitration, and which would be treated as a "guide" to determine whether circumstances exist which give rise to such justifiable doubts. On the other hand, in terms of the proposed Section 12(5) of the Act and the Fifth Schedule which incorporates the categories from the Red list of the IBA Guidelines (as above), the person proposed to be appointed as an arbitrator shall be ineligible to be so appointed, notwithstanding any prior agreement to the contrary. In the event such an ineligible person is purported to be appointed as an arbitrator, he shall be de jure deemed to be unable to perform his functions, in terms of the proposed explanation to Section 14. Therefore, while the disclosure is required with respect to a broader list of categories (as set out in the Fourth Schedule, and as based on the Red and Orange lists of the IBA Guidelines), the ineligibility to be appointed as an arbitrator (and the consequent de jure inability to so act) follows from a smaller and more serious sub-set of situations (as set out in the Fifth Schedule, and as based on the Red list of the IBA Guidelines).

60. The Commission, however, feels that real and genuine party autonomy must be respected, and, in certain situations, parties should be allowed to waive even the categories of ineligibility as set in the proposed Fifth Schedule. This could be in situations of family arbitrations or other arbitrations where a person commands the blind faith and trust of the parties to the dispute, despite the existence of objective "justifiable doubts" regarding his independence and impartiality. To deal with such situations, the Commission has proposed the proviso to Section 12(5), where parties may, subsequent to disputes having arisen between them, waive the applicability of the proposed Section 12(5) by an express agreement in writing. In all/all other cases, the general Rule in the proposed Section 12(5) must be followed. In the event the High Court is approached in connection with appointment of an arbitrator, the Commission has proposed seeking the disclosure in terms of Section 12(1) and in which context the High Court or the designate is to have "due regard" to the contents of such disclosure in appointing the arbitrator. (emphasis supplied)

17. We may put a note of clarification here. Though, the Law Commission discussed the aforesaid aspect under the heading "Neutrality of Arbitrators", the focus of discussion was on impartiality and independence of the arbitrators which has relation to or bias towards one of the parties. In the field of international arbitration, neutrality is generally related to the nationality of the arbitrator. In international sphere, the 'appearance of neutrality' is considered equally important, which means that an arbitrator is neutral if his nationality is different from that of the parties. However, that is not the aspect which is being considered and the term 'neutrality' used is relatable to impartiality and independence of the arbitrators, without any bias towards any of the parties. In fact, the term 'neutrality of arbitrators' is commonly used in this context as well.

18. Keeping in mind the afore-quoted recommendation of the Law Commission, with which spirit, Section 12 has been amended by the Amendment Act, 2015, it is manifest that the main purpose for amending the provision was to provide for neutrality of arbitrators. In order to achieve this, Sub-section (5) of Section 12 lays down that notwithstanding any prior agreement to the contrary, any person whose relationship with the parties or counsel or the subject matter of the dispute falls under any of the categories specified in the Seventh Schedule, he shall be ineligible to be appointed as an arbitrator. In such an eventuality, i.e., when the arbitration Clause finds foul with the amended provisions extracted above, the appointment of an arbitrator would be beyond pale of the arbitration agreement, empowering the court to appoint such arbitrator(s) as may be permissible. That would be the effect of non-obstante Clause contained in Sub-section (5) of Section 12 and the other party cannot insist on appointment of the arbitrator in terms of arbitration agreement."

6. In the aforesaid judgment, it has been categorically held by the Hon'ble Apex Court that main purpose for amending the provision was to provide for neutrality of arbitrators. Hon'ble Apex Court has further held that in order to achieve the neutrality, as referred above, Sub-section (5) of Section 12 lays down that notwithstanding any prior agreement to the contrary, any person, whose relationship with the parties or counsel or subject matter of dispute falls under any of the categories specified in the schedule, he shall be ineligible to be appointed as an arbitrator.

7. Consequently, in view of the discussion made herein above and fair stand adopted by Mr. Dinesh Thakur, learned Additional Advocate General, this Court without going into merits of the case, deems it proper to refer the matter to arbitration in terms of Clause 25 of the agreement.

8. Accordingly, with the consent of parties, present petition is allowed. **Mr. Justice D.D. Sud, J. (Retd.)**, is appointed as an arbitrator to adjudicate upon the dispute *inter se* parties. His consent/declaration under Section 11 (8) of the Act *ibid* be obtained and placed on record. Aforesaid arbitrator is requested to enter into reference within a period of two weeks from the date of receipt of a copy of this order. It shall be open for the learned arbitrator to determine his own procedure with the consent of the parties. Otherwise also, entire procedure with regard to fixing of time limit for filing pleadings or passing of award stands prescribed under Sections 23 and 29A of the Act.

9. Needless to say, award shall be made strictly as per provisions contained in Arbitration & Conciliation Act. A copy of this order shall be made available to the learned arbitrator named above, by the Registry of this court within one week enabling him to take steps for commencement of the arbitration proceedings within stipulated period.

10. The petition is disposed of.

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

Gurudwara Bei Sehjal Babehar through its President, Capt Mohinder Singh ((Retd.)
....Petitioner.

Versus

Gurparkash and others. ....Respondents.

CMPMO No. 108 of 2018
Decided on: 11.7.2018

Code of Civil Procedure, 1908- Order VIII Rule 1 –Written Statement – Extension of time – When can be ordered? – Defendants were served on 16.9.2017 and sought many opportunities in filing written statement – On 16.1.2018 application was filed for extension of time in filing written statement, which was allowed by Trial Court on same day – Petition against – On facts, it was found that application was neither signed by any of defendants nor supported by an affidavit – No opportunity of filing reply to that application was given to plaintiffs – Order was also unreasoned showing non-application of mind by Trial Court – Petition allowed – Order of Trial Court set aside – Matter remanded with direction to afford opportunity to plaintiffs to file reply to such application and then decide it in accordance with law. (Para-7)

For the petitioner.	Mr. R.P Singh, Advocate.
For respondents	Mr. Ajay Sharma, Advocate with M/s Amit Jamwal & Kishor Pundir, Advocates.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.*(Oral)*

By way of this petition, challenge has been laid to the order dated 16.1.2018 passed by the Court of learned Civil Judge, Court No.II, Amb, District Una in Civil Suit No. 171 of 2017 titled as Gurudwara Bei Sahjal Vs. Guruprakash and others, vide which an application filed before it purportedly on behalf of respondents No.1 to 3 for extending the time to file written statement has been allowed.

2. Mr. Singh learned counsel for the petitioner has argued that the impugned order is *per se* not sustainable in the eyes of law, because while passing the said order, learned trial court erred in not appreciating that neither the application filed before it, which is at page 19 of the paper book (Annexure P-5) was a proper application, as the same was neither signed by any of the applicants, nor was it supported by an affidavit, nor the contents therein revealed that there was any cogent explanation in the application as to why the written statement could not have been filed by the applicants within time, as is envisaged in the Code of Civil Procedure. While making this submission, Mr. Singh has drawn the attention of this Court to Annexure P-4, which is copy of the Court notice served upon respondents No.1 to 3, which demonstrates that said respondents/defendants were duly served on 16.9.2017in the suit. Mr. Singh has further argued that the impugned order otherwise is also not sustainable in the eyes of law, as the same is a cryptic and a non speaking order, which neither deals with the contention so made in the application nor any reasoning has been assigned as to why the said application was allowed. Further grievance raised by Mr. Singh is that the application was allowed on the same date on which it was preferred by the applicant without affording any opportunity to the present petitioner to respond to the same.

3. Mr. Sharma learned counsel for respondents on the other hand has submitted that there is no infirmity with the impugned order as it was the discretion vested before the learned trial court to have had allowed any such application preferred before it and the application was allowed by the learned trial court in the interest of justice.

4. I have heard learned counsel for the parties and have also gone through the documents appended with the present petition.

5. It is not in dispute that respondents No.1 to 3, who are defendants No.1 to 3 before the learned trial court were duly served on 16.9.2017. It is also a matter of record that since then several opportunities were given to the defendants to file their written statement, however, no written statement was filed. It is also a matter of record that on 16.1.2018 an application was filed for extension of time under Section 148 read with Section 151 of CPC through learned counsel by one applicant namely, Guruprakash. The contents of this application are reproduced hereinbelow:-

> *" 1. That abovementioned case is pending before this Hon'ble Court and is fixed for filing W.S for today.*
>
> *2. That for filing written statement, defendant needs old revenue record pertaining to year 1930ies and onwards and for that he had applied in various departments of District and Tehsil revenue offices. The above said record is very old and also in different languages which needs to be translated into court language.*
>
> *3. That due to the reason mentioned in para No.2 of this application, the defdt, is still unable to file the written statement and needs sufficient time to file the W.S.*
>
> *It is, therefore, humbly prayed that the applicant/defdft. May kindly be given some more time to file the written statement in the interest of justice."*

6. Incidentally, this application apparently has neither been signed by the applicant though it contains the signature of the learned counsel who moved the application nor the same is supported by an affidavit. This application was allowed by the learned trial court vide impugned order dated 16.1.2018 in the following terms:

> *"Application for extending time to file written statement U/S 148 CPC filed, considered and allowed. Be put up for filing written statement on or before 26.2.2018."*

7. In my considered view, the order impugned before this Court vide which the application filed in the name of applicant Guruprakash for extension of time for filing written statement was allowed by the learned trial court is not sustainable in the eyes of law. Mr. Singh learned counsel for the petitioner is correct in his submission that this order was passed without affording any opportunity of filing reply to the plaintiffs, which is evident from the fact that the application dated 16.1.2018 was disposed of on the same day and the order does not mention that opportunity of reply was given to the non applicants, but they chose not to file any reply. The contention of Mr. Singh that the order is non speaking and cryptic is also borne out from the impugned order as neither there is any mention in the impugned order of the facts of the application nor any reasoning whatsoever has been assigned therein as to what weighed with the learned trial court while allowing the application. Time and again, Hon'ble Supreme Court as also Hon'ble High Courts have been reiterating that judicial orders are required to be both speaking as also reasoned orders. The rationale behind this is that content of the order itself should be self explanatory as to why the conclusion arrived at in the order has been arrived. Besides this, a non speaking order perhaps also is an indicator of non application of mind by the Court concerned while passing the impugned order.

In this view of the matter, this petition is allowed and impugned order dated 16.1.2018 is quashed and set aside with further direction to the learned court below to decide the application filed by the applicant Guruprakash after affording opportunity to file reply to the application by the non applicants. As far as the contention of Mr. Singh that the application *per se* is not maintainable, as neither it bears any signatures of the applicant nor it supported by an affidavit is concerned, this court is not making any observation on the same because this objection can be taken by the present petitioner in the reply and it is for the learned trial court to adjudicate on the same.

Petition stands disposed of in above terms. The parties through their learned counsel are directed to appear before the learned trial court on 6.8.2018.

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

Parmod Sood .....Petitioner

Versus

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

Arb. Case No. 30 of 2018
Decided on: 11.07.2018

Arbitration and Conciliation Act, 1996- Sections 14 and 15- Appointment of new arbitrator – Arbitrator not deciding matter and passing award before the date stipulated by High Court – Petitioner-contractor filing petition before High Court and praying for termination of his appointment and replacement by new Arbitrator – However, it was found that Arbitrator could not proceed further because Measurement Books of work in question were with Vigilance and Anti Corruption Bureau, Bilaspur – Petition disposed of with direction to Dy. S.P. Vigilance and Anti Corruption Bureau to produce record before Arbitrator – Arbitrator also directed to decide matter within three months. (Paras- 5 and 6)

For the petitioner: Mr. J.S. Bhogal, Senior Advocate with Mr. Parmod Negi, Advocate.
For the respondents: Mr. Ashwani Sharma and Mr. P.K. Bhatti, Additional Advocate Generals.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge (oral)

The present petition, under Section 14 and 15 of the Arbitration and Conciliation Act, 1996, has been maintained by the petitioner for terminating the mandate of the Arbitrator and for appointment of an independent and impartial arbitrator. As per the petitioner, being a contractor, he has been executing works of various magnitudes to the satisfaction of various Government Departments, including the public works. During the course of his business dealings, he was awarded the work of construction relating to "strengthening of Chandigarh-Mandi-Manali road, NH 21, in Kms 105/0 to 127/0" vide letter dated 21.06.2002 for a sum of Rs. 3,27,000,99/-.

2. The dispute had arisen between the parties relating to the amounts claimed by the petitioner for execution of works beyond the agreed limits, which was initially referred to the sole arbitration of the Superintending Engineer, Arbitration Circle, HPPWD, Solan, who heard the matter and made an award dated 21.6.2002. The said award was challenged by the respondent in this Court by filing Arbitration Case No. 52 of 2002 and this Court vide order dated 05.09.2005 allowed the said application. Thereafter, the matter was referred to the sole arbitration of the Superintending Engineer, NH Circle, HPPWD, Shimla, who had made an award on 05.11.2011.

3. Aggrieved by the award dated 05.11.2011, the petitioner has challenged the same before this Court, vide Arbitration Case No. 19 of 2012, which was allowed and Superintending Engineer, NH Circle, HPPWD, Shimla was directed to reconsider the claim of the petitioner as expeditiously as possible and in no event later than 30th June, 2017. However, despite the fact that the learned Arbitrator was directed to decide the matter by 30.06.2017, no award has been passed by him till date, hence the present application.

4. Learned Additional Advocate General, on instructions from Sh. Ajay Sharma, Superintending Engineer, NH Circle, HPPWD Shimla (Arbitrator), who is present in person has submitted that the measurement books are with the Deputy Superintendent of Police, Vigilance and Anti Corruption Bureau, Bilaspur, H.P., who vide letter dated 18.07.2017 has been requested by the Executive Engineer, Bilaspur Division No. 2, HPPWD Bilaspur, to produce the same before the learned Arbitrator. Today, the copy of said letter is produced by the learned Additional Advocate General, which is taken on record.

5. This Court after hearing the learned counsel for the applicant, learned Additional Advocate General and learned Arbitrator comes to the conclusion that the arbitration proceedings could not be culminated, as the measurement books which are necessary for proper adjudication of the present case, were not with the learned Arbitrator.

6. So, in view of the above, the present petition is disposed of by ordering the Deputy Superintendent of Police, Vigilance and Anti Corruption Bureau, Bilaspur, H.P. to produce the measurement books or other relevant records of the present case, if any, before the learned Arbitrator on a date already fixed by the learned Arbitrator and thereafter, learned Arbitrator will decide the matter within a period of three months. Apart from that, learned counsel for the petitioner is directed to hand over the copy of the judgment rendered by Hon'ble Delhi High Court in **Mehta Teja Singh's** case to the learned Arbitrator.No further order is required to be passed in the present petition. Pending application(s), if any, shall also stand(s) disposed of.

Copy *dasti.*

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

Parvesh Kumar ...petitioner

Versus

Asha Kumari & Anr. ..Respondents

Cr.MMO No. 294 of 2018
Decided on: 11.07.2018

Code of Criminal Procedure, 1973- Sections 125 and 482- Inherent powers – Petitioner-husband seeking setting aside order of Add. CJM directing him to pay maintenance to respondent-wife and stay of recovery proceedings qua arrears of maintenance by filing petition under Section 482 of Code – Petitioner taking plea that he was suffering from schizophrenia and remained hospitalized for treatment, as such could not appear in proceedings under Section 125 of Code and thus was wrongly proceeded against ex-parte – Held, in absence of nature of mental disorder, it would not be sufficient to conclude that he was wrongly proceeded against exparte or he could not join proceedings thereafter – Petition under Section 482 of Code was filed by petitioner himself – He was serving in army whereas his wife was totally unemployed – Order of grant of maintenance, upheld– Petition dismissed. (Paras-8 to 11)

Medical Jurisprudence – Schizophrenia – What is? – Held, schizophrenia is a difficult mental-affliction - Insidious in its onset, it is characterized by the shallowness of emotions and is marked by a detachment from reality - In paranoid-state, the victim responds even to fleeting expressions of disapproval from others – However, not all schizophrenias are characterized by same intensity of the disease, therefore, degree of mental disorder is required to be proved. (Para-5)

Cases referred:

Ram Narain Gupta vs. Smt. Rameshwari Gupta AIR 1988 SC 2260
Vinita Saxena vs. Pankaj Pandit (2006) 3 SCC 778

Shilpa vs. Praveen S.R. AIR 2016 Karnataka 169

For the Petitioner: Mr. Pritam Singh Chandel, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral)

The petitioner has filed the present petition under Section 482 of the Criminal Procedure Code with the following prayers:-

> *"It is, therefore, most humbly and respectfully prayed that in the facts and circumstances explained here-in-above, present petition may kindly be allowed and the impugned judgment / order dated 27.01.2015, passed by Ld. Addl. Chief Judicial Magistrate, Court No. 1, Sarkaghat, District Mandi, H.P. in case No. 197-IV/2013, titled as Asha Kumari versus Parvesh Kumar and further stay the operation of recovery proceedings in demand no. 37/2018 issued by the Ld. Assistant Collector 1st Grade-cum-Tehsildar (Recovery), Bilaspur, H.P. against the petitioner with a prayer to quash and set aside in the interest of law and justice."*

2. It is not in dispute that the learned trial Court awarded a maintenance of Rs.5,000/- (Rupees five thousand) per month in favour of the respondent in a proceedings filed by her under Section 125 Cr.P.C. and it was only as a consequence thereof that the recovery/demand notice has been issued by the concerned Collector-cum-Tehsildar (Recovery).

3. It is vehemently argued by Shri Pritam Singh Chandel, Advocate, that the order passed by the learned Magistrate is absolutely illegal inasmuch as he has failed to take into consideration the fact that the petitioner was suffering from schizophrenia and was under treatment in Military Hospital w.e.f. 09.11.2013 and it was only on account thereof that he could not put in appearance before the court below and was proceeded *ex parte*.

I have heard learned counsel for the petitioner and have gone through the material placed on record.

4. In order to appreciate the controversy in question, it would be first necessary to understand as to what is '*schizophrenia*' and can this mental disorder be said to be a sufficient cause for a party not attending the court proceedings.

5. What is '*schizophrenia*' has been elaborately considered by the Hon'ble Supreme Court in ***Ram Narain Gupta vs. Smt. Rameshwari Gupta AIR 1988 SC 2260,*** wherein it was held that schizophrenia is a difficult mental-affliction, which is said to be insidious in its onset and is characterized by the shallowness of emotions and is marked by a detachment from reality. In paranoid-states, the victim responds even to fleeting expressions of disapproval from others by disproportionate reactions generated by hallucinations of persecution. Even well meant acts of kindness and of expression of sympathy appear to the victim as insidious trap and in its worst manifestation, this illness produces a crude wrench from reality, however, not all schizophrenics are characterised by the same intensity of the disease and, therefore, the degree of mental disorder is required to be proved. It shall be apt to reproduce the relevant observations which read thus:-

> *"10. The context in which the ideas of unsoundness of 'mind' and 'mental-disorder' occur in the section as grounds for dissolution of a marriage, require the assessment of the degree of the 'mental-disorder'. Its degree must be such as that the spouse seeking relief cannot reasonably be expected to live with the other. All. mental abnormalities are not recognised as grounds for grant of decree. If the mere existence of any degree of mental abnormality could justify dissolution of a marriage few marriages would, indeed, survive in-law.*
>
> *The answer to the apparently simple - and perhaps misleading - question as to "who is normal ?" runs. inevitably into philosophical thickets of the*

concept of mental normalcy and as involved therein, of the 'mind' itself. These concepts of 'mind', 'mental-phenomena' etc., are more known than understood and the theories of "mind" and "mentation" do not indicate any internal consistency, let alone validity, of their basic ideas. Theories of 'mind' with cognate ideas of 'perception' and 'consciousness' encompass a wide range of thoughts, more ontological than epistemological. Theories of mental phenomena are diverse and include the dualist concept - shared by Descartes and Sigmund Freud - of the separateness of the existence of the physical or the material world as distinguished from the non-material mental-world with its existence only spatially and not temporally. There is, again, the theory which stresses the neurological basis of the 'mental phenomenon' by asserting the functional correlation of the neuronal arrangements of the brain with mental phenomena. The 'behaviourist'-tradition, on the other hand, interprets all reference to mind as 'constructs' out of behaviour. "Functionalism", however, seems to assert that mind is the logical or functional state of physical systems. But all theories seem to recognise, in varying degrees, that the psychometric control over the mind operates at a level not yet fully taught to science. When a person is oppressed by intense and seemingly insoluble moral dilemmas, or when grief of loss of dear ones etch away all the bright colours of life, or where a broken-marriage brings with it the loss of emotional-security, what standards of normalcy of behaviour could be formulated and applied ? The arcane infallibility of science has not fully pervaded the study of the non-material dimensions of 'being'.

Speaking of the indisposition of science towards this study, a learned author says :

".....We have inherited cultural resistance to treating the conscious mind as a biological phenomenon like any other. This goes back to Descartes in the seventeenth century. Descartes divided the world into two kinds of substances : mental substances and physical substances. Physical substances were the proper domain of science and mental substances were the property of religion. Something of an acceptance of this division exists even to the present day. So, for example, consciousness and subjectivity are often regarded as unsuitable topics for science. And this reluctance to deal with consciousness and subjectivity is part of a persistent objectifying tendency. People think science must be about objectively observable phenomena. On occasions when I have lectured to audiences of biologists and neurophysiologists, I have found many of them very reluctant to treat the mind in general and consciousness in particular as a proper domain of scientific investigation."

".....the use of the noun 'mind' is dangerously inhabited by the ghosts of old philosophical theories. It is very difficult to resist the idea that the mind is a kind of a thing, or at least an arena, or at least some kind of black box in which all of these mental processes occur."

(See : John Searle "Minds, Brains and Science" 1984 Reith Lectures, pp. 10 and 11)

Lord Wilberforce, referring to the psychological basis of physical illness said that the area of ignorance of the body-mind relation seems to expand with that of knowledge. In McLoughlin v. O'Brian, (1983) 1 AC 410 at p. 418 the learned Lord said, though in a different context :

".....Whatever is unknown about the mind-body relationship (and the area of ignorance seems to expand with that of knowledge), it is now accepted by medical science that recognisable and severe physical damage

to the human body and system may be caused by the impact, through the senses, of external events on the mind. There may thus be produced what is as identifiable and illness as any that may be caused by direct physical impact. It is safe to say that this, in general terms, is understood by the ordinary man or woman who is hypothesised by the Courts ....."

But the illnesses that are called 'mental' are kept distinguished from those that ail the 'body' in a fundamental way. In "Philosophy and Medicine", Vol. 5 at page x the learned Editor refers to what distinguishes the two qualitatively :

".....Undoubtedly, mental illness is so divalued because it strikes at the very roots of our personhood. It visits us with uncontrollable fears, obsessions, compulsions, and anxieties....."

".....This is captured in part by the language we use in describing the mentally ill. One is an hysteric, is a neurotic, is an obsessive, is a schizophrenic, is a manic-depressive. On the other hand, one has heart disease, has cancer, has the flu, has malaria, has smallpox ....."

(Emphasis supplied)

[11] *'Schizophrenia', it is true, is said to be difficult mental-affliction. It is said to be insidious in its onset and has hereditary predisposing factor. It is characterized by the shallowness of emotions and is marked by a detachment from reality. In paranoid-states, the victim responds even to fleeting expressions of disapproval from others by disproportionate reactions generated by hallucinations of persecution. Even well meant acts of kindness and of expression of sympathy appear to the victim as insidious traps. In its worst manifestation, this illness produces a crude wrench from reality and brings about a lowering of the higher mental functions.*

"Schizophrenia" is described thus :

"A severe mental disorder (or group of disorders) characterized by a disintegration of the process of thinking, of contact with reality, and of emotional responsiveness. Delusions and hallucinations (especially of voices) are usual features, and the patient usually feels that his thoughts, sensations, and actions are controlled by, or shared with, others. He becomes socially withdrawn and loses energy and initiative. The main types of schizophrenia are simple, in which increasing social withdrawal and personal ineffectiveness are the major changes; hebephrenic, which starts in adolescence or young adulthood (see hebephrenia); paranoid, characterized by prominent delusion; and catatonic, with marked motor disturbances (See catatonia).

[12] *Schizophrenia commonly - but not inevitably - runs a progressive course. The prognosis has been improved in recent years with drugs such as phenothiazines and by vigorous psychological and social management and rehabilitation. There are strong genetic factors in the causation, and environmental stress can precipitate illness."*

(See Concise Medical Dictionary at page 566 : Oxford Medical Publications, 1980)

But the point to note and emphasise is that the personality- disintegration that characterises this illness may be of varying degrees. Not all schzophrenics are characterised by the same intensity of the decease. F. C. Redlich and Daniel X. Freedman in "The Theory and Practice. of Psychiatry" (1966 Edn.) say :

".....Some schizophrenic reactions, which we call psychoses, may be relatively mild and transient; others may not interfere too seriously with many aspects of everyday living....." (P. 252)

"Are the characteristic remissions and relapses expressions of endegenous processes, or are they responses to psychosocial variables, or both ? Some patients recover, apparently completely, when such recovery occurs without treatment we speak of spontaneous remission. The term need not imply an independent endegenous process; it is just as likely that the spontaneous remission is a response to non-deliberate but nonetheless favourable psychosocial stimuli other than specific therapeutic activity....." (p. 465)

(Emphasis supplied)

6. What is 'schizophrenia' was thereafter considered in detail by the Hon'ble Supreme Court in **Vinita Saxena vs. Pankaj Pandit (2006) 3 SCC 778**, and it was observed as under:-

"***A RESEARCH ON THE DISEASE***

"Schizophernia is one of the most damaging of all mental disorders. It causes its victims to lose touch with reality. They often begin to hear, see or feel things that aren't really there (hallucinations) or become convinced of things that simply aren't true (delusions). In the paranoid form of this disorder, they develop delusions of persecution or personal grandeur. The first signs of Paranoid Schizophrenia usually surface between the ages of 15 and 34. There is no cure, but the disorder can be controlled with medications. Severe attacks may require hospitalization. The appellant has filed Annexures L,m,n,o,p and Q which are extracts about the aforesaid disease. The extracts are sum and substance of the disease and on a careful reading it would be well established that the evidence and documents on record clearly make out a case in favour of appellant and hence appellant was entitled to the relief prayed. In the memorandum and grounds of appeal, some salient features of the disease have also been specified. Some of the relevant part of the extracts from various medical publications are reproduced herein below:

What is the disease and what one should know?

A psychotic lacks insight, has the whole of his personality distorted by illness, and constructs a false environment out of his subjective experiences.

It is customary to define 'delusion' more or less in the following way. A delusion is a false unshakeable belief, which is out of keeping with the patient's social and cultural background. ' German psychiatrists tend to stress the morbid origin of the delusion, and quite rightly so. A delusion is the product of internal morbid processes and this is what makes it unamenable to external influences.

Apophanuous experiences which occur in acute schizophrenia and form the basis of delusions of persecution, but these delusions are also the result of auditory hallucinations, bodily hallucinations and experiences of passivity Delusions of persecution can take many forms. In delusions of reference, the patient feels that people are talking about him, slandering him or spying on him. It may be difficult to be certain if the patient has delusions of self-reference or if he has self- reference hallucinosis. Ideas of delusions or reference are not confined to schizophrenia, but can occur in depressive illness and psychogenic reactions.

Causes

The causes of schizophrenia are still under debate. A chemical imbalance in the brain seems to play a role, but the reason for the imbalance remains unclear. One is a bit more likely to become schizophrenic if he has a family member with

the illness. Stress does not cause schizophrenia, but can make the symptoms worse.

Risks

without medication and therapy, most paranoid schizophrenics are unable to function in the real world. If they fall victim to severe hallucinations and delusions, they can be a danger to themselves and those around them.

What is schizophrenia?

schizophrenia is a chronic, disabling mental illness characterized by:

Psychotic symptoms

Disordered thinking

Emotional blunting

How does schizophrenia develop?

Schizophrenia generally develops in late adolescence or early adulthood, most often:

In the late teens or early twenties in men

In the twenties to early thirties in women

What are the symptoms of schizophrenia?

Although schizophrenia is chronic, symptoms may improve at times (periods of remission) and worsen at other times (acute episodes, or period of relapse).

Initial symptoms appear gradually and can include:

Feeling tense

Difficulty in concentrating

Difficulty sleeping

Social withdrawal

What are psychotic symptoms?

Psychotic symptoms include:

Hallucinations: hearing voices or seeing things

Delusions : bizarre beliefs with no basis in reality (for example, delusions of persecution or delusions of grandeur).

These symptoms occur during acute or psychotic phases of the illness, but may improve during periods of remission.

A patient may experience:

A single psychotic episode during the course of the illness

Multiple psychotic episodes over a lifetime

Continuous psychotic episodes

During a psychotic episode, the patient is not completely out of touch with reality. Nevertheless, he/she has difficulty distinguishing distorted perceptions of reality (hallucinations, delusions) from reality, contributing to feelings of fear, anxiety, and confusion.

The disorder can prove dangerous for some - especially when symptoms of paranoia combine with the delusional symptoms of schizophrenia. In fact, doctors say Paranoid schizophrenics are notorious for discontinuing the treatments which help control their symptoms."

7. A Division Bench of the Hon'ble Karnataka High Court in ***Smt. Shilpa vs. Praveen S.R. AIR 2016 Karnataka 169***, observed as under:-

"24. At this stage, we are reminded of a story of success portrayed by Sylvia Nasar in the Biography. 'A Beautiful Mind' (published by Simon & Schuster, as well as a Film of the same name) of John Forbes Nash Jr., an American Mathematician, born

on June 13, 1928. He started showing symptoms of mental illness and spent several years at Psychiatric Hospital and was treated for paranoid schizophrenia. After 1970, he refused further medication and his condition improved. Thereafter he was never committed to Hospital again. He recovered gradually with the love and care of his divorced wife whom he remarried in 2001. He gradually returned to academic work by mid 1980s. He was awarded the 1994 Nobel Memorial Prize in Economic Sciences for the thesis, which earned him Ph.D. Degree in 1950. He was both a Mathematician and Economist. He made groundbreaking work in the area of real algebraic geometry. He published number of theorems to his credit and was awarded prestigious Abel Prize in 2015."

8. Bearing in mind the aforesaid exposition of law, it can conveniently be held that in absence of the nature of mental disorder, the mere fact that the petitioner was suffering from schizophrenia would not be sufficient to conclude that he was wrongly proceeded *ex parte* or could not have joined the proceedings, after all, even the instant petition has been filed by the petitioner himself. The petitioner was required to place on record at least some material which could show that he was suffering from symptoms of psychotic illness and, thus, symptoms were not under control with medication, which has been administered to him.

9. Adverting to the merits of the case, it would be noticed that the specific case of the respondent was that the petitioner had been misbehaving and torturing the respondent by saying that your parents are beggar. Not only this, apart from demanding dowry, he had also beaten the respondent on 02.08.2012, constraining her to file the written complaint to the police post Jhandutta, wherein the petitioner admitted his guilt but despite the repeated compromise the petitioner did not mend his ways, as on 15.08.2012, the respondent was again beaten.

10. Notably, the petitioner had not only been duly served in this case but had initially appeared through his counsel and it was only lateron that he was proceeded *ex parte* vide order dated 12.11.2014.

11. It is not in dispute that the petitioner was serving in Indian Army, whereas the respondent was totally unemployed. Therefore, in the given circumstances, the amount of Rs.5000/- (Rupees five thousand) awarded as maintenance can by no stretch of imagination be said to be on higher side.

12. In view of the aforesaid discussion, I find no merit in this petition and the same is accordingly dismissed in *limine*.

****

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

The Land Acquisition Collector .....Appellant.
Versus
Surjit Singh and others .....Respondents.

RFA No.463 of 2012.
Judgment reserved on: 09.07.2018.
Date of decision: 11th July, 2018.

Land Acquisition Act, 1894- Section 36- Damages – Grant of – Acquiring department was in actual possession of land since 1974 – Notification under Section 4 of Act was issued only on 29.4.2006 – Claimant was deprived of usages and occupation of land for 32 years – Held, market value on date of acquisition cannot account for deprivation of land for 32 years – Therefore, competing interest of parties are required to be balanced – As such, acquiring department directed to award additional interest @ 15% per annum on market value (Rs. 666.66/- per sq.

meter) of land as damages from date of dispossession till date of notification under Section 4 of Act. (Paras- 23 & 24)

Land Acquisition Act, 1894- Sections 18 and 23- Determination of market value – Principles enunciated – Land acquired for public purpose – On reference by claimants, market value of land determined by District Judge at Rs.2,000/- per square meter – Appeal against – High Court found that notification under Section 4 of Act was issued on 29.4.2006 – Proximate sale deed was dated 11.9.2006 and as per that market value of acquired land was Rs. 666.66 per square meter – Other documents relied upon by claimants were deeds of conveyance of 'houses' or of period much later of acquisition – Held, such conveyance deeds or deeds much later in time cannot be made basis for determination of market value of land. (Paras-18 to 20)

Cases referred:

Chimanlal Hargovinddas v. Special Land Acquisition Officer, Poona and another (1988) 3 SCC 751

Balwan Singh and others versus Land Acquisition Collector and another (2016) 13 SCC 412

For the Appellant : Mr. Neeraj Gupta and Mr.Ajeet Pal Singh Jaswal, Advocates.

For the Respondents: Mr. Tara Singh Chauhan, Advocate, for respondents No.1 to 3.
Mr.Vinod Thakur and Mr.Sudhir Bhatnagar, Additional Advocate Generals, for respondent No.4.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

This appeal is directed against the award passed by the learned District Judge, Una, on 30.01.2012, whereby he awarded compensation at the rate of Rs.2,000/- per square metre of land, irrespective of its classification, along with statutory benefits.

2. The Government of H.P. issued notification dated 29.04.2006 (published in H.P. Government Gazette on 09.05.2006) under Section 4 of the Act, for acquisition of land measuring 0-14-46 Hects comprised in Khewat No.22, Khatauni No.30, Khasra Nos.140, 141, 142, 143, 144, 145, 146, 177, 215/1, 222, 231, 232, 233, 234, 235, 242, 242/1 and 223, situate in Up Mohal Rakkar Colony, Tehsil and District Una, H.P. for construction of Housing Board Colony. Notification under Sections 6 and 7 of the Act had been issued on 25.11.2006 (published in H.P. Govt. Gazette on 06.12.2006).

3. After issuing the necessary notifications under the Land Acquisition Act, 1894 (for short 'Act'), the Land Acquisition Collector assessed the market value of different kinds of land as under:-

Sr.No.	Kind of Land	Price per Sq.meters
1.	Banjar Kadeem	Rs.68-06
2.	Gair Mumkin	Rs.34-30

4. Aggrieved by the award on the ground of its inadequacy, the respondents-claimants filed reference petition under Section 18 of the Act.

5. At the outset, it would be necessary to set out certain broad parameters and principles that are required to be borne in mind while determining the compensation under the Land Acquisition Act.

6. The first and foremost is the price paid in a bona fide transaction of sale, by a willing seller to a willing buyer, subject to transaction being for the land adjacent to the land, proximity to the date and possessing similar advantages. Of course, the other well-known methods of valuation like opinion of experts and yield method. In absence of any evidence of a similar transaction, it is permissible to take into account the transaction of nearest land around the date of notification under section 4 of the Act, by making suitable alliance. There can be no fixed criteria as what would be the suitable addition or subtraction from the value of the land relied upon.

7. In ***Chimanlal Hargovinddas v. Special Land Acquisition Officer, Poona and another (1988) 3 SCC 751***, the Hon'ble Supreme Court summed up the principle as follows:

> *"[4] The following factors must be etched on the mental screen :*
>
> *(1) A reference under Section 18 of the Land Acquisition Act is not an appeal against the award and the Court cannot take into account the material relied upon by the Land Acquisition Officer in his Award unless the same material is produced and proved before the Court.*
>
> *(2) So also the Award of the Land Acquisition Officer is not to be treated as a judgment of the trial Court open or exposed to challenge before the court hearing the Reference. It is merely an offer made by the Land Acquisition Officer and the material utilised by him for making his valuation cannot be utilised by the Court unless produced and proved before it. It is not the function of the court to sit in appeal against the Award, approve or disapprove its reasoning, or correct its error or affirm, modify or reverse the conclusion reached by the Land Acquisition Officer, as if it were an appellate Court.*
>
> *(3) The Court has to treat the reference as an original proceeding before it and determine the market value afresh on the basis of the material produced before it.*
>
> *(4) The claimant is in the position of a plaintiff who has to show that the price offered for his land in the award is inadequate on the basis of the materials produced in the Court. Of course the materials placed and proved by the other side can also be taken into account for this purpose.*
>
> *(5) The market value of land under acquisition has to be determined as on the crucial date of publication of the notification under S. 4 of the Land Acquisition Act (dates of Notifications under Ss. 6 and 9 are irrelevant).*
>
> *(6) The determination has to be made standing on the date line of valuation (date of publication of notification under S. 4) as if the valuer is a hypothetical purchaser willing to purchase land from the open market and is prepared to pay a reasonable price as on that day. It has also to be assumed that the vendor is willing to sell the land at a reasonable price.*
>
> *(7) In doing so by the instances method, the Court has to correlate the market value reflected in the most comparable instance which provides the index of market value.*
>
> *(8) Only genuine instances have to be taken into account. (Sometimes instances are rigged up in anticipation of Acquisition of land.)*
>
> *(9) Even post-notification instances can be taken into account (1) if they are very proximate, (2) genuine and (3) the acquisition itself has not motivated the purchaser to pay a higher price on account of the resultant improvement in development prospects.*
>
> *(10) The most comparable instances out of the genuine instances have to be identified on the following considerations :*
>
> *(i) proximity from time angle*
>
> *(ii) proximity from situation angle.*

(11) Having identified the instances which provide the index of market value the price reflected therein may be taken as the norm and the market value of the land under acquisition may be deduced by making suitable adjustments for the plus and minus factors vis-a-vis land under acquisition by placing the two in juxtaposition.

(12) A balance-sheet of plus and minus factors may be drawn for this purpose and the relevant factors may be evaluated in terms of price variation as a prudent purchaser would do.

(13) The market value of the land under acquisition has thereafter to be deduced by loading the price reflected in the instance taken as norm for plus factors and unloading it for minus factors.

(14) The exercise indicated in clauses (11) to (13) has to be undertaken in a common sense manner as a prudent man of the world of business would do. We may illustrate some such illustrative (not exhaustive) factors:-

Plus factors Minus factors

1. Smallness of size. 1. largeness of area.

2. Proximity to a road. 2. situation in the interior at a distance from the road. 3. frontage on a road. 3. narrow strip of land with very small frontage compared to depth.

4. nearness to developed area. 4. lower level requiring the depressed portion to be filled up.

5. regular shape. 5. remoteness from developed locality.

6. level vis-a-vis land under acquisition. 6. some special disadvantageous factor which would deter a purchaser.

7. special value for an owner of an adjoining property to whom it may have some very special advantage.

(15) The evaluation of these factors of course depends on the facts of each case. There cannot be any hard and fast or rigid rule. Common sense is the best and most reliable guide. For instance, take the factor regarding the size. A building plot of land say 500 to 1000 sq. yds cannot be compared with a large tract or block of land of say 10000 eq. yds. or more. Firstly while a smaller plot is within the reach of many, a large block of land will have to be developed by preparing a lay out, carving out roads, leaving open space, plotting out smaller plots, waiting for purchasers (meanwhile the invested money will be blocked up) and the hazards of an entrepreneur. The factor can be discounted by making a deduction byway of an allowance at an appropriate rate ranging approx. between 20% to 50% to account for land required to be set apart for carving out lands and plotting out small plots. The discounting will to some extent also depend on whether it is a rural area or urban area, whether building activity is picking up, and whether waiting period during which the capital of the entrepreneur would be locked up, will be longer or shorter and the attendant hazards.

(16) Every case must be dealt with on its own fact pattern bearing in mind all these factors as a prudent purchaser of land in which position the Judge must place himself.

(17) These are general guidelines to be applied with understanding informed with common sense."

8. The respondents-claimants examined PW-2 Surjit Singh, who stated that in the year 1974 Housing Board Colony had taken over possession of his land measuring 0-14-46 hectares i.e. about 3 Kanals 7 Marlas and thereafter award dated 05.06.2008 was passed and payment was made to him on 19.07.2008. He further deposed that at the commencement of

development of colony, the value of his land was Rs.1,00,000/-per Marla. Mount Carmel School as also residential house complexes had come up in the vicinity of the land and lands worth lakhs of rupees were sold in the vicinity. He, thus, prayed for compensation according to the market value. In cross- examination, he admitted that the Housing Board Colony had taken over the possession of the suit land in the year 1974 and raised houses thereupon.

9. The claimants also examined Ravi Kumar, Registration Clerk, as PW-1, who proved the copies of conveyance deeds Ex.PW1/A to Ex. PW1/D. In addition to the above, the claimants also placed on record copies of sale deeds Ex. PA to Ex.PD.

10. On the other hand, the appellant herein tendered in evidence, copies of awards Ex. RX and Ex.RY.

11. At this stage, it would be necessary to deal with each of the sale exemplars/awards, as relied upon by the parties.

12. As per Ex. PW1/A i.e. deed of conveyance of house sold by allotment by the appellant, area measuring 14 x 46 feet=644 square feet i.e. about 60 square metres was sold for Rs.9500/- i.e. Rs.158.33 per square metre. This plot was allotted by the vendor through letter dated 11.04.1978.

13. As per Ex.PW1/B i.e. deed of conveyance, area of 253 square metres was sold for Rs.7,90,000/- which pertained to the allotment vide letter of the appellant dated 24.09.1998 and as per this conveyance deed, the area was sold at the rate of Rs.3122.52 per square metre.

14. As per Ex.PW1/C, another conveyance deed, 84 square metres land was sold for Rs.60,000/- vide allotment dated 30.05.1988 and the sale price as per this conveyance deed works out to be Rs.714.28 per square metre.

15. Exhibit PW1/D is another conveyance deed whereby 152 square metres land was sold for Rs.13,39,000/- and allotment was made vide letter dated 23.07.2008 and as per this allotment, the value of the land comes to Rs.8809.21 per square metre.

16. As per Ex.PA dated 11.09.2006, 0-01-50 square metres land was sold for Rs.1,00,000/- i.e. 666.66 per square metre. As per Ex. PB dated 16.04.2007, 0-01-93 square metres land was sold for Rs.2,90,000/- i.e. Rs.1502.59 per square metre. As per Ex. PC dated 23.01.2008, 0-02-16 square metres land was sold for Rs.4,40,000/- i.e. Rs.2037.03 per square metre. As per Ex. PD dated 13.08.2009, 0-01-53 square metres land was sold for Rs.4,32,000/- i.e. Rs.2823.52 per square metre.

17. Now, adverting to the copies of awards Ex.RX and Ex.RY. Exhibit RX is the award dated 05.04.1975 whereby the compensation for 'Barani' land of village Tabba was assessed at the rate of Rs.1,000/- per Kanal and that of 'Banjar Qadim' land was assessed at the rate of Rs.500/- per bigha or Rs.225/- per Kanal. Exhibit RY is the Award No.5/2008 dated 05.06.2008 passed by the Land Acquisition Collector, whereby the land classified as 'Banjar Qadim' had been assessed at Rs.68-06 per _ centiare and 'Gair Mumkin' at Rs.34-30 per centiare.

18. As per settled law, the market value of the land is required to be assessed on the date of notification issued under Section 4 of the Act which in the instant case is 29.04.2006. The most proximate sale deed made in point of time is Ex. PA dated 11.09.2006, according to which, the land has been sold at Rs.666.66 per square metre. As regards the other sale deeds, it would be noticed that Ex. PW1/A, Ex.PW1/B and Ex. PW1/D are deeds of conveyance of houses sold by allotment by the Housing Board/HIMUDA and, therefore, cannot be made the basis for determination of compensation of land.

19. Even though, Ex. PW1/C is a deed of conveyance of plot sold by the appellant, but the same was executed more than two years after the issuance of notification under Section 4 of the Act, and was executed on 6th June, 2008. That apart, all the aforesaid conveyance deeds Ex.PW1/A to Ex.PW1/D were executed subsequent to the issuance of the notification under

Section 4 of the Act and being post acquisitions, cannot be made the basis for determination of the market value.

20. As regards the sale deeds, Ex. PC and Ex.PD, even these sale deeds are post acquisition sale deeds and, therefore, cannot be made the basis to determine the market value.

21. As observed earlier, the most proximate sale deed in point of time is Ex.PA dated 11.09.2006 and as per this sale deed the market value at best works out at Rs.666.66 per square metre. Therefore, it is not at all understandable as to how the learned Court below assessed the market value at Rs.2,000/- per square metre that too by according the following reasons:-

> *"16. On over all analysis of the sale deeds, conveyance deeds and oral evidence in this regard particularly when no counter evidence has been adduced by respondents, this court is of the opinion that the value of suit land acquired on the date of notification under Section 4 i.e. 29.4.2006 could not have been less than Rs.2,000/- per sq. meters particularly when respondent-department has sold land at higher rates way back in 1998 as depicted above through conveyance deeds Ext.PW1/A to PW1/D. Therefore, this court assesses the value of land acquired liable to be enhanced to the extent of Rs.2,000/- per sq. meters irrespective of classification of land as the land is acquired for same purpose."*

22. The aforesaid findings, to say the least, are perverse and even the so called reasons in support of such findings are unsound and illogical. However, it needs to be borne in mind that even though the notification under Section 4 of the Act was issued on 29.04.2006, but yet this Court cannot lose sight of the fact and as admitted by the appellant that the possession of the land was taken by it in the year 1974. Obviously, the respondents have been deprived of the usages of this land for nearly 32 years. Therefore, in these circumstances, the Court is required to balance the competing interests of the parties. In case, the appellant had not deprived the respondents of the usages and occupation of the land for nearly 32 years, the market value of the land on the date of acquisition cannot account for and in fact does not account for the deprivation of usages of land for 32 years.

23. How, therefore, in the given facts and circumstances, the competing interests of the parties are required to be balanced, in such circumstances is in fact no longer *res integra* in view of the judgment of the Hon'ble Supreme Court in ***Balwan Singh and others*** *versus* ***Land Acquisition Collector and another (2016) 13 SCC 412***, wherein after taking into consideration the earlier precedent on the subject, the Hon'ble Supreme Court directed the acquiring authority to award additional interest by way of damages @ 15% per annum from the date when the respondents-claimants were dispossessed till the date of notification under Section 4 of the Act. It shall be apposite to refer to the relevant observations which read thus:-

> *"1. The short issue arising for consideration in this appeal is whether the appellants are entitled to interest for the period from the date of dispossession to the date of Notification under Section 4(1) of the Land Acquisition Act, 1894 (For short 'the Act'). That issue is no more res integra. In R.L. Jain Vs. DDA (2004) 4 SCC 79 at para 18, this Court has taken the view that the land owner is not entitled to interest under the Act. However, it has been clarified that the land owner will be entitled to get rent or damages for use and occupation for the period the Government retained possession of the property.*
>
> *2. Noticing the above position, this Court in Madishetti Bala Ramul Vs. Land Acquisition Officer (2007) 9 SCC 650, took the view that it may not be proper to remand the matter to the Collector to determine the amount of compensation to which the appellants therein would be entitled for the period during which they remained out of possession and hence, in the interest of justice, this Court directed that additional interest at the rate of 15% per annum on the amount awarded by the Land Acquisition Collector, shall be paid for the period between the date of dispossession and the date of Notification under Section 4(1) of the Act.*

3. The said view was followed by this Court in Tahera Khatoon Vs. Land Acquisition Officer (2014) 13 SCC 613.

4. Following the above view taken by this Court, these appeals are disposed of directing the respondents to award additional interest by way of damages, at the rate of 15% per annum for the period between 1.7.1984, the date when the appellants were dispossessed till 2.9.1993, the date of Notification under Section 4(1) of the Act. Needless to say that this compensation will be on the basis of land value fixed by the Reference Court. The amount as above, shall be calculated and deposited before the Reference Court within a period of three months from today."

24. In view of the law expounded in the aforesaid judgment, even though the respondents-claimants can only be held entitled to compensation at the rate of Rs.666/- per square metre as against Rs.2,000/- per square metre as awarded by the learned reference Court. Nonetheless, they are entitled to additional interest by way of damages @ 15% per annum on this amount i.e. Rs.666/- per square metre from 1st January, 1974, the date when the respondents-claimants were dispossessed till 29.04.2006, the date of notification under Section 4(1) of the Act.

25. Needless to say that this compensation will be on the basis of the land value fixed by this Court i.e. Rs.666/- per square metre. The amount as above shall be calculated and deposited before the reference Court within a period of three months from today.

26. The appeal is disposed of in the aforesaid terms, leaving the parties to bear their own costs. Pending application, if any, also stands disposed of.

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

Hoshiar Chand and Ors. .....Petitioners

Versus

State of HP and Anr. .....Respondents

CWP No. 2386 of 2017
Date of Decision: 12.7.2018

Constitution of India, 1950- Articles 14 & 16- Select/waiting list – Purpose of – Held, waiting list prepared in examination conducted by Commission does not furnish a source of recruitment - It is operative only for the contingency that if any of selected candidates does not join, then person from the waiting list may be pushed up and be appointed against vacancy so caused – Petitioners claiming themselves to be in the select/waiting list, challenged order of Board of Directors vide which fresh Advertisement was issued for "additional posts" – Petitioner claiming that they being in the waiting list ought to have been given appointment against those "additional posts" – Administrative Tribunal dismissed their application - Petition against – Writ Petition also dismissed by High Court. (Paras- 10 to 14)

Cases referred:

Rakhi Ray and Ors. v. High Court of Delhi and Ors, (2010) 2 SCC 637

Surinder Singh V. State of Punjab (1997) 8 SCC 488

For the Petitioners: Mr. Ajay Sharma, Advocate.

For the Respondents: Mr. Ashok Sharma, Advocate General with Mr. Ranjan Sharma, Mr. Adarsh Sharma, Ms. Ritta Goswami and Mr. Nand Lal Thakur, Additional Advocate Generals, for the State.
Mr. G.S. Rathore, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(oral)*

On 24.6.2016, respondent-corporation issued advertisement inviting therein applications (at page 33) for filling up of 300 posts of drivers. Petitioners alongwith other persons also submitted applications for consideration of their candidature. Though approximately 5000 persons applied in terms of aforesaid advertisement, but about 3800 candidates participated in the preliminary test and in the second test, only 1200 candidates participated. The respondent-corporation selected 430 candidates in the aforesaid recruitment process and accordingly, issued list of selected candidates, wherein admittedly, petitioners' names were also there. In this regard, on 27.9.2016, a news item (at page36) got published in daily news paper "Punjab Kesri". Subsequently, respondent-Corporation issued letters dated 29.11.2016 (at page-37), enclosing therewith list of 229 selected candidates, who were to be appointed as drivers on contract basis. Out of 229 candidates, only 226 candidates reported for pre-appointment training. On 13.12.2016, respondent corporation by way of message asked all the incumbents numbering about 220 to appear in further selection process of 146 additional posts of drivers to be held on 12/13th December, 2016. Since selected candidates were being again put to the test, they filed Original Application bearing OA No. 339 of 2016, which came to be decided vide judgment dated 14.3.2017 (at page 50). In the aforesaid OA, respondent-corporation placed on record copy of office order dated 9.3.2017 and claimed before the learned Tribunal below that in view of the urgency of the drivers, the Board of Directors of the respondent-corporation approved to fill up of unfilled posts which of 146 drivers as per the roster by conducting final driving test of 220 candidates, who qualified in final driving test but not selected. Respondent-corporation further apprised the learned Tribunal that recruitment process for 146 posts of drivers was allowed to go on by the learned Tribunal on 8.12.2016, but was not to be finalized without approval of the learned Tribunal. Interview/driving test for 146 posts of drivers was conducted by the HRTC at DW Taradevi on 13 and 14th December, 2016, whereas Board of Directors of the respondent-corporation in its 138th meeting held on 16.2.2017, decided to cancel the earlier recruitment process and start fresh two layer recruitment process as per the existing policy and new roster. Since respondent-corporation decided to withdraw the recruitment process started for filing up of 146 posts of driver, original applications having been filed by the present petitioners came to be disposed of having rendered infructuous.

2. Being aggrieved with aforesaid decision dated 18.10.2016, taken by the Board of Directors of HRTC, as referred herein above, person namely Ramesh Kumar, filed original application bearing OA No. 1958 of 2017, praying therein for following reliefs:-

> "7(i) That impugned orders Annexure A-6 dated 9.3.2017 and 138th proceedings of the Board of Directors qua cancelling of earlier recruitment process for filling up the posts of drivers contained in item B (iii) and advertisement Annexure A-7 may kindly be quashed and set-aside with direction to the respondents to fill in accrued posts of drivers from the selected panel available with them prepared in October-November, 2016, and thereafter advertise only remaining vacancies to be filled in from the open market."

3. Learned Tribunal below taking note of the pleadings adduced on record by the respective parties, dismissed the aforesaid Original Application and upheld the decision taken by the Board of Directors of respondent-corporation in its 138th meeting held on 16.2.2017.

4. In the aforesaid background, petitioners have approached this Court in the instant proceedings, praying therein to quash and set-aside the impugned judgment dated 12.9.2017, passed by the learned Tribunal below and issue direction to the respondent corporation to consider and send the petitioners for pre-appointment training along with 229 candidates, who were selected in terms of advertisement dated 26.2.2016.

5. Mr. Ajay Sharma, Advocate, representing the petitioners, while terming the impugned order passed by the learned Tribunal to be illegal contended that learned Tribunal below has fallen in error while upholding the decision of the respondent-corporation taken in its 138th meeting held on 16.2.2017 because there is clear cut discrimination and violation of Articles 14 and 16 of the Constitution of India in as much as 430 candidates were selected against 300 available posts, whereafter panel was prepared. He further argued that without preparation of panel, 229 candidates could not be sent for pre-appointment training and once that panel was in existence, 146 posts also ought to have been filled from the selected panel. He further argued that despite there being existence of selected panel, respondents advertised 574 posts, but learned Tribunal below without considering the aforesaid aspect of the matter, particularly with respect to the discrimination and violation of Articles 14 and 16 of the constitution of India, upheld the decision of the Board, whereby it decided to cancel its earlier recruitment process for filing up pots of drivers. He further argued that as per government instructions available in the handbook of Personal Matters, which has also application in the respondent-corporation mutatis mutandis, select panel prepared against the particular posts is/was to remain in vogue for a period of one year and as such, 146 vacancies accrued during the currency of panel was alive for one year and as such, action of respondent-corporation in inviting 574 posts afresh is not tenable. Lastly, Mr. Sharma, contended that order passed by the learned Tribunal is in violation of law laid down by the Hon'ble Apex Court and as such, same deserves to be quashed and set-aside. He further argued that the petitioners legitimately expected that when the select panel is available, any accrued vacancy during the currency of select panel shall be filled in from the select panel, but such legitimate expectation stands frustrated by the respondents, who despite there being subsistence of select panel proceeded to issue fresh advertisement, which action, on their part, cannot be allowed to sustain in any circumstances.

6. Mr. Ashok Sharma, learned Advocate General and Mr. G.S. Rathore, Advocate, appearing for State and respondent No.2, respectively, supported the impugned judgment passed by the learned Tribunal below and contended that there is no illegality and infirmity in the same and as such, same needs to be upheld. They argued that no select/waiting list as alleged by the petitioners was ever prepared at the time of selection of candidates pursuant to advertisement dated 24.6.2016. They further stated that out of 146 posts of drivers mentioned in the decision of Board of Directors, 71 posts were backlog vacancies which could not be filled up due to non-availability of candidates from the respective categories, whereas remaining 75 posts were new vacancies. They further contended that since challenge was laid to the decision taken by the respondent-corporation, Board of Directors in 138th meeting held on 16.2.2017, decided to cancel the earlier recruitment process and start fresh two layer recruitment process as per the existing policy and new roster. Lastly, above named counsel contended that by way of original application registered as OA No. 7256 of 2016, entire process was challenged on the ground that out of 146 vacancies , 75 posts are new vacancies and as such, same cannot be filled up except by way of fresh advertisement and similarly, remaining 71 vacancies, which are backlog vacancies, also cannot be filled up without re-advertising the same. In view of aforesaid challenge, Board of Directors in its 138th meeting rightly decided to cancel the earlier recruitment process.

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

8. There is no dispute that pursuant to advertisement dated 24.6.2016, applications were invited for filling up of posts of drivers and respondent-Corporation had selected 430 candidates in the recruitment process, but only 220 candidates were engaged as driver on contract basis. Though petitioners have claimed that the select/waiting panel was prepared in

2016 and to substantiate their aforesaid claim, they have placed reliance upon the news item, according to which, 430 candidates had qualified the screening test and Board of Directors decided only to call 220 candidates, but no such select/waiting panel, if any has been placed on record by the petitioners. To the contrary, respondents have categorically stated that no select/waiting list was ever prepared. Since out of 146 posts of drivers, as stand mentioned, in the decision of Board of Directors, 71 posts were backlog vacancies, which could not be filled up due to non-availability of candidates from the respective categories, whereas 75 posts were new vacancies, same could not be filled up without calling for fresh application. Board of Directors in its 137th Meeting held on 18.10.2017, took a conscious decision to fill up 146 posts of drivers from the remaining candidates, who had qualified the test and were amongst 449 candidates and final test pursuant to aforesaid decision taken by the Board was conducted 13.12.2016 and 14.12.2016, for filling up 146 posts but, as has been noticed hereinabove, one Shri Ramesh Kumar filed Original Application bearing O.A. (D) No. 339 of 2016, laying therein challenge to the process of filling up of 146 posts out of 220 candidates on the basis of re-test. Another original application bearing OA No. 7256 of 2016 titled Ramesh Kumar v. State of HP and Ors, also came to be filed, wherein entire process was challenged on the ground that out of 146 vacancies, 75 vacancies are new and as such, same cannot be filled up except by way of fresh advertisement. Applicants in the aforesaid Original Applications claimed before the learned Tribunal that remaining 71 vacancies, which are backlog cannot be filled up without re-advertising the same. During the pendency of the aforesaid Original Application before the learned Tribunal, matter came to be placed before the Board of Directors of respondent-corporation, which in its wisdom, to ensure transparency, took a conscious decision to re-advertise 75 posts afresh. In the aforesaid background, Original Applications bearing OA Nos. 7256 and 339 of 2016, came to be disposed of. Learned Tribunal below while disposing of the aforesaid Original Application observed in its order dated 14.3.2017 that "since earlier recruitment started for filling up of 146 posts of drivers, for which driving test/interview was taken on 13th /14th December, 2016, has been withdrawn on administrative grounds, nothing survives for further adjudication in these matters and accordingly, same are disposed of."

9. As has been noticed herein above, no select/waiting panel, if any, is placed on record by the petitioners, to substantiate their claim that they were selected pursuant to advertisement dated 24.6.2016, and since only 229 candidates were engaged as driver on contract basis, they were kept on select/waiting panel. Similarly, there is nothing on record to refute the contention of respondents that out of 146 posts of driver, 71 posts were backlog vacancies, which could not be filled up due to non-availability of candidates from respective categories, whereas remaining 75 vacancies were new vacancies. 71 backlog posts could not be filled up on the basis of process initiated vide advertisement dated 24.6.2016, but definitely in this regard, fresh advertisement was required to be issued by the corporation.

10. Otherwise also, it is well settled that vacancies cannot be filled up over and above the number of vacancies advertised because recruitment of the candidates in excess of the notified vacancies is a denial and deprivation of the right under Article 14 and 16(1) of the Constitution of India, of those persons, who acquired eligibility for the post in question in accordance with the statutory rules subsequent to the date of notification of vacancies, but in the case at hand, it is not in dispute that 71 backlog posts, which were indented to be filled up by the HRTC-respondent-corporation on the basis of earlier process initiated vide advertisement dated 24.6.2016, were not included in 300 posts of drivers advertised in the advertisement dated 24.6.2016. Similarly, there is nothing on record that remaining 75 posts were also from aforesaid 300 posts of the drivers. It has been repeatedly held by the Hon'ble Apex Court that filling up the vacancies over the notified vacancies is neither permissible nor desirable, for the reason that it amounts to improper exercise of power and only in a rare and exceptional circumstance and in emergent situation it can be allowed. Hon'ble Apex Court has further held that such deviation from rule is only permissible, if policy decision based upon some rationale is taken up by the appropriate authority. Hon'ble Apex Court in ***Rakhi Ray and Ors. v. High Court of Delhi and Ors, (2010) 2 SCC 637*** which has otherwise been taken note of by the learned Tribunal while

passing impugned order, has clearly laid down that filling up of vacancies over the notified vacancies amounts to filling up of future vacancies and thus, not permissible in law.

11. Hon'ble Apex Court in ***Surinder Singh V. State of Punjab (1997) 8 SCC 488,*** has categorically held that *"a waiting list prepared in an examination conducted by the Commission does not furnish a source of recruitment. It is operative only for the contingency that if any of the selected candidates does not join, then the person from the waiting list may be pushed up and be appointed in the vacancy so caused or if there is some extreme exigency the government may as a matter of policy decision pick up persons in order of merit from the waiting list."*

12. In the case at hand, though there is nothing on record to infer that select/waiting list, if any, was drawn by the respondent-corporation at the time of carrying out selection in terms of advertisement dated 24.6.2016, but otherwise also if the case of the petitioners is accepted, that their names were included in the waiting list, they are not entitled to any relief, as prayed for, because they could only be offered appointment, if any, of the selected candidate had not joined, but in this case, such is not the position. Rather in the case at hand, Board of Directors, in its meeting, took a decision to fill up 146 posts of the driver, which also included 71 backlog posts from remaining candidates, who had qualified for the posts and were amongst 449 candidates. As has been noticed above, since respondent corporation also intended to fill up 71 backlog posts while filling up of 446 posts of drivers, it ought to have issued advertisement and no such selection could be made on the basis of test held pursuant to advertisement dated 24.6.2016. Respondent-corporation after filing of as many as 21 Original Applications including OA Nos. 4256 and 339 of 2016, rightly took a decision in the 138th meeting held on 16.2.2017, to cancel the earlier recruitment process and start afresh two layer recruitment process as per new policy and new roster.

13. Otherwise also, by now it is well settled that a person whose name appears in the select list does not acquire any indefeasible right of appointment. Empanelment at the best is a condition of eligibility for purpose of appointment and by itself does not amount to selection or create a vested right to be appointed.

14. Consequently, in view of the discussion made herein above, this Court sees no illegality and infirmity in the judgment passed by the learned Tribunal, which otherwise is based upon proper appreciation of facts and law and hence the petition fails and dismissed accordingly.

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

Lt. Col. Ran Vijay Singh and another ...Petitioners.

Versus

State of Himachal Pradesh and others ...Respondents.

Cr. MMO No.: 246 of 2017
Reserved on: 27.06.2018
Date of Decision: 12.07.2018

Code of Criminal Procedure, 1973- Section 482- Inherent Powers – Quashing of FIRs and consequent proceedings, when can be ordered – Complainant, an NRI registering two FIRs against petitioners/accused, husband and wife – Petitioner/accused No.1 being nephew of complainant – In first FIR, complainant alleged theft of motor cycles etc. by accused No.1 in 2012 – In second FIR, he alleged that accused forged his GPA and SPA and got electricity connection installed in premises of complainant, transferred in his name - Petitioners alleging false implication by complainant as he wanted to grab entire ancestral property – Held, power to quash FIR and consequent proceedings should be exercised sparingly to prevent abuse of process of Court or to give effect to an order of Court or to secure ends of justice – While doing so, the High Court is not

to appreciate the evidence and its truthfulness or sufficiency – On finding that (i) core dispute was relating to ancestral property which was joint between parties (ii) theft of articles, if any, took place in December, 2012, but no FIR was registered till 2017, (iii) Complainant had executed GPA in favour of accused No.1 to look after the said property on his behalf (iv) cancellation report was filed by Investigating Agency in respect of second FIR – Both the FIRs were held to be abuse of process of Court – And set aside alongwith all consequent proceedings. (Paras-16, 19 and 20)

Cases referred:

State of Haryana and others Vs. Bhajan Lal and others, 1992 Supp (1) Supreme Court Cases 335
State of A.P. Vs. Golconda Linga Swamy and another, (2004) 6 Supreme Court Cases 522
Pratibha Vs. Rameshwari Devi and others, (2007) 12 Supreme Court Cases 369
Vakil Prasad Singh Vs. State of Bihar, (2009) 3 Supreme Court Cases 355
Om Prakash and others Vs. State of Jharkhand through the Secretary, Department of Home, Ranchi 1 and another, (2012) 12 Supreme Court Cases 72
Anup Sarmah Vs. Bhola Nath Sharma and others, (2013) 1 Supreme Court Cases 400
Lokesh Kumar Jain Vs. State of Rajasthan, (2013) 11 Supreme Court Cases 130

For the petitioners:	Mr. Y.P.S. Dhaulta, Advocate.
For the respondents:	M/s Sanjeev Sood & Desh Raj Thakur, Additional Advocate Generals, for respondents No. 1 to 4. Mr. N. S. Chandel, Advocate, for respondent No. 5.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge:

By way of this petition filed under Section 482 of the Code of Criminal Procedure, the petitioners have prayed for the following reliefs:

> *"Keeping in view the above mentioned peculiar facts and circumstances of the present case, therefore, it is respectfully prayed that the present petition may kindly be allowed and the FIR No. 32/2016 dated 06.03.2017 under Sections 379 and 34 IPC and FIR No. 69/2017 dated 03.06.2017 under Sections 420,468,470,471 and 120B IPC registered at Police Station Gagret, District Una, H.P. against the petitioners may kindly be quashed and criminal proceedings pertaining to these FIRs be quashed and set aside, being an inherent power of this Hon'ble Court, in the interest of justice and fair play.*
>
> *Any other order or directions which this Hon'ble Court may deem fit and proper in the peculiar facts and circumstances of the present case may kindly be passed in favour of the petitioners in the interest of justice and fair play."*

2. The case of the petitioners, who are husband and wife, is that a General Power of Attorney as also a Special Power of Attorney were executed in favour of petitioner No. 1 by respondent No. 5, who is his real uncle. As per the petitioners, the attorneys were executed in view of the fact that respondent No. 5 was residing in United States of America and was a Non-Resident Indian (NRI). As per petitioner No. 1, on the strength of said attorneys, he undertook renovation of ancestral property by way of raising loan for the said purpose. Further case of the petitioners is that respondent No. 5 arrived in India on 03.01.2017 and thereafter, with an intent to grab the entire ancestral property, he hatched a conspiracy by way of lodging two FIRs against the petitioners, i.e. FIR No. 32/2017, dated 06.03.2017, under Sections 379 and 34 of the Indian Penal Code and FIR No. 69/2017, dated 03.06.2017, under Sections 420,468,470,471 and 120-B of the Indian Penal Code at Police Station Gagret, District Una. Further as per the petitioners, they always considered respondent No. 5 to be their well wisher and were completely taken back by lodging of said FIRs and after they realized the ill-intentions of respondent No. 5, who

thereafter committed trespass over the property of the petitioners and also destroyed their property, the petitioners also lodged FIR No. 34/2017, dated 08.03.2017 against respondent No. 5, under Sections 448 and 427 of the Indian Penal Code at Police Station Gagret, District Una. According to the petitioners, they had brought to the notice of the authorities concerned that they had been falsely roped in by way of lodging of false FIRs against them by respondent No. 5. Further as per the petitioners, the contents of the FIRs which stand lodged against them by respondent No. 5 demonstrate that not only the said FIRs are time barred, but even otherwise, at the most, the dispute between the petitioners and respondent No. 5 is a civil dispute, which involves the ancestral property of the petitioners and respondent No. 5 and therefore, the said FIRs deserve to be quashed. It is further the case of petitioner No. 1 that he is a serving Indian Army officer and the purpose of registering false FIRs against him is to coerce him which is evident from the fact that even the wife of the petitioner No. 1 has also been falsely implicated in a criminal case.

3. I have heard the learned counsel for the parties and have also perused the FIRs, subject matter of the present petition, as also other documents which stand appended with the same. Records of investigation also stand perused.

4. Before proceeding further, it is pertinent to take note of the fact that taking into consideration the close relationship between petitioners and respondent No. 5, efforts were made by this Court to have the matter amicably settled between the parties by way of mediation, but the same did not yield positive result.

5. Prayer made in the petition is for quashing of two FIRs, therefore, before I proceed further, it is relevant to take note of the contents of the FIRs.

6. It is alleged in FIR No. 32/2017, dated 06.03.2017 that the complainant was a Non-Resident Indian and also a resident of America. As per the complainant, he returned to India alongwith his wife on 3rd January, 2017 after a period of five years. Thereafter, he visited his relatives at Delhi and Palampur. On 05.03.2017, when he reached at Daulatpur, where his house is, he discovered that his one Royal Enfield Motorcycle bearing registration No. HP-19A-7523, one Hero Passion Motorcycle without number, one Air Conditioner of Samsung company and Stabilizer of Voltas company were missing. He was told by Parveen Kumar, Diler Singh, Amit Thakur and Sunil Kanwar that in December, 2012 when the complainant was in America, the accused had committed theft of the above mentioned articles of the complainant and that they were witnesses to the same. According to the complainant, he was told by the above mentioned persons that when they made inquiries from the accused as to why he was taking away the valuables of the complainant, the accused told them that he had purchased the said Motorcycles and he was taking them away to have the same registered in his name. It is further mentioned in the FIR that the fact of theft having been committed by the accused could not be intimated by the witnesses immediately to the complainant, as the witnesses were not having the address etc. of the complainant. It is further mentioned in the same by the complainant that he had also come to know that the accused had committed other frauds with his relatives as also with the complainant and therefore, action be taken against the accused.

7. Similarly, in FIR No. 69/2017 dated 03.06.2017, it is mentioned that the complainant was a Green Card holder of United States of America and was a Non-resident Indian. It is further mentioned in the FIR that his wife Debrah Lynn Kanwar was a permanent resident of United States of America. Complainant had constructed his house in Ward No. 7 at Daulatpur Chowk, Tehsil Ghanari, District Una and had also installed an electric meter from the Himachal Pradesh State Electricity Board in the garage of his house. As per the complainant, he was exclusive owner of a *pakki* constructed lintel posh *abadi* alongwith garage of vehicles. Further as per the complainant, he returned to India alongwith his wife on 3rd January, 2017 after a period of five years. Thereafter, he visited his relatives at Delhi and Palampur. On 05.03.2017, when he reached at Daulatpur, where his house is, he discovered that the accused in conspiracy with each other and without the consent of the complainant, had dishonestly deceived and cheated the complainant and got the electricity meter of the garage transferred in the name of accused No. 1

and they had also prepared forged documents in the absence of the complainant with intention to transfer the electricity meter of the complainant in the name of accused No. 1. According to the complainant, he applied for information under the Right to Information Act and after receiving the same, he was shocked to see the documents which were produced by accused No. 1 in conspiracy with accused No. 2, i.e., wife of accused No. 1 for transfer of the said meter, taking advantage of the fact that the complainant and his wife were out of India from 2012 to 2016. As per the complainant, to get the meter transferred in his name, the accused has forged an affidavit of the complainant dated 18.10.2016 by forging the signatures of the complainant. In these circumstances, it stands mentioned in the FIR that an appropriate action be taken against the accused for commission of offences punishable under Sections 420, 468, 470, 471 and 120-B of the Indian Penal Code.

8. Before proceeding further, it is relevant to take into consideration the judgments of the Hon'ble Supreme Court, wherein the principles and the parameters stand laid down with regard to exercise of inherent powers so conferred upon the High Court under Section 482 of the Code of Criminal Procedure, more so, in the matters pertaining to quashing of FIRs.

9. Hon'ble Supreme Court in ***State of Haryana and others*** Vs. ***Bhajan Lal and others***, 1992 Supp (1) Supreme Court Cases 335 has held as under:

> *"102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extra-ordinary power under Article 226 or the inherent powers Under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any Court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.*
>
> *1. Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima-facie constitute any offence or make out a case against the accused.*
>
> *2. Where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers Under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.*
>
> *3. Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.*
>
> *4. Where, the allegations in the F.I.R. do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated Under Section 155(2) of the Code.*
>
> *5. Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.*
>
> *6. Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.*
>
> *7. Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking*

vengeance on the accused and with a view to spite him due to private and personal grudge.

103. We also give a note of caution to the effect that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases; that the Court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the F.I.R. or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the Court to act according to its whim or caprice."

10. Hon'ble Supreme Court in **State of A.P.** Vs. **Golconda Linga Swamy and another**, (2004) 6 Supreme Court Cases 522 has held as under:

"5. Exercise of power under Section 482 of the Code in a case of this nature is the exception and not the rule. The Section does not confer any new powers on the High Court. It only saves the inherent power which the Court possessed before the enactment of the Code. It envisages three circumstances under which the inherent jurisdiction may be exercised, namely, (i) to give effect to an order under the Code, (ii) to prevent abuse of the process of court, and (iii) to otherwise secure the ends of justice. It is neither possible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction. No legislative enactment dealing with procedure can provide for all cases that may possibly arise. Courts, therefore, have inherent powers apart from express provisions of law which are necessary for proper discharge of functions and duties imposed upon them by law. That is the doctrine which finds expression in the Section which merely recognizes and preserves inherent powers of the High Courts. All courts, whether civil or criminal possess, in the absence of any express provision, as inherent in their constitution, all such powers as are necessary to do the right and to undo a wrong in course of administration of justice on the principle quando lex aliquid alique concedit, conceditur et id sine quo res ipsa esse non potest (when the law gives a person anything it gives him that without which it cannot exist). While exercising powers under the Section, the Court does not function as a court of appeal or revision. Inherent jurisdiction under the Section though wide has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the Section itself. It is to be exercised ex debito justitiae to do real and substantial justice for the administration of which alone courts exist. Authority of the court exists for advancement of justice and if any attempt is made to abuse that authority so as to produce injustice, the court has power to prevent such abuse. It would be an abuse of process of the court to allow any action which would result in injustice and prevent promotion of justice. In exercises of the powers court would be justified to quash any proceeding if it finds that initiation or continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice. When no offence is disclosed by the complaint, the court may examine the question of fact. When a complaint is sought to be quashed, it is permissible to look into the materials to assess what the complainant has alleged and whether any offence is made out even if the allegations are accepted in toto."

11. The Hon'ble Supreme Court in **Pratibha** Vs. **Rameshwari Devi and others**, (2007) 12 Supreme Court Cases 369 has held as under:

"12. From the principles laid down in the abovementioned decisions, it is clear that the Court is entitled to exercise its inherent jurisdiction for quashing a criminal proceeding or an FIR when the allegations made in the same do not disclose the commission of an offence and that it depends upon the facts and circumstances of each particular case. We also feel it just and proper to refer to a

leading decision of this court reported in State of Haryana Vs. Bhajan Lal [1992 Suppl. {1} SCC 335] in which this court pointed out certain category of cases by way of illustrations wherein the inherent power under Section 482 of the Code can be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice. The same are as follows :-

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers unde Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with malafide 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.

16. It is pertinent to note that the complaint was filed only when all efforts to return to the matrimonial home had failed and the respondent No.2-husband had filed a divorce petition under Section 13 of the Hindu Marriage Act, 1955. That apart, in our view, filing of a divorce petition in a Civil Court cannot be a ground to quash criminal proceedings under Section 482 of the Code as it is well settled that criminal and civil proceedings are separate and independent and the pendency of a civil proceeding cannot bring to an end a criminal proceeding even if they arise out of the same set of facts. Such being the position, we are, therefore, of the view that the High Court while exercising its powers under Section 482 of the Code has gone beyond the allegations made in the FIR and has acted in excess of its jurisdiction and, therefore, the High Court was not justified in quashing the FIR by going beyond the allegations made in the FIR or by relying on extraneous considerations."

12. The Hon'ble Supreme Court in ***Vakil Prasad Singh*** Vs. ***State of Bihar***, (2009) 3 Supreme Court Cases 355 has held as under:

"14. Before adverting to the core issue, viz. whether under the given circumstances the appellant was entitled to approach the High Court for getting the entire criminal proceedings against him quashed, it would be appropriate to notice the circumstances and the parameters enunciated and reiterated by this Court in a series of decisions under which the High Court can exercise its inherent

powers under Sections 482 Cr.P.C. to prevent abuse of process of any Court or otherwise to secure the ends of justice.

15. The power possessed by the High Court under the said provision is undoubtedly very wide but it has to be exercised in appropriate cases, ex debito justitiae to do real and substantial justice for the administration of which alone the courts exist. The inherent powers do not confer an arbitrary jurisdiction on the High Court to act according to whim or caprice. It is trite to state that the said powers have to be exercised sparingly and with circumspection only where the court is convinced, on the basis of material on record, that allowing the proceedings to continue would be an abuse of the process of the court or that the ends of justice require that the proceedings ought to be quashed. [See: Kurukshetra University & Anr. Vs. State of Haryana & Anr.1, Janata Dal Vs. H.S. Chowdhary & Ors.2, and State of Haryana & Ors. Vs. Bhajan Lal & Ors."

13. The Hon'ble Supreme Court in ***Om Prakash and others*** Vs. ***State of Jharkhand through the Secretary, Department of Home, Ranchi 1 and another***, (2012) 12 Supreme Court Cases 72 has held as under:

"43. In our considered opinion, in view of the facts which we have discussed hereinabove, no inference can be drawn in this case that the police action is indefensible or vindictive or that the police were not acting in discharge of their official duty. In Zandu Pharmaceutical Works Limited, this Court has held that the power under Section 482 of the Code should be used sparingly and with circumspection to prevent abuse of process of court but not to stifle legitimate prosecution. There can be no two opinions on this, but, if it appears to the trained judicial mind that continuation of a prosecution would lead to abuse of process of court, the power under Section 482 of the Code must be exercised and proceedings must be quashed. Indeed, the instant case is one of such cases where the proceedings initiated against the police personnel need to be quashed. In the circumstances, we dismiss the appeal filed by the complainant Kailashpati Singh. We allow the appeal filed by Om Prakash, Pradeep Kumar, Shyam Bihari Singh and Bharat Shukla and set aside the impugned order to the extent it dismisses Cr.M.P.No.822 of 2005 filed by them for quashing order dated 14/06/2005 passed by Judicial Magistrate, 1st Class, Jamshedpur, in Complaint Case No.731 of 2004 issuing process against them. We quash Complaint Case No. 731 of 2004 pending on the file of Judicial Magistrate, 1st Class, Jamshedpur."

14. The Hon'ble Supreme Court in **Anup Sarmah** Vs. **Bhola Nath Sharma and others**, (2013) 1 Supreme Court Cases 400 has held as under:

"4. In Sardar Trilok Singh v. Satya Deo Tripathi AIR 1979 SC 850 this Court examined a similar case wherein the truck had been taken in possession by the financier in terms of hire-purchase agreement, as there was a default in making the payment of instalments. A criminal case had been lodged against the financier under Sections 395, 468, 465, 471, 120-b/34 IPC. The Court refused to exercise its power under Section 482 Cr.PC and did not quash the criminal proceedings on the ground that the financier had committed an offence. However, reversing the said judgment, this Court held that proceedings initiated were clearly an abuse of process of the court. The dispute involved was purely of civil nature, even if the allegations made by the complainant were substantially correct. Under the hire-purchase agreement, the financier had made the payment of huge money and he was in fact the owner of the vehicle. The terms and conditions incorporated in the agreement gave rise in case of dispute only to civil rights and in such a case, the civil court must decide as to what was the meaning of those terms and conditions."

15. The Hon'ble Supreme Court in ***Lokesh Kumar Jain*** Vs. ***State of Rajasthan***, (2013) 11 Supreme Court Cases 130 has held as under:

> *"25. Having regard to the factual scenario, noted above, and for the reasons stated below, we are of the opinion that the present case of the appellant is one of the fit cases where the High Court should have exercised its power under Section 482 Cr.PC. It is not disputed by the respondent that the departmental proceeding was initiated against the appellant with regard to identical charges made in the FIR. It was alleged that as per CAG Inquiry Report dated 15th December, 2008 Rs.4,39,617/- has been misappropriated by the appellant, all the copies of original bills and documents are available in the office of CAG and the original documents are available in the office of the Directorate, State Literacy Programme."*

16. A perusal of the law so declared by Hon'ble Supreme Court categorically and clearly lays down that the powers of quashing criminal proceedings should be exercised very sparingly depending upon the peculiar facts of the case. Hon'ble Supreme court has further held that while exercising inherent jurisdiction under Section 482 of the Code of Criminal Procedure, it is not for the High court to appreciate the evidence and its truthfulness or sufficiency inasmuch as it is the function of the trial Court. Hon'ble Supreme court has further laid down that if it appears to the trained judicial mind that continuation of a prosecution would lead to abuse of process of Court, the power under Section 482 of the Code of Criminal Procedure must be exercised and proceedings must be quashed. However, there is a caution which has been so reiterated on more than one occasions by the Hon'ble Supreme court and the same is to the effect that the said power has to be exercised by the High Court very sparingly and with circumspection and also in the rarest of rare cases. Hon'ble Supreme Court has further held that this inherent jurisdiction has to be exercised: (a) to give effect to an order under the Code; (b) to prevent abuse of the process of Court; and (c) to otherwise secure the ends of justice. It has also held that it is neither possible nor desirable to lay down any flexible rule which would govern the exercise of inherent jurisdiction.

17. Now, coming to the facts of the present case, it is not in dispute that the accused and the complainant are closely related to each other. In fact, petitioner No. 1 Ran Vijay Singh is the nephew of the complainant, whereas petitioner No. 2 is the wife of petitioner No. 1. It is also not in dispute that the complainant came back to India in January 2017 after more than five years. A General Power of Attorney having been executed in favour of petitioner No. 1 by the complainant dated 12.08.2011 is also not in dispute. By way of a General Power of Attorney (Annexure P-1 with the petition), the complainant had authorized the petitioner No. 1 to look after and manage the share of the complainant in the immovable property so mentioned in the General Power of Attorney, which was jointly owned and possessed both by the complainant as well as by petitioner No. 1. Acts which had been permitted by the complainant to be performed by accused No. 1 as his Attorney are as under:

> *"1. To look after and manage our share in the immovable property mentioned above.*
>
> *2. To deal with any of our court cases and to file any court case or appeal on our behalf in any competent Court and execute any document required in this connection, to engage or appoint any lawyer or advocate or legal practitioner in this case.*
>
> *3. To apply for any loan from any bank/deptt. and mortgage our share in the property for the purpose of loan mentioned above and to make statement, produce evidence oral and documentary.*
>
> *4. To enter into any correspondence/deed with any respective authority as deemed necessary in this connection."*

18. It is also a matter of record that certain FIRs have been lodged by the petitioner also against the private respondents.

19. Having heard learned counsel for the parties and having perused the contents of the documents appended with the petition, it is evident and apparent that the bone of contention

between the parties is ancestral property. As far as first FIR (FIR No. 32/2017) is concerned, the allegations contained in the same are to the effect that the accused has committed theft of two Motorcycles, one air conditioner and a stabilizer, value of which, as per the complainant is about two lakhs. In the second FIR (FIR No. 69/2017), the allegation is that forgery has been committed by the accused therein in having an electricity meter, which was alloted by the Himachal Pradesh State Electricity Board in favour of the complainant by having the same fraudulently transferred on the basis of forged documents in the name of the accused. The alleged theft, which was committed by the accused as per the first FIR, was committed even as per the complainant in December 2012. The allegation is based against the accused on the basis of information so provided to the complainant by persons named in the FIR, who allegedly saw accused committing the theft in December, 2012. Allegation with regard to electricity meter is that documents were forged for having the same transferred in the name of the accused. It is apparent from the other documents appended alongwith the petition by the present petitioners that he has taken up the matter with the authorities concerned that the FIRs in issue have been falsely registered as the intent of the complainant therein is to grab the property in issue, which is the ancestral property. Now, though it is mentioned in the FIR by the complainant that the property, electricity meter installed wherein was got fraudulently transferred by the accused in his name was owned and possessed by the complainant, but documents demonstrate that the property in issue is joint property. Besides this, complainant had executed a General Power of Attorney in favour of petitioner No. 1 authorizing him to look after the said property also on behalf of the complainant. As already mentioned hereinabove, the first FIR pertains to the alleged acts, which took place in December 2012. The explanation which has been given in the FIR itself as to why the factum of the alleged offence being committed by petitioner No. 1 could not be brought to the notice of the complainant by the alleged eye witnesses, does not inspires confidence. On the other hand, it appears to be a version which has been concocted to justify that as far as the complainant is concerned, on his behalf there is no delay in lodging complaint/FIR. Records of the case, which stand perused, demonstrate that as far as the other FIR is concerned, i.e., FIR No. 69/2017, dated 03.06.2017**,** post investigation, the police has prepared a cancellation report.

20. Be that as it may, in my considered view, lodging of both the said FIRs is nothing but an abuse of the process of Court and if the allegations made in the FIRs are taken at their face value also, they *prima facie* do not constitute any offence nor do they make out a case against the accused in the peculiar facts and circumstances of this case. Lodging of the FIRs appears to be a motivated act on account of the dispute which is between the complainant and petitioner No. 1 pertaining to the ancestral property. Unlike the contentions so made on behalf of the complainant, record demonstrates that the property which is the bone of contention between the complainant and petitioner No. 1, is ancestral property and not a property which can be termed to be exclusively owned and possessed by the complainant. This Court is not oblivious to the fact that the scope of inherent jurisdiction so vested in this Court under Section 482 of the Code of Criminal Procedure Code is narrow, yet this Court has to perform its duty even by invoking the inherent power so vested in it when in the opinion of the Court, the same is necessary to prevent the abuse of the process of Court and also to secure the ends of justice. In the peculiar facts and circumstances of this case, in my considered view, it is a fit case where this Court has to exercise its inherent jurisdiction to prevent the abuse of process of Court and secure the ends of justice.

21. Accordingly, this petition is allowed. FIR No. 32/2017 dated 06.03.2017 under Sections 379 and 34 IPC and FIR No. 69/2017 dated 03.06.2017 under Sections 420,468,470,471 and 120B IPC, registered at Police Station Gagret, District Una, H.P., are quashed and set aside.

Petition stands disposed of, so also miscellaneous applications, if any.

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

State of H.P. .....Petitioner.
Versus
Randhir Singh & Another .....Respondents.

Cr. Rev. No. 113 of 2017.
Decided on: 12th July, 2018

Code of Criminal Procedure, 1973- Section 397/401 – Revision – Maintainability – State filing a composite petition challenging order of Trial Court dated 17.9.2016 vide which prosecution evidence was closed and also order dated 15.3.2017 acquitting accused of offence under Section 109 of I.P.C. – Held, Revision against order dated 17.9.2016 was time barred and even no condonation of delay in filing petition was sought – Whereas remedy against judgment of acquittal dated 15.3.2017 was by way of appeal and not in filing revision – Petition dismissed.

(Paras- 4 & 5)

For the Petitioner: Mr. Narinder Guleria Addl. A.G. with Mr. R.P. Singh,Dy. A.Gs.
For the respondents: Ms. Anjali Soni Verma, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. (oral).

In this revision petition, order dated 17.9.2016 whereby, on failure of the petitioner-prosecution to produce PW-13 Dr. Rahul Gupta, despite last opportunity granted, its evidence stands closed and order dated 15.3.2017, whereby accused-respondent No.2 herein has been acquitted of the charge under Section 109 IPC framed against her are under challenge. The allegations against respondent No.2 are that on 15.2.2014, she has instigated her brother Randhir Singh, the principal accused to quarrel and beat his wife deceased Seema Devi and as a result thereof her co-accused administered beatings to his wife, who ultimately died thereby. She allegedly abetted the commission of murder of deceased Seema Devi by her co-accused.

2. After hearing the parties on both sides at length on 22.11.2017, the following order came to be passed:

> "Heard for some time. The challenge to the impugned order passed on 17.09.2016 is on the grounds inter-alia that PW-13 Dr. Rahul Gupta was served through e-mail. The ground so raised in the petition, however, seems to be not correct because the zemini order dated 31.08.2016 reveals that the said witness was reported to be served for that day allegedly through e-mail. Learned trial Judge has rightly observed that he was actually served or not was not clear from the report made on the summon. It is for this reason, last opportunity was granted to the prosecution to serve PW-13 Dr. Rahul Gupta through special messenger for the next date i.e., 17.09.2016, the day when the impugned order was passed. The report made by the Alhmad in the margin of the order sheet reveals that consequent upon order dated 31.8.2016, the summons to PW-13 were issued on 2nd September, 2016. It was for the petitioner-prosecution to have clarified that the summons so issued to the said witness were actually collected and special messenger deputed to effect service thereof upon the witness concerned. On the other hand, as recorded by learned trial Judge in the impugned order, the summons ordered to be issued to the said witness were not returned to the Court. In case the summons were collected and the special messenger deputed, entries to this effect should have been made in the rapat

rojnamcha. Learned Additional Advocate General seeks time for clarification in this regard. Allowed. List on 13th December, 2017."

3. In compliance to the orders ibid, the petitioner-State has filed the affidavit of the then Superintendent of Police Kangra at Dharamshala. On perusal of the same, the following orders came to be passed on 13.12.2017:

"Affidavit in compliance to the order passed on the previous date, reveals that PW-13 Dr. Rahul Gupta could not be served for the date fixed, i.e. 17.09.2016 and the concerned Police Station has handed over the Summons to the Naib Court for placing the same on the record of the case. This aspect finds corroboration from the record annexed to the supplementary affidavit. The witness, as such, was unserved for the date fixed. In these circumstances, the order dated 17.09.2016, under challenge in this petition, could have been passed or not, is a matter which needs further consideration.

Learned counsel representing the respondent-accused, has raised a legal question that the petition so far as the impugned order dated 17.09.2016 is concerned, is time barred and in case it is the case of the petitioner-State that the revision petition is preferred against the subsequent order dated 15.03.2017, in that event, also the same could have not been assailed by impleading Kamlesh Kumari, co-accused, in the case who has been ordered to be discharged thereby. Learned Additional Advocate General, on being confronted with such a situation, prays for and is granted two weeks time to address this Court on this aspect of the matter. List for the purpose on 29th December, 2017."

4. The revision against the order whereby the evidence of the petitioner-prosecution has been closed, is admittedly time barred. There being no application filed for seeking condonation of delay, this petition to that extent is dismissed.

5. As regards the order of acquittal dated 15.3.2017, the same has been passed at a stage when the trial against the respondents-accused was fixed after the prosecution evidence was over for consideration, in terms of the provisions contained under Section 232 of the Code of Criminal Procedure. Learned trial Court on appreciation of the evidence produced by the prosecution has concluded that nothing tangible, suggesting the involvement of the respondent-accused in the commission of the offence, has come on record. There being no incrementing circumstance appearing against her in the prosecution evidence, she has been acquitted of the charge. Against the order of acquittal revision is not maintainable and rather the petitioner-State, if so advised, may have challenged the same by filing the appeal. Therefore, this petition is wholly misconceived and is accordingly dismissed. The interim order passed on 23.5.2015 stands vacated.

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

Sunil Kumar ....Petitioner.

Versus

Dina Nath and others. ....Respondents.

CMPMO No. 430 of 2017
Decided on: 12.7.2018

Code of Civil Procedure, 1908- Section 151- Order 1 Rule 10- Impleadment of party – When can be made? – Plaintiffs 'S' and 'A' filed suit against defendants – During pendency, 'A' withdrew from suit – 'S' then filing application before Trial Court for impleading 'A' as proforma defendant – Trial

Court rejecting this application of 'S' – Petition against – 'S' arguing before High Court that if 'A' is not permitted to be impleaded as defendant, his suit would be rendered defective – Held, when 'S' choose to implead 'A' only as a proforma defendant against whom no relief is claimed then suit cannot be said to be fatal for sole plaintiff 'S' on account of non-impleadment of 'A' as a proforma defendant – Petition dismissed – Order of Trial Court upheld. (Para-4)

For the petitioner.	Mr. Dheeraj K. Vashisht, Advocate.
For respondents	Mr. Vive Singh Attri, Advocate forrespondents No.21 to 23.
	Mr. Ajay Sharma, Advocate forrespondent No.24.
	None for remaining respondents.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.*(Oral)*

By way of this petition, the petitioner herein has laid challenge to order dated 16.8.2017 passed by the learned trial court on an application filed before it by the present petitioner under Order 1 Rule 10 read with Section 151 of CPC, whereby the request of the present petitioner to implead one Ajay Kumar, who earlier was plaintiff in the suit along with petitioner as defendant in the suit stands rejected.

2. Undisputed facts are that a suit stands filed against the present respondents/defendants in the Court of learned Senior Civil Judge Court No1, Una by the present petitioner, in which Ajay Kumar also was a plaintiff. Subsequently, on an application so filed by Ajay Kumar, he was permitted to withdraw as plaintiff from the suit. Following this order, present petitioner filed an application under Order 1 Rule 10 of CPC, praying therein that in view of the subsequent developments as Ajay Kumar had colluded with the defendants, therefore, he was a necessary party and he be impleaded as a proforma defendant. This prayer of the present petitioner has been rejected by the learned trial court, vide impugned order dated 16.8.2017.

3. I have heard learned counsel for the petitioner as also learned counsel for the respondents.

4. In my considered view, there is no infirmity with the order passed by the learned trial court, whereby it has not found merit that the application so filed by the present petitioner for impleading Ajay Kumar as defendant. This is for the reason that the suit originally filed though was on behalf of two plaintiffs, but yet relief sought therein was against the persons who were impleaded as defendants therein and in my considered view even if Ajay Kumar has chosen not to pursue the present suit, yet petitioner Sunil Kumar who now is the sole plaintiff in the suit has the right to continue with his suit which so stands filed against the defendants and learned trial court is bound to decide the same on merit. The apprehension of the petitioner that non impleadment of Ajay Kumar as a party defendant would render the plaint as defective, in my considered view is misconceived for the simple reason that he did choose to array Ajay Kumar as a party proforma defendant and since his application in this regard stands rejected by the learned trial court and rightly so, therefore, the factum of Ajay Kumar not being there as a proforma defendant by no stretch of imagination can be said to be fatal for the sole plaintiff.

In view of above observation, as there is no merit in the petition, as the petition of the petitioner is misconceived, the petition is dismissed in above terms, so also pending miscellaneous applications, if any.

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

United India Insurance Company Ltd. .....Appellant.
Versus
Smt. Vidya Devi & ors. .....Respondents.

FAO No. 324 of 2018.
Date of decision: July 12, 2018.

Motor Vehicles Act, 1988- Section 140- No fault liability – Claims Tribunal directing Insurance Company to pay compensation towards no fault liability – Appeal against – Insurance Company assailing liability on ground that accident took place at 1:00 P.M., whereas, policy was effective from 3:30 P.M. – Question of liability left open with liberty to Insurer to agitate it at appropriate stage in claim petition – Appeal disposed of. (Paras-2 to 4)

For the appellant Mr. Ashwani K. Sharma, Senior Advocate with Mr. Jeevan Kumar, Advocate.
For the respondents Nemo.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. ***(Oral)***

Heard.

2. The complaint is that the accident had occurred at 1.00 p.m., i.e., well before the issuance of the Insurance Policy, which allegedly became effective on the date of accident at 3.30 p.m.

3. Therefore, according to Mr. Ashwani Sharma, learned arguing counsel, the appellant-Insurance Company is not liable to pay a sum of Rs.50,000/- to the respondents-claimants towards 'No Fault Liability'. The point so urged in this appeal is left open to be considered at an appropriate stage in the Claim Petition, however, at this stage, it is clarified that deposit of Rs.50,000/- under 'No Fault Liability' by the appellant-Insurer shall abide by the final decision in the Claim Petition. A sum of Rs.25,000/- lying deposited in the Registry be remitted to the Motor Accident Claims Tribunal below for appropriation in accordance with law.

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

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

Anita Kumari .....Petitioner.
Versus
State of H.P. & others ....Respondents.

CWP No. 5843 of 2011.
Reserved on : 6th July, 2018.
Decided on : 13th July, 2018.

Constitution of India, 1950- Articles 14 and 16- Appointment of lecturer on PTA basis – Petitioner challenging appointment of private respondent (R5) as lecturer in History on PTA basis as being contrary to prevailing norms – Petitioner assailing appointment on grounds inter alia (i) R5 was given extra marks for holding NSS certificate, (ii) No such marks were given to petitioner,

(iii) R5 was given marks for teaching experience though she had taught political science, whereas appointment was for lecturer in History – Held ; (i) Prevalent norms provided for extra marks for co-curricular activities and grant of marks for NSS Certificate was justified, (ii) In absence of allegation of malafides, it is not believeable that Selection Committee refused to award marks to petitioner despite production of NSS certificate by her (iii) Pharse 'Teaching Experience' being unamenable to any restricted and trammeled significance only appertaining to teaching experience in a subject against which selection is desired – Petition dismissed. (Paras- 1 to 5)

For the Petitioner:	Mr. Sanjeev Bhushan, Sr. Advocate with Ms. Abhilasha Kaunadal, Advocate.
For Respondent No.1 & 2:	Mr. Hemant Vaid, Addl. A.G. with Mr. Vikrant Chand and Mr. Y.S. Thakur, Dy. A.Gs.
For Respondent No.3:	Nemo.
For Respondent No.4:	Mr. Lovneesh Kawnwar, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

Through, the instant petition, the petitioner challenges the appointment of respondent No.4, to, the post, of, Lecturer, History on PTA basis, in, Government Senior Secondary School, Harsar, Tehsil Jawali, District Kangra, H.P. She also seeks quashing of Annexure P-4, Succinctly, the challenge, as, cast by the petitioner, vis-a-vis, the selection of respondent No.4, to the post concerned, is, squarely embedded upon the contesting respondent, beyond the domain, of, the then in vogue criteria, vis-a-vis, meteing of marks to the aspirants, rather proceeding hence to include in the apposite score sheet, a, column appertaining, to extra curricular activities, (i) and, further awarding of marks to respondent No.4, on anvil, of his holding, a, NSS certificate, also concomitantly, being beyond the domain, of the apposite the then existing criteria, (ii) hence, the apposite meteing of marks, vis-a-vis, respondent No.4, on anvill of his holding, a, NSS certificate being both arbitrary, and, unreasonable, hence, the awardings, of, apposite marks in respect thereof, rather warranting subtraction, from, his total score.

2. However, the aforesaid contention is unamenable to acceptance, (i) as, a perusal of the records, appertaining, to, the ordained the then, in, vogue criteria, does make an apparent display of in the viva voce 15, points being earmarked, for, awardings by the expert, and, five marks being, earmarked for apt awardings, vis-a-vis, CCA, (ii) parlance whereof, is, none other, than, of, it appertaining, to co-curricular activities, hence, even if the coinage "co-curricular activities", was, substituted, by coinage "extra curricular activities", in the apposite score sheet, yet rather both visibly hence carry, a, similar parlance. (iii) In aftermath, the awarding of marks, vis-a-vis, respondent No.4, for his holding, a, NSS certificate, apparently, a, co-curricular activity, is not beyond the domain, of, the then ordained criteria.

3. Be that as it may, the learned counsel appearing, for the petitioner has contended, (a) that even when the petitioner alike respondent No.4, held, a, NSS certificate, besides, despite, its being produced, before, the apposite committee, yet its not being taken into consideration, by the committee, nor marks being awarded to her, (b) hence, he further contends that in respect thereto, she has been discriminated. However, the aforesaid contention, though anvilled upon apposite therewith pleading, cast, in paragraph No.4, of the petition, apt portion whereof reads as under:

> "4. .....despite petitioner producing a certificate of National Service Scheme (NSS), such marks were not awarded to her. Though, on the other hand, additnal five marks were awarded to respondent No.4, for producing the similar certificate...."

(i) Yet an incisive reading thereof, does not, with specificity delineate, the factum qua one amongst the members, of the selection committee, before whom the apt NSS certificate, even if produced, rather, hence with his rearing, evidently proven malafides, against the petitioner, therepon, his refusing to accept, the apt NSS certificate, and, also hence his refusing to award marks, in, respect thereof to the petitioner. Absence of the aforesaid specific pleadings, vis-a-vis, any specific apposite member, of the committee, and, also hence absence, of, proven allegations of malafide(s) against him, whereupon, he stood prodded, despite tendering(s), of, the NSS certificate, hence not accept it, and, also refused to award marks thereon, vis-a-vis the petitioner, does constrain, this Court to conclude, that, the aforesaid apposite averments, cast in the petition being surmisal, and, being not amenable, for, their vindication.

4. Furthermore, the counsel for the petitioner, has contended, that with the selection being made, to the post of Lecturer in History, yet with Selection Committee concerned, acknowledging the previous teaching, by respondent No.4, in the subject of political science, and, also purportedly awarding marks in respect thereof qua him, is, grossly improper, (a) given, the awarding of marks, vis-a-vis, teaching experience, imperatively, requiring an apt nexus rather emerging inter se the apt previous experience, vis-a-vis, the subject, whereagainst, the selection is made. However, the aforesaid submission as addressed by the learned counsel, appearing for the petitioner, is, rejected, (b) given, the phrase "teaching experience" being unamenable, to, any restricted, and trammeled signification qua it, only appertaining, vis-a-vis, teaching experience in a subject alike the one, whereagainst, the selection is desired, (c) AND, it not appertaining, vis-a-vis, teachings, in, any other subject, (d) more so when there, are, no specific reflections, borne, in the apposite advertisement, qua the aspirants being enjoined, to, hold teaching experience(s), only, in the subject concerned. Moreover, the apposite selection committee, also consists of a subject expert, and, he is solitarily bestowed, with, the apt empowerments, for, adjudging the knowledge, of, the aspirants, and, his subjective assessment, is, unamenable, for being faulted, unless allegations, of, apt malafides, are reared and are also proven. However, want thereof, renders the, awarding 10 marks, to each of the aspirants i.e. to the petitioner, and, to respondent No.4, vis-a-vis, their knowledge and experience in the subject concerned, hence, cannot be faulted, especially when he is solitarily bestowed, with the apt expertise, for adjudging, their, apt knowledge in the apt subject, and, teaching experience, in any subject dissimilar, to the advertised part, is, only supplemental thereto.

5. 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 SURESHWAR THAKUR, J.

Besar Singh & others ....Appellants/defendants.
Versus
Ramesh Chand & another .....Respondents/Plaintiffs.

RSA No. 553 of 2009.
Reserved on : 6th July, 2018.
Decided on : 13th July, 2018.

Specific Relief Act, 1963- Sections 5 and 38- Suit for possession and injunction – Trial Court granting decree of permanent prohibitory injunction with respect to part of suit land, and of vacant possession by demolition of construction of defendants with respect to remaining land, after denying plea of adverse possession of defendants – Appeal of defendants dismissed by First Appellate Court – RSA – On facts, High Court found that some land was granted to defendants predecessor-in-interest as 'Nautor' adjoining to suit land in 1969 - Exact locations and dimensions of such land are not depicted in 'patta' – Nor does grant shows that suit land was part

of such land allotted to defendants' predecessor – Held, it cannot be held that defendants were possessing part of suit land since 1969 adversely to 'K', the predecessor of plaintiff – Adverse possession over part of suit land not proved - RSA dismissed. (Paras-9 to 14)

For the Appellants:	Mr. Ajay Kumar, Sr. Advocate with Mr. Dheeraj K. Vashishat, Advocate.
For Respondents:	Mr. Bhupender Gupta, Senior Advocate with Mr. Neeraj Gupta, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

Both the learned Courts below under concurrently recorded pronouncement, upon, Civil Suit No. 108 of 2000, hence decreed the plaintiffs' sit for injunction, vis-a-vis, Khasra No. 1440/1337 and also concurrently decreed the plaintiffs' suit for vacant possession in respect to Khasra Nos. 1440/1337/1 and 1440/1337/2, respectively measuring 0-0-17 and 0-1-15 Bigha, and, also thereafter making pronouncement for demolition o the structure raised thereon. Moreover, both the learned Courts below dismissed, the defendants' counter claim, whereunder, they espoused qua theirs becoming owners of the suit land by way of adverse possession. Being aggrieved, therefrom, the defendants/counter claimants have instituted the instant appeal before this Court.

2. Briefly stated the facts of the case are that the the plaintiffs have filed a suit for injunction against the defendants with the averments that the plaintiffs are owners in possession of the suit property, measuring 0-4-14 bighas and land measuring 1-6-0 bighas, comprising Khasra No. 1440/1337 and 1338 min/1339 min along with house situate at Mauja Passal/6, Tehsil Jogindernagar, District Mandi, H.P. The plaintiffs have purchased the suit land from Smt. Kaushlya Devi by way of sale deeds dated 9.5.2000 for a sum of Rs.80,000/- and Rs.3,40,000/- respectively. The defendants intended to purchase the suit land and on account of sale, they got annoyed and started interference in the possession of the plaintiffs over the suit land. So, the plaintiffs brought a suit for permanent injunction restraining the defendants from interfering in the possession of the plaintiffs over the suit land along with decree for possession, in the alternative. The plaintiffs, by way of amendment have claimed possession of land measuring 0-0-17 bighas compromising Khasra No.1440/1337/1 and land measuring 0-1-15 bighas comprising Khasra No. 1440/1337/2 on which the defendants have trespassed after filing the suit.

3. The defendants contested the suit and filed written statement, wherein, they have taken preliminary objections, inter alia, jurisdiction and malafide intention. On merits, it is averred that the plaintiffs were not in possession of the suit land. The defendants were in possession of the land measuring 0-2-12 bigha, comrpising Khasra No. 1440/1337/1 and 1440/1337/2. The defendants had been in possession of the suit land since 1969. The defendants had raised pucca structure with fence over the suit land. The possession of the defendants over the suit land was peaceful, open, continuous and hostile. The defendants have acquired title over the suit land.

4. The defendants have filed counter claim with the averments that are owner in possession of the suit land. The plaintiffs filed written statement to the counter claim and raised preliminary objection about maintainability, locus standi, cause of action and estoppel. On merits, it is averred that the father of defendant No.1 or defendants were never in possession of the suit land. The suit land is in possession of the plaintiffs by virtue of sale deed dated 9.5.2000 executed by one Smt. Kaushlya Devi in their favour.

5. The plaintiff filed replication to the written statement of the defendant(s), wherein, he denied the contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

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

1. Whether the plaintiffs are entitled to the relief of injunction as prayed for? OPP

1(a) Whether the defendants have occupied part of the suit land during the pendency of the suit?OPP.

1(b) If Issue No.1 is answered in the affirmative, whether the plaintiffs are entitled to the possession of the suit land?OPP

1(c) Whether this Court has no pecuniary jurisdiction to hear and try the present suit?OPD.

2. Whether the defendants NO.1 to 6 have become owner by way of adverse possession upon Khasra Nos. 1440/1337/1 and 1440/1337/2 as alleged for last 31 years?OPD.

3. Whether the counter claim is not maintainable as alleged?OPD.

4. Whether the defendants have no locus standi and cause of action to file counter claim?OPD.

5. Whether the plaintiffs are estopped by their act and conduct to file the suit?OPD.

6. Relief.

7. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the plaintiffs/respondents herein, whereas, it dismissed the counter-claim of the defendants. 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.

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 5.03.2010, admitted the appeal instituted by the defendants/appellants against the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

(a) Whether the findings of the Ld. First Appellate Court and the ld. Trial Court are a result of complete misreading of pleadings, evidence and the law as applicable to the facts of the case and particularly document exhibits DW2/A to Ex.DW2/E as also Exhibit Dx and DY and as such palpably erroneous and illegal and if so to what effect?

(b) Whether the order dated 2.1.2008 passed by the learned trial Court rejecting the application of the appellants under Order 6, Rule 17 of the Code of Civil Procedure, 1908, is vitiated with material illegality, irregularity and impropriety and has further resulted into miscarriage of justice to the appellants and if so to what effect?

Substantial questions of Law No.1 and 2:

9. Uncontrovertedly, the plaintiffs acquired, the suit land through registered deeds of conveyance, executed inter se them, and, one Kaushalya Devi, registered deeds of conveyance whereof, stand executed on 9.5.2000. As apparent, upon, a perusal of Ex. Dy, the predecessor-in-interest of the defendants, was, thereunder hence allotted by way of Nautor, land measuring 0-15-5 bighas. It appears, that, the land aforesaid, as granted by way of Nautor, under Ex. Dy, vis-a-vis, the predecessor-in-interest, of, the defendants/counter-claimants, rather adjoins the suit khasra numbers. Furthermore, it appears, that, upon occurrence, of, grant, in the year 1969, of land borne in Ex Dy, qua the predecessor-in-interest of the defendants, (i) qua thereupon, the defendants/counter-claimants, hence, being encouraged to espouse a plea qua even with respect, to, the adjoining thereto, suit kahsra numbers, theirs since 1969, through, their predecessor-in-interest, holding, with an *animus possidendi*, possession thereof, (ii) and, with the apt statutorily

enjoined period, of time, elapsing therefrom upto now, theirs hence perfecting title thereto, by prescription. However, the aforesaid plea, is, amenable to founder, (iii) given Ex. Dy, whereunder, the predecessor-in-interest, of the defendants was allotted, by way of Nautor, land adjoining to the suit khasra numbers, rather not therein hence making any visible echoings, qua the precise location(s) and dimension(s) of the land depicted therein, (iv), whereas, delineations with precision, and, with specificity, were, rather enjoined to be displayed, qua land, depicted in Ex. Dy, being ascribed thereto, a, kahsra number(s), also, therewith an apt tatima, was, enjoined to be appended. However, Ex. Dy, is silent about the aforesaid factum probandum, (v) thereupon absence of earmarking(s), and, elucidations with precision, and, with exactitude, vis-a-vis, the land depicted therein, hence being a part of the suit kahsra numbers, of, its mingling therewithin, (vi) whereas, apt or clear delineations aforestated, rather would bring forth hence candid evidence, in, respect of the defendants/counter claimants, through, their predecessor-in-interest, with an *animus possidendi,* purportedly, since 1969, hence holding possession of a part, of the suit khasra numbers, (vii) and, also concomitantly with an alike animus possidendi, theirs holding possession thereof, with, the open knowledge, of, the alienor of the plaintiffs, (viii) also whereuon, it would be further aptly concludable, qua the trite element, hence, ingraining the principle, of, adverse possession, comprised in all concerned, being awakened, vis-a-vis, the apt adversarial invasions, upon the suit kahsra number(s), rather begetting apt satiation, (ix) whereas, absence, of, the aforesaid evidence, constrains this Court to conclude, qua the aforesaid plea of adverse possession, foisted upon the defendants/counter-claimants, in, the year 1969, through, their predecessor-in-interest, holding with an *animus possidendi,* possession of the suit land, and, also possession thereof being open, and, to the knowledge of the vendor of the plaintiffs, (x) rather contrarily, being nebulously raised, nor, it being anchored upon apt pleadings, nor apt evidence therewith standing adduced, hence rendering it obviously to founder.

10. Furthermore, even if, the defendants/counter-claimants, through, their predecessor-in-interest, assumingly, held possession, since, 1969, of, the suit khasra numbers, (a) thereupon, given the apt allotment, of, the land, being made, in the year 1969, to the predecessor-in-interest of the defendants, (b) AND, since then, its, purportedly forming a part of the suit khasra numbers or its purportedly mingling therewithin, hence, enjoined the counter-claimants/defendants, to, adduce further evidence, qua, the apt possession held by their predecessor-in-interest, of, land granted to him, by way of Nautor, in the year 1969, not bearing consonance with the area allotted therein qua him, or evidence was also enjoined to be adduced, qua their predecessor-in-interest, being dissatisfied with the possession taken by him, of, land, granted to him, in pursuance to Ex. Dy, (c) rather his though making an apposite espousal, before the authorities concerned, hence, seeking assured determination, of the dimensions, and, locations of land, alloted qua him, under Ex. Dy. However, the aforesaid evidence remains unadduced, (d) thereupon, it is to be invincibly concluded, that, the apt possession obtained by the predecessor-in-interest of the defendants, in pursuance to Ex. Dy, bearing square concurrence, with the apt recitals, borne, in Ex. Dy, and, also hence his being not aggrieved by the apt possession as taken, in contemporaneity, vis-a-vis, the making of Ex. Dy. Even if, assumingly, the predecessor-in-interest, of, the defendants/counter-claimants, was, holding possession of the suit kahsra numbers, since 1969, thereupon, also the predecessor-in-interest, of, Smt. Kaushalya Devi, and, the latter, the apt vendor of the plaintiffs, would assuredly, be sparked to agitate qua the adversarial act, vis-a-vis, their right, title and interest, vis-a-vis, the suit khasra numbers. Even Kaushalya Devi has not made any bespeakings qua thereof, rather with a tatima being appended, with the apt sale deeds, and, when in contemporaneity thereto, also possession(s) being handed over, qua the plaintiffs, and, apt reflections, in consonance therewith, also occurring in the jamabandi, appertaining to the suit land, (e) thereupon, it is to be concluded, that, the alienor of the plaintiff, throughout, holding possession of the suit khasra numbers, and, the defendants/counter-claimants, misfounding, a, plea qua theirs rather even during the longevity, of hers holding ownership, and, possession thereof, and, to her knowledge, hence holding possession thereof.

11. Be that as it may, the learned Courts below had assigned probative vigour, to, Ex. Ex.DW2/A to Ex.DW2/E, all exhibits whereof, stood, prepared in the year 2000, hence, much subsequent to the year, whereat, the purported adverse possession, vis-a-vis, suit khasra number, is, espoused to commence, (a) especially in the year 1969, whereat, the apt purported commencement, of, encroachments, by the defendants/counter-claimants, upon, an area reflected therein, hence, apparently purportedly occurred, upon, the suit khasra numbers, (b) veracity of all the recitals borne in the demarcation report(s), carries immense strength, given Ex.DW2/A, making a clear, unveiling, of one Ajay Rathore, arrayed as a defendant, also taking part in the demarcation proceedings, and, yet his only orally acquiescing, to, the demarcation conducted, by the demarcating officer, and rather his refusing to sign, his aptly drawn acquiescing statement, given, the land adjoining to the suit land being owned by his father Besar Singh. With his orally acquiescing, vis-a-vis, the echoings made in the apt demarcation report(s), he is hence estopped to contend, that, it acquires no validity, and, is, also unworthwhile, for, setting at rest, the controversy engaging the parties at contest. Obviously, when, in contemporaneity, with, holding of demarcation, vis-a-vis, the suit khasra numbers, as, adjoin the land of the counter-claimants/defendants, the apt encroachments, hence, stood noticed, encroachments whereof also, for reasons aforestated, stand acquiesced by the defendants, (c) thereupon, with the defendants, hence contradicting the espoused plea of adverse possession, inasmuch, as theirs espousing, qua, it, commencing from the year 1969, (d) Contradiction whereof, apparently surfacing, given their apt knowledge qua the apt encroachments, hence, erupting only in the year 2000, thereupon hence for evident want of earlier thereto apt knowledge, by the alienor of the plaintiffs or vis-a-vis the plaintiffs, (e) does render unsatiated, the, trite principles, ingraining, the, rearing, of, a valid plea of adverse possession, (f) principles whereof, are, comprised in the apt possession of the suit land, remaining known, and, openly proclaimed, to be, adversarial, vis-a-vis, the apt opponent, in, the legal combat, (g) and whereas, it remaining hidden, and, camouflaged uptill, 2000, thereupon, it cannot be said of the defendants/counter claimants, throughout, since 1969, uptill the year 2000, bringing, apt awakenings, in the mind of the alienor of the plaintiffs, or in the mind of the plaintiffs, qua theirs hence openly, continuously, peacefully, and, with, a, hostile animus, hence, holding possession of the suit khasra numbers, (h) obviously, hence, the vigour, of, the disaffirmative thereon, concurrent verdicts, recorded by both the learned courts below, hence, remain undispelled.

12. The learned counsel appearing, for the appellant has contended with vigour, that, it was grossly, inapt, for, the learned trial Court, to, record disaffirmative findings, upon, an application of the defendants/counter claimants, as, instituted before the learned trial court, application whereof was cast under the provisions, of, Order 6, Rule 17 CPC wherein, leave was sought, to, amend the written statement. The strength, of, the reasoning assigned thereto, would suffer diminution, dehors its standing belatedly instituted, since, the acquisition of apt knowledge thereof, by the defendants/counter claimants, (i) conspicuously when it would rather put to, a, quietus, the nerve center of the controversy engaging the parties, and, also when it would preclude multiplicity of litigation. However, as aforestated, with, Ex. Dy not therein with precision, hence, making any pronouncement, qua the dimensions, and, locations of the land allotted thereunder, by way of Nautor, vis-a-vis, the predecessor-in-interest of the defendants, (ii) and, with the requests, comprised in the application, pressed by defendant No.1, before the Revenue Officer concerned, on 10.01.1983, bespeaking qua his being in possession of 0-2-12 bighas, of suit land, and, his since long holding its cultivating possession, (iii) yet with it not making, any, apt communication qua his being owner thereof, and, also when therewith stands not appended, the apt khasra girdawaris, for validating the aforesaid espousals, it, cannot assuredly, in any manner hence bolster, the, defendants/counter-claimants, espousal qua, the initial pleaded factum, of, theirs since 1969, through, their predecessor-in-interest, with, an animus possidendi hence holding possession of the suit kahsra numbers. Rather it belittles the aforesaid espousal besides being antithetical, vis-a-vis, it nor when the allottee, has been able to project qua the allotment made under Ex.Dy, appertaining vis-a-vis the suit khasra numbers also hence, the disaffirmative pronouncement made upon the defendants' application, cast under the provisions of Order 6, Rule 17, CPC, before the learned trial Court, rather enjoins its validation,

whereunder, the defendants prayed for the hereinafter extracted amendments, being permitted to be incorporated, in, the written statement:-

> "That after para No.2 of the written statement, the following amendment may kindly be allowed to be inserted-that in fact the land over which the defendant has claimed ownership by way of adverse possession which is measuring 0-2-12 bighas is initially a part of land which was sanctioned to the father of defendant NO.1, as Nautor and the entries in the name of Sh. Ramesh Chand, plaintiff and prior to him of Smt. Chinti Devi is a result of connivance of revenue staff and then owner Smt. Chinti Devi, hence the defendant No.1 is owner in possession of this part f land and the plea of adverse possession raised in the counter claim of earlier written statement be treated as alternative plea."

13. 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/plaintiffs, and, against the appellants/ defendants.

14. In view of the above discussion, there is no merit in the present Regular Second Appeal, and, it is dismissed accordingly. In sequel, the judgements and decrees rendered by both 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. Records be sent back forthwith.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, ACJ AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Court on its own Motion ....Petitioner.

Versus

State of HP and others ....Respondents.

CWPIL No. 121 of 2017
Decided on 13.7.2018

Constitution of India, 1950- Article 226- Public Interest Litigation - Felling of trees in and around Chaugan of Chamba Town – Petition against – Trees allowed to be felled as they were 'leaning' – No material on record to show that such trees were dangerous to public life or property or any trees were planted by way of compensatory measures – On basis of report of Commissioner and affidavit of DFO, Chamba that Deputy Commissioner had accorded permission to fell trees on recommendations of Tree Committee, petition disposed of with directions that no tree within Municipal limits of Chamba Town is to be lopped or felled except in accordance with law.

(Paras–2, 3 to 6)

For the petitioner. : Mr. Deven Khanna, Advocate as Amicus Curiae.

For respondents : Mr. Ashok Sharma, Advocate General with M/s Ritta Goswami, Adarsh Kumar Sharma and Nand Lal Thakur, Additional Advocates General.

The following judgment of the Court was delivered:

Sanjay Karol, Acting Chief Justice, (*Oral*).

Letter petitioner, Mr. Neeraj, who is a practising Advocate at District Courts Chamba and a resident of Chamba town, invited our attention to various acts, omission and

commission on the part of the respondents-authorities including the Municipal Committee, Chamba, as also the department of Forest, Government of Himachal Pradesh in allowing felling of trees within Chamba town.

2. On 27th October, 2017, we had passed the following order:-

"On a letter petition, this Court by taking suo moto cognizance, issued notice to the State. Also, an Amicus Curiae was appointed to assist.

2. It is not in dispute, as is evident from the material placed on record that at least ten green trees were allowed to be felled in and around the main Chaugan of Chamba town, a place having great historical importance and significance. The reason for felling of the trees, as is emanating from the record, is that they were leaning. Whether they were otherwise dangerous to public life or property or not is not substantiated by any material on record. Also, whether any trees were planted by way of compensatory measure or not is not emanating from the record.

3. Mr. Deven Khanna, learned Amicus Curiae invites our attention to the directions issued by this Court in LPA No. 152 of 2007, titled as H.P. State Forest Corporation Ltd. Vs. Ram Lal and others, wherein this Court has issued following directions:

"(1) There shall be no felling of any tree in any forest area in the State of Himachal Pradesh whether private or State Forest except in accordance with the orders given by the Apex Court.

(2) The reports of the Committees appointed under the General Directions of the Apex Court given in its order dated 12.12.1996 require the approval of the Apex Court.

(3) Report of the Committee constituted pursuant to direction No. 3 in respect of specific directions given to the State has to be complied by the State without any further orders from the Apex Court.

(4) The State Government is entitled either departmentally or through the State Forest Corporation to remove fallen trees or fell and remove diseased trees and dry standing timber except from areas notified under Section 18 or Section 35 of the Wild Life Protection Act or any other Act banning such felling or removal of trees.

(5) The State Government or any other authority executing a project shall be entitled to remove and fell trees in case permission has been taken under the provisions of the Forest Conservation Act and other laws applicable thereto.

(6) That felling of trees in all forests shall remain suspended except in accordance with the working plans of the State Government <u>approved by the Central Government.</u>

(7) Removal of Khair trees from forest land is not permitted till clarification is obtained from the Apex Court.

(8) The order of the Apex Court is applicable to forest lands only."

4. Our attention is further invited to judgment dated 4th November, 2014, passed by a Coordinate Bench of this Court in CWP No. 5677 of 2014, titled as Abhimanya Rathor Vs. State of H.P. & Ors. to the following effect:

"……3. The Tree Authority is directed to take a final decision on all the applications after holding inquiry as per Chapter XX of the Act, within a period of one week after the receipt of applications. The Tree Authority shall record convincing and cogent reasons while permitting felling/cutting of trees posing threat to life and property in each case. The Tree Committee is directed to photograph and videograph the spot while processing the applications. The felling of trees is to be permitted only as a last resort."

5. Whether such method was adopted while felling the tree falling within the municipal limits of Chamba town or not is not emanating from the record.

6. Let the Deputy Commissioner, Chamba and the Divisional Forest Officer, Chamba file their separate affidavits dealing with each one of the averments made in the petition, as also the queries raised by us. Needful be done on or before the next date of hearing.

*7. List on **14th November, 2017**, when the Divisional Forest Officer, Chamba shall personally remain present alongwith the record. Till then, we direct that no tree within Chamba Municipal limits shall be felled, save and except in accordance with law, without leave of this Court."*

3. Thereafter, we had requested one Advocate Mr. Avinash Jaryal to visit the spot for ascertaining the correctness of the report expressing urgency for felling dried up trees within the Chamba town. The Divisional Forest Officer, Chamba Forest Division, Chamba vide his affidavit dated 10.11.2017 has clarified that no tree dried or green falling within the Municipal limits of Chamba town was allowed to be felled, save and except that on the recommendation of the Tree Committee, permission for lopping of branches and removal of trees was accorded and that too in compliance of the Himachal Pradesh Municipal Act, 1968 and after verification of the spot by the appropriate authorities. Also the Deputy Commissioner, Chamba was seized of the matter and only he after proper verification accorded such permission. The Department of Forest has not accorded any permission for felling of trees. Permissions granted by the Deputy Commissioner on the basis of the Tree Committee, report stand annexed along with the affidavit.

4. We notice that the Additional Chief Secretary (Forest) to the Government of Himachal Pradesh has issued instructions to all stakeholders as under:-

"To:

1. The Pr. Secretary Urban Development to the
2. Government of Himachal Pradesh.
3. PCCF (Territorial) Govt. of H.P.
4. All Deputy Commissioners.
Dated Shimla-2, the 20th August, 2011

Subject: Felling of trees outside Shimla Municipal Corporation area.

Sir,

References are being received in this office regarding permission of felling of trees outside forest land in the state. The directions in the matter are very clear and therefore it is felt that once this clarification is issued, no such matter should be referred either to this office or the office of PCCF. The Hon'ble High Court of H.P. has passed an order whereby the Deputy Commissioners are competent to allow felling of trees in municipal/ NAC areas in the state. However, this will not apply to Shimla Municipal Corporation where the Tree Committee notified by the Govt. will take such decisions. The Hon'ble High Court has expressed anguish at the reference made by Deputy Commissioner Solan whereby he had referred a matter to the Govt. regarding felling of trees in Parwanoo. The court had viewed that the Deputy Commissioner Solan totally abrogated his function and tried to pass on his duty which cast on him. The Hon'ble High Court was also pained to observe that Pr. Secy (Law) to the Govt. of H.P. had taken a similar view. Therefore, the Deputy Commissioners shall use their judgment and permit the felling of trees which are either causing danger of life and property or mandatorily required for developmental activities within the city limits. In the rural areas in all

non-forest land permission will be granted by the Conservator of Forest of the area. The DFO shall be involved in inspection of these trees as and when required and the disposal of such trees would be done through the Forest Corporation in case of nationalized species.

Yours faithfully,
-sd-
Additional Chief Secretary (Forests) to the
Government of Himachal Pradesh."

5. We may also observe that this Court in LPA No. 152 of 2007, titled as H.P. Forest Corporation Ltd. Vs. Ram Lal and others and other batch matters has already issued the following directions, which we reiterate:-

".....We may summaries our findings in the following terms:-"

(1) There shall be no felling of any tree in any forest area in the State of Himachal Pradesh whether private or State Forest except in accordance with the orders given by the Apex Court.

(2) The reports of the Committees appointed under the General Directions of the Apex Court given in its order dated 12.12.1996 require the approval of the Apex Court.

(3) Report of the Committee constituted pursuant to direction No.3 in respect of specific directions given to the State has to be complied by the State without any further orders from the apex court.

(4) The State Government is entitled either departmentally or through the State forest Corporation to remove fallen trees or fell and remove diseased trees and dry standing timber except from areas notified under Section 18 or Section 35 of the Wild Life Protection Act or any other Act banning such felling or removal of trees.

(5) The State Government or any other authority executing a project shall be entitled to remove and fell trees in case permission has been taken under the provisions of the Forest Conservation Act and other laws applicable thereto.

(6) That felling of trees in all forests shall remain suspended except in accordance with the working plans of the State government approved by the Central Government.

(7) The order of the Apex Court is applicable to forest land only ....."

6. Under these circumstances, we dispose of the present petition with direction to the Executive Officer, Municipal Council, Chamba as also to the Deputy Commissioner, Chamba (Respondent No.4) to ensure that no tree falling within the Municipal limits Chamba town is permitted to be lopped or felled, save and except, in accordance with law.

7. In view of the above, we see no reason to keep alive the present petition and as such the same is closed. Before parting, we wish to place on record appreciation qua the efforts put in by Mr. Deven Khanna, learned Amicus Curiae, who, on the instructions of this Court, contacted letter petitioner and obtained necessary feedback.

8. Registry is directed to send a copy of this judgment to the Deputy Commissioner, Chamba, H.P. for necessary action as well as to the letter petitioner to enable him to take follow up action with the concerned authority.

In view of above, the petition stands disposed of, so also pending miscellaneous applications, if any.

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

Smt. Darshana Devi .....Petitioner.

Versus

Sh. Ramesh Chand Jaswal & ors. .....Respondents

CMPMO No. 119 of 2017.
Date of decision: July 13, 2018.

Hindu Marriage Act, 1955- Section 25- **Hindu Adoption and Maintenance Act, 1956-** Section 21- Alimony- Grant of, after death of husband – Held, After death of husband, against whom an order for payment of alimony has been made, the widow being one of dependents as defined in Section 21 of Hindu Adoptions and Maintenance Act would be entitled to the benefit of the obligation imposed on heirs of deceased husband to maintain her out of the estate of deceased inherited by them. (Para-2)

Cases referred:
Gurdev Kaur and others Vs. Channo, AIR 1986 (251)

For the petitioner : Mr. V.D.Khidta, Advocate.
For the respondents : Mr. Sanjay Jaswal, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. ***(Oral)***

This petition is directed against the order dated 1.6.2015 passed by learned District Judge, Kangra at Dharamshala in Execution No.38-D/X/2012, whereby on the death of Shri Ramesh Chand, the deceased respondent, learned Court below has concluded that the petitioner-wife is not entitled to claim alimony. The petition as such has been dismissed being not maintainable.

2. The High Court of Punjab and Haryana in **Gurdev Kaur and others Vs. Channo, AIR 1986 (251),** in a similar case, has held as under**:**

> "6. The death of the husband against whom an order for payment of alimony has been made does not mean that the widow is left without remedy. Relief is indeed available to her but not under the Hindu Marriage Act, 1956. It is the provisions of the Hindu Adoptions and Maintenance, 1956, that then come into play. The widow being one of the dependants, as defined under S.21 thereof, would be entitled to the benefit of the obligation imposed upon the heirs of the deceased-husband under S. 22 of the said Act to maintain her out of the estate of the deceased inherited by them."

3. On the previous date, after taking note of the judgment supra, on the request made by learned counsel for the petitioner, the matter was adjourned enabling him to obtain instructions in view of the law laid down in the judgment supra. Learned counsel seeks permission to withdraw this petition with liberty reserve to resort to the remedy available to the petitioner in accordance with law including under the provisions of Hindu Adoption and Maintenance Act, 1956. The leave and liberty, as sought, is granted.

4. This petition is accordingly disposed of, so also the pending application (s), if any.

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

Gajju Ram ..Appellant
Versus
Jindu Ram (deceased through LRs and others ..Respondents

RSA No. 128 of 2007
Decided on: July 13, 2018

Code of Civil Procedure, 1908- Order 1 Rule 10- Impleadment of a party - When can be ordered? – Plaintiffs selling their equity shares in a company to defendants and on the failure of latter to pay balance amount of shares, filing suit for recovery – Defendants refuting their liability – Plaintiffs filing application under Order 1 Rule 10 of Code for impleadment of one 'B' as proforma defendant on ground that 'B' is one of the beneficiary under agreement in question – High Court observed that as per agreement, defendants were to pay certain amount to 'B' and in lieu thereof they had also given post dated cheques to 'B' – Held, amount, if any, was to be paid to 'B' by defendants alone and in event of non-payment thereof, it was 'B' , who was required to take action under law – Plaintiffs cannot hold brief on behalf of 'B' by seeking his impleadment – No relief as such was being prayed against 'B' in the suit – 'B' was not a necessary or proper party to the suit – Application dismissed. (Paras-7 to 9 and 12)

Case referred:
Laliteshwar Prasad Singh v. S.P. Srivastava, (2017) 2 SCC 415

For the appellant Mr. Surinder Saklani, Advocate.
For the respondents: Mr. Karan Singh Kanwar, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:

Having regard to the nature of order, this court proposes to pass in the peculiar facts and circumstances of the case, it may not be necessary to give detailed facts of the case, save and except that the appellant-plaintiff (hereinafter, 'plaintiff') filed a suit for possession by way of demolition and for permanent prohibitory injunction, before the learned Sub Judge 1st Class, (I), Hamirpur, Himachal Pradesh, which came to be registered as Civil Suit No. 290 of 1992. Suit having been filed by the plaintiff came to be decreed vide judgment and decree dated 25.11.1999, whereby trial court decreed the suit for possession of the suit land in favour of the plaintiff and against the respondents-defendants (hereinafter, 'defendants') by ordering demolition of structure of the defendant over the suit land. Learned court below further restrained the defendants by way of decree for permanent prohibitory injunction from raising further construction, enter or claim passage over the suit land comprising of Khata No. 12 min, Khatauni No. 54, Khasra Nos. 2206 and 2207, measuring 1 Kanal as per Jamabandi for the years 1988-89 situate at Tikka Tarakwari, Tappa Bamsan, Tehsil Bhoranj, District Hamirpur, Himachal Pradesh.

2. Being aggrieved and dissatisfied with the judgment and decree passed in favour of the plaintiff, defendants preferred an appeal under Section 96 CPC in the court of learned Additional District Judge, Fast Track Court, Hamirpur, Himachal Pradesh, which came to be registered as Civil Appeal No. 36 of 2000/ 118 of 2004. Learned Additional District Judge, vide judgment and decree dated 11.5.2006, set aside the judgment and decree passed by the trial court and dismissed the suit of the plaintiff. In the aforesaid background, plaintiff has approached this Court in the instant proceedings, praying therein for restoration of the judgment

and decree passed by trial Court, after setting aside the judgment and decree passed by the learned first appellate Court.

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

4. Having heard the learned counsel for the parties and gone through the impugned judgment and decree passed by first appellate Court vis-à-vis material available on record fairly conceded that the judgment passed by first appellate Court is not sustainable because of contradictory findings. Though perusal of impugned judgment and decree passed by first appellate Court suggests that, while examining correctness and genuineness of the judgment and decree passed by trial Court, learned first appellate Court has made an endeavour to deal with all the issues, however, no definite findings have been recorded while setting aside judgment and decree passed by trial Court. Learned first appellate Court, has categorically held that the plaintiff by way of placing on record, Exhibits P2 and P3 i.e. revenue record, has proved that he is in possession of the suit land as non occupancy tenant because entries in the revenue record have not been rebutted by defendants by leading cogent and convincing evidence. Learned first appellate Court has also held that plaintiff is in possession of suit land, as non-occupancy tenant. In nutshell, case set up by the plaintiff while filing suit for possession by way of demolition and permanent prohibitory injunction is that he is owner-in-possession of the land comprising of Khata No. 12, Khatauni No. 54, Khasra Nos. 2206 and 2207, measuring 1 Kanal. Plaintiff has specifically pleaded before the learned Court below that defendants being head strong persons, have forcefully encroached the suit land by way of construction as reflected in the site plan as mark "A, B, C, D, E, F, G, and H" and mark "J, K, L and M". Allegedly, plaintiff had taken demarcation in the month of April, 1992, wherein defendants were found to have encroached upon the suit land by way of construction. Since despite objections, defendants failed to stop the construction activity over the suit land, suit as referred to herein above came to be filed in the civil court.

5. Defendants resisted the aforesaid claim of the plaintiff on the ground that revenue entries depicting ownership and possession of plaintiff over suit land are palpably wrong and plaintiff is in possession of Khasra No. 2206 and defendants are in possession of Khasra No. 2207, by way of construction of *Abadi* and remaining portion is being used by them as courtyard. It is quite apparent from the pleadings adduced on record by the defendants that there is no dispute, if any, qua ownership and possession of plaintiff over Khasra No. 2206. Dispute, if any, is with regard to Khasra No. 2207, qua which definitely entries in revenue record are in favour of the plaintiff. Since report of demarcation allegedly taken by the plaintiff in April, 1992, was not placed on record by plaintiff, learned first appellate Court arrived at a conclusion that the findings returned by trial Court that defendants forcibly encroached upon 5 Marla of suit land, are not sustainable. Since, it has been specifically averred in the plaint that the defendants have forcibly encroached upon the suit land by way of construction as shown in the site plan as "A, B, C, D, E, F, G and H" and "J, K, L and M", findings returned by the learned Court below that the plaintiff has not specified and described particularly, which portion of suit land was encroached upon by the defendants, appear to be contrary to the record and no cogent and convincing reason has been assigned while differing with the findings recorded by the learned trial Court in this regard.

6. Interestingly, first appellate Court on one hand has returned the finding that the plaintiff has not been able to prove encroachment over the suit land by the defendants and, on the other hand, has returned categorical finding that defendants have also not been able to prove their adverse possession over the suit land. Learned first appellate Court has also recorded findings that tenancy as pleaded by the defendants has also not been proved on record. Since defendants, with a view to prove that their ancestors were recorded as non-occupancy tenants over suit land, have placed reliance upon exhibit DW-6/A, learned first appellate Court, while dealing with aforesaid claim, has returned categorical finding that defendants have not brought any record pertaining to the years 1914-15 and 1989-90, to show that how their/ancestors'

names were omitted from the revenue record by the revenue officials. Since, no evidence was brought on record by the defendants to prove their allegations that names of their ancestors were omitted from the suit land by mischief of revenue officials, learned first appellate Court arrived at a conclusion that tenancy of the defendants has also not been proved on record.

7. Most importantly, learned first appellate Court on the basis of evidence led on record has also rejected the claim of the defendants that they are in possession of Khasra No. 2207 out of suit land and they had raised their *Abadi* thereupon since the time of their forefathers, these findings appear to be totally contradictory in the teeth of findings returned by the learned first appellate Court that plaintiff has not been able to prove encroachment over the suit land. Since, first appellate Court did not find the defendants to be in possession over Khasra No. 2207, aforesaid findings that plaintiff was not able to prove encroachment over suit land by the defendants, could not be returned by the court below because defendants in the written statement have claimed their possession over Khasra No. 2207.

8. Lastly, learned first appellate Court has arrived at a conclusion that revenue record placed on record clearly proves plaintiff to be in possession over the suit land as non-occupancy tenant but despite that learned first appellate Court has proceeded to record totally contradictory findings that the plaintiff has failed to prove any encroachment over the suit land by the defendants. Since the learned first appellate Court had arrived at a definite conclusion that defendants have not been able to prove by leading cogent and convincing evidence that they are in possession of Khasra No. 2207 and they have raised their *Abadi* thereupon since the time of their forefathers, aforesaid findings with regard to encroachment, having not been proved by the plaintiff, could not be recorded by the first appellate Court.

9. As has been already observed the learned counsel representing the parties, while assisting this Court during proceedings of the case have fairly conceded that learned first appellate Court has erred in returning contradictory findings as such matter needs to be remanded back to the learned Additional District Judge, Fast Track Court, Hamirpur for fresh decision.

10. At the cost of repetition, it may be observed that though the learned first appellate Court has attempted to deal with all the issues but has failed to give definite and specific findings, as a consequence of which, claims as set up by both the parties in the suit at hand have not been decided in either way.

11. At this stage, this Court deems it fit to refer to the judgment rendered by Hon'ble Apex Court in Laliteshwar Prasad Singh & Ors. vs. **S.P. Srivastava (D) Thr. LRs.** (Civil Appeal No. 4426 of 2011) decided on 15.12.2016, whereby the Hon'ble Apex Court has held that an appellate court is the final court of facts and as such it should deal with all the issues. The judgment of the appellate court must therefore reflect application of mind and findings should be supported by reasons. It would be apt to reproduce following paragraphs of the aforesaid judgment:

12. "In this regard, reliance is placed upon judgment of Apex Court in **Laliteshwar Prasad Singh** v. **S.P. Srivastava** reported in (2017) 2 SCC 415, wherein Hon'ble Apex Court has held as follows:

> "13. An appellate court is the final court of facts. The judgment of the appellate court must therefore reflect court's application of mind and record its findings supported by reasons. The law relating to powers and duties of the first appellate court is well fortified by the legal provisions and judicial pronouncements. Considering the nature and scope of duty of first appellate court, in Vinod Kumar v. Gangadhar (2015) 1 SCC 391, it was held as under:-
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> > "12. In Santosh Hazari v. Purushottam Tiwari (2001) 3 SCC 179, this Court held as under: (SCC pp. 188-89, para 15)

> "15. ... The appellate court has jurisdiction to reverse or affirm the findings of the trial court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. ... while reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it."
>
> 4. The appellate court has jurisdiction to reverse or affirm the findings of the trial court. The first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. Sitting as a court of first appeal, it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings. The first appeal is a valuable right and the parties have a right to be heard both on questions of law and on facts and the judgment in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings. (Vide Santosh Hazari v. Purushottam Tiwari (2001) 3 SCC 179, SCC p. 188, para 15 and Madhukar v. Sangram (2001) 4 SCC 756 SCC p. 758, para 5.)
>
> 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."

13. Consequently, in view of the discussion above and with the consent of the learned counsel representing the parties, judgment and decree dated 11.5.2006 passed by the learned Additional District Judge, Fast Track Court, Hamirpur, Himachal Pradesh in Civil Appeal No. 36 of 2000/118 of 2004 are set aside and matter is remanded back. Learned Additional District Judge, Fast Track Court, Hamirpur is directed to decide the matter afresh in view of the aforesaid observations made in the instant judgment, within a period of two months from today. Learned counsel for the parties undertake to cause presence of their clients before the learned Court below on **30.7.2018.** Learned Additional District Judge, after having heard the parties on the basis of material available on record, shall decide the appeal afresh, within stipulated period.

14. Since the matter is to be decided afresh on the basis of pleadings and evidence already available on record, observations, if any, made in the instant judgment qua correctness and genuineness of the impugned judgment and decree passed by learned first appellate Court, shall have no bearing on the judgment to be passed by the court below. Learned Court below

shall decide the matter afresh, strictly in accordance with law as well as evidence adduced on record by respective parties.

15. Registry is directed to send a copy of instant judgment alongwith records of the case forthwith to the learned Court below, enabling it to do the needful within stipulated period.

16. That appeal stands disposed of accordingly. Pending applications, if any, are disposed of. Interim directions, if any, are also vacated.

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

Meenakshi Sharma ...Petitioner.
Versus
State of H.P. & Others ....Respondents.

Cr.MMO No. 120 of 2016.
Reserved on : 6th July, 2018.
Decided on : 13th July, 2018.

Code of Criminal Procedure, 1973- Section 173- Closure report – Magistrate accepted closure report and ordered cancellation of FIR by holding that deceased in his dying declaration had admitted of having committed theft from premises of accused and thereafter voluntarily jumping from double storeyed building – Petition against – Dying declaration neither sent to FSL for comparison with admitted writing/signatures of deceased nor the same was bearing fitness certificate of declarant issued by the Medical Officer – No fracture was found on body of deceased yet he jumped from double storeyed building – Held, acceptance of closure report and cancellation of FIR not based on proper appreciation of material on record – Petition allowed – Order set aside – Investigating Officer directed to re-investigate the case. (Paras-2 to 4)

For the Petitioner: Mr. Subhash Sharma, Advocate.
For the Respondents: Mr. Hemant Vaid, Addl. A.G. with Mr. Yudhveer Singh Thakur and Mr. Vikrant Chandel, Dy. Advocate Generals.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The petitioner herein, is, aggrieved by the orders, borne in Annexure P-17, whereby the learned trial Magistrate, after accepting the closure report submitted therebefore by the Investigating Officer concerned, hence ordered for cancellation, of, the apt FIR.

2. The fulcrum, of, the reason(s) assigned by the learned trial Magistrate, is, hinged upon the factum, of, the deceased one Manoj Kumar, making a signatured statement, before, the Investigating Officer concerned, whereunder, he confessed qua his committing theft, of, a sum of Rs.50,000/- from the premises of the accused, and, his thereafter volitionally jumping, from, the double storeyed building. The meteing of credence thereto, by the learned trial Magistrate, is highly inappropriate, as the original copy of the relevant dying declaration, made by the deceased before the Investigating Officer, and, as exists, on the record, being not along with the signatures borne thereon, along with the admitted signatures of the deceased, hence transmitted to the FSL concerned, for their apt comparison thereat, for, hence, facilitating, emanation therefrom, of, an apt opinion qua the deceased authoring, the, relevant signatures upon the apt statement, nor the

competent medical practitioner has appended thereunder, an apt certificate, of, fitness, of the declarant.

3. Furthermore, the recitals borne therein also are prima facie, in, disconcurrence with the postmortem report, wherein there occurs no reflection qua the deceased sustaining any fracture, whereas, in the apt statement, occurs a recital qua the deceased volitionally jumping from a building, whereupon, existence of fractures, upon, his body rather was imminent, thereupon, prima facie the apt statement may not carry any worth.

4. The aforesaid disconcurrence, inter se, the postmortem report, and, the revelations borne, in the apt statement, does prima facie, constrains this Court , to, conclude that the order rendered by the learned trial Magistrate, whereunder, he accepted the closure report, filed therebefore, by the the Investigating Officer, and, also hence ordered for cancellation of the FIR, being not hinged, upon, proper appraisal of the relevant material on record. Consequently, the instant petition is allowed, and, the order impugned before this Court, and, as borne in Annexure P-17 is quashed. In sequel, the Investigating Officer concerned is directed to hold re-investigation(s) in the case, vis-a-vis, the aforestated facets. All pending applications also stand disposed of. Records, if any, received, be sent back forthwith.

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

M/s RP Earthmovers & Builders ....Petitioner.

Versus

M/s IL & FS Engineering & Construction Company ltd. ....Respondent.

CARBC No. 4 of 2017.
Reserved on : 5th July, 2018.
Decided on: 13th July, 2018.

Arbitration & Conciliation Act, 1996- Section 11- Appointment of arbitrator – Agreement interse parties providing for settlement of dispute first by way of conciliation through Conciliator, within specified period if possible and failing which by way of arbitration by an Arbitrator to be appointed by Chief Executive Officer of Contractor – Sub Contractor raising dispute regarding non-payment of bills as well as wrong deduction of amount towards TDS from his bills by Contractor – On basis of no dues declaration given by Sub Contractor, in its favour, contractor denying existence of any arbitrable dispute interse parties – Held, TDS certificate is not conclusive proof that deductions made by deductee were towards work performed by Sub-Contractor – Raising of bills and clearance thereof in contemporaneity vis-à-vis TDS deductions by deductee is imperative – Deductions by Contractor were subsequent to issuance of no dues certificate by Sub-contractor - Further held that a subsisting contractual dispute arising and being referable to arbitration exists – High Court appointed Advocate as an Arbitrator and asked him to enter upon arbitration. (Paras-2, 3, 8 & 10)

Cases referred:

National Insurance Company Limited vs. Boghara Polyfab Private Limited, reported in (2009)1 SCC 267

Demerara Distillers Pvt. Limited vs. Demerara Distiller Limited, reported in (2015) 13 SCC 610

For the Petitioner: Mr. Ashwani K. Sharma, Sr. Advocate with Mr. Jeewan Kumar, Advocate.

For the Respondent:: Ms. Jyotsna Rewal Dua, Sr. Advocate with Ms. Charu Bhatnagar, Advocate, for the respondent.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

Through, the instant petition, the petitioner seeks appointment, of, an Arbitrator.

2. The works, appertaining, to, Four Laning of Kiratpur Ner-Chowk Section of NH-21 (From km 21.55 to Km 154.00), stood, allotted to the petitioner company, by, the respondent company. The petitioner avers, qua, despite his completely executing, the, awarded works, and, despite his satisfactorily, and, completely executing the awarded works, the respondent company, rather not liquidating, vis-a-vis, it, the entire payments in respect thereof, (i) thereupon, the petitioner contends, that, within the ambit, of, the apposite arbitration clause 62, contained in the Standard Condition of Sub contract/Work Order, clause whereof stands extracted hereinafter, an apt contractual dispute emerging or arising, vis-a-vis, the respective contractual obligations, of, the parties at contest, (ii) and, thereupon it being referable, for, arbitration, and, concomitantly, an, Arbitrator being enjoined to be appointed by this Court, for, his hence being entailed, to, embark, upon, arbitration proceedings.

"**62. Settlement of Disputes**

If a dispute of any kind whatsoever arises between the Contractor and the Subcontractor in connection with, or arising out of, the execution of the subcontract, whether during the execution of the subcontract or after its completion and whether before or after repudiation or other termination of the subcontract, then the Contractor or Subcontractor may give a notice of such dispute to the other party, in which case the parties shall attempt for the next 21 days to settle such dispute amicably before the commencement of conciliation/arbitration. Such notice shall state that it is made pursuant to this clause.

Any dispute which has not been amicably settled within 21 days after the day on which such notice is given shall be settled by conciliation as per Arbitration and Conciliation Act, 1996. Both the Contractor and Subcontractor shall agree for appointment of sole conciliator to settle the dispute.

Any dispute referred to conciliation which has not been settled by conciliation within 30 days from the date of reference of such dispute or such other period as mutually agreed by the parties, shall be finally settled in accordance with the Arbitration & Conciliation Act, 1996 by way of Arbitration and this behalf a Sole Arbitrator to be nominated and appointed by the Chief Executive Officer of Contractor. The Arbitration may be commenced prior to or after completion of the Works, provided that the obligations of the Contractor and Subcontractor shall not be altered by reason of the arbitration being conducted during the progress of the Works.

The venue of the Arbitration proceedings shall take place at Hyderabad and the language of proceedings that of documents and communications shall be English. The Arbitration shall furnish reasoned award in writing. The award of the Arbitrator shall be final and binding on both the Contractor and subcontractor."

2. The nerve centre of the propagation, of, the petitioner company, (a) is, harboured upon the respondent company deducting sums of money, respectively, borne in Rs. 1,16,074/- and Rs. 1,21,696/-, and, the apt deductions appertaining to TDS, and, concomitantly, towards, the apposite tax liability accruing, upon, the bills for payment, as, purportedly forwarded by the petitioner, to, the respondent company, (b) and despite the bills, rather appertaining to the awarded works, works whereof, though, standing, satisfactorily and completely executed, theirs remaining neither cleared nor payments in respect thereof being liquidated, (c) thereupon, it is concomitantly espoused, that, the respondent company has abysmally failed to liquidate, vis-a-

vis, the petitioner company, the entire pecuniary liabilities accruing qua it, and, as arise out of the contractual works executed by it.

3. However, the learned counsel appearing, for the respondent company, has, made, a, vociferous submission before this Court, (a) that with portrayals standing embodied in the "no dues declaration", borne in Annexure R-4, qua the respondent company, fully and finally settling, its entire contractual liabilities, vis-a-vis, it, (b) and, also with the aforesaid embodiments, being, supported by the table occurring underneath paragraph No.2, of, the Sur-rejoinder instituted by the respondent company, to, the petitioner's application, (c) hence, the respondent company, contends that the aforesaid portrayals, rather make, apt evincings qua the respondent company, completely and satisfactorily, discharging, all the apt pecuniary contractual liability(ies), encumbered upon it, (d) and, thereupon, there existing neither any dispute nor the apt arbitration clause being invocable, by the petitioner. In making the aforesaid submission, the learned counsel appearing, for the respondent has placed reliance upon a verdict, of, the Hon'ble Apex Court, rendered in a case titled as ***National Insurance Company Limited vs. Boghara Polyfab Private Limited***, reported in ***(2009)1 SCC 267***, the relevant paragraphs No. 36 to 42 whereof are extracted hereinafter:-

> "38. In Union of India v. L.K. Ahuja & Co., (1988)3 SCC 76, this Court observed :
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> > "In order to be entitled to ask for a reference under section 20 of the Act, there must be an entitlement to money and a difference or dispute in respect of the same. It is true that on completion of the work, right to get payment would normally arise and it is also true that on settlement of the final bill, the right to get further payment gets weakened but the claim subsists and whether it does subsist, is a matter which is arbitrable."
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> There was no full and final discharge or accord and satisfaction in that case.
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> 39. In Jayesh Engineering Works vs. New India Assurance Co. Ltd., (2000)10 SCC 178, there was an acknowledgment by the contractor that he had received the amount in full and final settlement and he has no further claim. This Court following L. K. Ahuja held that whether the contract has been fully worked out and whether the payments have been made in full and final settlement are questions to be considered by the arbitrator when there is a dispute regarding the validity of such acknowledgement and that the arbitrator will consider whether any amount is due to be paid and how far the claim made by the contractor is tenable. Jayesh Engineering Works did not refer to Kishorilal Gupta { AIR 1959 SC 1362}, Nav Bharat Builders, {1994 Supp (3) SCC 83}, P.K. Ramaiah {1994 Supp.(3) SCC 126}, or Nathani Steels {1995 Supp (3) SCC 324}.
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> 40. In Reshmi Constructions {(2004) 2 SCC 663}, the employer prepared a final bill and forwarded the same along with a `No-Demand Certificate' in printed format confirming that it had no claims. The contractor signed the no-demand certificate and submitted it. But on the same day, the contractor also wrote a letter to the employer stating that it had issued the said certificate in view of a threat that until the said document was executed, payment of the bill will not be released. In those circumstances, after considering P. K. Ramaiah and Nathani Steels, this Court held :
>
> > "26. ... The conduct of the parties as evidenced in their letters, as noticed hereinbefore, clearly goes to show that not only the final bill submitted by the respondent was rejected but another final bill was prepared with a printed format that a "No-Demand Certificate" has been executed as otherwise the final bill would not be paid. The respondent herein, as noticed hereinbefore, categorically stated in its letter dated 20.12.1990 as to under what circumstances they were compelled to sign the said printed letter. It appears from the appendix appended to the judgment of the learned trial Judge that the said letter was filed even before the trial court. It is, therefore, not a case whether the respondent's assertion of "under influence or coercion" can be said to have been taken by way of an afterthought.

27. Even when rights and obligations of the parties are worked out, the contract does not come to an end inter alia for the purpose of determination of the disputes arising thereunder, and, thus, the arbitration agreement can be invoked. Although it may not be strictly in place but we cannot shut our eyes to the ground reality that in a case where a contractor has made huge investments, he cannot afford not to take from the employer the amount under the bills, for various reasons which may include discharge of his liability towards the banks, financial institutions and other persons. In such a situation, the public sector undertakings would have an upper hand. They would not ordinarily release the money unless a "No-Demand Certificate" is signed. Each case, therefore, is required to be considered on its own facts.

28. Further, necessitas non habet legem is an age-old maxim which means necessity knows no law. A person may sometimes have to succumb to the pressure of the other party to the bargain who is in a stronger position.

29. We may, however, hasten to add that such a case has to be made out and proved before the arbitrator for obtaining an award."

This decision dealt with a case where there was some justification for the contention of the contractor that the `No-demand Certificate' was not given voluntarily but under coercion, and on facts, this Court felt that the question required to be examined.

41. In Ambica Constructions (supra) {(2006)13 SCC 475}, this Court considered a clause in the contract which required the contractor to give a no claim certificate in the form required by Railways after the final measurement is taken and provided that the contractor shall be debarred from disputing the correctness of the items covered by `No claim certificate' or demanding a reference to arbitration in respect thereof. There was some material to show that the certificate was given under coercion and duress. This Court following Reshmi Constructions, observed that such a clause in contract would not be an absolute bar to a contractor raising claims which were genuine, even after submission of a no-claim certificate.

42. We thus find that the cases referred fall under two categories. The cases relied on by the appellant are of one category where the court after considering the facts, found that there was a full and final settlement resulting in accord and satisfaction, and there was no substance in the allegations of coercion/ undue influence. Consequently, this Court held that there could be no reference of any dispute to arbitration. The decisions in Nav Bharat and Nathani Steels are cases falling under this category where there were bilateral negotiated settlements of pending disputes, such settlements having been reduced to writing either in the presence of witnesses or otherwise. P.K. Ramaiah is a case where the contract was performed and there was a full and final settlement and satisfaction resulting in discharge of the contract. It also falls under this category."

4. Be that as it may, the aforesaid reliance placed by the counsel for the respondent company, upon, Annexure R-4, and, the consequential thereto applicability thereon, of the mandate, of, the Hon'ble Apex Court rendered in Boghara Ployfab's case (supra), (a) is, to be juxtaposed, vis-a-vis, TDS deductions, made, towards, the income tax liability, as, accruing upon the deductee, hence appertaining, or not appertaining, vis-a-vis, the apt consonance therewith purported payments made to the petitioner company, (b) besides hence the apposite discharging acquiescence, of, the petitioner company, unfolded by Annexure R-4, rather carrying or not carrying any worth, (c), for hence reiteratedly meteing, a, befitting verdict qua the apt TDS deductions, in, the sums aforestated, even when as espoused, by the counsel for the petitioner, qua theirs, rather remaining unpreceded, by any clearance of bills forwarded, by it, to the respondent company, nor payments thereunder standing liquidated, vis-a-vis, it, rather hence reiteratedly thereupon, the respondent company, withholding, the contractual sums of money, in respect of contractual works, completely and satisfactorily executed by it. (d) AND, hence a contractual dispute amenable for reference, for, arbitration, hence, emerging, (e) conspicuously

reiteratedly also qua the TDS deduction(s), rather belittling or not, the worth of, the, apposite discharging acquiescence.

5. For determining the comparative worth, of, the aforestated respective contentions addressed, before this Court, by the learned counsel appearing, for the parties, (a) initially, it has to be determined, whether, the respondent company, has meted, good, sound and tangible explanations, vis-a-vis, the apt TDS deductions. (b) Tangible explanation, in respect thereto, do purportedly emanate, from, a reading, of, clause (e), of, paragraph No.3 of its reply, furnished to the apposite petition, (c) wherein, echoings occur, qua the aforesaid deductions, being statutory deductions, and, the aforesaid appertaining to the bills raised, on anvil of primary measurements, and, the aforesaid arrangements, being to the knowledge, and, awareness of the petitioner company, (d) hence, the petitioner not demanding payments in respect, of the bills, qua wherewith, the, apposite TDS, deductions were made. Consequently, also when, a, no due certificate/ declaration, borne in Annexure R-4, was tendered by the petitioner company, thereupon, the import, if any, of TDS deductions being insignificant, nor theirs working, vis-a-vis, the, petitioner's espousal.

6. Before proceeding to adjudicate, upon, the aforestated comparative merits, of, the respective espousals, addressed,before this Court, by the learned counsel appearing for the parties at contest, it is also significant to bear in mind, that, the judgment cited by the learned counsel appearing, for the respondent company, rendered, by the Hon'ble Bombay High Court, in a case titled as ***S.P. Brothers, A partnership Firm vs. Biren Ramesh Kadalia,*** decided on 27th March, 2008, the relevant portion of paragraph No.8 whereof stands extracted hereinafter:

> "8....The issuance of TDS certificates does not amount to an acknowledgement of defendant within the meaning of Section 25 of the Indian Evidence Act and the Full Bench Judgment of this Court in case of Jyotsna (supra), puts the matter beyond doubt. The TDS certificate is primarily to acknowledge the deduction of tax at source. The certificate does not refer to any amount of loan or even the rate of interest which is payable on the said principal amount. It does not refer to any contract between the parties and even a transaction. When a written contract is produced before the Court, its contents are the best evidence....."

rather with clarity expounds therein, (i) that the mere issuance of TDS certificate, not, amounting to any apt contractual acknowledgement(s), within, the domain of Section 25, of, the Indian Evidence Act, and, its issuance and preparation, is, a pointer, merely, vis-a-vis, the simplicitor acknowledgement, of deduction, of, tax at source, unless, it is assuredly proven by the relevant contract, being, hence placed on record, and, its being also proven qua it appertaining to a contractual transaction. The aforesaid trite expostulation carried thereunder, does rather, shatter the submission of the learned counsel, appearing for the respondent company herein, qua ipso facto, any TDS deduction, when conjoined with, a, no due certificate, rather with aplomb putting at rest, the *res controversia,* vis-a-vis, any contractual liability, still warranting liquidation, by the respondent company, vis-a-vis, the petitioner. Even otherwise, the aforesaid TDS deduction, were, enjoined to be supported, by transmission, of, bills by the petitioner company, to the respondent company, and, also prima facie material, at this stage, was, enjoined to be adduced, with, trite clear pronouncements borne therein, qua in contemporaneity, vis-a-vis, the clearance of the bills, the apt TDS deductions standing meted thereon. However, the apposite no dues certificate, executed, by the authorised signatory of the petitioner company, rather stood executed, on 27.09.2014, whereas, the apt TDS deductions imminently occurred subsequent thereto, on 3.10.2010, (I) hence, apparently, the force of the aforesaid necessity, of, the respondent company, comprised in its, being enjoined to adduce material, in display, qua in contemporaneity, of, the apposite TDS deductions, qua thereat, the relevant bills of the petitioner company also being cleared, rather acquires immense galvanised fillip, (ii) whereas, with the aforestated material, rather remaining unadduced, thereupon, it is to be concluded, that, prima facie, the respondent company, despite, the petitioner company purportedly transmiting bills to it for clearance, the latter withholding payments thereon, more so, with the apposite explanation

appertaining to deductions, omits to unveil, the, aforesaid factum, (iii) and, concomitantly, the petitioner company, does gather ground, to make a submission, that, some bills, dehors Annexure R-4, yet remaining uncleared, and, hence, the relevant arbitration clause being invocable at its instance, for, hence the emerging contractual dispute being referred, to, an Arbitrator.

7. Even otherwise, the aforestated, reliance upon judgment supra, is misplaced, as, visibly, it does not appertain to a arbitration case, rather it appertains, to, a summary suit. The learned counsel for the respondent company, placed reliance upon judgment rendered by the Income Tax Appellate TRibunal Tribunal, Hyderabad Bench in a case titled as ***Dy. Commissioner of Income Tax, Circle -3(3), Yderabad vs. M/s Zelan Projects Pvt. Ltd.***, bearing ITA No. 946/Hyd/2012, on 12th June, 2015, the relevant portion of paragraph No.6 whereof stand extracted hereinafter:-

> "6. We have considered the submission of the parties and perused the orders of the revenue authorities as well as other material on record. As can be seen, only on the basis of TDS certificate enclosed by assessee in the return of income, AO has concluded that the amount received by assessee from LAPPL is a contract receipt and accordingly proceeded to estimate the income. However, as can be seen from the terms of the relevant agreement between assessee and LAPPL, assessee is to receive 15% of the total contract amount as mobilization advance. Though, it may be a fact that in the TDS certificate, deductee has mentioned it as payment towards professional charges but, that itself is not conclusive enough to prove the fact that amount received was not advance but towards work executed. Assessee has also through documentary evidence demonstrated that during the relevant FY it has not raised any bills on the contractee towards contract work entrusted to it, but, has stated raising bills in next FY after completion of the contract work and has also recognized income accordingly in the said FY. These facts have not been controverted by the Ld. DR."

However, any reliance placed thereon, is, also misfounded (i) given any TDS deduction, by, a, deductee, being expounded therein, rather to hence not comprise any conclusive proof, qua, the deductions being towards works performed, (ii) unless, apt best documentary evidence, was adduced, with, clear demonstration, comprised in the raising of bills, and, apt clearance(s) thereof occurring, in, contemporaneity, vis-a-vis the apt TDS deduction, whereupon, the apt deductions, would stand validation. In other words, the raising of bills, and, clearance(s) thereof, by the deductee, is, imperative, significantly, in contemporaneity, vis-a-vis, the apt deduction(s). However, hereat, with, the date of execution of Annexure P-4, being evidently prior to the date of the apt TDS deduction, nor when the bills in respect whereof, the purported deductions were made, standing adduced into evidence, whereas, their adduction into evidence is imperative, for, drawing conclusions leaning towards, the respondent, (iii) thereupon, it prima facie, appears that the apt TDS deductions were, made subsequent to preparation and execution of Annexure R-4, (iv) hence giving leeway to an inference, that, though some bills were transmitted, by the petitioner company, to the respondent company, yet despite theirs being uncleared, and, also despite, payments comprised therein remaining unliquidated, by, the respondent company, to the petitioner company, TDS deductions being made, whereupon hence a contractual dispute inter se them, rather surfacing.

8. In summa, the admissions of the petitioner company, as, borne in Annexure R-4, and, theirs purportedly comprising, the apt satisfactory acquiescing discharge, by the respondent, vis-a-vis, it, of, hence all contractual liabilities, emanating from, the apt contract executed inter se both, (I) and, hence no subsisting contractual dispute, rather arising or existing, are, both misplaced and mis-founded, (ii) rather it is to be concluded, that, a subsisting contractual, dispute, arising, and, it being referable to arbitration, within, the ambit of the apposite arbitration clause.

9. Nowat, the learned counsel appearing for the respondent company has with much force, made, a vigorous contention, before, this Court that, with, an apt pre-arbitration

mechanism, being contemplated in the arbitration clause, hence, unless the pre-arbitration mechanism, is, resorted to, thereupon, the present petition being premature, hence warranting its dismissal. However, even the aforesaid submission is misfounded, as it has been, with, aplomb pronounced by the Hon'ble Apex Court, in a judgment reported in a case titled as ***Demerara Distillers Pvt. Limited vs. Demerara Distiller Limited,*** reported in ***(2015) 13 SCC 610***, qua, the relegating, of, parties to any pre-arbitral mechanism, being an empty formality, and, resort thereto, being not mandatory.

10. For the foregoing reasons, the instant petition is allowed. Consequently, Mr. B.C. Negi, Senior Advocate is appointed as the sole Arbitrator. All the disputes including disputes raised in the instant petition are hereby referred to the learned sole arbitrator. The Arbitration proceedings shall held at Hyderabad. The learned Arbitrator shall be at liberty to fix his own fees/remuneration/other conditions and consultation with the parties. All the expenses in regard to the arbitration proceedings shall be jointly shared by the litigating parties, in equal share. This order be communicated to the learned arbitrator so that the arbitration proceedings can commence and conclude as expeditiously as possible.

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

Rinku Sharma & another .....Petitioners/defendants.
Versus
Susheel Kumar .....Respondent/plaintiff.

Civil Revision No. 77 of 2018.
Reserved on : 9th July, 2018.
Date of Decision: 13th July, 2018.

Code of Civil Procedure, 1908- Section 151- Enforcement of injunction order - Police assistance – Trial Court temporarily restraining defendants from raising construction over land in possession of plaintiff and also from blocking back door of his office – Plaintiff seeking police assistance for enforcing order – Trial court appointing Local Commissioner for spot investigation – Report of Local Commissioner prima facie also confirming plaintiff's possession and blockade of his entry – Trial Court granting police assistance for enforcing temporary injunction– Challenge thereto – Held, temporary injunction was not challenged by defendants – Allegations of plaintiff prima facie stand corroborated from report of Local Commissioner – Only question of enforcement of order was involved - Therefore, Trial Court was within its ambit to provide police assistance – Petition dismissed – Order upheld. (Paras-4 to 7)

For the Petitioners: Mr. Naresh K. Sharma, Advocate.
For the Respondent: Mr. K.D. Sood, Sr. Advocate with Mr. Shubham Sood, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiff, instituted a suit for rendition, of, a decree for permanent prohibitory injunction, averring therein qua the defendants being restrained, vis-a-vis, the portion reflected as ABCD in the apposite site plan, from, carrying construction thereon, and, from closing the door shown therein, as, D-1, besides the defendants being restrained to erect, an, iron stair case upon portion ABCD. The plaintiff averred that he is, a, tenant under the defendants, in, the relevant premises. The defendants contested the suit, and, contended therein, that, the door reflected as D-1, in, the apposite site plan, being never used as egress or ingress, by the plaintiff, rather it being only used for ventilation of air. The defendants also contended that the erection,

of, the iron stair case, rather occurring on 25.12.2017, hence, prior to the filing of the instant suit.

2. During the pendency of the civil suit, before, the learned trial Court, the plaintiff, hence, instituted an application, cast, under the provisions of Order 39, Rules 1 and 2 of the CPC, whereon, the learned trial Court, after considering, the relevant material placed before him, rendered an order on 6.01.2018, (i) whereunder, the defendants were restrained either personally, or through their servants, agents or assignees, from, interfering by raising construction, and, by closing door, reflected as D-1, in portion shown as ABCDEF in the apposite site plan, in hence the plaintiff making use, of, the demised premises. The afore referred pronouncement made on 6.01.2018, by the learned trial Court, being, not concerted to be reversed, thereupon, hence it acquires conclusivity.

3. On 6.01.2018, the learned trial Court also allowed the plaintiff's application, for, appointment, of, a local commissioner, for visiting the apposite site, and, for his making an apt report, vis-a-vis, the nature and extent, of, construction, raised by the defendants, upon, the relevant site. The Local Commissioner, visited the relevant site, and, in the relevant inspection thereof, he, associated, the, presence before him, of all the contesting litigants, (i) the factum of the litigating parties taking part in the inspection, carried by the local commissioner, of the relevant site, is borne out, by their signatured statements, appended, with the report of the Local Commissioner. The Local Commissioner, in his apposite report, report whereof, is, accompanied by the apt photographs, and, by a rough site plan, and, as stood submitted before the learned trial Court, has, made disclosures therein, (ii) qua, the possession of the plaintiff, existing, at portions CDEF in the site plan, besides has made disclosures therein qua the back door, hence, leading to the office of the plaintiff, (iii) and, furthermore, has detailed therein, qua the defendants erecting a stair case, adjoining, the, back door of the office of the plaintiff, whereupon, the plaintiff, is, precluded to open the apt door, leading to his office. The aforesaid portrayals, as, embodied in the report of the Local Commissioner, remains, apparently not objected, to, by the defendants, given, theirs, not meteing any objections thereto. Consequently, the apposite depictions/unfoldments, made, by the Local Commissioner, in his report, do acquire an aura of solemnity, and, hence, the unfoldments occurring therein, are, to be prima faice hence meted credence.

4. Subsequent, thereto, the learned trial Court, on, 06.02.2018, hence allowed, the plaintiff's application, for, the apt ad interim order rendered on 6.01.2018, being enforced, through, the aegis of police. The aforesaid order was concerted, to be recalled, by the defendants, and, thereon a disaffirmative order, was, pronounced, on, 20.03.2018, by the learned trial Court, and, hence, the validity of the order pronounced earlier, on 6.02.2018, remains intact. The defendants, being aggrieved therefrom, hence, cast a challenge, vis-a-vis, the orders pronounced, by the learned trial Court, on 06.02.2018, (i) whereunder, the learned trial Court, upon the plaintiff's application, cast under the provisions of 151 of the CPC, rendered an order qua the ad interim order rendered by it, on 6.01.2018, being enforced through the aegis of the police, whereunder the defendants were restrained, from, raising construction, and, closing door D-1 in a portion shown as ABCDEF, in, the apposite site plan.

5. Be that as it may, with the order pronounced on 6.01.2018, hence acquiring conclusivity, thereupon, its mandate was enjoined to be enforced. The orders pronounced, by the learned trial Court, for, hence ensuring its apt enforcements, by its ordering for police assistance, being meted to the applicant/plaintiff, is, obviously, within the domain, of, the conclusive mandate recorded, by he learned trial Court, upon, the plaintiff's application, cast under the provisions of Order 39, Rules 1 and 2 of the CPC, (i) and, also meteings, of, apt police assistance, by the learned trial Court, for ensuring its enforcement, is, also within the ambit of law. Consequently, the orders pronounced, on 20.03.2018, whereunder, defendants' application, for recalling of orders, rendered on 6.02.2018, whereunder, police assistance, stood, meted to the plaintiff, for ensuring enforcement, of, the ad interim orders pronounced, on 6.01.2018, hence cannot be construed to be ingrained, with, any inherent legal fallibility.

6. Nowat, with the defendants, not meteing objections, to, the report of the Local Commissioner, (i) thereupon, the report of the Local Commissioner, is, to be prima facie assigned solemnity, and, gravity, (ii) especially qua the mandate of the orders recorded, by, the learned trial Court on 6.01.2018, being hence infringed, (iii) besides when no relevant material has been adduced by the defendants, for, succoring their propagation qua the construction, of, an iron stair case, existing at the site, and, leading upto the office of the plaintiff, not being made, subsequent, to, the orders made on 6.01.2018, rather its construction occurring, prior, to the institution of the suit, (iv) also gives strength to the factum, of, the relevant construction being made subsequent, to the pronouncement made by the learned trial Court, on 6.1.2018, (v) and, when prima faice hence obviously rather the order rendered, on the aforesaid date rather is infringed, as, displayed by the report of the Local Commissioner, thereupon, the meteing, of, police assistance to the plaintiff, for, ensuring the enforcement, of, the mandate, of, the ad interim order recorded, on, 6.1.2018, is concludable, to be both apt, and, tenable.

7. For the foregoing reasons, the instant petition, is, dismissed, and, the impugned order is maintained, and, affirmed. The parties are directed to appear, before, the learned trial Court on 23rd July, 2018. However, it is made clear that the observations made hereinabove shall have no bearings on the merits of the case. No order as to costs. All pending applications also stand disposed of. Records, if received, be sent back forthwith.

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

Roop Dutt Sharma .....Petitioner.
Versus
State of H.P. .....Respondent.

Cr.MP(M) No. 705 of 2018
Reserved on: 6th July, 2018
Date of Decision : 13th July, 2018

Indian Penal Code, 1860- Sections 363, 366 and 376- **Protection of Children from Sexual Offences Act, 2012 (Act)-** Sections 4, 7 and 16- **Code of Criminal Procedure, 1973-** Section 439- Grant of Bail – Accused in judicial custody for committing offences under I.P.C. and Act - Accused seeking bail – Although, victim was shown minor in School certificate and also in her MLC, but victim filing affidavit claiming to be major at time of alleged offences and of having married the accused – MLC not bearing signature or thumb mark of victim – Her Radiological age was not determined – Birth Certificate of victim not taken from the Competent Authority – Held, lack of firm and best documentary evidence on record qua age of victim, accused entitled for bail – Petition allowed – Accused granted conditional bail. (Paras-3 to 5)

For the Petitioner: Mr. R.K. Gautam, Sr. Advocate with Ms. Megha Kapur Gautam, Advocate.
For the Respondent: Mr. Hemant Vaid, Addl. A.G. with Mr. Y.S. Thakur and Mr. Vikrant Chandel, Dy. Advocates General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral)

The bail applicant, is, suffering judicial incarceration, for, his allegedly committing offences constituted under Sections 363, 366, and, Section 376 of the IPC, and, for

his allegedly committing offences, embodied in Sections 4, 7 and 16 of the POCSO Act, in respect whereo, FIR No. 7 of 2018 of 8.02.2018, is lodged with Women Police Station, Baddi.

2. The prosecutrix, has, solemnised marriage with the bail applicant, and, in her sworn affidavit, she has made a disclosure qua hers, at the relevant time, being a major. The marriage certificate, qua the solemnisation, of, marriage inter se the bail applicant, and, the prosecutrix also elborates therein qua the prosecutrix, at the relevant time, being, a, major. However, in case, the aforesaid material is imputed sanctity, thereupon, the offences allegedly committed by the bail application, would prima facie, be hence construable to be with the consent of the prosecutrix, (I) dehors, in her statement, recorded, under Section 164 of the Cr.P.C., before the learned Judicial Magistrate concerned, she ascribes, vis-a-vis, the bail applicant, an, incriminatory role, qua his, on, 8.02.2018, subjecting her, to, forcible sexual intercourse.

3. However, before proceeding to mete credence, to the aforesaid disclosures, unfolded, in the affidavit sworn, by the prosecutrix, and, in the apt marriage certificate, (a) it is necessary, to, bear in mind, the further factum of the MLC, appertaining, to the prosecutrix, contrarily unfolding therein, qua the prosecutrix being aged 15 years, and, also the school leaving certificate, appertaining to the prosecution, also, alike therewith unraveling, qua the prosecutrix, at the relevant time, being a minor.

4. In summa, the comparative worth, of, the aforesaid material, is, enjoined to be determined. In the apt MLC, though the prosecutrix, is, delineated therein, to be, at the relevant time, hence a minor, yet for the aforesaid reflections, to, carry vigour, (a) it stood enjoined, upon, the doctor concerned, to ensure hers appending, her signatures or thumb impression thereon, (b) whereas, with the apt MLC, neither carring the signatures of the prosecutrix, nor with her thumb impressions, standing embossed thereon. (c) Contrarily, with, the thumb impression(s) of her mother, standing, embossed thereon, (d) thereupon, it is to be invincibly, concluded, qua the delineations borne therein, qua the prosecutrix, at the relevant time, being a minor, not, prima facie, carrying any solemnity or gravity. More so, when the mother, of, the prosecutrix has therein revealed, her willingness, for her minor daughter undergoing, a, radiological test, for, her radiological age hence being determined. (i) Willingness whereof, would not, emanates unless, she is unsure about the exact date of birth of her daughter. Furthermore, though, the school leaving certificate also unravels qua the prosecutrix, at the relevant time, being a minor, yet, thereupon, too, no prima facie sanctity, is to be imputed, (a) given, the Investigating Officer, not, collecting from the quarters concerned, the, birth certificate of the minor prosecutrix, whereas, the birth certificate, alone, given its solitarily comprising the best evidence qua the relevant fact, would hence constrain this Court to mete authenticity, vis-a-vis, the reflections qua the date, of, birth of the prosecutrix, as borne, in her school leaving certificate. Contrarily, want of existence, on, record of the birth certificate of the prosecutrix, as, maintained with the offices concerned, does prima facie, bely her age, as, borne in the apt school leaving certificate, rather, the, reflections borne in the school leaving certificate qua the prosecutrix, at the relevant time, being a minor, are, to be construed to be sumisally and conjecturely made, whereupon, hence no reliance can be imputed.

5. Consequently, lack of firm, and, apposite best documentary material on record, displaying, qua the prosecutrix, at the relevant time, being a minor, rather when the mother of the prosecutrix, has evinced in the apposite MLC, hence her willingness, qua, the prosecutrix undergoing, the, radiological test, (i) hence, rears a formidable conclusion qua an aura of uncertainty, hence, existing, even in the mind of the mother, of, the prosecutrix, vis-a-vis, the exact date of birth, of, the prosecutrix, (ii) whereupon, it is to be concluded qua the prosecutrix being, a major, at the relevant time. In aftermath, even if, she in her statement recorded, under Section 164 of the Cr.P.C., hence attributes an incriminatory role, vis-a-vis, the bail applicant, yet with hers thereafter, solemnising, a, valid marriage, with the accused, thereupon, it is to be concluded, that, the aforesaid ascribed penal misdemeanors, prima facie, at this stage, hence fading into insignificance. Moreover, with the State not bringing on record, any material

displaying that in the event of bail applicant being released on bail, there is any likelihood of his fleeing from justice or tampering with the prosecution evidence, further constrains this Court to accord the facility of bail to the bail applicant. Consequently, the present bail application is allowed and the indulgence of bail is granted to the bail applicant subject to compliance of the following conditions:-

(i) that the bail applicant shall furnish personal bond in the sum of Rs.50,000/- with two local sureties in the like amount to the satisfaction of the learned Addl. Chief Judicial Magistrate, Nalagarh

(ii) that the bail applicant shall join the investigation, as and when required by the Investigating Agency;

(iii) 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 any police officer;

(iv) that he shall not leave India without the prior permission of the Court ;

(v) that he shall deposit his passport(s), if any, with the SHO, Police Station concerned;

6. With the aforesaid observations the present petition stand disposed of. It is, however, made clear that the findings recorded hereinabove shall have no bearings on the merits of the case.

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

Sh. Vijay Kumar .....Petitioner

Versus

Sh. Subhkaran and another .....Respondents

CMPMO No. 72 of 2018
Decided on: 13.07.2018

Code of Civil Procedure, 1908- Order XXXIX Rules 1 & 2 – Temporary prohibitory Injunction- Existence of prima facie case, necessity of – Plaintiff filing suit and seeking injunction against defendants from running industry adjoining to his house, in a residential area, which according to plaintiff was causing noise pollution – Trial Court declining temporary injunction but in appeal, Addl. District Judge allowing plaintiff's appeal and granting ad interim injunction – Petition against – On finding that defendants were permitted to shift their industry to that locality by Department of Industries, Electricity connection to run industry was also sanctioned in their favour, High Court held that plaintiff had no prima facie case and balance of convenience in his favour – Further comparative mischief by way of temporary injunction would be more to defendants as industry would be closed – Petition allowed – Order of First Appellate Court set aside and of Trial Court restored. (Paras- 6 and 7)

For the petitioner: Mr. Ajay Kumar, Sr. Advocate with Mr. Dheeraj K. Vashisth, Advocate.

For the respondent: Mr. Ajay Chandel, Advocate for respondent No.1.
Mr. R.P. Singh, Dy. A.G. with Mr. Kunal, Thakur, Dy. A.G for respondent No.2.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)

Petitioners-defendants have preferred this petition against the judgment dated 27.11.2017 passed by learned Additional District Judge (III), Kangra at Dharamshala in Civil Miscellaneous Appeal No. 02-D/XIV/2016, whereby on reversal of the order dated 29.09.2015 passed by learned Civil Judge, Dharamshala in an application under Order 39 Rules 1 and 2 CPC, registered as CMA No. 187/2015 has restrained them from running their industry 'Vishu Steel Products' at the present site i.e. village Barol, Post Office, Dari, Tehsil Dharamshala, District Kangra, H.P.

2. Respondent No.1-plaintiff is neighbour of petitioner-defendant. He filed a suit for the decree of permanent prohibitory injunction restraining them from causing any noise/sound pollution and nuisance by running their industry in that area, which according to him is residential.

3. The stand of the petitioner-defendant, however, is that after acquiring the plot adjoining to that of the plaintiff, they raised construction thereon. In the ground floor, shops are situated, whereas, upper floor is being used as residence. They initially were running their industry at M/s Vishu Products, Brij Lal Road, Kotwali Bazar, Dharamshala. The certificate of registration dated 13.02.1986 is Annexure P-12, whereas, the registration of the industry for the purpose of Central Sale Tax of the same date is also part of Annexure P-12. The certificate issued by the General Manager, District Industries Centre, Kangra at Dharamshala is Annexure P-11. As per these documents, the permission to defendants was granted to run the industry at Brij Lal Road, Kotwali Bazar, Dharamshala. In Annexure P-11, there is endorsement dated 18.04.2012, regarding change of site from Kotwali Bazar, Dharamshala to Village Barol, Post Office, Dari, Tehsil Dharamshala, District, Kangra, H.P., the present site.

4. Learned trial Court on appreciation of the pleadings of the parties and also the documents filed along with the plaint and also the written statement has concluded that the respondent-plaintiff is not entitled to the relief of temporary injunction. The application, as such, was dismissed vide order dated 29.09.2015.

5. As pointed out at the out set, learned lower appellate Court has reversed the order passed by learned trial Court and while allowing the appeal has restrained the petitioners-defendants from running their business at the present site. This has led in filing this petition on the several grounds, however, mainly that learned lower appellate Court has failed to appreciate the pleadings of the parties and also the legal principles need to be taken into consideration while considering an application under Order 39 Rules 1 and 2 CPC and as a result thereof reversed the order passed by learned trial Court illegally.

6. On hearing learned counsel representing the parties on both sides and also going through the material available on record of this petition, it would not be improper to conclude that learned lower appellate Court has went wrong while allowing the appeal and quashing the order passed by learned trial Court for the reason that respondent-plaintiff has failed to make out a case for grant of ad-interim injunction. The suit has been filed for the decree of permanent prohibitory injunction restraining the petitioners-defendants from creating sound/noise pollution by running their industry at the present site. Admittedly, the parties are neighbour. The permission by the defendants-petitioners under Section 118 of the H.P. Tenancy and Land Reforms Act may have been sought on the ground of raising construction of a residential house. The facts, however, remain that respondents-defendants who were already running their industry under the name and style of M/s Vishu Steel Products at Brij Lal Road, Kotwali Bazaar, Dharamshala after obtaining the permission from the District Industries Centre and also all clearances from the Department of Excise and Taxation under Central Sales Tax (registration and turnover) Rule 1957 was later on shifted to the present site. The intimation to this effect was given to the department of Industries. An endorsement to this effect dated 18.04.2012 under the

seal and signature of General Manager, District Industries Centre, Dharamshala District Kangra is there on the registration certificate Annexure P-11. Not only this but the order, Annexure P-13, whereby electricity connection was also sanctioned by the Himachal Pradesh State Electricity Board for running the industry by the respondents-defendants at the present site also *prima-facie* substantiate their claim. Therefore, irrespective of the permission to purchase the land under Section 118 of the Act has been granted for raising construction of residential building. The documentary evidence discussed hereinabove *prima-facie* reveals that the petitioners-defendants were permitted to shift their business to the present site by the department of industries. Otherwise also, in case there is some ambiguity or such permission has been granted in violation of the Rules, the same has to be gone into during the course of trial of the suit. At the stage of consideration of an application under Order 39 Rules 1 and 2 CPC, it is only to be seen as to whether there exists a *prima-facie* case or balance of convenience lies in favour of the plaintiff and that a comparative mischief likely to be caused in case such relief is granted, it would be higher to the defendants as compared to the plaintiff. It is again well settled that the main relief should not be granted by way of interim relief because to do so amounts to decree the suit well before its trial.

7. In view of the documentary evidence taken note of in para supra, the plaintiff has failed to make out a *prima-facie* case for grant of ad-interim injunction. On the other hand, the comparative mischief as is likely to be caused by way of impugned judgment shall be greater to the defendants-respondents as compared to the plaintiff for the reason that in case the industry by way of ad-interim injunction is ordered to be closed, that too, during the pendency of the suit, they will be deprived of their livelihood. The balance of convenience and equity leans in their favour and not in favour of the plaintiffs. Being so, the impugned judgment being not legally sustainable is quashed and set aside and the order passed by learned trial Court is upheld.

8. The appeal is accordingly allowed and stands disposed of. Pending application(s), if any, shall also stand disposed of.

Before parting, the trial Court is directed to decide the suit at the earliest, preferably within six months from today. Parties on both sides also to render all assistance to the trial Court in deciding the suit.

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

Chhering Dorje (Deceased) through LRs Smt. Padma Devi and ors. ...Appellants.

Versus

Dawa Gialchhan & anr. ...Respondents.

RSA No.306 of 2007.
Reserved on: 15.6.2018.
Date of Decision : 16th July, 2018.

Specific Relief Act, 1963- Section 34- Suit for declaration and injunctions – **Code of Civil Procedure, 1908-** Order XVIII Rule 18- Before First Appellate Court, defendants filing application under Order XVIII Rule 18 of Code for spot inspection – Appellate Court deciding appeal without passing any order on it – RSA by defendants – Held, decree of First Appellate Court was vitiated for non-consideration of application under Order XVIII Rule 18 of Code – Appeal allowed – Judgment and decree of First Appellate Court set aside – Matter remanded. (Paras-10 & 11)

For the appellants Mr. K.D. Sood, Senior Advocate with Mr. Shubham Sood, Advocate.

For the respondents Mr. B.C. Negi, Senior Advocate with Mr. Pranay Pratap Singh, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

By way of the present appeal, the appellants have challenged the judgment passed by the Court of learned District Judge, Kinnaur Civil Division at Rampur camp at Reckong Peo, in Civil Appeal No.16 of 2006, dated 13.6.2007, vide which, the learned lower Appellate Court, has affirmed the judgment and decree passed by the learned Civil Judge (Senior Division), District Kinnaur at Reckong Peo, in Civil Suit No.26-1 of 2004, dated 31.3.2006.

2. Material facts necessary for adjudication of this Regular Second Appeal are that plaintiffs/respondents (hereinafter referred to as 'plaintiffs') maintained a suit for declaration against the defendants/appellants (hereinafter referred to as 'defendants') alleging therein that they (plaintiffs) having their orchard on the land comprised in Khasra No.50, 51, 84, 85 in Up Mohal Danmochhe, Tehsil Pooh, District Kinnaur (H.P) (hereinafter referred to as 'suit land') and land of the defendant Chhering Dorje, is situated over Khasra No.136. There is a water channel (Kuhal) on Khasra No.132, in the same Mohal. The plaintiffs have been exercising right of easement by way of going to their respective fields and houses alongwith the edges (mainds) of Khasra No.132 for the last more than 30 years peacefully, openly, continuously, without any interruption and have also been transporting their agricultural products such as apple fruit etc. to the market through the same path. The defendants obstructed the path in the month of October, 2003 without assigning any reason.

3. Defendants have contested the suit of the plaintiffs and raising preliminary objections qua cause of action, limitation, estoppel and valuation. On merits, defendants have alleged that plaintiffs never exercised the alleged customary right of easement for going to their fields and houses. The defendants tried to make a path forcibly in the year 2003, bearing Khasra No.85, 87, 132 and 136 and when the defendants requested them not to do so, false report was lodged by the plaintiffs to police. The plaintiffs have encroached upon the Government land comprised in Khasra No.49, 82 & 86 and planted fruit trees and have defaced and dismantled the path.

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

"1. Whether the plaintiffs have customary rights of easement of way for their fields and houses alongwith mainds (edge) of Kuhal situated in Khasra No.132, as alleged ? OPP

2. Whether the plaintiffs are entitled to the relief of permanent prohibitory injunction, as prayed for ? OPP.

3. Whether the plaintiffs are having their path for their fields and houses through the land bearing Khasra Nos.49, 82 and 86, as alleged ? OPD.

4. Whether the plaintiffs have no cause of action to file the present suit ? OPD.

5. Whether the suit is barred by limitation ? OPD.

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

7. Whether the plaintiff are estopped from filing the present suit by custom prevalent in the area as alleged ? OPD.

8. Whether the suit is bad for non joining of the necessary parties, i.e. State of H.P, if so, its effect? OPD.

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

10. Relief."

5. The learned trial Court after deciding Issues No.1, 2 in affirmative, Issue No.3 to 9 in negative, decreed the suit.

6. Feeling aggrieved thereby the defendants maintained first appeal before the learned District Judge, Kinnaur Civil Division at Rampur Bushahr camp at Reckong Peo, assailing the findings of learned Trial Court being against the law and without appreciating the evidence and pleading of the parties to its true perspective. The learned lower Appellate Court affirmed the findings of the learned Court below. Now, the appellants have maintained the present Regular Second Appeal, which was admitted for hearing on 3.5.2010 on the following substantial questions of law:

" 1. Whether the pleadings of the parties the evidence on record have been misconstrued and in the absence of a specific plea of acquisition of easementary right by prescription or by necessity, the plaintiff could be granted the relief of mandatory injunction more particularly when the alleged obstruction was not on the land of the defendant-appellant and in the absence of the owners of the land and the persons who had erected the wall, decree could be passed against the appellant ?

2. Whether in view of the fact that the respondent admitted alternative, path, the decree for mandatory injunction can be passed against the appellant on the alleged custom to carry the agricultural produce on the alleged Kuhal by invoking the custom of passage for agricultural purposes of meend/edges of the filed ?

3. Whether the judgment and decree of the District Judge is vitiated for non-consideration and non- decision of the application under Order 18 Rule 18 C.P.C. in the alternative under Order 26 Rule 9 C.P.C read with section 151 C.P.C ?"

7. Learned Senior Counsel appearing on behalf of the appellants has argued that the learned Courts below without appreciating the evidence and documents, which have come on record to its true perspective, decreed the suit of the plaintiffs. He has argued that the findings recorded by the learned Courts below are required to be set aside. He has further argued that the learned lower Appellate Court has not decided the application of the appellant-defendant, under Order 18 Rule 18 of the Code of Civil Procedure and the appeal has been disposed of. On the other hand, learned Senior Counsel for the respondents has argued that no arguments were advanced in the application without arguing the main appeal, so no illegality and infirmity is committed by the learned lower Appellate Court in not deciding the application. In rebuttal, learned Senior Counsel appearing on behalf of the appellants has argued that the pleadings qua easement were not construed properly and the customary right, as claimed is not favaourable to the respondents-plaintiffs.

8. To appreciate the arguments of learned Senior Counsel appearing on behalf of the parties, I have gone through the record in detail.

9. In order to prove its case, PW-1, Dawa Gialchhan, deposed that he has been using the path, on the edges of the water channel in order to go to his orchard and for transporting the apple crop. He is using this path for the last more than 30 years. The path in question was closed in the year 2003, by the defendants by constructing a wall, as a result of which, the plaintiffs suffered loss. The water channel is not owned by the defendants, but is of the villagers and there is no loss to the plaintiff to pass through the edges of this Kuhal. Plaintiff has also made an application, under Section 107 and 150 of the Code of Criminal Procedure, in

which, defendants were directed to be of good conduct for one year. In his cross-examination, he has admitted that there is land of Horticulture Department above his land. He has denied that he has dispute with the Horticulture Department about the path. He has further denied that the path to his orchard and houses passes through the nursery of Horticulture Department. The water channel is about three metres in width. He has denied that he has no right to pass through the edges of Kuhal. PW-2, Prittam Chand, Ex-Pradhan of Gram Panchayat, Pooh, deposed that plaintiffs having their orchard at village Danmochha and they have been transporting the apples, since 1985-86 from the edges of the water channel. This water channel is on Government land and defendants have no right on this land. He has also stated that there is another path through the Government farm, but this path is quite lengthy and is quite steep and it is difficult to transport the apple boxes through that path. In his cross-examination, he has stated that he cannot say from which path, plaintiffs are transporting their apple boxes. He has not visited the orchard of the parties after 1988-89. PW-4, Susheel Sana, deposed that he has seen the passage in question. This passage goes through the edge of the Kuhal, which is owned by the Government. In October, 2005, there was a dispute between the parties regarding this passage and plaintiffs had complained to him that the defendants had blocked their passage, because of which, he had visited the spot. At the spot, he found that defendants had blocked the passage by raising wall. He has asked the defendants not to block the passage, but they did not agree. He has further stated that he is seeing the plaintiffs using this passage for the purpose of transporting their apple boxes etc. He has further deposed that there is no other passage for the plaintiffs to transport their fruits and to go and come out of the orchard. He has further stated that the defendants have still not removed the '*danga*' raised by them in the passage in question, because of which, the path of the plaintiffs has been blocked. DW-1, defendant, Chhering Dorje, stated that the plaintiffs have no right to maintain the suit, as they have ancestral old path through the farm of the Horticulture Department. There is no custom of walking on the edges of *Kuhal*. The land is sandy and in case, path is made along side the *Kuhal*, then *Kuhal* can be damaged. The edges of the *Kuhal* are used only for water and no other purpose. There is also danger to the branches of the trees, in case, the apple boxes are transported along side the water channel. No other person of the village has used this path. In his cross-examination, he has stated that the police and Pradhan have also visited the spot. The passage which, he has shown is near the Horticulture farm. He has denied that in order to pass through Horticulture farm, the plaintiff has go to ascending through a long distance and then again has to walk for about ½ KM through the village, whereas the path in dispute is just adjoining to his orchard. He has admitted that the plaintiffs never tried to walk through his land. DW-2, Gulab Singh, has also stated that the path of the plaintiffs passes through the Government farm, which is being used by them. The plaintiffs have encroached upon the Government land and closed the path. In his cross-examination, he has denied that the plaintiffs are transporting their apple on the edges of Khasra No.132. He has further stated that *Kuhal* is in his land, but he does not remember the Khasra number. He has denied that no loss is caused to him, in case, the person walks on the edges of the *Kuhal*.

10. After scrutinizing the entire evidence and documents available on record, the learned lower Appellate Court has passed the following order (s), which reads as under :

"24.8.2006 Present : Sh. B.L. Thakur, Advocate, for the appellants.

Sh. Ram Singh Negi, Advocate, for the respondents.

At this stage, an application under Order 18 Rule 18 C.P.C. has been filed by the Ld. Counsel for the appellants. Time prayed by the Ld. Counsel for the respondents to file reply. Now list the application for reply and consideration Camp at Reckong Peo on 18.10.2006.

Sd/-

District Judge, Kinnaur Rampur Bushahr,

camp at Reckong Peo.

18.10.2006 Present : Sh. B.L. Thakur, Advocate, for the appellants.
Sh. Gian Singh Negi, Advocate, for the respondents.
Reply to the application under Order 18 Rule 18 CPC has been filed on behalf of the respondents. Time prayed by the learned counsel for the applellants to file rejoinder. Now list the application for rejoinder and consideration on 23.11.2006 at Rampur.

Sd/-
District Judge, Kinnaur Rampur Bushahr,
camp at Reckong Peo.

23.11.2006 Present : Sh. B.L. Thakur, Advocate, for the appellants.
Sh. Ram Singh Negi, Advocate, for the respondents.
Rejoinder filed. At the request of ld. Counsel for the respondents, now list the application alongwith main appeal for consideration, on 15.12.2006.

Sd/-
District Judge, Kinnaur Rampur Bushahr,
camp at Reckong Peo.

15.12.2006 Present : Sh. B.L. Thakur, Advocate, for the appellants.
Sh. Ram Singh, Advocate, for the respondents.

The Ld. Presiding Officer has been transferred. Now list the case for proper orders on 10.1.2007.

Sd/-
P.A.

10.1.2007 Present: Sh. B.L. Thakur, Advocate, for the appellants.
Sh. Ashok Mehta, Advocate vice counsel for the respondents.

This case is fixed today for proper order. Now to come up for consideration on application under Order 18 Rule 18 CPC and arguments on appeal, on 21.3.2007.

Sd/-
District Judge, Kinnaur Division Rampur

21.3.2007 Present : Sh. Ashok Kumar, Adv. vice counsel for the appellants.
None for the respondent.

As the Ld. P.O. is on leave for today. Now, it be listed for proper order on 30.3.2007.

Sd/-
Reader.

30.3.2007 Present: Sh. Himesh Thakur, Advocate, for the appellants.

None for the respondents.

As the ld. P.O is on leave today. Now it be listed for proper order on 11.4.2007.

Sd/-
Reader.

11.4.2007 Present: Sh. B.L. Thakur, Advocate, for the appellants.
Sh. Ashok Mehta, Advocate vice Sh. Ram Singh Negi, Advocate for respondents.

The appeal is fixed today for proper order. Now to come up for arguments at Camp court Reckong Peo, on 20.4.2007. Notice be also issued to ld. Counsel for the respondent for the date fixed.

Sd/-
District Judge, Kinnaur Division Rampur Bushahr,

20.4.2007 Sh. Himesh Thakur, Advocate, for the appellants.
Sh. Ram Singh Negi, Advocate, for the respondents.

Now to come up for arguments, on 16.5.2007 at Reckongpeo.

Sd/-
District Judge, Kinnaur Division Rampur Bushahr

16.5.2007 Present: Sh. B.L. Thakur, ADvoate, for the appellants.
Sh. Ram Singh Negi, Advocate, for the respondents.
Arguments partly heard. Now list the case for further arguments and orders on 13.6.2007 at Reckongpeo.

Sd/-
District Judge, Kinnaur Division Rampur Bushahr

13.6.2007 Present: Sh. B.L. Thakur, Advocate, for the appellants.
Sh. Ram Singh Negi, Advocate, for the respondents.

Further arguments heard. Vide separate judgment of even date, the appeal is dismissed. The record of the trial court be sent back alongwith a copy of the judgment and the file of this court be consigned to record room.

Sd/-
Announced District Judge, Kinnaur Rampur Bushahr,
13.6.2007 camp at Reckong Peo."

11. Now, while going through the entire judgment passed by the learned lower Appellate Court, it seems that there is no mention with regard to the application, under Order 18

Rule 18 of the Code of Civil Procedure, which was ordered to be heard and disposed of the main appeal, as per the order dated 23.11.2006, meaning thereby, application remained undecided, as the application has not been decided by the learned lower Appellate Court. So, this Court finds that the case is required to be remanded back to the learned lower Appellate Court with a direction to decide the application, under Order 18 Rule 18 of the Code of Civil Procedure, which remained undecided and thereafter disposed of the main appeal. Thus, the findings, as recorded by the learned lower Appellate Court are perverse and required to be set aside. Consequently, substantial questions of law No.1 and 2, are not required to be answered at this stage, as the appeal is only remanded back of substantial question of law No.3, that the judgment and decree of the learned District Judge is vitiated for non-consideration and non-decision of the application, under Order 18 Rule 18 of the Code of Civil Procedure.

12. In view of the above discussion, the appeal of the appellants is allowed and the judgment and decree passed by the learned lower Appellate Court is set aside and the case is remanded back to the learned lower Appellate Court, to decide the same afresh, after hearing counsel appearing on behalf of the parties, at the earliest. Parties through their learned counsel are directed to put in appearance before the learned lower Appellate Court on ***6th August, 2018***. Pending application, if any, also stands disposed of. No order as to costs.

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

Ravinder Kumar Bansal and others ... Applicants/Plaintiffs

Versus

Pankaj Gupta and others ... Non-applicants/ defendants

OMP No. 406 of 2017
In Civil Suit No. 25 of 2016
Decided on July 16, 2018

Code of Civil Procedure, 1908- Order 1 Rule 10- Impleadment of party – Recovery suit – Plaintiffs vide agreement sold their equity shares in a company to defendants – On failure of defendants to pay balance sale price, plaintiffs filing suit for recovery and during its pendency seeking impleadment of one 'B' as proforma defendant on ground that 'B' is also one of the 'beneficiary' under agreement in question and requires to be impleaded as proforma defendant – And his exclusion from suit would lead to multiplicity of litigation – Held, no relief whatsoever has been prayed for by plaintiffs against 'B' – 'B' may be a beneficiary under the agreement and that amount is to be paid to him by defendants, but plaintiffs cannot hold brief for 'B' in matter between him and defendants – 'B' not being necessary or proper party to lis – Application for his impleadment dismissed. (Paras-8, 12 & 14)

Cases referred:

Savitri Devi v. District Judge, Gorakpur, AIR 1999 SC 976
Vidur Impex and Traders Pvt. Ltd. v. Tosh Apartments Pvt. Ltd., AIR 2012 SC 2925
Chet Ram V/s Brij Lal, Latest HLJ 2015 (HP) Suppl. 616
Razia Begum vs Sahebzadi Anwar Begum & Others, AIR 1958 SC 886
State Bank of India v. Krishana Pottery Udyog Association, 1994(2) Sim. L.C. 197

For the applicant/plaintiff Ms. Ambika Kotwal, Advocate.
For the non-applicants/ defendants Mr. Ramakant Sharma, Senior Advocate with Mr. Basant Thakur, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

By way of instant application filed under Order 1 Rule 10 read with Section 151 of the Code of Civil Procedure, prayer has been made on behalf of the applicants-plaintiffs for adding Shri Birbhan Goel as proforma defendant No. 4. Prayer made in the application referred to herein above is opposed by the non-applicants/defendants by way of a detailed reply filed to the application. Applicants-plaintiffs have filed above captioned civil suit for recovery of an amount of Rs. 4,74,32,000/- as balance consideration in terms of agreement dated 21.3.2013. As per agreement dated 21.3.2013, applicants-plaintiffs agreed to transfer their complete equity share of Atul Castings Limited (ACL) having its registered office at Village Dandi Kania, Tehsil Nalagarh, District Solan, Himachal Pradesh in favour of the defendants for a total sale consideration of Rs. 8,51,00,000/-. Since non-applicants/defendants allegedly failed to make complete payment in terms of agreement referred to herein above, suit bearing No. 25 of 2016 titled Ravinder Kumar Bansal and others vs. Pankaj Gupta and others came to be filed for recovery of amount, as has been taken note herein above.

2. Ms. Ambika Kotwal, learned counsel representing the applicants/ plaintiffs contended that while going through the pleadings and documents at the time of framing of issues, it transpired to the counsel for the applicants/plaintiffs that as per Clause 2 (c) of the agreement dated 21.3.2013, one Shri Birbhan Goel is also a beneficiary of the said agreement but inadvertently, that too under bonafide inference of law and facts, he could not be arrayed as a defendant in the suit for recovery on the basis of agreement dated 21.3.2013 and as such he may be ordered to be impleaded as proforma defendant. While inviting attention of this Court to agreement dated 21.3.2013, Ms. Ambika Kotwal, made a serious attempt to persuade this Court to agree with her contention that since Birbhan Goel is beneficiary of the agreement dated 21.3.2013, he being a necessary party for proper and complete adjudication of the matter, deserves to be arrayed as a proforma defendant. In support of aforesaid contention, Ms. Ambika Kotwal, placed reliance upon following judgments to persuade this Court to agree with her contention that it is not necessary that relief should be claimed against a person proposed to be added as party respondent or plaintiff because his/her presence may be otherwise essential for proper adjudication of the case:

(i) **Savitri Devi** v. **District Judge, Gorakpur**, AIR 1999 SC 976

(ii) **Vidur Impex and Traders Pvt. Ltd.** v. **Tosh Apartments Pvt. Ltd.**, AIR 2012 SC 2925

(iii) **Chet Ram** V/s **Brij Lal**, Latest HLJ 2015 (HP) Suppl. 616

3. While placing reliance upon the aforesaid judgment, Ms. Kotwal, further argued that the plaintiffs being the *dominus litus* are otherwise entitled to array anybody as a party because exclusion, if any of the proposed defendant at this stage, would ultimately lead to multiplicity of proceedings, which is against the very object of the provisions contained in Order 1 Rule 10 (2) CPC.

4. Mr. Ramakant Sharma, learned Senior Advocate duly assisted by Mr. Basant Thakur, Advocate, while opposing/refuting aforesaid prayer made on behalf of the applicants-plaintiffs and submissions made by the learned counsel representing the applicants/plaintiffs, vehemently argued that neither Shri Birbhan Goel is a necessary nor a proper party for the adjudication of the *lis* at hand as such, application deserves to be dismissed. Mr. Ramakant Sharma, learned Senior Advocate, while inviting attention of this court to para-5 of the application filed on behalf of the applicants-plaintiffs contended that since it is an admitted case of the parties that no relief has been claimed against the proposed proforma defendant, as such, prayer made in the instant application deserves to be rejected being devoid of any merit. Apart from above, Mr. Sharma, learned Senior Advocate, while referring to the written statement having been filed on behalf of the non-applicants/defendants, argued that a sum of Rs. 28,83,597/- is

due and payable to the defendants by the applicants/plaintiffs and as such, there is no force in the arguments of the learned counsel representing the applicants/plaintiffs that non-applicants/defendants have failed to pay balance sale consideration in terms of agreement dated 21.3.2013.

5. Having heard the learned counsel representing the parties and gone through the record, one thing is quite apparent that in terms of the agreement dated 21.3.2013, validity and legality whereof is otherwise subject matter of the civil suit pending before this Court, applicants/ plaintiffs have agreed to transfer their complete equity share of Atul Castings Limited in favour of the defendants, for a total sale consideration of Rs. 8,51,00,000/-. Similarly, it emerges from the pleadings adduced on record by the plaintiff that as of today, an amount of Rs. 4,74,32,000/- is payable by non-applicants/defendants towards alleged balance consideration. As has been noticed herein above, controversy with regard to complete payment in terms of agreement dated 21.3.2103 is pending adjudication before this Court in the main suit. No doubt, perusal of clause 2 (c) of agreement dated 21.3.2013 suggests that as per agreed terms *inter se* parties, an amount of Rs. 225.00 Lakh is payable to Shri Birbhan Goel by the non-applicants/defendants. It would be profitable to take note of the aforesaid clause as stands mentioned in the agreement dated 21.3.2013, as under:

> "Rs.225.00 Lakh payable to Shri Birbhan Goel by the first party shall now be paid by second party. If payment is not made by 5.4.2013, then interest @ 1.5% per month will also be paid. Two post dated cheques for the same have already been issued to Shri Birbhan Goel."

6. It is evident from a bare reading of aforesaid Clause contained in agreement dated 21.3.2013 that defendants being second party to the agreement are/were under obligation to pay an amount of Rs. 225.00 Lakh to Mr. Birbhan Goel before 5.4.2013, whereafter interest at the rate of 1.5% per month is/was payable.

Noticeably, Clause referred to herein above clearly suggests that at the time of entering into agreement two post-dated cheques qua amount referred to herein above were issued to Shri Birbhan Goel. Interestingly, neither in the plaint nor in the application at hand, there is averment, if any, that amount as mentioned in the aforesaid clause has not been paid to Shri Birbhan Goel by the defendants, rather, application in this regard is conspicuously silent. Further, in para-6 of the plaint, it has been mentioned that person namely Birbhan Goel is persistently demanding amount in terms of agreement dated 21.3.2013 from the applicants-plaintiffs, but, interestingly, no documents/notice(s), if any, received in this regard have been placed on record. Even during the pendency of this application, matter was repeatedly adjourned to enable learned counsel representing the plaintiffs to place on record letter or notice, if any, issued by Shri Birbhan Goel, claiming aforesaid amount from the applicants/plaintiffs.

7. Otherwise also, once it is not in dispute that as per agreement, this amount is/was to be paid by the defendants, where is/ was occasion for Shri Birbhan Goel to approach applicants/ plaintiffs for the payment of amount as stated in aforesaid clause. Leaving everything aside, as has been noticed herein above, two post-dated cheques already stand issued in favour of Shri Birbhan Goel, qua the amount mentioned in the aforesaid clause and as such, Shri Birbhan Goel could always present these cheques in the bank concerned after expiry of the date i.e. 5.4.2013 as mentioned in the agreement. In the event of dishonouring of cheques, he could always initiate proceedings under Section 138 of the Negotiable Instruments Act against the non-applicants/defendants, who had issued cheques in favour of Shri Birbhan Goel. Though, applicants/ plaintiffs in para Nos. 6 and 7 of the plaint, have stated that cheques issued in favour of Shri Birbhan Goel in terms of agreement dated 21.3.2013, were actually snatched and destroyed by the non-applicants/defendants and in this regard, FIR was also lodged with the police but non-applicants/defendants in their written statement have disputed aforesaid fact and have categorically stated that in lieu of amount of cheques in question, material to M/s Shri Kangra Steel Limited has been supplied. Otherwise also, these allegations/counter allegations

can not be seen at the stage of deciding the application but shall be decided in the main suit, on the basis of evidence led on record by the respective parties.

8. It is not in dispute that no relief, whatsoever has been claimed against Shri Birbhan Goel, who is proposed to be added as a party rather, applicants/plaintiffs in para-5 have admitted themselves that no relief is claimed against Birbhan Goel, and at the same time, no cogent and convincing reasons have been placed on record to substantiate their argument that impleadment of Shri Birbhan Goel is necessary as well as proper for adjudication of the case at hand.

9. True it is that as per agreement dated 21.3.2013, Shri Birbhan Goel is to receive some amount but, as has been noticed herein above, that amount is payable by non-applicants/ defendants and in this regard, action, if any, is/was to be taken by Shri Birbhan Goel against the non-applicants/defendants, if permissible under law, for recovery of such amount. Definitely, applicants/ plaintiffs can not hold brief for Shri Birbhan Goel, who has chosen not to approach this Court, seeking his impleadment. Similarly, Ms. Kotwal was unable to show from the record that Shri Birbhan Goel, who is proposed to be impleaded as defendant has initiated any proceedings for recovery of amount in terms of agreement, in any court of law.

10. There can not be any quarrel with the proposition of law laid down by the Hon'ble Apex Court, as has been relied upon by Ms. Kotwal, that it is not necessary that any relief is sought against a party, who is proposed to be impleaded, but to prove that the person proposed to be impleaded as party is a necessary or property party, applicants are required to prove /show that such a person has a direct interest in the case as held by Hon'ble Apex Court in **Razia Begum** vs **Sahebzadi Anwar Begum & Others,** AIR 1958 SC 886 , wherein it has been held as under:

> "13. As a result of these considerations, we have arrived at the following conclusions:-
>
> (1) That the question of addition of parties under R. 10 of O I of the Code of Civil Procedure, is generally not one of initial jurisdiction of the court, but of a judicial discretion which has to be exercised in view. of all the facts and circumstances of a particular case; but in some cases, it may raise controversies as to the power of the court, in contra distinction to its inherent jurisdiction, or, in other words, of jurisdiction in the limited sense in which it is used in s. 115 of the Code;
>
> (2)That in a suit relating to property in order that a person may be added as a party, he should have a direct interest as distinguished from a commercial interest in the subject matter of the litigation;
>
> (3)Where the subject-matter of a litigation is a declaration as regards status or a legal character, the rule of present or direct interest may be relaxed in a suitable case where the court is of the opinion that by adding that party it would be in a better position effectually and completely to adjudicate upon the controversy ;
>
> (4)The cases contemplated in the last proposition have to be determined in accordance with the statutory provisions of ss. 42 and 43 of the Specific Relief Act ;
>
> (5)In cases covered by those statutory provisions the court is not bound to grant the declaration prayed for, on a mere admission of the claim by the defendant, if the court has reasons to insist upon a clear proof apart from the admission;
>
> (6)The result of a declaratory decree on the question of status such as in controversy in the instant case affects not only the parties actually before the court but generations to come, and, in view of that consideration, the rule of I present interest' as evolved by case law relating to disputes about property does not apply with full force; and (7)The rule laid down in s. 43 of the Specific Relief Act is not exactly a rule of res judicata. It is narrower in one sense and wider in another."

11. Further, this Court in **State Bank of India** v. **Krishana Pottery Udyog Association**, 1994(2) Sim. L.C. 197 has held as under:

> "8. In the instant suit, privity of contract is in between the parties to the suit in question. In fact, the Board is not in any way concerned with the terms and conditions relating to the advancement of the loan or repayment thereof. Further, the Board had agreed to extend interest subsidy benefit to the loanee in case the latter owned a small scale industrial unit and this benefit had been given under a statutory scheme applicable in the case of such loanees. It is well settled that in order a party may be added as a defendant in the suit, he should have a legal interest in the subject-matter of the litigation- legal interest not as distinguished from an equitable interest, but an interest which the law recognizes. A person who would be only indirectly or commercially affected by the result of the litigation, cannot be impleaded as a party as a person having a direct interest in the subject-matter in dispute. The expression "all the questions involved in suit" cannot be read as "questions involved between the parties to the suit". [See Bindeshwari Chaudhary's case (supra)]. In the instant case, the Board, as observed, had simply bound itself to the payment of interest on the loan advanced to the defendants and that too till the time, their industrial unit/Association continued to remain in production. What was the amount of loan advanced or how it was to be repaid, were not the contractual terms entered into in between the parties to the suit in question and the Board. Thus, in that view of the matter, the Board having no legal interest, cannot be directed to be arrayed as a defendant in the present suit. Further, the plaintiff-bank has not sought any relief against the Board. This fact also cements the conclusion arrived at on this aspect of the case. Accordingly, issue No.1 is decided against the defendants and in favour of the plaintiff "

12. Similarly, though this Court is in agreement with Ms. Kotwal, that very object and purpose of provisions contained in Order 1 Rule 10 (2) CPC is to avoid multiplicity of proceedings, but, in the case at hand, though there is mention of Shri Birbhan Goel in agreement dated 21.3.2013, but as per agreement, there appears to be no liability, if any, of applicants/ plaintiffs to pay the amount to Shri Birbhan Goel, rather, amount if any, is to be paid by the non-applicants/defendants and in this regard, proceedings, if any, are /were to be initiated by Shri Birbhan Goel against the non-applicants/defendants.

13. Otherwise also, at the cost of repetition, it may be observed that there is no material adduced on record by applicants/plaintiffs to demonstrate that the person namely Shri Birbhan Goel is pressing hard for money in terms of agreement, from the applicants/ plaintiffs.

14. Consequently, in view of detailed discussion made herein above, this Court is convinced and satisfied that impleadment of Shri Birbhan Goel as proforma defendant is not necessary or proper in the instant proceedings, for proper adjudication of the case. Accordingly, the application is dismissed being devoid of merits.

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

Reliance General Insurance Company Ltd. ..Appellant.

Versus

Smt. Neelam Devi & Others. ..Respondents.

FAO(MVA) No. 185 of 2013
Decided on : 16.7.2018

Motor Vehicles Act, 1988- Sections 149 and 166- Claim application – Liability of Insurer – Gratuitous passenger, who is? – Claims Tribunal fastening liability on Insurer – Appeal against –

Insurance company assailing award of Claims Tribunal on ground that claimants had not pleaded that deceased was travelling in light goods vehicle as owner of goods, being so, it had no liability to indemnify award – On facts, High Court found that claimants had failed in establishing that deceased was travelling as owner of goods in a 'goods vehicle' – Held, deceased was a gratuitous passenger in the vehicle - Insurance Company had no liability – However, Insurer directed to pay the amount in question first to claimants and then recover same from Insured – Appeal disposed of – Award modified. (Paras- 3 and 4)

Case referred:
Manuara Khatun and Others versus Rajesh Kumar Singh and Others, (2017) 4 SCC 796

For the Appellant:	Mr. Jagdish Thakur, Advocate.
For the Respondent:	Mr. Rakesh Chauhan, Advocate, for respondent No.2. Respondents No. 1 and 3 ex-parte.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The instant appeal, is, directed against the award of 19.12.2012, pronounced by the learned Motor Accident Claims Tribunal, Fast Track Court, Chamba, H.P. in M.A.C No. 61/12/11, whereunder an apt indemnificatory liability stands fastened, upon, the insurer of the offending vehicle/ appellant herein, to, pay compensation amount constituted in a sum of Rs.3,60,600/- alongwith interest at the rate of 7.5% per annum, vis-a-vis, the claimants'.

2. The learned counsel for the appellant, does not contest, the affirmative findings returned upon the issue appertaining, to, the relevant mishap being caused by the rash, and, negligent manner, of, driving, of, the offending vehicle by its driver. However, the learned counsel for the appellant, has, contested, the, fastening of the apposite indimnificatory liability upon it, by, making a strenuous contention, before this Court (i) that with the dependents of the deceased, casting an averment at Sr. No. 10, of, the claim petition, qua the deceased, " traveling, in the ill-fated vehicle alongwith his photography cameras, flash lights, and, other allied equipments of photography", however with no pleading existing in the claim petition, qua, the deceased rather occupying the vehicle, evidently registered, as, borne by the apposite Registration Certificate, as, a "Light Goods Vehicle", as owner of the goods carried thereon, (ii) hence, when the deceased was not traveling in the ill-fated vehicle, in, the apposite manner/capacity, of, his evidently being the owner of the goods carried in the vehicle, thereupon, it was unbefitting for the learned MACT concerned, to, fasten an apt indemnificatory liability, upon it.

3. The aforesaid submission has force, (a) given though the dependents of the deceased, in, paragraph 10 of the claim petition, making an averment of the deceased, traveling, in the ill-fated vehicle alongwith his photography cameras flash lights and other allied equipments of photography (b) however they failed to thereafter hence aver the imminent factum, of, his hence traveling, in the vehicle, being, in the ordained permissible capacity as owner of the goods purportedly, carried in the ill-fated vehicle (c) whereas, with the apposite Registration Certificate appertaining to the vehicle, and, as borne in Ex. RZ rather unraveling qua it being registered, as a "Light Goods Vehicle", and, its further unfolding qua, the, permissible number of passengers, hence being upto three, (d) thereupon though the relevant vehicle at the relevant time did carry the permissible number of passengers, (e) yet thereafter it was also enjoined to be cogently proven qua the apt passengers borne in the relevant vehicle, also, owning the goods purportedly carried in the relevant vehicle, at, the relevant time. However, the learned tribunal did not yet insist, upon, the afore-stated factum being pleaded, by the dependents of the deceased, rather it considered, the, mere occupancy(s) of the relevant vehicle, by the deceased, and, of his carrying photography cameras, flash lights, and, other allied equipments of photography, hence per se galvanising a conclusion, qua, perse thereupon, his holding the apt

valid permissible capacity, and, thereafter fastened the apt indemnificatory liability, upon, the appellant herein. The reason(s) afore-stated, is per-se shaky, and, is amenable for rejection (a) given the dependents relying, upon FIR, borne in Ex. PW-2/A, wherein, there exists a categorical echoing, qua, the offending vehicle at the relevant time, carrying Baratis, and, in consequence of the vehicle suffering an accident, 20-27 passengers borne therein, hence suffering their demise(s). Consequently, when hence with the afore-stated number, of, passengers, being at the relevant time, hence carried in the vehicle concerned, thereupon ipso facto rendered impossible, the, carrying thereon, of, any goods, (b) besides, concomitantly rendered the deceased, to, at the relevant time, being rather not amenable for his being construed to be holding the apposite permissible valid capacity, of, his owning them, nor he can be construed to be traveling in the relevant vehicle, as owner thereof, conspicuously when no evidence in respect thereof stands adduced. Consequently, the fastening, of, the apt indemnificatory liability, upon, the insurer was inapt, and, the apt liability fastened, upon, the insurance company, for, liquidating to the claimants, the, compensation amount, warrants, it, being quashed and set aside.

4. Be that as it may given with, the, Hon'ble Apex Court in a judgment pronounced, in case titled as ***Manuara Khatun and Others*** **versus** ***Rajesh Kumar Singh and Others reported in (2017) 4 SCC 796,*** relevant paragraph 15 whereof stands extracted hereinafter, making a clear expostulation of law that where "gratuitous passengers", at the relevant time, hence, are carried in the vehicle concerned, and, when hence the insurance company, cannot be saddled with the apt indemnificatory liability, arising, out of the accident rather, yet, also with the Hon'ble Apex Court, hence making a direction upon the insurance company, to redeem payments of awarded sums of compensation, to the claimants, and, thereafter permitting it, to, recover it from the insured. In sequel, this Court in consonance therewith, apply(s) hereat, the principle of "pay and recover", and, thereafter directs the appellant to pay the compensation amount, as, assessed in the impugned award, to, the claimants,, with, liberty reserved qua it, to, thereafter by instituting an Execution Petition under Section 174 of the Motor Vehicles Act, hence, in, accordance with law recover it, from the insured.

> "15. This question also fell for consideration recently in National insurance Co. Ltd v. Saju Paul wherein this Court took note of entire previous case law on the subject mentioned above and examined the question in the contest of section 147 of the Act. While allowing the appeal filed by the insurance company by reversing the judgment of the High Court, it was held on facts that since the victim was travelling in offending vehicle as "gratuitous passenger" and hence the insurance company cannot be held liable to suffer the liability arising out of accident on the strength of the insurance policy. However, this Court keeping in view the benevolent object of the Act and other relevant factors arising in the case, issued the directions against the insurance company to pay the awarded sum to the claimants and then to recover the said sum from the insured in the same proceedings by applying the principle of "pay and recover"."

In view of the aforesaid observations, the present appeal stands disposed of. All pending applications stand disposed of accordingly.

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

The New India Assurance Company Ltd. .....Appellant.

Versus

Smt. Kashmiri Devi & Others. .....Respondents.

FAO No. 4031 of 2013
Decided on : 16.7.2018

Motor Vehicles Act, 1988- Sections 147 & 166 – Compensation – Liability of insurer – Claims Tribunal on the basis of salary certificate assessing monthly income of deceased at Rs.4,000/- - Claims Tribunal also granting compensation to legal representatives under conventional heads – Appeal by insurer – Insurance company submitting that salary certificate could not have been relied upon for want of non-production of attendance and salary register maintained by the employer of deceased - Being so, assessment of income of deceased as determined by Claims Tribunal is wrong – Held, it was open to insurer to ensure production of such record before the Tribunal but it omitted to do so, hence cannot object to the assessment of income done on basis of such salary certificate – High Court further enhanced compensation under conventional heads in tune with ratio laid down in **National Insurance Co. Ltd. vs. Pranay Sethi and others,** reported in **2017 ACJ 2700** – Appeal partly allowed – Award modified. (Paras-2 to 4)

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

For the Appellant:	Mr. Praneet Gupta, Advocate.
For the Respondent:	Mr. Ajay Sharma, Advocate, for respondents No. 1 to 4.
	Mr. Parmod Thakur, Advocate, vice counsel, for respondent No.5.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The instant appeal, is, directed against the award of 28.2.2013, as, pronounced by the learned Motor Accident Claims Tribunal, Una, Himachal Pradesh, in M.A.C Case No. 11/2012, whereunder, an apt indemnificatory liability stands fastened, upon, the appellant herein, to, pay compensation amount, constituted in a sum of Rs.8,84,000/- alongwith interest at the rate of 8% per annum, vis-a-vis the claimants', accrual whereof thereon, is, ordered to commence, from, the date of petition, uptill, its deposit. The compensation amount stands apportioned, amongst, the claimants, in the hereafter extracted manner:-

"Petitioner No. 1 Widow:	40%
Petitioner No.2 daughter:	40%
Petitioner No. 4 mother	20%

2. The learned counsel for the appellant, does not, contest, the affirmative findings pronounced upon the issue appertaining, to, the relevant mishap, being a sequel of rash, and, negligent driving, of, the offending vehicle, by its driver. However, the learned counsel for the appellant, has, contested the apt computation(s), vis-a-vis, the per mensem salary of the deceased, by his making a strenuous contention, before this Court (i) that the reliance placed, upon, Ex.PW-3/A by the learned MACT concerned, being grossly improper, given, the witness concerned, as apparent on a reading of her cross-examination, not producing before the Tribunal concerned, the apt attendance register, salary register, as, maintained by the employer of the deceased. Hence, he contends that non-adduction thereof, could not yet constrain, the learned MACT concerned, to, impute any probative vigor vis-a-vis Ex.PW-3/A. The aforesaid submission is not acceptable to this Court, given it being yet open for the learned counsel, for, the appellant, to make an apposite endeavour, through, the aegis of learned tribunal concerned, for ensuring production(s) therebefore vis-a-vis the original of the relevant records. However, the learned counsel for the appellant, omitted to, therebefore hence, make the aforesaid endeavour, thereupon the reckoning therefrom, of, Rs. 4,000/-, as, per mensem, salary of the deceased, does hence prima-facie carry some probative vigor. Even otherwise the strength of aforesaid contention, is emasculated, by the trite factum of the learned Tribunal, in computing the per mensem salary of the deceased, its not meteing deference, vis-a-vis, the apt reflections borne thereon, rather it proceeding to compute the per mensem salary of the deceased, to stand borne in a sum of Rs.4,000/- per mensem. The aforesaid reckoning by the learned Tribunal, vis-a-vis,

the per mensem salary, of the deceased, from, his relevant employment, hence acquires an aura of conclusivity. More so, when the claimants did not contest, the aforesaid computation especially, when neither they instituted an apposite appeal before this Court nor when they instituted any cross objections, vis-a-vis, the instant appeals instituted before this Court, by the Insurance Company.

3. Since the deceased was rendering employment, in, a private sector or was self-employed, thereupon, 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)

rather expostulating (i) that where the deceased concerned, is rendering employment, in non government organization(s), as is hereat, the apt employment, of, the deceased, (a) thereupon, hikes or accretions, on anvil, of future incremental prospects, vis-à-vis, the salary drawn, by him, in contemporanity, vis-a-vis, the ill fated mishap, from his employer, 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 trite factum of the deceased, at, the relevant time, being aged 24 years, (iv) thereupon, with the afore extracted paragraph, mandating, of, accretions towards future incremental prospects, vis-à-vis, the salary last drawn, by the deceased, being hence pegged, upto 40% thereof, besides being tenably meteable vis-à-vis, the, apposite last drawn salary. Consequently, in consonance therewith, after meteing 40% increase(s), vis-à-vis, the deceaseds' last drawn salary, thereupon, the relevant last drawn salary, of, the deceased is reckonable, at Rs. 5600/-, [Rs.4,000/-(last drawn salary of the deceased)+ Rs. 1600/- (40% of the last drawn salary). Significantly, the number of dependents, of, the deceased, are, three, hence, 1/3rd deduction is to be visited, upon, a sum of Rs. 5600/-, deducted, amount whereof, is calculated at Rs. 1866/- per mensem. Consequently, the annual dependency, including the future hikes towards future prospects, is, worked out, now at Rs.5600 – Rs. 1866= 3,734. In sequel whereto, the annual dependency, of the dependents, upon, the income of the deceased is computed, at Rs.3,734 x 12 = Rs.44,808/-. After applying, upon, the aforesaid figure, of, annual dependency, the apposite multiplier of 18, the total compensation amount, is assessed, in a sum of Rs.44,808/- X 18 =8,06,544/-.

4. However, the quantification, of damages, by the learned Tribunal in a sum of Rs. 10,000/-, vis-a-vis, the widow of deceased, and, Rs. 5,000/- vis-a-vis all claimants under the head, loss of estate and Rs. 5000/- funeral expenses, 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.25,000/- respectively, (iii) and, with no expostulation, occurring therein, vis-a-vis compensation amount(s), being awardable, to the widow, and, to the offspring and mother of the deceased, especially under the head, loss of love and affection, hence reliefs in respect thereto, stand hence impermissibly granted. Consequently, the award of the learned tribunal is interfered, to the extent aforesaid, of, its inaptly determining compensation, under, the aforesaid heads, vis-à-vis, the widow of the deceased, as also, vis-à-vis, the off springs, and, mother of the deceased. Accordingly, in addition to the aforesaid amount of Rs. 8,06,544/-, the claimants, are, nowat entitled, under, conventional heads, namely, loss to estate and loss of consortium, and, funeral expenses both letter heads of compensation (only to the widow of the deceased), sums of Rs.15,000/-, Rs.40,000/- and Rs.25,000/- respectively, as such, the total compensation whereto the claimants are entitled, comes to Rs.8,06,544/- + 15,000/- + 40,000/- + 25,000/-= Rs. 8,86,544/-.

5. 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 are, held entitled to a total compensation, of, Rs. 8,86,544/-, along with pending and future interest thereon @ 7.5 %, from, the date of petition till the date, of, deposit, of the compensation amount. Compensation amount be apportioned amongst the claimants in the hereinafter extracted manner:-

Claimant No.1 (widow)):	50%
Claimant No. 2:(Daughter)	30%
Claimant No.4:(Mother)	20%

The amount of interim compensation, if awarded, be adjusted against the aforesaid compensation amount, at the time of final payment. The shares of the minor child, shall remain invested, in FDRs, upto, the stage of theirs attaining majority. However, interest accrued thereon, shall be releasable vis-a-vis her mother, only when she explains, of, its being required, for, the upkeep and benefit, of the, 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.

The New India Assurance Company Ltd. ...Appellant.
Versus
Smt. Rajni Devi & Others. ...Respondents.

FAO No. 4027 of 2013
Decided on : 16.7.2018

Motor Vehicles Act, 1988- Sections 147 & 166 – Compensation – Liability of insurer – Claims Tribunal on the basis of salary certificate assessing monthly income of deceased at Rs.5,000/- - Claims Tribunal also granting compensation to legal representatives under conventional heads – Appeal by insurer – Insurance company submitting that salary certificate could not have been relied upon for want of non-production of attendance and salary registers maintained by the employer of deceased - Being so, assessment of income of deceased as determined by Claims Tribunal is wrong – Held, it was open to insurer to ensure production of such record before the Tribunal but it omitted to do so, hence cannot object to the assessment of income done on basis of such salary certificate – High Court further enhanced compensation under conventional heads in tune with ratio laid down in **National Insurance Co. Ltd. vs. Pranay Sethi and others,** reported in **2017 ACJ 2700** – Appeal partly allowed – Award modified. (Paras-2 to 4)

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

For the Appellant: Mr. Praneet Gupta, Advocate.
For the Respondent: Mr. Ajay Sharma, Advocate, for respondents No. 1 to 7.
Mr. Parmod Thakur, Advocate, vice counsel, for respondent No.8.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The instant appeal, is, directed against the award of 28.2.2013, as, pronounced by the learned Motor Accident Claims Tribunal, Una, Himachal Pradesh, in M.A.C Case No. 12/2012, whereunder, an apt indemnificatory liability stands fastened, upon, the appellant herein, to, pay compensation amount, constituted in a sum of Rs.11,67,500/- alongwith interest at the rate of 8% per annum, vis-a-vis the claimants', accrual whereof thereon, is, ordered to commence, from, the date of petition, uptill, its deposit. The compensation amount has been apportioned, amongst, the claimants, in the hereafter extracted manner:-

"Petitioner No. 1 Widow:	30%
Petitioner No.2 ,3 and 7 children:	20% each
Petitioner No. 4 mother	10%

2. The learned counsel for the appellant, does not, contest, the affirmative findings pronounced upon the issue appertaining, to, the relevant mishap, being a sequel of rash, and, negligent driving, of, the offending vehicle, by its driver. However, the learned counsel for the appellant, has, contested the apt computation(s), vis-a-vis, the per mensem salary of the deceased, by his making a strenuous contention, before this Court (i) that the reliance placed, upon, Ex.PW-4/A by the learned MACT concerned, being grossly improper, given, the witness

concerned, as apparent on a reading of his cross-examination, not producing before the Tribunal concerned, the apt attendance register, salary register, as, maintained by the employer of the deceased. Hence, he contends that non-adduction thereof, could not yet constrain, the learned MACT concerned, to, impute any probative vigor vis-a-vis Ex.PW-4/A. The aforesaid submission is not acceptable to this Court, given it being yet open for the learned counsel, for, the appellant, to make an apposite endeavour, through, the aegis of learned tribunal concerned, for ensuring production(s) therebefore vis-a-vis the original of the relevant records. However, the learned counsel for the appellant, omitted to, therebefore hence, make the aforesaid endeavour, thereupon the reckoning therefrom, of, Rs. 5,000/-, as, per mensem, salary of the deceased, does hence prima-facie carry some probative vigor. Even otherwise the strength of aforesaid contention, is emasculated, by the trite factum of the learned Tribunal, in computing the per mensem salary of the deceased, its not meteing deference, vis-a-vis, the apt reflections borne thereon, rather it proceeding to compute the per mensem salary of the deceased, to stand borne in a sum of Rs.5,000/- per mensem. The aforesaid reckoning by the learned Tribunal, vis-a-vis, the per mensem salary, of the deceased, from, his relevant employment, hence acquires an aura of conclusivity. More so, when the claimants did not contest, the aforesaid computation especially, when neither they instituted an apposite appeal before this Court nor when they instituted any cross objections, vis-a-vis, the instant appeals instituted before this Court, by the Insurance Company.

3. Since the deceased was rendering employment, in, private sector or was self-employed, thereupon, 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)

rather expostulating (i) that where the deceased concerned, is rendering employment, in non government organization(s), as is hereat, the apt employment, of, the deceased, (a) thereupon, hikes or accretions, on anvil, of future incremental prospects, vis-à-vis, the salary drawn, by him, in contemporanity vis-a-vis the ill fated mishap, from his employer, 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 trite factum of the deceased at the relevant time, being aged 28 years, thereupon, with the afore extracted paragraph, mandating, of, accretions towards future incremental prospects, vis-à-vis, the salary last drawn, by the deceased, being hence pegged, upto 40% thereof, besides being tenably meteable vis-à-vis, the, apposite last drawn salary. Consequently, in consonance therewith, after meteing 40% increase(s), vis-à-vis, the deceaseds' last drawn salary, thereupon, the relevant last drawn salary, of, the deceased is reckonable, at Rs. 7000/-, [Rs.5,000/-(last drawn salary of the deceased)+ Rs. 2000/- (40% of the last drawn salary). Significantly, the number of dependents, of, the deceased, are, three, hence, 1/4th deduction is to be visited, upon, a sum of Rs. 7000/-, deducted, amount whereof, is calculated at Rs. 1750/- per mensem. Consequently, the annual dependency, including the future hikes towards future prospects, is, worked out, now at Rs.7000 – Rs. 1750= 5,250/- In sequel whereto, the annual dependency, of the dependents, upon, the income of the deceased is computed, at Rs.5250 x 12 = Rs.63,000/-. After applying, upon, the aforesaid figure, of, annual dependency, the apposite multiplier of 17, the total compensation amount, is assessed, in a sum of Rs.63,000/- X 17 =10,71,000/-.

4. However, the quantification, of damages, by the learned Tribunal in a sum of Rs. 10,000/-, vis-a-vis, the widow of deceased, and, Rs. 5,000/- vis-a-vis all claimants under the head, loss of estate and Rs. 5000/- vis-a-vis all claimants under the heard funeral expenses, 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.25,000/- respectively, (iii) and, with no expostulation, occurring therein, vis-a-vis the compensation amount(s), being awardable, to the widow, and, to the offspring and mother of the deceased, especially under the head, loss of love and affection, hence reliefs in respect thereto, stands hence impermissibly granted. Consequently, the award of the learned tribunal is interfered, to the extent aforesaid, of, its inaptly determining compensation, under, the aforesaid heads, vis-à-vis, the widow of the deceased, as also, vis-à-vis, the off springs, and, mother of the deceased. Accordingly, in addition to the aforesaid amount of Rs. 10,71,000/-, the claimants, are, nowat entitled, under, conventional heads, namely, loss to estate and loss of consortium, and, funeral expenses both letter heads of compensation (only to the widow of the deceased), sums of Rs.15,000/-, Rs.40,000/- and Rs.25,000/- respectively, as such, the total compensation whereto the claimants are entitled, comes to Rs.10,71,000/- + 15,000/- + 40,000/- + 25,000/-= Rs. 11,51,000/-.

5. 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 are, held entitled to a total compensation, of, Rs. 11,51,000/-, along with pending and future interest thereon @ 7.5 %, from, the date of petition till the date, of, deposit, of the compensation amount. Compensation amount be apportioned amongst the claimants in the hereinafter extracted manner:-

Claimant/respondent No.1 herein (widow)):	30%
Claimants/ respondents No. 2 to 4 herein:(Children)	20% each
Claimant/respondent No. 6 herein:(Mother)	10%

The amount of interim compensation, if awarded, be adjusted against the aforesaid compensation amount, at the time of final payment. The shares of the minor Children, shall remain invested, in FDRs, upto, the stage of theirs attaining majority. However, interest accrued thereon, shall be releasable vis-a-vis her mother, only when she explains, of, its being required, for, the upkeep and benefit, of the, minor child. All pending applications also stand disposed of. Records be sent back forthwith.

****

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

Umardeen ... Petitioner

Versus

State of Himachal Pradesh ... Respondent

Cr. Revision No. 35 of 2008
Decided on July 16, 2018

Code of Criminal Procedure, 1973- Section 482- Inherent powers - Quashing of proceedings - Trial Court convicting accused of offences under Sections 279, 304-A and 338 of I.P.C. – Conviction & sentence upheld by Additional Sessions Judge – Revision against – During proceedings, petitioner seeking quashing of FIR and consequent proceedings pursuant to a compromise – High Court found settlement between parties bonafide – Petition allowed – Judgments of Lower Courts set aside – Petitioner/accused acquitted of offences charged with.

(Paras-12 and 13)

Cases referred:

Gian Singh v. State of Punjab and anr. (2012) 10 SCC 303

Dimpey Gujral and Ors. vs. Union Territory through Administrator, UT, Chandigarh and Ors. (2013(11 SCC 497

For the Petitioner :	Mr. Raman Jamalta, Advocate.
For the respondent :	Mr. S.C. Sharma, AAG with Mr. Amit Kumar, DAG.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

By way of instant petition filed under Section 397 CrPC, challenge has been laid to the judgment dated 19.2.2008 passed by the learned Additional Sessions Judge, Fast Track Court, Shimla in Criminal Appeal No. 32-S/10 of 2004/2003, affirming the judgment/order of conviction dated 19.12.2002 passed by the learned Judicial Magistrate 1st Class, Chopal, District Shimla, H.P. in Case No. 9-II of 2002, whereby learned trial Court, while holding petitioner-accused guilty of having committed offences under Sections 279, 338 and 304A IPC, convicted

and sentenced the petitioner-accused to undergo simple imprisonment for a period of one year for the commission of offence under Section 304A IPC and to undergo one month's simple imprisonment each for commission of offences punishable under Sections 338 and 279 IPC.

2. Facts, as emerge from the record are that on 25.9.2001, at around 2.30 pm, a Utility Jeep bearing registration No. HP-08-0559, met with an accident at a place called Shamtha, as a consequence of which, some of the occupants of the Utility vehicle expired on the spot, whereas others suffered injuries. After having received intimation with regard to aforesaid accident, police carried out investigation and after completion of investigation, presented Challan in the competent Court of law. Learned trial court, on the basis of material adduced on record by the prosecution, held petitioner-accused guilty of having committed offences punishable under Sections 279, 338 and 304A IPC and convicted and sentenced him as per description given herein above.

3. Being aggrieved and dissatisfied with the aforesaid judgment of conviction recorded by learned trial Court, petitioner preferred an appeal before the learned Additional Sessions Judge, Fast Track Court, Shimla, however, the fact remains that the appeal came to be dismissed, as a consequence of which, findings of conviction recorded by learned trial Court were upheld. In this background, petitioner has approached this Court in the instant proceedings, seeking his acquittal after setting aside judgments of conviction recorded by both the learned Courts below.

4. During pendency of the petition, CrMP No. 503 of 2017 under Section 482 CrPC, came to be filed on behalf of the petitioner, wherein he prayed for compounding of the offence in view of the compromise arrived inter se petitioner and legal heirs of the deceased and injured. In the said application, petitioner averred that during the pendency of the appeal, matter stands settled amicably with the intervention of the respectable persons of the families, as such, FIR No. 82 of 2001 as well as consequential proceedings may be ordered to be quashed and set aside. Copy of compromise entered into with the legal representatives of the deceased Tilmi Devi wife of Jawanu Ram, resident of Village and Post Office Bijmal Sub-Tehsil Nerwa, District Shimla, Himachal Pradesh and Vinayavin as also the injured Rajender Sharma, is also placed on record as Annexure AP-1, perusal whereof clearly suggests that legal representatives of deceased Tilmi Devi and Vinyavin and Rajender Sharma injured, have entered into compromise with the petitioner and they have no objection in case FIR detailed herein above as well as judgments of conviction recorded by learned Courts below are quashed and set aside and petitioner-accused is acquitted of the charges framed against him.

5. Though, compromise placed on record clearly suggests that the parties have arrived at amicable settlement inter se them, but this Court solely with a view to ascertain correctness and genuineness of the averments contained in the application as well as compromise placed therewith, directed petitioner-accused to cause presence of the parties, who entered into compromise.

6. Pursuant to directions issued by this Court on 7.7.2017, complainants, Nawabdeen, Hari Ram, Shobh Ram, Rahila Bibi, Ratni, Hussain and Smt. Barsi Devi came present on 21.7.2017 to get their statements recorded whereas, persons namely Rajender Sharma, Prem Chand, Nillu Ram, Yusuf and Saraj Deen appeared before this Court on 1.9.2017. All the above named persons, who happen to be legal representatives of the deceased Tilmi Devi and Vinyavin and injured himself (Rajender Sharma), categorically stated on oath before this Court that they, of their own volition and without any pressure, have entered into compromise (Annexure AP-1) with the petitioner, whereby they have agreed to settle the dispute between themselves amicably. They further stated before this Court that as per compromise, both the parties have resolved to settle the dispute amicably with the sole motive to live peacefully and to maintain cordial relations with each other and they have no objection in case FIR No. 82 of 2001 dated 26.9.2001 under Sections 279, 337, 338 and 304A IPC and judgments of conviction passed by learned Courts below are quashed and set aside. All the above named persons also stated

before this Court that the compromise appended as Annexure AP-1 to application under Section 482 CrPC bears their signatures.

7. Mr. Raman Jamalta, learned counsel representing the petitioner, while inviting attention of this Court to the application, compromise and the statements recorded on oath contended that the offences alleged to have been committed by petitioner can be ordered to be compounded by this Court in light of judgment passed by Hon'ble Apex Court in **Narinder Singh and others** versus **State of Punjab and another** (2014)6 Supreme Court Cases 466. Learned counsel for the petitioner also placed reliance upon judgments rendered by this Court in Mukesh Kumar vs. State of Himachal Pradesh and others (CrMMO No. 35 of 2017 decide on 21.2.2017), Sanjay Kumar Gupta vs. Mehar Chand and others (CrMMO No. 131 of 2016, decided on 27.5.2016) and Ram Kumar vs. State of Himachal Pradesh and others (CrMMO No. 269 of 2016, decided on 16.9.2016), wherein this Court has quashed the FIR and set aside the judgments of conviction on the basis of compromise.

8. Though this Court having perused the compromise which has been duly executed *inter se* parties, sees substantial force in the prayer having been made by the learned counsel representing the parties, but since the application stands filed under Section 482 CrPC, this Court deems it fit to dispose of the present petition in light of the judgment rendered by Hon'ble Apex Court in **Narinder Singh** (supra), whereby 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, 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 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 the power 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. Accordingly, in view of the averments contained in the petition as well as the submissions having been made by the learned counsel for the petitioner, that the complainants are no more interested in pursuing the case, and keeping in mind the well settled proposition of law as well as the statements of the complainants recorded on oath before the Court, this Court has no inhibition in accepting the prayer made in the present petition and quashing the FIR as well as judgments of conviction passed by learned Courts below. Moreover, the Hon'ble Apex Court in the judgment supra, has observed that power under Section 482 CrPC is not to be exercised in those cases which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. In the present case, since legal representatives of the deceased Tilmi Devi and Vinyavin as also injured Rajender Sharma are not interested in pursuing the criminal case against the petitioner and want to maintain cordial relations with each other to live their lives peacefully, as such, chance of conviction in this case are bleak and no fruitful purpose would be served in continuing with the criminal proceedings against the accused.

13. Consequently, in view of the peculiar facts and circumstances of the case, whereby compromise stands entered into *inter se* petitioner-accused and legal representatives of deceased Tilmi Devi and Vinyavin as also injured Rajender Sharma, this Court while exercising power vested in it under Section 482 Cr.P.C., deems it fit to accept the prayer having been made by the learned counsel representing the petitioner in CrMP No. 503 of 2017, as such, the application and main petition are allowed. FIR No. 82 of 2001 dated 26.9.2001, under Sections 279, 337, 338 and 304A IPC registered at Police Station, Chopal, District Shimla, Himachal Pradesh and the judgment dated 19.2.2008 passed by the learned Additional Sessions Judge, Fast Track Court, Shimla in Criminal Appeal No. 32-S/10 of 2004/2003 and judgment/order of conviction dated 19.12.2002 passed by the learned Judicial Magistrate 1st Class, Chopal, District Shimla, H.P. in Case No. 9-II of 2002 are quashed and set aside. Petitioner-accused is acquitted of the offences punishable under Sections 279, 337, 338 and 304A IPC. Bail bonds furnished by the petitioner are discharged.

Pending applications, if any, are also disposed of.

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

Narayan Mishra ....Petitioner.

Versus

The State of Himachal Pradesh & another ...Respondents.

Cr. MMO No. 238 of 2016
Reserved on: 11.07.2018
Decided on: 17.07.2018

Code of Criminal Procedure, 1973- Section 482- Inherent power – Exercise of - Transfer of case – Petitioner seeking transfer of proceedings initiated under Section 125 of Code by his wife and pending before Add. CJM, Theog to the Court of Addl. CJM, Nurpur on ground that he is blind and cannot travel from Nurpur to Theog to attend such proceedings – High Court found that petitioner was in job and he had been attending said proceedings at Theog – Whereas respondent wife was a poor lady with no means of livelihood – Further, petitioner could also avail videoconferencing facilities for recording his statement – Petition dismissed. (Paras-3 and 4)

For the petitioner:	Ms. Shubh Mahajan, Advocate, Legal Aid Counsel.
For respondent No. 1:	Mr. Ashwani Sharma and Mr. P.K. Bhatti, Additional Advocates General.
For respondent No. 2:	Mr. Ajeet Jawal, Advocate, vice Mr. Neeraj Gupta, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge

The present petition is maintained by the petitioner, who is husband of respondent No. 2, under Section 482 Cr.P.C. seeking transfer of the case, which is maintained by respondent No. 2 under Section 125 Cr.P.C., from the Court of Learned Additional Chief Judicial Magistrate, Theog, District Shimla, H.P., to the Court of Learned Additional Chief Judicial Magistrate, Nurpur, District Kangra, H.P.

2. As per the petitioner, he is blind and permanent resident of District Kangra. Respondent No. 2 brusquely made to live with the petitioner for six months at Nurpur with an objective to grab money. During May, 2013, respondent No. 2 showed empathy and sympathy that she will take care of the petitioner, but in the month of July, 2013, she deserted the petitioner and came to Shilaroo and promised to join his company if he gets his transfer done to Theog. Somehow, the petitioner got himself transferred to Theog, however, respondent No. 2 harassed him. She lived with the petitioner for about 6-7 days and again deserted him. Respondent No. 2 at times used to come to the petitioner for money. As there was no one to take care of the petitioner, so in April, 2015, he got himself transferred to Nurpur and respondent No. 2 did not turn up, as she started living with her children born out of her previous wedlock. Subsequently, respondent No. 2 maintained a petition under Section 125 Cr.P.C. against the petitioner in the Court of learned Additional Chief Judicial Magistrate, Theog, District Shimla, H.P., with a sole motive to fetch money from the petitioner. The petitioner has also maintained a petition under Section 9 of the Hindu Marriage Act, 1955, at Nurpur. In the above backdrop, the petitioner has prayed that the petition be allowed and the case filed by respondent No. 2 under Section 125 Cr.P.C., titled as Asha Devi vs. Narayan Mishra, which is pending adjudication in the

Court of Learned Additional Chief Judicial Magistrate, Theog, District Shimla, H.P., be transferred to the Court of learned Additional Chief Judicial Magistrate, Nurpur, District Kangra, H.P.

3. Heard. The learned Legal Aid Counsel has argued that the petitioner is not in a position to travel all the way from Nurpur to Theog and attend the Court, so the case filed by respondent No. 2 against the petitioner under Section 125 Cr.P.C. be transferred from the Court of learned Additional Chief Judicial Magistrate, Theog, District Shimla, to the Court of learned Additional Chief Judicial Magistrate, Nurpur, District Kangra, H.P. On the other hand, the learned Additional Advocate General, appearing on behalf of respondent No. 1/State has argued that the petitioner is doing his job and earlier also he used to attend the Court at Theog, so there is no merit in the petition and the same be dismissed. The learned vice counsel appearing on behalf of respondent No. 2 has argued that respondent no. 2 is a very poor lady and she is unable to travel from Theog to Nurpur for attend the Court, as she is having a small child. He has further argued that due to poverty, respondent No. 2 is not in a position to bear the travel expenses. He has argued that keeping in view the fact that respondent No. 2 is a poor lady having a small child and also considering the fact that earlier the petitioner used to travel to attend the Court at Theog and is a man of means, as he is doing a job, the petition be dismissed.

4. After taking into consideration the fact that the petitioner is doing job and earlier he used to travel from Nurpur to Theog in order to attend the Court at Theog and also considering the fact that respondent No. 2 is a poor rustic lady having a child and is being maintained by her poor parents, this Court finds there is no merit in the petition. This Court has also considered the fact that in the age of technology in case the petitioner so needs, he can always take the help of video conferencing and make the appropriate request to the learned Court for recording his statement.

5. In view of what has been discussed hereinabove, the petition is devoid of merit, deserves dismissal and is accordingly dismissed. Pending application(s), if any, shall also stand(s) disposed of.

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

FAO No. 327 of 2017 alongwith connected matters.
Decided on : 17.7.2018

1. FAO No. 327 of 2017
United India Insurance Company Ltd. Appellant.
Versus
Vidya Devi & Others. Respondents.
2. FAO No. 328 of 2017
United India Insurance Company Ltd. Appellant.
Versus
Smt. Kalru Devi and others. Respondents.
3. FAO No. 477 of 2016
United India Insurance Company Ltd. Appellant.
Versus
Smt. Janga Devi & Others. Respondents.

Motor Vehicles Act, 1988- Sections 147 & 166- Claim application(s) – Liability of insurer – Claims Tribunal holding that the accident was the result of rash and negligent driving of driver of offending vehicle and fastening liability on Insurer to indemnify award(s) – Appeal(s) against – Insurer assailing award(s) on grounds that (i) sudden mechanical defect was cause of accident (ii)

driver was drunk while driving, (iii) ten persons were travelling in light goods vehicle and they were gratuitous passengers – Held, (i) in absence of any mechanical report no finding can be given that some mechanical defect was cause of accident, (ii) FSL report though proves highly inebriated condition of driver indicating that he was driving in intoxicated condition, but drunken driving is not a defence available to the insurer (iii) documents tender on record prove that deceased were travelling as owners of goods – Further held, Claims Tribunal was justified in fastening liability on insurer – Appeals dismissed – Awards upheld. (Paras-2 and 3)

Case referred:
Khem Chand vs. Uma Devi and Others, 2010(2) SLJ (H.P) 1207

FAO No. 327 of 2017
For the Appellant: Mr. Anil Tomar, Advocate.
For the Respondents: Mr. Baldev Singh Negi, Advocate, for respondents No. 3 and 4.
Respondents No. 1 and 2 ex-parte.

FAO No. 328 of 2017
For the Appellant: Mr. Anil Tomar, Advocate.
For the Respondents: Mr. Naresh K Gupta, Advocate, for respondents No. 1 to 4.
Mr. Baldev Singh Negi, Advocate, for respondents No. 5 and 6.

FAO No. 477 of 2016
For the Appellant: Mr. Anil Tomar, Advocate.
For the Respondents: Mr. Suneet Goel, Advocate, for respondent No.1.
Mr. Baldev Singh Negi, Advocate, for respondents No.2 and 3.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The instant appeals, arise out of, a, common accident, and, are directed, against, the award pronounced by the learned Motor Accident Claims Tribunal, Kinnaur at Rampur Bushehar, H.P. in MAC Petition Nos. 33-R/2 of 2016/2015, 39-R/2 of 2016/2015 and 0000022 of 2015, whereby, it proceeded to assess compensation as follows:-

(1) In FAO No. 327 of 2017:- A sum of Rs. 24,06,000/- along with interest @ 9% per annum from the date of filing of petition till the final realisation of the amount qua the dependents of deceased Mahender Singh, and, the apposite indemnificatory liability, is, fastened upon the insurer/appellant herein.

(2) In FAO No. 328 of 2017:- A sum of Rs. 14,40,000/- along with interest @ 9% per annum from the date of filing of petition till the final realisation of the amount qua the dependents of deceased Ram Dayal, and, the apposite indemnificatory liability, is, fastened upon the insurer/appellant herein.

(3) In FAO No. 477 of 2016:- A sum of Rs. 9,78,000/- along with interest @ 7.5% per annum from the date of filing of petition till the final realisation of the amount qua the dependents of deceased Kailash Singh, and, the apposite indemnificatory liability, is, fastened upon the insurer/appellant herein.

2. The learned counsel for the appellant(s), submits before this Court, that he is contesting, the affirmative findings recorded by the learned MACT concerned, upon the issue appertaining to the relevant mishap, being caused by the rash and negligent driving, of, the ill-fated vehicle, by its driver. He submits, that, with the FSL concerned, in, its apposite report(s) making an echoing qua the driver of the vehicle being excessively inebriated , hence attraction(s) by the learned MACT concerned, of, the principle of *res ipsa loquitur* being inappropriate (i) rather he contends that with the driver espousing, that owing to, eruption of, a, sudden mechanical

defect in the vehicle at the relevant time, hence the relevant mishap rather occurring (ii) whereas with the aforesaid ground standing dispelled by the learned MACT concerned, pointedly for want of tendering(s) into evidence the apt report of, the, mechanical expert concerned (iii) thereupon the relevant mishap is to be concluded, to arise, solely on the account, of, the gross excessively inebriated condition, at the relevant time, of the driver of the offending vehicle. The aforesaid ground cannot be accepted, in view of, a, judgment reported in 2010(2) SLJ (H.P) 1207, titled as ***Khem Chand*** vs. ***Uma Devi and Others***, wherein the ground of intoxication, at the relevant time, of, the apt driver, stands expostulated to be hence statutorily un-espousable, by the insurance company. However,the learned counsel for the appellant(s) still contends (iv) that with the relevant vehicle, as reflected, by the apposite registration certificate, being evidently registered as "light Motor Vehicle" (v) whereas at the relevant time, its evidently carrying 10 passengers, and, with no evidence being adduced (vi) qua the deceased owning the goods purportedly carried, at the relevant time, in the relevant vehicle, hence all the deceased passengers', as borne therein, were hence palpably carried therein, beyond the permissible carrying capacity, of the vehicle,(vii) AND are, to be concomitantly construed, to be traveling in the relevant vehicle, as "Gratuitous Passengers", and, hence the indemnificatory liability, as, fastened upon the insurer, being inaptly fastened upon it. However, the aforesaid ground cannot be accepted, as, a witness namely Sanjay Negi, tendered into evidence, certain bills, emanating from M/s K.C Verma Trading company, (viii) and with the aforesaid bills, making a display qua at the time contemporaneous, to the occurrence, of, the relevant mishap, hence goods being purchased by the deceased passengers', from the aforesaid commercial establishment, and, theirs being carried, in the relevant vehicle,(ix) besides, when at the stage, of, theirs being tendered, into evidence, besides at the stage of exhibition marks being embossed thereon, the learned counsel for the insurance company rather omitted to rear apt objection, vis-a-vis, the embossing, of, exhibition marks thereon, (x) thereupon the learned counsel for the insurance company, cannot, contend that, for want of proofs thereof, emanating from author thereof, the aforesaid exhibits being neither readable nor admissible in evidence.

3. Reemphasizingly, even if the aforesaid contention has some force, it was yet incumbent, upon the, learned counsel for the appellant(s), to, thereafter institute, an appropriate application, before the learned MACT concerned, for, seeking its leave, for summoning, from, M/S K.C Trading company Badrash, from whose commercial establishment, the, apt bills emanated, the person concerned, who issued them, for hence his being enabled to step into the witness box, and, his thereat proving or disproving all scribings' occurring therein. However the learned counsel for the insurer, omitted, to, make the aforesaid endevour. Consequently, the contention of the learned counsel for the appellant(s), qua, the aforesaid apt bills' being neither readable nor admissible in evidence, is hence unacceptable.

In view of the above, there is no merit in the appeals, and, the same are accordingly dismissed. All pending applications also stand disposed of accordingly.

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

Dharam Pal (deceased) through Sheela Rani and others ....Petitioners.

Versus

Shri Yashwant Singh and another ... Respondents.

Civil Revision No. : 108 of 2011
Reserved on : 12.07.2018
Decided on : 19.07.2018.

Motor Vehicles Act, 1989- Section 174- Execution of Award – Claims Tribunal granting compensation to claimant with interest for loss caused to his property and directing insurer to

indemnify the award in toto – In appeal, High Court allowing appeal of insurance Company and restricting its liability towards third party loss at Rs. 6,000/- only – Claimant filing execution against owners of offending vehicle – Executing Court dismissing execution application on ground that award of Claims Tribunal as modified by High Court does not impose any liability on owners – Petition against – Held, Claims Tribunal in its award had specifically held that claimant suffered loss because of rash and negligent driving of driver of bus, owned by said owners – Also that owners had not contravened any terms and conditions of Insurance Policy and in that view of matter had fastened liability on Insurance Company – Further held, it is not a case where Claims Tribunal did not hold owners of bus liable to indemnify the claimants, notwithstanding that their liability is not written in so many words in the award – Approach of Executing Court is hyper technical – Petition allowed – Order set aside – Matter remanded to Executing Court to execute award in its letter and spirit. (Paras-12 to 15)

For the petitioners : Mr. Dibender Ghosh, Advocate.

For the respondents :Mr. Bhupinder Gupta, Sr. Advocate with Mr. Ajit Saklani, Advocate for respondent No. 1.

: Mr. Ranvir Chauhan, Advocate for respondent No. 2.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge

By way of this revision petition, the petitioners have prayed for the following reliefs:-

> *"It is, therefore most respectfully prayed that this petition may be accepted and the impugned order dated 19.4.2011, passed by the learned Motor Accident Claims Tribunal (III), Shimla, in case No. Execution Petition No. 31-S/10 of 2008, title as Sh. Dharam Pal versus Sh. Yashwant Singh and another, may be ordered to be quashed and set aside and the petitioner may be held entitled to recover the compensation awarded by the learned Motor Accident Claims Tribunal (II), Shimla, by proceeding in the above execution petition before the court below."*

2. It is not in dispute that the claim petition filed by the predecessor-in-interest of the present petitioners, namely, Dharam Pal in the Court of Motor Accident Claims Tribunal (II) Shimla, i.e. MAC No. 74-S/2 of 1994, was decided by way of award dated 27.04.2000 in the following terms:-

> *"In view of my findings on all the issues hereinabove, this petition is allowed. A sum of Rs. 2,64,000/- alongwith interest @ 12% per annum from the date of the petition till the deposit of the entire amount of compensation is awarded as compensation to the petitioner. Let the memo of costs be prepared accordingly.*
>
> *Out of the amount of compensation, let a sum of Rs. 24,000/- plus interest incurred upon the entire amount of compensation up to date, be released to him, whereas the remaining Rs. 2,40,000/- be invested in fixed deposit in his name for a period of two years in any nationalised bank at Shimla. The record of this petition, be completed, and consigned to record."*

3. It is also not in dispute that learned Tribunal vide award dated 27.4.2000 held that respondent No. 4 therein i.e. New India Assurance Company Ltd., was liable to satisfy the award. Relevant paras of the award are reproduced herein-below:-

> *"25. In view of the case law cited supra, as well as, the perusal of the evidence available on record, it is held that no doubt the uill fated bus was being driven at the time of accident by respondent NO. 3, who was not having the valid driving licence, but, the said respondent was allowed to drive the same by Sh. J.K. Verma, who was the duly licence-holder driver engaged by respondents No. 1 and 2. In*

this way the respondent No. 4 is not entitled to its exclusion viz from the liability to pay compensation to the petitioner.

26. In view of the discussions herein-above, it is respndent No. 4 liable to satisfy the award, because the objection raised by the said respondent to seek its exclusion stand rejected. This issue thus stand accordingly answered and against the respondent No. 4."

4. It is also a matter of record that in a appeal filed by the Insurance Company, this Court in FAO No. 341 of 2000, vide its judgment dated 16.11.2006, modified the award in the following terms:-

"In view of the aforesaid findings, appeal Nos. 325 of 2001, 342 of 2000 and 165 of 2002, filed by the insurance company are dismissed. Appeal Nos. 340 and 341 of 2000, filed by the insurance company are allowed to the extent that their liability for payment of claims awarded by the Tribunal on account of damage to third party property is held to the extent of Rs. 6,000/-, only, in each of the two cases, with proportionate interest."

5. Grievance of the present petitioner is that thereafter execution filed by the claimants for execution of the award has been erroneously dismissed by MACT (III), Shimla, vide order dated 19.4.2011 by holding that there was no order imposing liability on Yashwant Singh and Govind Mehta, i.e. the owners of the bus involved in the accident.

6. I have heard learned Counsel for the petitioner as also learned Senior Counsel appearing for respondent No. 1 and learned Counsel for respondent No. 2. I have also gone through the records of the case.

7. A perusal of the impugned order dated 19.4.2011 demonstrates that learned Executing Court has dismissed the execution petition by holding that there was no order imposing liability on Yashwant Singh and Govind Mehta, i.e. respondents No. 1 and 2 before learned Tribunal, and therefore, the execution was not maintainable against the judgment debtors.

8. As the order passed by the learned Executing Court is not lengthy, the same is reproduced herein-below for ready reference:-

"It is 12:30 P.M. At this stage Sh. Ajay Sharma, advocate appeared for the decree holder.

This execution petition has been raised against Yashwant Singh and Govind Mehta for recovery of Rs. 7,13,488/- on the strength of award passed by Motor Accidents Claims Tribunal (II), Shimla dated 27.04.2000 rad with final order passed by the Hon'ble High Court of H.P. in FAO No. 341 of 2000 decided on 16.11.2006. A perusal of the order of the Tribunal dated 27.04.2000 would show that the liability to pay the compensation was fixed on the Insuance Company and Insurance Company went in appeal before the Hon'ble High Court of H.P. in FAO No. 341/2000 and appeal preferred by the Insurance Company was allowed and their liability for payment of claim was limited to Rs. 6,000/-. There is no order imposing liability on Yashwant Singh and Govind Mehta. As such, in my humble opinion, this execution petition is not maintainable against the judgment debtors herein. This being the position, execution petition is dismissed. Be consigned to record room."

9. Having heard learned Counsel for the petitioners and leaned Counsel for the respondents, in my considered view, the impugned order passed by the learned Executing Court is perverse and not sustainable in the eyes of law.

10. It is not in dispute that in a Motor Accident Claims petition preferred by predecessor in interest of the present petitioners against Yashwant Singh and Govind Mehta,

learned Claims Tribunal after holding that the accident had occurred on account of rash and negligent driving of respondent No. 3 therein held the claimants were entitled for compensation.

11. The issues which were framed by the learned tribunal are quoted herein-below:-

"1. Whether the petitioner had suffered loss on account of rash and negligent driving of the driver of respondent No. 1 & 2?OPP.

2. To what amount of compensation is the petitioner entitled and from whom? OP Parties.

3. Whether the respondent No. 1 and 2 had contravened the terms and conditions of the insurance policy, as alleged? If so, with what effect? OPR-4.

3-A. Whether the petition is bad for mis-joinder of necessary parties?OPR-1.

4. Relief."

12. A perusal of Issue No. 3 framed by learned Tribunal demonstrates that the Insurance Company had taken a stand before the learned Tribunal that they were not liable to indemnify the owners of the bus, i.e. insured, as they had contravened the terms and conditions of the policy. Learned Tribunal firstly held in favour of the petitioner/claimant that he had suffered loss on account of rash and negligent driving of the driver of the owners of the bus. Thereafter while deciding Issue No. 3, learned Tribunal held that respondents No. 1 and 2 had not contravened the terms and conditions of the Insurance Policy and fastened the liability to indemnify on the Insurance Company. In other words, firstly learned Tribunal held claimant to be entitled for compensation from the owners of the bus and thereafter, as learned Tribunal came to the conclusion that the owners were duly insured qua the bus with the Insurance Company and there was no contravention of the conditions of the Insurance Policy, it held that Insurance Company was liable to indemnify the owner. Therefore, it cannot be said that learned Tribunal did not hold the owners of the bus liable to indemnify the claimants.

13. Now incidentally, the award passed by the learned Tribunal was only assailed by the Insurance Company but not by the owners of the bus. In appeal, this Court held that Insurance Company was only liable for payment of claim on account of third party damage to the extent of Rs.6,000/- with proportionate interest.

14. In this view of the matter, it is but obvious that the award so passed by the learned Tribunal has now to be satisfied by the judgment debtors, i.e. owners of the bus. Said owners cannot shun their liability by taking a hyper technical stand that it is nowhere expressly mentioned in the award that they were liable to compensate the claimant. Simply because it is not written in the award in so many words that owners were liable to compensate the claimant, the owners cannot be permitted to evade their liability. In fact, learned Tribunal after holding that there was a valid Insurance Policy executed by the owners of the bus with the Insurance Company, directed that compensation has to be paid by the Insurance Company. However, before returning these findings, learned Tribunal has also held that the accident took place on account of rash and negligent driving of the driver of the owners of the bus. This, but of course, means that at first instance, owners of the bus were liable to indemnify the claimant but, as in the view of the learned Tribunal, there was valid insurance policy, it further held that liability has to be fastened upon the Insurance Company. This very important aspect of the matter has been ignored by the executing Court while dismissing the execution petition. The approach adopted by learned Executing Court is a hyper technical one. The contention of learned Senior Counsel appearing for respondent No. 1 that executing Court cannot go behind a decree, does not hold good in the peculiar facts of this case, because after in the appeal filed by the Insurance Company, this Court had held Insurance Company to indemnify the claimant to a limited extent only, then it is but obvious that the remaining part of the award, which has not been disturbed by this Court, has to be satisfied by the owners of the vehicle.

15. In view of findings returned herein-above, this petition is allowed with costs. Impugned order dated 19.04.2011, passed by MACT (III), Shimla, in case No. 31-S/10 of 2008, is

quashed and set aside and the matter is remanded back to learned Executing Court with a further direction to execute the award dated 27.04.2000, passed by the learned Motor Accident Claims Tribunal (II), Shimla, in M.A.C. No. 74-S/2 of 1994 in letter and spirit.

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

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, ACJ AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Kashmir Chand ....Petitioner.

Versus

Bhakra Beas Management Board and another ...Respondents.

CWP No.689 of 2018.
Reserved on: 2.5.2018
Decided on: July 20, 2018

Punjab Re-organization Act, 1966- Section 79(9) – Bhakhra Beas Management Board Class III and Class IV Employees (Recruitment & Conditions of Service) Regulations, 1994 (Regulations) - Power of Chairman to amend Regulations without prior approval of Central Government – Held, Language of sub Section 9 of Section 79 of Act is unambiguously clear – Regulations stipulating the conditions of service of Officers and other staff, which expression would also include amended Regulations can be framed by the Board with previous approval of Central Government and by issuing a notification in the official gazette – As the prior approval of Central Government for the proposed amendment in the Regulations for promotion to the post of Sub Fire Officer was not obtained, it cannot be said that Regulations stood amended with exercise of such power by Chairman of the Board – Therefore, promotion to the post of Sub Fire Officer is to be governed by original Rules/Regulations. (Paras – 29 to 31)

Cases referred:

Hukamchand v. Union of India, AIR 1972 SC 2427

Additional District Magistrate v. Shri Siri Ram, 2000 (5) SCC 643

Indian Express Newspaper v. Union of India, (1985) 1 SCC 641

Moti Ram Deka vs. General Manager, North East Frontier Railway, AIR 1964 Supreme Court 600

Macquarie Bank Limited Vs. Shilpi Cable Technologies Limited, (2018) 2 Supreme Court Cases 674

Association of Management of Private Colleges Vs. All India Council for Technical Education and others, (2013) 8 Supreme Court Cases 271

V.L.S. Finance Limited Vs. Union of India and others, (2013) 6 Supreme Court Cases 278

Babu Verghese and others Vs. Bar Council of Kerala and others, (1999) 3 Supreme Court Cases 422

Pradip Kumar Maity Vs. Chinmoy Kumar Bhunia and others, (2013) 11 Supreme Court Cases 122

K.P. Sudhakaran and another Vs. State of Kerala and others, (2006) 5 Supreme Court Cases 386

Marathwada University Vs. Seshrao Balwant Rao Chavan, (1989) 3 Supreme Court Cases 132

For the Petitioner : Mr. Shrawan Dogra, Senior Advocate, with Ms Nishi Goel, Advocate.

For the Respondents : Mr. Naresh Sood, Senior Advocate, with Mr. Aman Sood, Advocate, for the respondents.

Mr. Anup Rattan, Advocate, for the applicant in CMPST No. 6479 of 2018.

The following judgment of the Court was delivered:

Sanjay Karol, Acting Chief Justice

The sole issue, which arises for consideration in the present petition, is as to whether in the absence of any prior approval of the Central Government, as envisaged under sub-section (9) of Section 79 of the Punjab Re-organization Act, 1966 (hereinafter referred to as the Act), by way of Subordinate Legislation, can the Chairman of the Bhakra Beas Management Board (hereinafter referred to as the Board), be said to have been authorized, thus, entitling him to carry out amendment to the Bhakra Beas Management Board Class-III and Class-IV Employees (Recruitment & Conditions of Service) Regulations, 1994 (hereinafter referred to as 'Regulations').

2. At this point in time, we may observe that the Writ Petitioner, while reserving liberty qua Reliefs No.(ii), (iii) & (iv), to be agitated in appropriate proceedings, in accordance with law, desired the Court to adjudicate the following relief in the present petition:

> "(i) That the respondents may kindly be directed to hold DPC for the existing three post(s) of Sub Fire Officers which have already fallen vacant, as per 'existing provisions' reflected in Annexure P-10, and consider the petitioner for promotion to the aforesaid post(s) from due date, with all consequential benefits".

3. Certain facts are not in dispute. On 9.1.1992, petitioner Kashmir Chand was selected and appointed as a Fireman in the respondent-Board. On the issue of promotion to the next higher post, i.e. Leading Fireman, the Writ Petitioner had to agitate his rights, which stood crystallized by this Court, with the rendering of judgment dated 26.5.2014, in CWP No. 4709 of 2010, titled as *Kashmir Chand versus Bhakra Beas Management Board and others*. Significantly, the Board accepted the findings returned therein, but however, some of the aggrieved private parties, preferred an appeal, being LPA No.137 of 2014, titled as *Tek Chand & others v. B.B.M.B & others*, in which interim directions were passed to implement the directions contained in the judgment, subject to the outcome of the appeal. Consequently, vide Office Order dated 21.7.2014, the Writ Petitioner was promoted as a Leading Fireman, on regular basis, w.e.f. 9.2.2012.

4. The next promotional post from Leading Fireman is that of a Sub Fire Officer, for which post, the regulations originally envisaged the eligibility criteria as under:

Sr. No.	Category	Method of appointment	Minimum educational & other qualifications	Minimum experience
2.	Sub Fire Officer	By promotion amongst Leading Firemen	Qualified Sub Fire Officer's course from National Fire Service College, Nagpur OR Matric with Fire Course from Ministry of Defence or Home Affairs. OR Matric without any Fire course	2 years experience in Fire Service 4 years experience in Fire Service 5 years experience in Fire Service

5. However, the eligibility criteria was to be amended vide order dated 16.12.2014 (Annexure P-9), whereby it was proposed as under:

Sr. No.	Category	Method of appointment	Minimum educational & other qualifications	Minimum experience
2.	Sub Fire Officer	By promotion amongst Leading Firemen	Qualified Sub Fire Officer's course from National Fire Service College, Nagpur OR Matric with Fire Course from Ministry of Defence or Home Affairs. OR Matric without any Fire course	2 years experience in Fire Service 4 years experience in Fire Service 5 years experience in Fire Service

6. In the said factual matrix, we are called upon to adjudicate as to whether Office Order dated 16.12.2014 (Annexure P-9), issued by the Chairman of the Board, which is reproduced hereinunder, authorisedly amends the Regulations (reproduced supra) or not:

> "In exercise of powers conferred under Regulation 2 (I) (p) of Bhakra Beas Management Board Class-III & Class-IV Employees' (Recruitment and Conditions of Service) Regulations, 1994, Chairman, BBMB is pleased to amend the provisions i.e. method of appointment, minimum educational & other qualifications of Schedule 'A' of ibid Regulations and substitute the same in respect of the categories under various Groups as mentioned in Annexure 'A' to "F" attached with this order.
>
> This issues with the approval of the Chairman, BBMB."

7. The Board is entitled to frame Regulations under the provisions of Section 79 of the Act, which reads as under:

> **"79. Bhakra Management Board:-** (1) The Central Government shall constitute a Board to be called the Bhakra Management Board for the administration, maintenance and operation of the follow- ing works namely:-
>
> (a) Bhakra Dain and Reservoir and works appurtenant thereto;
>
> (b) Nangal Dam and Nangal-Hydel Channel up to Kotia Power House;
>
> (c) the irrigation headworks at Rupar, Harike and Ferozepur;
>
> (d) Bhakra Power Houses : Provided that the administration, maintenance and operation by the said Board of the generating units of the Right Bank Power House as have not been commissioned shall commence as and when any such unit has been commissioned;
>
> (e) Ganguwal and Kotia Power Houses;
>
> (f) Sub-stations at Ganguwal, Ambala, Panipat, Delhi, Ludhiana, Sangrur and Hissar and the main 220KV transmission lines connecting the said sub-stations with the power stations specified in clauses (d) and (e): and

(g) such other works as the Central Government may, by notification in the Official Gazette, specify.

(2) The Bhakra Management Board shall consist of-

(a) a whole time Chairman and two whole time members to be appointed by the Central Government;

(b) a representative each of the Governments of the States of Punjab, Haryana and Rajasthan and the Union territory of Himachal Pradesh to be nominated by the respective Governments or Administrator, as the case may be:

(c) the representatives of the Central Government to be nominated by that Government.

(3) The functions of the Bhakra Management Board shall include-

(a) the regulation of the supply of water from the Bhakra-Nangal Project to the States of Haryana. Punjab and Rajasthan having regard to-

(i) any agreement entered into or arrangement made between the Governments of the existing State of Punjab and the State of Rajasthan, and

(ii) the agreement or the order referred to in sub-section (1) of section 78 ;

(b) the regulation of the supply of power generated at the power-houses referred to in sub-section (1) to any Electricity Board or other authority in charge of the distribution of power having regard to-

(i) any agreement entered into or arrangement made between the Governments of the existing State of Punjab and the State of Rajasthan,

(ii) the agreement or the order referred to in sub-section (1) of section 78 , and

(iii) any agreement entered into or arrangement made by the existing State of Punjab or the Punjab Electricity Board or the State of Rajasthan or the Rajasthan Electricity Board with any other Electricity Board or authority in charge of distribution of power before the appointed day in relation to the supply of power generated at the power houses specified in sub-section (1);

(c) the construction of such of the remaining works connected with the Right Bank Power House as the Central Government may specify;

(d) such other functions as the Central Government may, after consultation with the Governments of the States of Haryana, Punjab and Rajasthan, entrust to it.

(4) The Bhakra Management Board may employ such staff as it may consider necessary for the efficient discharge of its functions under this Act : Provided that every person who immediately before the constitution of the said Board was engaged in the construction, maintenance or operation of the works in sub-section (I) shall continue to be so employed under the Board in connection with the said works on the same terms and conditions of service as were applicable to him before such constitution until the Central Government by order directs otherwise: Provided further that the said Board may at any time in consultation with State Government or the Electricity Board concerned and with the previous approval of the Central Government return any such person for service under that Government or Board.

(5) The Governments of the successor States and of Rajasthan shall at all times provide the necessary funds to the Bhakra Management Board to meet all expenses (including the salaries and allowances of the staff) required for the discharge of its functions and such amounts shall be apportioned among the successor States the State of Rajasthan, and Electricity Boards of the said States in such proportion as the Central Government may, having regard to the benefits to each of the said States or Boards, specify.

(6) The Bhakra Management Board shall be under the control of the Central Government and shall comply with such directions, as may from time to time, be given to it by that Government.

(7) The Bhakra Management Board may with the approval of the Central Government delegate such of its powers, functions and duties as it may deem fit to the Chairman of the said Board or to any officer subordinate to the Board.

(8) The Central Government may, for the purpose of enabling the Bhakra Management Board to function effectively, issue such directions to the State Governments of Haryana, Punjab and Rajasthan and the Administrator of the Union territory of Himachal Pradesh or any other authority, and the State Governments Administrator or authority shall comply with such directions.

(9) The Bhakra Management Board may, with the previous approval of the Central Government and by notification in the Official Gazette, make regulations consistent with this Act and the rules made thereunder, to provide for-

(a) regulating the time and place of meetings of the Board and the procedure to be followed for the transaction of business at such meetings,

(b) delegation of powers and duties to the Chairman or any officer of the Board:

(c) the appointment, and the regulation of the conditions of service, of the officers and other staff of the Board:

(d) any other matter for which regulations are considered necessary by the Board.**"**(Emphasis Supplied)

8. We find language of the statute to be unambiguously clear. From a plain reading of the statute, it is evidently clear that the Regulations can be framed, which expression would also include "amended" by the Board "with the previous approval of the Central Government and by issuing a notification in the official Gazette".

9. At this point in time, we may only record that the factum of previous approval of the Central Government was never ever sought for or obtained by the Board/its Chairman, nor has the Central Government accorded such approval.

10. While arguing that the Rule stood amended vide order dated 16.12.2014, whereby the Writ Petitioner becomes ineligible for promotion to the post of Sub Fire Officer, Mr. Naresh Sood, learned Senior Advocate, appearing for the Board, invites our attention to the provisions of clause (2)(i)(p) of the Regulations, which reads as under:

"2(1)(p). "Service" means the service of the Board and shall comprise groups of various classes of posts shown in Schedule 'A' annexed with these regulations;

Provided that the Chairman shall be competent to make additions to or deletions of, or substitution of any post(s) in a group or add new group(s) in the Schedule 'A' annexed with these regulations, when considered expedient to do so depending upon the work load:**"** (Emphasis supplied)

11. We find the submission to be fallacious, for two reasons, (a) the power under clause (2)(i)(p) is by way of Subordinate Legislation, (b) such power is restricted only with regard

to "addition", "deletion" or "substitution" of any post in a group or add new groups in Schedule 'A' to the Regulations, having effect of changing the eligibility criteria of any post, so specified in the Regulations. And the reason is not far to seek. The Board was constituted to carry out certain works of national importance, originally sought to be undertaken by different States, for which purpose employees, fulfilling certain eligibility criteria, were employed. Each State had its different Rules. Hence, to ensure timely completion of the Projects, uniformity and continuity in service and its conditions were required to be maintained.

12. We are also not in agreement with Mr. Naresh Sood, learned Senior Counsel, that the Chairman is empowered to amend the Regulations also by virtue of Section 97 of the Act, which we find also does not authorize or empower the Chairman to do so, for no rules authorizing him to amend the rules/regulations stand framed by the Central Government, reads under:

> **"97. Power to make rules:-** (1) The Central Government may, by notification in the Official Gazette make rules to give effect to the provisions of this Act.
>
> (2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:-
>
> (a) the procedure to be followed by the Bhakra Management Board and the Beas Construction Board for the conduct of business and for the proper functioning of the Boards and the manner of filling casual vacancies among the members of the said Boards;
>
> (b) the salaries and allowances to be paid to the whole time Chairman and whole time members of the Bhakra Management Board;
>
> (c) the salaries and allowances and other conditions of service of the members of the staff of the Bhakra Management Board or the Beas Construction Board;
>
> (d) the maintenance of records of all business transacted at the meetings of the Bhakra Management Board or the Beas Construction Board and the submission of copies of such records to the Central Government.
>
> (e) the conditions subject to which, and the mode in which, contracts may be made on behalf of the successor States and the State of Rajasthan in relation to the functions of the Bhakira Management Board or the Beas Construction Board;
>
> (f) the preparation of the budget estimates of the receipts and expenditure of the said Boards and the authority by which such estimates shall be approved;
>
> (g) the conditions subject to which the said Boards may incur expenditure or reappropriate funds from any budget head to another such head;
>
> (h) the preparation and submission of annual reports;
>
> (i) the maintenance of accounts of the expenditure incurred by the said Boards;
>
> (j) any other matter which is to be, or may be, prescribed.
>
> (3) Every rule made under this section shall be laid, as soon as may be after it is made, before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or 1 [in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be, so however that any such modification or annulment

shall be without prejudice to the validity of anything previously done under that rule.**"**

13. There is nothing in the said Section, which confers any power upon the Chairman, as is so contended. The rules making powers are quite stringent.

14. In *Hukamchand v. Union of India*, AIR 1972 SC 2427, Hon'ble Supreme Court has held that power to make subordinate legislation is derived from the enabling Act and it is fundamental that the delegate on whom such a power is conferred has to act within the limits of authority conferred by the Act. This law has again been reiterated by Hon'ble Supreme Court in *Additional District Magistrate v. Shri Siri Ram*, 2000 (5) SCC 643, 451.

15. It is settled law that delegated legislation is open to scrutiny of the Courts and may be declared invalid particularly on two grounds: (a) Violation of the Constitution; and (b) Violation of the enabling Act.

16. In fact, the delegate cannot override the Act either by exceeding the authority or by making provisions which are inconsistent with the Act. The delegate has to exercise the power of making subordinate legislation in accordance with the procedure prescribed ad subordinate legislation may be struck down as arbitrary if the same fails to take into account very vital facts which either expressly or by necessary implication are required to be taken into consideration by the statute or the Constitution. (*Indian Express Newspaper v. Union of India*, (1985) 1 SCC 641)

17. In *Moti Ram Deka vs. General Manager, North East Frontier Railway*, AIR 1964 Supreme Court 600, a seven Judge Bench of the Hon'ble Supreme Court, while dealing with a subordinate legislation which was not in consonance with the provisions of the Constitution, has held that such subordinate legislation, violating any mandatory provision of the Constitution, will be void.

18. Sub section (7) of Section 79 empowers the Board to delegate its functions to its Chairman, but then even this has to be with the "approval of the Central Government". Well, this has not been done in the present case.

19. At this stage, we would like to refer to provisions of Section 21 of the General Clauses Act, 1897, which reads as under:-

> "21. Power to issue, to include power to add to amend, vary rescind notifications, orders, rules or bye-laws—Where, by any [Central Act] or Regulations a power to [issue notifications,] orders, rules or bye-laws is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction and conditions (if any), to add to, amend, vary or rescind any [notifications,] orders, rules or bye-laws so [issued]."

20. Section 21 of the General Clauses Act, 1897 thus clearly provides that where any Central Act or Regulation confers powers to issue notifications, orders, rules or bye-laws, then that power is exercisable in the like manner and subject to the like sanction and conditions, if any, to add to, amend, vary or rescind any notifications, orders, rules or bye-laws so issued.

21. In the present case, the Regulations in issue have been framed in exercise of powers conferred upon the Board by the Central Act. Now, in case the Regulations so framed are to be amended by the Board, then obviously, they have to be amended by exercising powers to amend the same, if any, which in our considered opinion, means that as respondent-Board can make Regulations only with the previous approval of the Central Government, then amendment in the same can also be carried out by the respondent-Board only with the previous approval of the Central Government.

22. In *Macquarie Bank Limited* Vs. *Shilpi Cable Technologies Limited*, (2018) 2 Supreme Court Cases 674, Hon'ble Supreme Court has held that the task of a Judge, when he looks at the literal language of the statute as well as the object and purpose of the statute, is not to interpret the provision as he likes but is to interpret the provision keeping in mind Parliament's

language and the object that Parliament had in mind. With this caveat, it is clear that judges are not knight-errants free to roam around in the interpretative world doing as each Judge likes. They are bound by the text of the statute, together with the context in which the statute is enacted; and both text and context are Parliaments', and not what the Judge thinks the statute has been enacted for.

23. In *Association of Management of Private Colleges* Vs. *All India Council for Technical Education and others*, (2013) 8 Supreme Court Cases 271, Hon'ble Supreme Court has held as under:

> "67. The position of law is well settled by this Court that if the Statute prescribes a particular procedure to do an act in a particular way, that act must be done in that manner, otherwise it is not at all done. In the case of Babu Verghese v. Bar Council of Kerala, after referring to this Court's earlier decisions and Privy Council and Chancellor's Court, it was held as under:
>
> > "31. It is the basic principle of law long settled that if the manner of doing a particular act is prescribed under any statute, the act must be done in that manner or not at all. The origin of this rule is traceable to the decision in Taylor v. Taylor which was followed by Lord Roche in Nazir Ahmad v. King Emperor who stated as under:
> >
> > 32. This rule has since been approved by this Court in Rao Shiv Bahadur Singh v. State of V.P. and again in Deep Chand v. State of Rajasthan. These cases were considered by a three-Judge Bench of this Court in State of U.P. v. Singhara Singh and the rule laid down in Nazir Ahmad case was again upheld. This rule has since been applied to the exercise of jurisdiction by courts and has also been recognised as a salutary principle of administrative law."
> >
> > In view of the above said decision, not placing the amended Regulations on the floor of the Houses of Parliament as required under Section 24 of the AICTE Act vitiates the amended Regulations in law and hence the submissions made on behalf of the appellants in this regard deserve to be accepted. Accordingly, point Nos. 4 and 5 are answered in favour of the appellants."

24. In *V.L.S. Finance Limited* Vs. *Union of India and others,* (2013) 6 Supreme Court Cases 278, Hon'ble Supreme Court has held as under:

> "18. As is well settled, while interpreting the provisions of a statute, the court avoids rejection or addition of words and resort to that only in exceptional circumstances to achieve the purpose of Act or give purposeful meaning. It is also a cardinal rule of interpretation that words, phrases and sentences are to be given their natural, plain and clear meaning. When the language is clear and unambiguous, it must be interpreted in an ordinary sense and no addition or alteration of the words or expressions used is permissible."

25. In *Babu Verghese and others* Vs. *Bar Council of Kerala and others*, (1999) 3 Supreme Court Cases 422, Hon'ble Supreme Court has held as under:

> "31. It is the basic principle of law long settled that if the manner of doing a particular act is prescribed under any Statute, the act must be done in that manner or not at all. The origin of this rule is traceable to the decision in Taylor vs. Taylor (1875) 1 Ch.D 426 which was followed by Lord Roche in Nazir Ahmad vs. King Emperor 63 Indian Appeals 372 = AIR 1936 PC 253 who stated as under:
>
> "Where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all."

> 32. This rule has since been approved by this Court in Rao Shiv Bahadur Singh & Anr. vs. State of Vindhya Pradesh 1954 SCR 1098 = AIR 1954 SC 322 and again in Deep Chand vs. State of Rajasthan1962(1) SCR 662 = AIR 1961 SC 1527. These cases were considered by a Three-Judge Bench of this Court in State of Uttar Pradesh vs. Singhara Singh & Ors. AIR 1964 SC 358 = (1964) 1 SCWR 57 and the rule laid down in Nazir Ahmad's case (supra) was again upheld. This rule has since been applied to the exercise of jurisdiction by courts and has also been recognised as a salutary principle of administrative law."

26. In *Pradip Kumar Maity* Vs. *Chinmoy Kumar Bhunia and others,* (2013) 11 Supreme Court Cases 122, Hon'ble Supreme has held as under:

> "13.....The Constitution of India is the grund-norm, demanding meticulous allegiance from all other laws. Statutes, central/parliamentary or of State legislatures, must mandatorily comply with our Constitution. We must hasten to emphasise that statutes must also conform with the discipline of the three lists contained in the Seventh Schedule of the Constitution. Most statutes postulate the promulgation of Rules, through delegated legislation, which, if they are not ultra vires the Statute inasmuch as they are operational within the parameters of their parent pandects, require adherence. Executive Orders or Administrative Instructions cease to have legal efficacy the moment they are contrary to their superiors, i.e., the Constitution, a Statute, or any delegated legislation in the form of Rules or Regulations. This is also referred to as 'dominion paramountcy' by some Courts. There is a plethora of precedents on this proposition, as also on the tiers of subservience, including the adumbration in the case of Saiyad Mohammad Bakar El-Edroos v. Abdulhabib Hasan Arab [JT 1998 (3) SC 76 : 1998 (4) SCC 343] and K.P. Sudhakaran v. State of Kerala"

27. In *K.P. Sudhakaran and another* Vs. *State of* Kerala *and others,* (2006) 5 Supreme Court Cases 386, Hon'ble Supreme Court has held that once a statutory rule is made without providing any exceptions, it is not possible to carve out exceptions to such rule by judicial interpretation.

28. In *Marathwada University* Vs. *Seshrao Balwant Rao Chavan,* (1989) 3 Supreme Court Cases 132, Hon'ble Supreme Court has held that statutory authority cannot travel beyond the power conferred and any action without power has no legal validity. It is void abinitio and cannot be ratified.

29. Thus, in our considered view, in the absence of any previous approval, as envisaged under sub-section (9) of Section 79, it cannot be said that the Regulations stood amended with the exercise of such power by the Chairman of the Board.

30. The result of the above discussion of ours is that the field pertaining to promotion to the post of Sub Fire Officer is still governed by the original Rules which are reflected in the heading "existing provision" in Annexure P-10 and the "proposed amendment" which is so reflected in the Annexure P-10 has not legally come into force.

31. Accordingly, eligibility of the petitioner has to be taken into consideration as per the existing provisions for considering him for the purpose of promotion to the post of Sub Fire Officer, which the Board must do immediately.

In view of above discussion, the petition is allowed. Pending miscellaneous application(s), if any, also stands disposed of.

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

Roshan Lal Thakur .....Petitioner.

Versus

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

CWP No. 9489 of 2012
Decided on: 20.07.2018

Constitution of India, 1950- Articles 14 and 226- **Industrial Disputes Act, 1947-** Section 33-C(2)- Recovery of wages - Entitlement – Petitioner remained posted as Chowkidar on daily wage basis at the storage godown of respondents for many years – Petitioner filing application before respondents and claiming holidays with respect to Sundays, second Saturdays, local national and other gazetted holidays on which he had rendered services at the godown – Application rejected by department – Claim of petitioner for payment of wages for such holidays also dismissed by Labour Court – Writ petition – State submitting before High Court that petitioner being a daily wager was entitled for one holiday on completion of six working days, besides national holidays i.e. 26th January, 15th August and 2nd October – Held, being a daily wager he was not entitled for holidays on second Saturday, Gazetted Holidays & Local holidays – There was no evidence that he was not allowed to avail one holiday after completion of six working days- He was paid wages for full month including Sundays- Petition dismissed. (Paras- 4 and 5)

For the petitioner: Mr. Vinay Mehta, Advocate vice Mr. Anuj Gupta, Advocate.
For the respondents: Mr. Kunal Thakur, Dy. A.G.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)

Petitioner herein is working as Peon in the Department of Food and Civil Supplies to the Government of Himachal Pradesh on regular basis. Prior to his appointment, as such, he was engaged as Chowkidar on 13.10.1982 for watch and ward of the food grains of the department in its Go-down at Ghatti in District Solan, H.P., vide order dated 13.10.1982. The said order was partially modified vide order dated 9.9.1996, Annexure P-1. The typed copy of appointment letter is at page 21-A of the writ petition. In terms of his engagement on daily wage basis, he was required to remain on duty and watch and ward of the go-down day and night. He was called upon to report for joining duties in case the terms and conditions on which appointed were acceptable to him. He reported for duties and continued to work as Chowkidar on daily wage basis till 31.3.1999. Thereafter, his services were regularized and presently he is working as Peon on regular basis.

2. The complaint is that during his engagement as Chowkidar on daily wage basis, he was not allowed to avail the holidays such as Sundays, second saturday, local, national, gazetted as well as festival holidays. He, therefore, has worked out the holidays which should have been allowed to be availed by him, the kind of holidays hereinabove during each and every calender year as per detail given in Annexure P-2. The respondents, however, did not acceed to his claim and rejected the same. Consequently, he filed an application under Section 33-C (2) of the Industrial Disputes Act for payment of wages on account of he worked on Sundays, second Saturdays and gazetted holidays etc. Learned Presiding Judge, Industrial Tribunal-cum-Labour Court Shimla has, however, dismissed the application vide order, Annexure P-6, of course, with liberty reserved to the petitioner to approach the appropriate forum for redressal of his grievances, if any. He, therefore, has filed the present petition with a prayer to quash the order, Annexure P-6 and for a direction to the respondents to pay the amount he sought on account of he having worked during the holidays.

3. The response of the respondent-State is that being a daily waged Chowkidar, he was entitled for one holiday i.e. Sunday in a week on completion of six working days. Besides, the national holiday falling on 15th August, 26th January and 2nd October during each and every calender year were also being given to him. Also that, he has been paid due and admissible wages during his services on daily wage basis with the respondents. The application he preferred in the Labour Court below is, therefore, stated to be rightly dismissed.

4. On hearing Mr. Vinay Mehta, learned counsel for the petitioner and Mr. Kunal Thakur, learned Deputy Advocate General and going through the record, it would not be improper to conclude that the petitioner, a daily wager was not entitled to avail the holidays falling on second saturday, Gazetted holidays or local holidays being not admissible to the staff deployed on daily wage basis. Otherwise also, he has not brought on record any instructions/rules which permits a daily wager to avail such holidays. On the other hand, detail (at page 25 of the writ petition) of working days and the wages paid to him he himself annexed to the writ petition goes to show that throughout he continued to receive the wages for full months. There is nothing on record to suggest that he has not been allowed to avail one holiday on the completion of every six working days. The days he worked out as per Annexure P-2, when he worked during Sundays, second Saturdays, Gazetted holidays or local holidays, however, not paid his wages is otherwise also not substantiated from any contemporaneous record. On the other hand, in a calender year, he was only entitled to claim the wages for one holiday on completion of every six working days in a calender month. He, however, has failed to prove that such holiday on completion of every six working days was not allowed to be availed by him. On the other hand, as per response of the respondents, he was not supposed to be on duty during 24 hours, however, as and when necessary or called upon to do so.

5. Therefore, learned Labour Court has rightly rejected his claim while dismissing the application vide order, Annexure P-6. True it is that in the judgment of this Court, Annexure P-5 vide award under challenge therein the employer was directed to pay wages to the petitioner-workman for Sundays, however, the facts of that case were identical or not, no opinion on the basis of the judgment and in the absence of award which was under challenge in that writ petition can be formed. Otherwise also, in the case in hand, as noticed supra, the petitioner has received wages for full month including Sundays. Above all, the petitioner is entitled to the amount as claimed or not, is a mixed question of law and facts, which cannot be determined in exercise of writ jurisdiction vested in the High Court under Article 226 of the Constitution of India.

6. The writ petition being devoid of any merits is dismissed.Pending application(s), if any, shall also stand disposed of.

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

Nand Ram ...Petitioner.

Versus

State of H.P. ...Respondent

Cr.MP(M) No.345 of 2018.
Decided on: 24th July, 2018.

Code of Criminal Procedure, 1973- Section 438- Pre-arrest bail- Grant of- Petitioner allegedly obtained agricultural loan from a bank by furnishing a forged jamabandi showing him owner of land, whereas he was found to be not the owner of said land – Petitioner apprehending arrest for offences punishable under Sections 420, 467, 468 and 471 of I.P.C. and praying for pre-arrest bail – On finding that case was based on documentary evidence and there was no chance of

tampering with such evidence and also that petitioner had deposited some amount with bank, High Court granted pre-arrest bail subject to conditions. (Para-5)

For the petitioner	Mr. Ashwani Kaundal, Advocate.
For the respondent	Mr. Ashwani Sharma with Mr. P.K. Bhatti, Additional Advocate Generals. ASI Pyare Lal, Police Station Sangla, District Kinnaur, present in person.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge (oral).

The present bail application has been maintained by the petitioner, under Section 438 of the Code of Criminal Procedure, for releasing him on bail, in the event of his arrest, in case FIR No. 16/2017, dated 28.6.2017, under Sections 420, 467, 468 and 471 of the Indian Penal Code, Police Station, Sangla, District Kinnaur, H.P.

2. As per the averments made in the petition, petitioner is innocent and has been falsely implicated in the present case. He is neither in a position to tamper with the prosecution evidence nor in a position to flee from justice.

3. Police report stands filed. As per the police report, complainant lodged an FIR alleging therein that on 12.9.2013, the petitioner had applied for agricultural loan amounting to Rs.6,00,000/- from UCO Bank, Branch Sangla. The petitioner has furnished *jamabandi* pertaining to his land before the Bank, on the basis of which, loan was duly sanctioned. When, the petitioner has not deposited regular loan installments, *jamabandi* pertaining to his land was sent to the Tehsildar, Sangla as well as to concerned Patwari and it was found that the land in question, as shown in the *jamabandi* does not belong to him, but the land was in the name of one Thakur Sen, as mentioned in the land record. The petitioner has prepared forged *jamabandi* in order to obtain agricultural loan and has also made forged signatures of Tehsildar Sangala and concerned Patwari in the revenue record. During the course of investigation, statements of the witnesses were recorded, under Section 161 of the Code of Criminal Procedure. Lastly, the prosecution has prayed that the bail application of the petitioner may be dismissed.

4. I have heard the learned Counsel for the petitioner, learned Additional Advocate General for the State and gone through the record, including the police report, carefully.

5. Heard. At this moment, taking into consideration the fact that after registration of the case, the petitioner has deposited some amount in the Bank towards his loan liability, which he has taken, as per the prosecution, after cheating the bank. This Court finds that the case is based upon the document and it is a fit case, where the judicial discretion to admit the petitioner on bail is required to be exercised in his favour, as he is neither in a position to tamper with the prosecution evidence nor in a position to flee from justice. Under these circumstances, it is ordered that the petitioner be released on bail, in the event of his arrest, in case FIR No. 16/2017, dated 28.6.2017, under Sections 420, 467, 468 and 471 of the Indian Penal Code, Police Station Sangla, District Kinnaur, on his furnishing personal bond to the tune of Rs.20,000/- (rupees twenty thousand only) with one surety in the like amount to the satisfaction of the Investigating Officer. The bail is granted subject to the following conditions:

(i) That the petitioner will join investigation of the case as and when called for by the Investigating Officer in accordance with law.

(ii) That the petitioner will not leave India without prior permission of the Court.

(iii) That the petitioner will not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so

as to dissuade him/her from disclosing such facts to the Investigating Officer or Court.

(iv) In case, the petitioner tries to interfere with the prosecution evidence or tries to flee from justice, the present bail order is likely to be recalled at the instance of petitioner.

6. In view of the above, the petition is disposed of. Copy dasti.

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

Paritosh Chauhan .....Petitioner/D.H.

Versus

Anil Mohil and others .....Respondents/J.D.

Civil Revision No.23 of 2012.
Date of decision: 25th July, 2018.

Code of Civil Procedure, 1908- Order XXI Rule 32- Mandatory injunction, decree of – Execution – Limitation – Computation of – **Limitation Act, 1963-** Article 135- District Judge while allowing appeal of defendants, partly decreeing suit – Directing defendants by way of mandatory injunction to demolish room raise by them over common passage and remove debris from plaintiff's land within three months – District Judge passed decree of mandatory injunction on 12.9.2000 – RSA of defendants and cross-objections of plaintiff dismissed by High Court on 2.11.2006 – Original plaintiff selling land to DH vide sale deed dated 3.11.2006 – DH/vendee filing execution application - Executing Court dismissing execution application on ground that it became enforceable within three months after pronouncement of judgment dated 12.9.2000 and execution application if any ought to have been filed within three years from 12.12.2000 – Revision against – On facts, it was observed that during pendency of RSA, High Court had directed parties to maintain status quo qua nature and possession of property in dispute – And as long as that order was subsisting, Trial Court could not have enforced the decree of mandatory injunction – Regular Second Appeal came to be decided on 2.11.2006 and decree passed by Trial Court/First Appellate Court finally merged with decree of High Court and became executable – Execution application filed on 22.10.2007, thus was within limitation – Petition allowed – Order of Executing Court set aside and it is directed to restore application and execute decree in accordance with law. (Paras- 6, 8, 9 and 17)

Cases referred:

Dilip versus Mohd. Azizul Haq and another, (2000) 3 SCC 607

Union of India and others versus West Coast Paper Mills Ltd. and another, (2004) 2 SCC 747

Chandi Prasad and others versus Jagdish Prasad and others (2004) 8 SCC 724

For the Petitioner : Ms. Jyotsna Rewal Dua, Senior Advocate with Mr. Tijender Singh, Advocate.

For the Respondents: Mr.Karan Singh Kanwar, Advocate, for respondents No.1 and 3.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral).

This revision petition is directed against the order passed by the learned Civil Judge (Junior Division), Nahan, District Sirmaur, H.P. on 17.12.2011 whereby he dismissed the execution petition preferred by the petitioner as being time barred.

2. The undisputed facts are that Sh. Bikram Singh Thakur instituted a Civil Suit bearing No.80/1 of 1993 against the respondents and their predecessors in interest for mandatory and permanent prohibitory injunction and the same was decreed by the learned trial Court vide judgment and decree dated 21.09.1999 and directed the defendants by way of decree of mandatory injunction to remove the unauthorized constructions raised by them in the shape of a huge outer gate in the entrance, a staircase and a bathroom, a toilet, the room preventing the approach to the property of the plaintiff from the common passage adjoining to the latrines comprising of Khasra Nos. 202, 221/1, 221/2, 222 and 225/1, measuring 105-79 square metres, situated at Mohal Naya Bazar, Nahan and further the defendants were restrained by way of permanent prohibitory injunction from interfering or trespassing aforesaid property and the property of the plaintiff comprised in Khasra Nos. 216/2, 217, 268, total measuring 270-68 square metres, situated at Mohal Naya Bazar, Nahan with the costs of the suit. The defendants appealed against the aforesaid judgment and decree before the learned District Judge, District Sirmaur, who vide its judgment and decree dated 12.09.2000 passed in Civil Appeal No.119-CA/13 of 1999, modified the judgment and decree of the learned trial Court. The directions of the learned trial Court for demolition of the iron gate in front of the property from Naya Bazar and the stair case, bath room cum toilet and water tank in the common passage were set aside. The remaining part of the decree was allowed. The suit of the plaintiff was allowed for mandatory injunction against the defendants to the extent to demolish the room constructed by them in the common passage as described in the judgment passed by the learned trial Court. The defendants were also directed to remove debris/malwa thrown in the vacant side of the property of the plaintiff within three months from the date of the judgment. The defendants preferred regular second appeal against the judgment and decree of learned appellate Court before this Court by filing RSA No. 633 of 2000. Plaintiff also filed Cross Objections. Both the RSA and Cross Objections were dismissed by this Court vide judgment dated 02.11.2006.

3. The present petitioner vide a registered sale deed dated 03.11.2006 purchased the suit property from the plaintiff Shri Bikram Singh Thakur.

4. The petitioner preferred an execution petition seeking execution of the judgment and decree of the learned appellate Court as upheld by this Court. However, the defendants/judgments debtors filed objections to the extent that the petitioner was not competent to file the execution petition, notice of the execution petition should have been served upon the original plaintiff, room sought to be demolished was not identifiable and defendants had adverse possession over the suit property etc. All these objections were dismissed by the learned trial Court upholding that the petitioner was very much competent to institute the execution petition, no notice of the execution petition was required to be served upon the original plaintiff, plea of adverse possession raised by the defendants in their written statement was rejected by all the Courts concurrently and the room sought to be demolished was very much identifiable. Though, all the issues framed in the execution petition were decided in favour of the petitioner/decree holder, however, the learned executing Court dismissed the execution petition on the ground that decree passed by learned appellate Court became enforceable three months after the pronouncement of the judgment i.e. 12.12.2000 and it could be executed within a period of three years from 12.12.2000. Since the execution was not preferred within a period of three years from 12.12.2000, therefore, it was dismissed as time barred.

5. Evidently, the learned executing Court dismissed the execution petition only on the ground that the same had not been filed within three years of passing of the decree and in accordance with Article 135 of the Limitation Act.

6. It is vehemently contended by Ms. Jyotsna Rewal Dua, Senior Advocate, assisted by Shri Tijender Singh, Advocate, for the petitioner that the learned executing Court committed factual error in observing that there was no stay against the judgment and decree of the learned appellate Court dated 12.09.2000 and without considering the fact that regular second appeals

had been preferred by the defendants/objectors before this Court by way of RSA Nos. 633 and 643 of 2000 whereby following interim orders were passed by this Court:-

> *"In the meanwhile, the parties shall maintain status quo qua the nature and possession of the property in dispute."*

7. On the other hand, Shri Karan Singh Kanwar, Advocate, appearing for respondents No.1 and 3, would support the order and claimed that the same has been passed in accordance with law and, therefore, the same be upheld.

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

8. It is not in dispute that the time period for enforcing the decree of mandatory injunction is provided under Article 135 of the Limitation Act which reads thus:-

"Art. 135. For the enforcement of a decree granting a mandatory injunction.	*Three years*	*The date of the decree or where a date is fixed for performance, such date."*

9. Now, the moot question is whether in teeth of the order passed by this Court whereby the parties had been directed to maintain status quo, could the decree have been executed. Obviously, the answer is in the negative because till and so long the order of status quo was subsisting, the learned trial Court could not have enforced the decree of mandatory injunction as that would be in direct conflict and contrary to the orders passed by this Court.

10. That apart, it needs to be noticed that the learned executing Court has completely ignored the doctrine of merger. It cannot be disputed that an appeal is in continuation of the original suit and when the decision passed in the original suit is under consideration of the appellate Court the whole matter is writ large. Even while affirming the appeal, the Court would be passing its own decree which would then merge with the decree resulting in merging of the decree of the trial Court with that of the appellate Court.

11. At this stage, certain precedents on the subject need to be noticed.

12. In ***Dilip*** *versus* ***Mohd. Azizul Haq and another, (2000) 3 SCC 607***, it was held as follows:-

> *"Once a decree passed by a court has been appealed against the matter becomes sub-judice again and thereafter the appellate court acquires seisin of the whole case. A court of appeal shall have the same powers and shall perform as nearly as many be the same duties as conferred and imposed on courts of original jurisdiction. The hearing of an appeal under the processual law of the country being in the nature of a rehearing and it is on the theory of an appeal being in the nature of a rehearing that the Courts in this country have, in numerous cases, recognized that in moulding the relief to be granted in a case on appeal, the court of appeal is entitled to take into account even facts and events which have come into existence after the decree appealed against. As an appeal is a rehearing, it must follow that if an appellate court dismisses an appeal it would be passing a decree affirming eviction and thereby passes a decree of its own, and in the event it upsets the decree of the trial court, it would be again passing a decree of its own resulting in merger of decree of the trial court with that of the appellate court. The legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and one to be regarded as one legal proceeding."*

13. Similarly, in ***Union of India and others*** *versus* ***West Coast Paper Mills Ltd. and another, (2004) 2 SCC 747***, the Hon'ble Supreme Court held as follows:-

> *"It may be true that by reason of Section 46-A of the Indian Railways Act the judgment of the Tribunal was final but by reason thereof the jurisdiction of this Court to exercise its power under Article 136 of the Constitution of India was not and could not have been excluded.*
>
> *Article 136 of the Constitution of India confers a special power upon this Court in terms whereof an appeal shall lie against any order passed by a court or tribunal. Once a special leave is granted and the appeal is admitted, the correctness or otherwise of the judgment of the Tribunal becomes wide open. In such an appeal, the court is entitled to go into both questions of fact as well as law. In such an event the correctness of the judgment is in jeopardy.*
>
> *Even in relation to a civil dispute, an appeal is considered to be a continuation of the suit and a decree becomes executable only when the same is finally disposed of by the court of appeal.*
>
> *The starting point of limitation for filing a suit for the purpose of recovery of the excess amount of freight illegally realized would, thus, begin from the date of the order passed by this Court. It is also not in dispute that the respondent herein filed a writ petition which was not entertained on the ground stated hereinbefore. The respondents were, thus, also entitled to get the period during which the writ petition was pending, excluded for computing the period of limitation. In that view of the matter, the civil suit was filed within the prescribed period of limitation.*
>
> *The trial Judge as also the High Court have recorded a concurrent opinion that the respondents were entitled to the benefits of Sections 14 and 15 of the Limitation Act, 1963. We have no reason to take a different view."*

14. However, more pertinent and important observations have been made in a decision by Hon'ble three Judges of the Hon'ble Supreme Court in ***Chandi Prasad and others*** *versus* ***Jagdish Prasad and others (2004) 8 SCC 724*** wherein while dealing with the doctrine of merger, it was observed as under:-

> *"Merger*
>
> *23. The doctrine of merger is based on the principles of propriety in the hierarchy of justice delivery system. The doctrine of merger does not make a distinction between an order of reversal, modification or an order of confirmation passed by the appellate authority. The said doctrine postulates that there cannot be more than one operative decree governing the same subject matter at a given point of time.*
>
> *24. It is trite that when an Appellate Court passes a decree, the decree of the trial court merges with the decree of the Appellate Court and even if and subject to any modification that may be made in the appellate decree, the decree of the Appellate Court supersedes the decree of the trial court. In other words, merger of a decree takes place irrespective of the fact as to whether the Appellate Court affirms, modifies or reverses the decree passed by the trial court. When a special leave petition is dismissed summarily, doctrine of merger does not apply but when an appeal is dismissed, it does. [See V.M. Salgaocar and Bros. Pvt. Ltd. Vs. Commissioner of Income-tax, AIR 2000 SC 1623].*
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> *25. The concept of doctrine of merger and the right of review came up for consideration recently before this Court in Kunhayammed and Others Vs. State of Kerala and Another (2000) 6 SCC 359 wherein this Court inter alia held that when a special leave petition is disposed of by a speaking order, the doctrine of merger shall apply stating:*

(SCC p.383, paras 41-43)

> *"41. Once a special leave petition has been granted, the doors for the exercise of appellate jurisdiction of this Court have been let open. The order impugned before the Supreme Court becomes an order appealed against. Any order passed thereafter would be an appellate order and would attract the applicability of doctrine of merger. It would not make a difference whether the order is one of reversal or of modification or of dismissal affirming the order appealed against. It would also not make any difference if the order is a speaking or non-speaking one. Whenever this Court has felt inclined to apply its mind to the merits of the order put in issue before it though it may be inclined to affirm the same, it is customary with this Court to grant leave to appeal and thereafter dismiss the appeal itself (and not merely the petition for special leave) though at times the orders granting leave to appeal and dismissing the appeal are contained in the same order and at times the orders are quite brief. Nevertheless, the order shows the exercise of appellate jurisdiction and therein the merits of the order impugned having been subjected to judicial scrutiny of this Court.*
>
> *42. "To merge" means to sink or disappear in something else; to become absorbed or extinguished; to be combined or be swallowed up. Merger in law is defined as the absorption of a thing of lesser importance by a greater, whereby the lesser ceases to exist, but the greater is not increased; an absorption or swallowing up so as to involve a loss of identity and individuality. (See Corpus Juris Secundum, Vol. LVII, pp. 1067-68)*
>
> *43.We may look at the issue from another angle. The Supreme Court cannot and does not reverse or modify the decree or order appealed against while deciding a petition for special leave to appeal. What is impugned before the Supreme Court can be reversed or modified only after granting leave to appeal and then assuming appellate jurisdiction over it. If the order impugned before the Supreme Court cannot be reversed or modified at the SLP stage obviously that order cannot also be affirmed at the SLP stage."*

26. In Kunhayammed (supra), it was observed: (SCC p.370, para 12)

> *"12.....Once the superior court has disposed of the lis before it either way - whether the decree or order under appeal is set aside or modified or simply confirmed, it is the decree or order of the superior court, tribunal or authority which is the final, binding and operative decree or order wherein merges the decree or order passed by the court, tribunal or the authority below. However, the doctrine is not of universal or unlimited application. The nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or which could have been laid shall have to be kept in view."*

27.The said decision has been followed by this Court in a large number of decisions including Union of India and Others Vs. West Coast Paper Mills Ltd. and Another [(2004) 2 SCC 747].”

15. What thus emerges from the aforesaid exposition of law is that once the decree and judgment passed by the trial Court is appealed against, and the judgment is rendered by the appellate Court either affirming or dismissing the appeal, the decree passed in the original suit becomes inoperative, since the lacuna of merger comes into play. The doctrine of merger does not make a distinction between an order of reversal, modification or an order of confirmation passed

by the appellate authority. The said doctrine postulates that there cannot be more than one operative decree governing the same subject matter at a given point of time.

16. Admittedly, RSA Nos. 633 and 643 of 2000 came to be decided by this Court only on 02.11.2006 and, therefore, it was on this date that the decree as passed by the trial Court finally merged with the decree of this Court and became executable. Concededly, the execution petition was thereafter filed within one year of the said decision i.e. 22.10.2007 and, therefore, the same could not have been dismissed on the ground that it was barred by limitation.

17. Having said so, the present petition is allowed. The order passed by the learned executing Court on 17.12.2011 is clearly not sustainable in the eyes of law and is accordingly set aside. The learned executing Court is directed to restore the execution petition to its original number and thereafter proceed to execute the same in accordance with law. Pending application, if any, also stands disposed of.

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

Sanjay Kumar ...Appellant

Versus

Shri Amar Nath (deceased) through

his L.Rs. Smt. Santosh Kumari & others. ...Respondents

R.S.A. No. 237 of 2003
Reserved on: 18.6.2018
Date of decision: July 25, 2018.

Specific Relief Act, 1963- Section 38- Suit for permanent prohibitory injunction – Plaintiff seeking permanent prohibitory injunction for restraining defendants from damaging/destroying brick kiln and its other assets, etc., being run in partnership by him and defendants till firm is legally dissolved and accounts are rendered and paid to him – Suit decreed by Trial Court – In appeal, First Appellate Court allowing appeal setting aside judgment and decree and dismissing suit of plaintiff – Regular Second Appeal – High Court found that partnership had validly been dissolved with mutual consent of parties through a dissolution deed – Due execution of dissolution deed further proved from statement of marginal witness 'M' – Held, Suit for injunction was not maintainable and suit, if any, ought to have been for rendition of accounts – Parties even can go for arbitration as per term of dissolution deed – RSA dismissed – Decree of First Appellate Court upheld. (Paras-14 to 16)

Cases referred:

Shasidhar and others versus Ashwini Uma Mathad and another (2015) 11 Supreme Court Cases 269

B.M. Narayana Gowda versus Santhamma (Dead) By LRs and another, (2011) 15 Supreme Court Cases 476

Shasidhar and others versus Ashwini Uma Mathad and another (2015) 11 Supreme Court Cases 269

B.M. Narayana Gowda versus Santhamma (Dead) By LRs and another, (2011) 15 Supreme Court Cases 476

For the appellant : Mr. G.D. Verma, Sr. Advocate with Mr. B.C. Verma, Advocate.

For the respondents: Mr. K.D. Sood, Sr. Advocate, with Mr. Rajnish K. Lal, Advocate for respondent No.1.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present regular second appeal is maintained by the appellant against the judgment and decree dated 13.03.2003, passed by the learned Additional District Judge (II), Kangra at Dharamshala, District Kangra, H.P., in Civil Appeal No.105-K/99, whereby the learned Appellate Court has reversed the judgment and decree dated 11.11.1999, passed by the then Sub Judge, Ist Class(I), Kangra (H.P.) in Civil Suit No.56 of 1996, with the prayer to set aside the same and to restore the judgment and decree passed by the learned Trial Court.

2. The brief facts giving rise to the present appeal are that the plaintiff/Appellant (hereinafter to be called as "the plaintiff") maintained a suit for permanent injuction restraining the defendants permanently from damaging, disposing of brick kiln and other assets or destroying or changing the accounts or to deal with the assets and profits of M/s Dayal Brik Kiln Industries situated at Village and Post Office, Nagrota Surian at present Village Jarpal, Post Office, Amlela, Tehsil Jawali, District Kangra in any manner till the partnership is legally dissolved and accounts are rendered and paid to the plaintiff. The plaintiff has averred that the partnership was constituted between the plaintiff and defendant No.1 on 31.8.1992 in the name and Style of M/s Dayal Brick Kiln Industries (hereinafter to be referred as 'Partnership firm'). According to the partnership between the plaintiff and defendant No.1, the plaintiff had 40% share and defendant No.1 was having 60% share in the partnership business. It has been alleged that the partnership deed was registered with the Sub Registrar, Kangra on 31.8.1992. Thereafter, the business of installing Brick Kiln was carried out and after its manufacturing the Bricks, tiles etc., were sold as per the terms and conditions in the partnership deed. It has been alleged that the place of the business was shifted to village Jarpal. During this business, a truck was also purchased by the Partnership firm bearing No.PBL-9064 from its funds and was used for the business of this firm. On 31.3.1993, defendant No.1 retired from the partnership business and his shares were given to defendants No. 2 and 3. It has been alleged that the other conditions were also settled between the plaintiff and defendants No. 2 and 3 on 01.04.1993 and as per that agreement the plaintiff had share of 30% whereas the defendant No.2 was having 30% share and defendant No.3 was having 20% share, who futher carried out the business of M/s Dayal Brick Kiln Industries. It has been contended that the plaintiff never took out the profits from the funds of the firm which were reinvested in the capital. Again the other agreement was entered into by which defendant No.1 rejoined defendant No.2 and defendant No.3, as partners. As per that agreement, defendant No.1 became partner to the extent of 20% share, defendant No.2 to the extent of 30% share and defendant No.3 to the extent of 20% share. The remaining 30% share remained with the plaintiff, as per the earlier agreement. It has further been contended that the firm has not been dissolved nor the share of the plaintiff has been paid to him by rendering acounts and the plaintiff was running business alongwith other partners, but thereafter, the intention of the defendants became malafide an they did not permit him to enter in the business premises. They also threatened to do away with the capital or other assets of the firm and not allowed the plaintiff to inspect the accounts of the firm. They also threatened to dispose of the Brick Kiln and other assets including the truck and to destroy the account books for which the defendant has got no right or title. It has been alleged that a notice was also issued by the plaintiff to the defendants showing his intention to get partnership dissolved after determining the accounts, but the defendants are adament not to permit the plaintiff to participate in the business and has got the firm dissolved in accordance with law. It has been alleged that as the threats were started to be advanced in the month of April, 1995, the plaintiff has thus filed the suit in the Court. Thereby decree for permanent injunction restraining the defendants from causing any damage to the assets of the firm without getting the accounts rendering properly by getting the firm dissolved.

3. The suit was contested by the defendants on the preliminary objections of cause of action and locus standi, limitation valuation, estoppel, jurisdiction. By filing a detailed written statement, the averments made by the plaintiff have been stated to be wrong. It has been alleged

that earlier the plaintiff was a partner of M/s Dayal Brick Kiln Industries with defendant. However, the firm was dissolved by the dissolution deed dated 02.5.1995, signed and executed by the plaintiff and other partners. Thereby he had retired and he ceased to have any concern with the partnership business. The business is being carried out by the defendants, who are the sole partners to the exclusion of the plaintiff. It has further been averred that earlier business was carried out by the partners at Nagrota Surian, which was thereafter shifted to Jarpal. However, investment made by the plaintiff as per his share stands disputed. It has been admitted that the truck was purchased by the firm. The averments made qua change of share between the partners from time to time as claimed by the plaintiff, has also been admitted to be correct. The dissolution was stated to be held with the mutual consent of the parties on 03.3.1995 and thereafter, dissolution deed was stated to have been prepared on 02.5.1995. It has been alleged that there is no malafide intention in the pareparation of dissolution deed. No threats so far have been advanced to the plaintiff or to damage the assets and account books etc. of the partnership business. However, it has been averred that the business is being carried out by the defendants after the retirement of the plaintiff to his exclusion for which they have every right and threreby it has been averred that the plaintiff has got no locus standi and cause of action to file the present suit.

4. The plaintiff filed replication, in which the averments made in the plaint have been re-asserted. The preliminary objections taken by the defendants and the averments made in the written statement have been denied. It has been alleged that there was no dissolution of the firm as on 02.5.1995, as alleged by the defendants.

5. It has been further reiterated that the partnership deed dated 31.3.1993 is still in operation and the plaintiff is entitled for 30% share in the assets of the firm of its business. It has been sated that the firm was never dissolved. However, the plaintiff issued a notice to settle the accounts by rendering accounts since there is mistrust between the parties. Hence, the plaintiff prayed for decree of the suit by way of grant of decree for injunction.

6. On the pleadings of the parties, the trial Court framed the following issues on 05.8.1996 :

"1. Whether the plaintiff is partner of M/s Dayal Brick Kiln Industries with the defendants, as alleged? ... OPP

2. Whether the plaintiff was having share of 40% and defendant No.1 was having share of 60% in the partnership business, as alleged? ... OPP

3. Whether on 31.3.1993, defendant No.1 retired from the partnership business of M/s Dayal Brick Kiln Industries and in his place, he gave his share to defendant Nos. 2 & 3, as alleged? ... OPP

4. Whether it was agreed upon on 01.4.1993 that the plaintiff was having 30% share, defendant No.2, 50% share and defendant No.3, 20% share in the partnership, as alleged? ... OPP

5. Whether another agreement was entered into by which defendant No.1 again joined defendants No.2 and 3, as partners in the business and defendant No.1 became partner to the extent of 20% share, defendant No.2 to 30% share and defendant No.3, 30% share, as alleged? ... OPP

6. Whether the partnership of M/s Dayal Brick Kiln Industries is not so far legally dissolved and the plaintiff who was having 40% share in the total assets of the firm has not been paid his share by rendering the accounts etc., as alleged? ... OPP

7. Whether the plaintiff is entitled for 40% share upto 31.3.1993 and 30% thereafter in all the assets of the firm? ... OPP

8. Whether the defendants are threatening to damage dispose off the Brick Kiln and other assets of the firm including the truck and shall destroy the accounts etc., as alleged? ... OPP

9. Whether the plaintiff has got no cause of action and locus standi to sue? ... OPD

10. Whether the suit is not competent in the present form? ...OPD

11. Whether the suit is not within limitation? ...OPD

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

13. Whether the act, conduct, acquiescence and silence of the plaintiff is a bar to the present suit? ...OPD

14. Whether this Court has no jurisdiction to try and decide the present suit? ... OPD

15. Whether plaintiff retired from the partnership on 2.5.1995, as alleged? ... OPD

16. Whether the alleged resolution dated 2.5.1995 is fraudulent, false and has been set up collusively by the defendants and others, as alleged? ...OPD

17. Relief."

7. The learned trial Court decided Issues No.1 to 8 and 16 in favour of the plaintiff and the remaining issues in favour of the defendants and decreed the suit.

8. The defendants maintained the appeal in the learned lower Appellate Court, which was allowed and the judgment and decree passed by the learned Trial Court was set aside. Hence, the present regular second appeal, which was admitted on 17.12.2003, on the following substantial question of law:-

"1. Whether the Lower Appellate Court has rendered erroneous findings by holding that the civil court had no jurisdiction to entertain the suit of the Plaintiff? In the absence of the defendants taking the objection that dispute between the parties to be arbitrable, before taking steps in the suit, could the Lower Appellate court hold that the remedy of the plaintiff was to go to the Arbitration as per the terms of the Partnership Deed?

2. Whether the Lower Appellate Court has committed grave error of law in holding that the suit for mere injunction is not maintainable and the plaintiff ought to have sought further relief in the suit, as mandatory injunction etc.? Has not the Lower Appellate Court failed to appreciate the provisions of the Specific Relief Act and the Code of Civil Procedure?

3. Whether the Lower Appellate Court has committed grave procedural illegality in taking into consideration inadmissible evidence i.e. Mark 'D', the notice served by the defendants on the plaintiff? Could such inadmissible evidence be relied upon merely on the ground that it was the plaintiff who produced such document and specially when the defendants did not admit such document either in their pleadings or during the course of their evidence?

4. Whether the Lower Appellate Court has misunderstood and misapplied the provisions of Order 6, Rule 4 of the Code of Civil Procedure by holding that the suit of the plaintiff was not maintainable for want of proper pleadings, especially when the defendants did not take such objection at the earliest point of time of lack of material particulars, in the

absence of proper objection was not such plea deemed to have been waived by defendants?"

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

10. Learned counsel for the appellant/plaintiff has argued that the judgment and decree passed by the learned lower Appellate Court is without appreciating the facts, which have come on record to its true perspective and the same is required to be set aside. He has further argued that it was incumbent upon the learned lower Appellate Court to give findings on each fact, but the learned lower Appellate Court has failed to do so. Hence, the appeal is required to be remanded back to the learned lower Appellate Court for afresh trial. To support his contentions, he has relied upon judgment of the Hon'ble Apex Court rendered in ***Shasidhar and others*** versus **Ashwini Uma Mathad and another** (2015) 11 Supreme Court Cases 269. He has also placed reliance upon a judgment rendered in ***B.M. Narayana Gowda*** versus **Santhamma (Dead) By LRs and another,** (2011) 15 Supreme Court Cases 476, on this aspect.

11. On the other hand, the learned counsel appearing for respondents/defendants has argued that the judgment and decree passed by the learned lower Appellate Court is just reasoned, as the suit for simpliciter injunction was not maintainable, so, the decree was liable to be set aside. He has further argued that the plaintiff has remedy by way of arbitration and this is also the reason that the suit was rightly set aside. He has further argued that the learned lower Appellate Court below has given findings on each and every aspect in detail and no interference is required to be taken at this moment, as there is no substantial question of law involved.

12. In rebuttal the learned counsel for the apellant/plaintiff has argued that there are substantial questions of law involved, which needs to be adjudicated upon, as the defendants/respondents have never taken objection in the suit that the dispute between the parties is arbitrable. He has further argued that the appeal be allowed.

13. To appreciate the arguments of the learned counsel for the parties, I have gone through the record of the case, in detail.

14. PW-1 has stated that the partnership is still in existence an it has not been dissolved and he has not been paid his dues. He has further stated that he used to work alone at the Brick Kiln and whenever the appellants used to visit, they used to obtain his signatures on blank paper on the pretext that the papers are to be submitted with an Advocate and that he has never signed any dissolution deed. The appellants were the sons of his father's sister and therefore, he used to sign the paper in confidence. In his cross-examination, he has admitted that the membership in the firm continued to change from time to time alongwith the shares of the partners. While denying the execution of the dissolution deed, Ex.DA on 02.5.1995, he admitted his signatures on the said dissolution deed, encircled as Ex.DB. He also admitted the signatures of Tarsem Kumar and Manju Sharma appellants as well as the thumb impression of Jogeshwari Devi on dissolution deed dated 02.5.1996. He also admitted the signatures of Tarsem Kumar, Manju Sharma and thumb impression of Jogeshwari Devi. However, it is un-presumable under any stretch of imagination that without his presence on the spot at the time of execution of the dissolution deed Ex.DA, he is in a position to identify the thumb impression of Jogeshwari Devi. He has admitted that the marginal witnesses of the dissolution deed Ex.DA, Mohan Lal and Subhash Chand were not in any manner inimical towards him and that Subhash Chand had already died. The signatures of Mohan Lal second marginal witness are not disputed by him, rather the respondent has admitted his signatures even on the first page of Ex.DA encirled as Ex.DC. He has also admitted that he is a literate person and is running a shop. PW-1 has no where stated that the stamp papers used in Ex.DA were at any point of time signed by him in blank state, rather he has stated that he is not aware as to when he signed Ex.DA. He has also stated that he is not aware of any dissolution deed and that he filed the suit after one month when dispute arose. This fact also seems unsustainable from the record for the reson that according to him, the dispute arose in April, 1995, as he pleaded in his plaint and got issued

notice mark 'D', dated 23.09.1995, showing his intention to dissolve the partnership w.e.f. 1.12.1995, whereas, he instituted the suit for injunction after the appellants on 28.9.1995. A perusal of the notice mark 'D', which has been brought on record by the respondent himself, reveals that respondent pleaded in the said notice that the appellants obtained his signatures on a blank stamp paper of Rs.5/- on the pretext that the stamp paper is required for getting the loan limit from the bank. It appears that the respondent has taken different stand at different point of time with regard to the execution of the dissolution deed, Ex.DA. A perusal of the dissolution deed Ex.DA, reveals that it contains two pages and stamp papers of Rs.10/- and Rs.5/- have been used. In the notice the stand of the respondent is that his signatures were obtained on a blank stamp paper of Rs.5/- on the pretext that the stamp paper is required for getting the loan limit from the bank, whereas in para No.5 of his replication, he pleaded that there is no dissolution deed executed on 02.5.1995, and while appearing as PW-1, he has deposed totally different facts that his signatures were used to obtain on stamp papers on the pretext that the same are to be handed over to Advocate for income tax and sales tax purposes. The respondent pleaded different facts in his written statement. He has stated totally different facts in the notice mark 'D' and has led evidence totally contrary to the facts, he mentioned in his replication and also in notice mark 'D'. So, it appears that the respondent has not maintained consistency in the facts pleaded and he tried to prove on record while appearing as PW-1.

15. The plaintiff has failed to show that the dissolution deed was prepared by coercion, undue influence, fraud, mis-representation or mistake and so the findings, as recorded by the learned lower Appellate Court, on the fact that the dissolution of partnership was there, needs no intereference. Further, from the evidence on record, it is clear that the dissolution deed Ex.DA, dated 02.5.1995 was executed and the respondent retired from the partnership. However, this fact has been proved by Amar Nath, DW-1 as well as by Mohan Lal, DW-2, who signed the dissolution deed, as a marginal witness. The respondent while appearing as PW-1, during his cross-examination has admitted that he has no enmity with Mohan Lal, DW-2 in any manner. The version given by DW-2, Mohan Lal that dissolution deed (Ex.DA) was signed by the parties in his presence, therefore, appears to be not rightly appreciated by the learned trial Court and his statement has been rejected without there being any sufficient reason or cause for it. Shri Mohan Lal (DW2) in his cross-examination has corroborated the statement of DW1, Amar Nath to the effect that no transaction took place at the time of execution of the dissolution deed, as the parties admitted that they have already settled their accounts with regard to their assets and liabilities on 31st March, how much amount was settled, it was not discussed in his presence. He has denied that at the time of dissolution deed, Ex.DA was executed, appellant Tarsem Lal was not present on the spot. He also denied that the signatures of the respondent were obtained prior to the scribe of Ex.DA. He also denied that the dissolution deed was not executed in his presence. The respondent while cross-examining Mohan Lal, DW-2, who is a marginal witness of the dissolution deed has no where brought any such circumstance, which gives any inference that Mohan Lal, DW-2 had his inclination to favour appellants or to dis-favour the respondent in any manner. Even if, for argument sake, the claim of the respondent is admitted that he did not execute the dissolution deed Ex.DA. Even then, the respondent is ceased to be a partner of the firm of his own act and conduct, as he himself issued notice to the appellants mark 'D', dated 23.9.1995, under the terms of the partnership deed a two months notice, wherein he expressed his intention to retire from the partnership of the firm w.e.f. 01.12.1995.

16. The suit was for injunction only, which is itself not maintainable, as the plaintiff has failed to maintain the suit for rendition of accounts. This Court finds that the findings of the learned lower Appellate Court are just reasoned. Further, as the parties have themselves stated that before the learned lower Appellate Court, there was arbitration clause, the parties can even go for arbitration for settlement of their dispute per dissolution deed.

17. In ***Shasidhar and others*** versus ***Ashwini Uma Mathad and another*** (2015) 11 Supreme Court Cases 269, the Hon'ble Apex Court has held as under:

" 11. As far back in 1969, the learned Judge - V.R. Krishna Iyer, J (as His Lordship then was the judge of Kerala High Court) while deciding the first appeal under Section 96 of the CPC in Kurian Chacko vs. Varkey Ouseph, reminded the first appellate Court of its duty as to how the first appeal under Section 96 should be decided. In his distinctive style of writing and subtle power of expression, the learned judge held as under:

> **"1. The plaintiff, unsuccessful in two Courts, has come up here aggrieved by the dismissal of his suit which was one for declaration of title and recovery of possession. The defendant disputed the plaintiff's title to the property as also his possession and claimed both in himself. The learned Munsif, who tried the suit, recorded findings against the plaintiff both on title and possession. But, in appeal, the learnedcted of him as an appellate Court. Although there is furious contest between the counsel for the appellant and for the respondent, they appear to agree with me in this observation....." Subordinate Judge disposed of the whole matter glibly and briefly, in a few sentences.**
>
> **2. An appellate court is the final Court of fact ordinarily and therefore a litigant is entitled to a full and fair and independent consideration of the evidence at the appellate stage. Anything less than this is unjust to him and I have no doubt that in the present case the learned Subordinate Judge has fallen far short of what is expected of him as an appellate Court.**
>
> **3. Although there is furious contest between the counsel for the appellant and for the respondent, they appear to agree with me in this observation." (Emphasis supplied)**

18. This Court finds that the learned lower Appellate Court has dealt with each and every facts of the case and so, the ratio of this judgment is not applicable to the facts of the present case.

19. Hon'ble Apex Court in ***B.M. Narayana Gowda*** versus ***Santhamma (Dead) By LRs and another,*** (2011) 15 Supreme Court Cases 476, has held as under:

> **"3. "This Court has observed in a number of cases that the first appeal is a valuable right of the appellant and therein all questions of fact and law decided by trial court are open for reconsideration. In a case where the High Court found the trial court judgment is unsatisfactory and wanted to set aside the judgment, the High Court ought to have carefully examined the facts and the law and given cogent reasons for setting aside the trial court's judgment. The legal position in law is no longer res integra. This Court had repeatedly said that in first appeal the High Court needs to decide questions of fact and law comprehensively by giving full-dressed hearing.**
>
> **4. Learned counsel for the appellant has drawn our attention to a judgment of this Court in Sanjay Singh Rawat and Others Vs. National Small Industries Corpn. Ltd., the relevant portion of the judgment i.e. paras 3 - 4, reads as under:**
>
> **"3. Having heard the learned counsel for the parties, we are satisfied that the first appeal filed in the High Court did raise questions of fact and law which called for a full-dressed hearing. First appeal is a valuable right of the appellant and therein all the questions of fact and law decided by the trial court are open for reconsideration. In our opinion, the**

disposal of the appeal by the High Court, in the manner in which it has been done, is not satisfactory.

4. The appeal is allowed. The impugned order of the High Court dismissing the appeal summarily is set aside. The appeal is remanded to the High Court for hearing and decision afresh and in accordance with law."

5. The learned counsel for the appellant also placed reliance on another judgment of this Court in H.K.N.Swami Vs. Irshad Basith, the relevant portion of the judgment i.e. para 3, reads as under:

"3. The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard both on questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. Unfortunately, the High Court, in the present case has not recorded any finding either on facts or on law. Sitting as the first appellate court it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording the finding regarding title. The order of the High Court is cryptic and the same is without assigning any reason."

6. The learned counsel for the appellant also placed reliance on yet another judgment of this Court in Rama Pulp & Papers Ltd. Vs. Maruti N.Dhotre. In this judgment, this Court observed that in first appeal the High Court has to properly consider the evidence on record or for that matter even the arguments and the grounds raised in support of their case.

7. We are constrained to observe that in the impugned judgment the High Court has not followed the settled legal position crystallised by a number of judgments of this Court. Consequently, we set aside the impugned judgment and remit the matter to the Division Bench of the High Court for fresh consideration in accordance with law. We request the High Court to dispose of the appeal as expeditiously as possible.

8. We direct the parties to maintain status quo, as of today, till the disposal of the appeal by the High Court."

20. This Court finds that the learned lower Appellate Court has dealt with each and every facts of the case and so, the ratio of the aforesaid judgment is also not applicable to the facts of the present case.

21. The net result of the above discussion is that as the suit of the plaintiff was not maintainable for simpliciter injunction after the dissolution of the firm, the substantial question No.1 is answered holding that as the suit was not maintainable, the observations of the learned lower Appellate Court that the parties could go for arbitration are as per law. Similarly, substantial question No.2 is answered holding that as the suit was required to be maintained for rendition of accounts after the dissolution of the partnership deed, which the plaintiff has himself executed. The learned lower Appellate Court has not committed any illegality in dismissing the suit, as the suit of the plaintiff was not maintainable for simpliciter injuction. The substantial question No.3 is answered holding that the Court below has not committed any illegality, as it is only the mark 'D', which is taken into consideration, but taking into consideration the other material on record and discussing it at length, the learned lower Appellate Court has given the findings and it cannot be said that the findings are based on the appreciation of mark 'D' only. So, the substational question No.3 is answered accordingly. The substantial question No.4 is answered holding that the learned Court below has not mis-understood or misapplied the provisions of Order 6 Rule 4 of the Code of Civil Procedure, as the suit was not dismissed for want of proper pleadings, but it was not maintainable for simpliciter injunction and so, the substantial question No.4 is answered accordingly.

22. The net result of the above discussion is that the appeal, which sans merits, deserves dismissal and is accordingly dismissed. However, in the peculiar facts and circumstances of this case, the parties are left to bear their own costs.

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

****

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

Smt. Sukha Devi .....Appellant/Plaintiff

Versus

Sh. Paritosh Chauhan ....Respondent/Defendant

RSA No.355 of 2017.
Date of decision: 25.07.2018.

Indian Easement Act, 1882- Sections 4 and 15- Easement of Light and air – Mode of acquisition – Prescription, what is? - Plaintiff claiming easementary right of light and air with respect to her room coming from the adjoining land of defendant – Plaintiff alleging exercise of such right for the last more than 25 years without interruption and seeking relief of prohibitory injunction against defendant from raising construction over his own land (servient tenement) and thereby blocking light and air to her room – Suit dismissed by Trial Court and appeal against that decree by First Appellate Court – Regular Second Appeal - High Court found that plaintiff in an earlier suit, had claimed ownership with respect to defendant's land (servient tenement) by way of adverse possession and over which she in the present suit, was claiming easementary right and acknowledging defendant's title in it - Earlier suit was withdrawn by her – Held, claimant's consciousness during the statutory period that she is exercising such right on property treating it as somebody else's property is a necessary ingredient in proof of the establishment of that right as an easement – Plaintiff had actually claimed ownership over servient tenement in a previous litigation within the statutory period of twenty years might be regarded as an important piece of evidence to show that she did not exercise that right as an easement - Appeal dismissed with cost of Rs.50,000/- as suit was considered an abuse of process of Court. (Paras- 21, 22, 31 and 32)

Cases referred:

Arulvelu and another vs. State Represented by the Public Prosecutor & anr (2009) 10 SCC 206
Damodar Lal vs.Sohan Devi and others (2016) 3 SCC 78
Raychand Vanmalidas vs. Maneklal Mansukhbhai AIR 1946 Bombay 266 (FB.)
K.K.Modi vs. K.N.Modi and others, (1998) 3 SCC 573
Kishore Samrite vs. State of Uttar Pradesh and others, (2013(2) SCC 398
Ranipet Municipality Rep. by its... Vs. M. Shamsheerkhan, 1998 (1) CTC 66

For the Appellant Mr. Suneet Goel, Advocate.
For the Respondent Ms. Jyotsna Rewal Dua, Senior Advocate, with Mr. Tijender Singh, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral).

The instant appeal has chequered history.

2. The plaintiff is the appellant, who after having lost before both the learned Courts below has filed the instant Regular Second Appeal.

The parties shall be referred to as the 'plaintiff' and the 'defendant'.

3. The plaintiff filed a suit for declaration and permanent prohibitory injunction against the defendant before the learned Civil Judge (Jr. Division), Sirmaur District at Nahan vide Civil Suit No. 37/1 of 2014 with averments that she is the owner in possession of suit property comprised in Khewat Khatauni No. 74/109, Khasra No. 2141/216, measuring 7.65 sq.mtrs. Khasra No. 218 measuring 91.14 sq.mtrs., khasra No. 2145/221 measuring 6.46 sq.mtrs. total measuring 105.25 sq.mtrs situated at Mohal Naya Bazar, Nahan, District Sirmaur and the plaintiff has built up her residential house over the suit property. It was claimed that adjacent to the suit property, the defendant is having his landed property comprised in khasra No. 2142/216 measuring 161.43 sq.mtrs. and khasra No. 217 measuring 80.40 sq.mtrs total measuring 241.83 sq.mtrs situated at Naya Bazar, Nahan. The house of the plaintiff is situated over her land for the last more than 25 years and there exists a window of size about 6' x 2.5 feet, which opens towards the land of khasra No. 217 owned and possessed by the defendant and she is enjoying the light and air to her house/bed room from the said window peacefully without any interruption continuously as an easement for the last 25 years and thus she has acquired easement by way of prescription. The construction and window of the house of the plaintiff is sown in site plan mark X in green colour. It was claimed that the appellant for the protection of her property has raised a boundary wall around it up to the height of 11 feet bricks and stone wall and the defendant has no right, title or interest in her property. It was pleaded that the defendant started raising construction over his property on khasra No. 217 and 2142/216 without getting the site plan approved from the M.C. or TCP, Nahan and he started digging the pits for construction of pillars just adjacent to the wall of the plaintiff and thereby caused huge damage to the wall of the plaintiff. Moreover, the defendant also dug a pit in front of the window of the house of the plaintiff with a view to block it and she had to file a complaint with the police on 30.3.2014 and the defendant was also directed not to do so and he made a statement before the police to the effect that he will not raise any kind of construction till he gets his land demarcated through the revenue agency. It was pleaded that thereafter the defendant again started raising construction of his house in an illegal manner and if the defendant is not restrained from causing interference or raising construction in illegal manner, he will demolish the wall of the plaintiff and close the window by raising construction and the plaintiff will be deprived of enjoying light and air to her house and she will suffer irreparable loss and injury which cannot be compensated in terms of money. Hence the suit.

4. The defendant contested the suit by filing written statement wherein preliminary objections qua dishonesty of the plaintiff, lack of approved site plan, enforceable cause of action, locus-standi etc. were taken. On merits, it was averred that the property which adjoins the property of the defendant lying in the shape of the ruin even the revenue record referred by the plaintiff reflects the same to be a 'Khandar' and vacant land meaning thereby it is not a house, where the plaintiff resides and the plaintiff has very cleverly recently fixed a small piece of wood on the top of the wall to show that it is ventilator. It was averred that the plaintiff has deliberately not mentioned that the defendant is also a joint owner to the extent of half share in the common passage, which adjoins the suit property and terminates at the Iron Gate facing Naya Bazar, Nahan. In fact, the portion allegedly fallen to the share of the plaintiff is lying vacant and as Khandar, therefore, the averment that she is residing there is simply a flight of imagination and no window exists there and recently a small piece of wood has been fixed on a portion of a ruined wall with a view to show the same as ventilator and this particular piece is being claimed as a window. It was denied that the plaintiff getting light and air to her house through the aforesaid ventilator for the past 25 years and she has not acquired any easementary right. It was claimed that no fresh wall was constructed by the plaintiff as a boundary wall and the aforesaid wall falls within the share of the defendant and cannot by any stretch of imagination be deemed to be a part of the property of the plaintiff. It was averred that the defendant has not closed any window nor has obstructed the passing of light and air through such window. Lastly, the defendant prayed for dismissal of the suit.

5. In the replication, the plaintiff reiterated the averments made in the plaint and denied the assertions made in the written statement.

6. On 10.10.2014, the following issues were framed by the learned trial Court:-

"1. Whether the plaintiff is enjoying the light and air to her house/bed room from the window situated in the suit property continuously, peacefully without interruption for the past more than 25 years? OPP

2. If issue No.1, is answered in affirmative, whether the plaintiff has acquired easement by way of prescription, as alleged? OPP

3. Whether the plaintiff is entitled to the relief of declaration as prayed for? OPP

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

5. Whether the plaintiff has got no cause of action to file the present suit? OPD

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

7. Whether the plaintiff has not approached this Court with clean hands? OPD

8. Whether the plaintiff is estopped by her act and conduct, deed and acquiescence from filing the present suit? OPD

9. Whether the suit property is in the form of Khundar and vacant land and no such window exists through which any light or air is enjoyed by the plaintiff, as alleged? OPD

10. Relief.

7. The learned trial Court after recording the evidence and evaluating the same dismissed the suit filed by the plaintiff and the appeal preferred by the plaintiff came to be dismissed by the learned first appellate Court vide judgment and decree dated 06.05.2017. Undeterred, the plaintiff has filed the instant appeal on the ground that the findings recorded by the learned Courts below are perverse and, therefore, deserves to be set-aside.

8. On the other hand, learned Senior counsel for the defendant would contend that the instant suit is nothing but an abuse of the process of the Court as the plaintiff has been repeatedly litigating on one pretext or the other despite having lost uptil this Court in RSA No.633 of 2000 decided on 2.11.2006.

9. What is 'perverse' was considered by the Hon'ble Supreme Court in a detailed judgment in ***Arulvelu and another*** *vs.* ***State Represented by the Public Prosecutor and another (2009) 10 SCC 206*** wherein it was held as under:-

> "*26. In M. S. Narayanagouda v. Girijamma & Another AIR 1977 Kar. 58, the Court observed that any order made in conscious violation of pleading and law is a perverse order. In Moffett v. Gough, (1878) 1 LR 1r 331 the Court observed that a perverse verdict may probably be defined as one that is not only against the weight of evidence but is altogether against the evidence. In Godfrey v. Godfrey 106 NW 814, the Court defined `perverse' as turned the wrong way, not right; distorted from the right; turned away or deviating from what is right, proper, correct etc.*
>
> *27. The expression "perverse" has been defined by various dictionaries in the following manner:*
>
> *1. Oxford Advanced Learner's Dictionary of Current English Sixth Edition*
>
> *PERVERSE:- Showing deliberate determination to behave in a way that most people think is wrong, unacceptable or unreasonable.*

2. Longman Dictionary of Contemporary English - International Edition

PERVERSE: Deliberately departing from what is normal and reasonable.

3. The New Oxford Dictionary of English - 1998 Edition

PERVERSE: Law (of a verdict) against the weight of evidence or the direction of the judge on a point of law.

4. New Webster's Dictionary of the English Language (Deluxe Encyclopedic Edition)

PERVERSE: Purposely deviating from accepted or expected behavior or opinion; wicked or wayward; stubborn; cross or petulant.

5. Stroud's Judicial Dictionary of Words & Phrases, Fourth Edition

PERVERSE: A perverse verdict may probably be defined as one that is not only against the weight of evidence but is altogether against the evidence.

28. In Shailendra Pratap & Another v. State of U.P. (2003) 1 SCC 761, the Court observed thus: (SCC p.766, para 8

> *"8…We are of the opinion that the trial court was quite justified in acquitting the appellants of the charges as the view taken by it was reasonable one and the order of acquittal cannot be said to be perverse. It is well settled that appellate court would not be justified in interfering with the order of acquittal unless the same is found to be perverse. In the present case, the High Court has committed an error in interfering with the order of acquittal of the appellants recorded by the trial court as the same did not suffer from the vice of perversity."*

29. In Kuldeep Singh v. The Commissioner of Police & Others (1999) 2 SCC 10, the Court while dealing with the scope of Articles 32 and 226 of the Constitution observed as under: (SCC p.14, paras 9-10)

> *"9. Normally the High Court and this Court would not interfere with the findings of fact recorded at the domestic enquiry but if the finding of "guilt" is based on no evidence, it would be a perverse finding and would be amenable to judicial scrutiny.*
>
> *10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with."*

30. The meaning of `perverse' has been examined in H. B. Gandhi, Excise and Taxation Officer-cum- Assessing Authority, Karnal & Others v. Gopi Nath & Sons & Others 1992 Supp (2) SCC 312, this Court observed as under: (SCC pp. 316-17, para 7)

> *"7. In the present case, the stage at and the points on which the challenge to the assessment in judicial review was raised and entertained was not appropriate. In our opinion, the High Court was in error in constituting itself into a court of appeal against the assessment. While it was open to the respondent to have raised and for the High Court to have considered whether the denial of relief under the proviso to Section 39(5) was proper or not, it was not open to the High Court re-appreciate the primary or perceptive facts which were otherwise within the domain of the fact-finding authority under the statute. The question whether the transactions*

were or were not sales exigible to sales tax constituted an exercise in recording secondary or inferential facts based on primary facts found by the statutory authorities. But what was assailed in review was, in substance, the correctness - as distinguished from the legal permissibility - of the primary or perceptive facts themselves. It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law."

10. What is 'perverse' has further been considered by this Court in ***RSA No.436 of 2000***, titled ***'Rubi Sood and another*** *vs.* ***Major (Retd.) Vijay Kumar Sud and others***, decided on 28.05.2015 in the following manner:-

"25..... A finding of fact recorded by the learned Courts below can only be said to be perverse, which has been arrived at without consideration of material evidence or such finding is based on no evidence or misreading of evidence or is grossly erroneous that, if allowed to stand, it would result in miscarriage of justice, is open to correction, because it is not treated as a finding according to law.

26. If a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or even the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then the finding is rendered infirm in the eye of the law.

27. If the findings of the Court are based on no evidence or evidence, which is thoroughly unreliable or evidence that suffers from vice of procedural irregularity or the findings are such that no reasonable persons would have arrived at those findings, then the findings may be said to be perverse.

28. Further if the findings are either ipse dixit of the Court or based on conjectures and surmises, the judgment suffers from the additional infirmity of non application of mind and thus, stands vitiated."

11. What is 'perversity' recently came up for consideration before the Hon'ble Supreme Court in ***Damodar Lal*** *vs.****Sohan Devi and others (2016) 3 SCC 78*** wherein it was held as under:-

"8. "Perversity" has been the subject matter of umpteen number of decisions of this Court. It has also been settled by several decisions of this Court that the first appellate court, under Section 96 of The Civil Procedure Code, 1908, is the last court of facts unless the findings are based on evidence or are perverse.

9. In Krishnan v. Backiam (2007) 12 SCC 190, it has been held at paragraph-11 that: (SCC pp. 192-93)

"11. It may be mentioned that the first appellate court under Section 96 CPC is the last court of facts. The High Court in second appeal under Section 100 CPC cannot interfere with the findings of fact recorded by the first appellate court under Section 96 CPC. No doubt the findings of fact of the first appellate court can be challenged in second appeal on the ground that the said findings are based on no evidence or are perverse, but even in that case a question of law has to be formulated and framed by the High Court to that effect."

10. In Gurvachan Kaur v. Salikram (2010) 15 SCC 530, at para 10, this principle has been reiterated: (SCC p. 532)

"10. It is settled law that in exercise of power under Section 100 of the Code of Civil Procedure, the High Court cannot interfere with the finding of

> *fact recorded by the first appellate court which is the final court of fact, unless the same is found to be perverse. This being the position, it must be held that the High Court was not justified in reversing the finding of fact recorded by the first appellate court on the issues of existence of landlord-tenant relationship between the plaintiff and the defendant and default committed by the latter in payment of rent."*

11. In the case before us, there is clear and cogent evidence on the side of the plaintiff/appellant that there has been structural alteration in the premises rented out to the respondents without his consent. Attempt by the respondent-defendants to establish otherwise has been found to be totally non-acceptable to the trial court as well as the first appellate court. Material alteration of a property is not a fact confined to the exclusive/and personal knowledge of the owner. It is a matter of evidence, be it from the owner himself or any other witness speaking on behalf of the plaintiff who is conversant with the facts and the situation. PW-1 is the vendor of the plaintiff, who is also his power of attorney. He has stated in unmistakable terms that there was structural alteration in violation of the rent agreement. PW-2 has also supported the case of the plaintiff. Even the witnesses on behalf of the defendant, partially admitted that the defendants had effected some structural changes.

12. Be that as it may, the question whether there is a structural alteration in a tenanted premises is not a fact limited to the personal knowledge of the owner. It can be proved by any admissible and reliable evidence. That burden has been successfully discharged by the plaintiff by examining PWs-1 and 2. The defendants could not shake that evidence. In fact, that fact is proved partially from the evidence of the defendants themselves, as an admitted fact. Hence, only the trial court came to the definite finding on structural alteration. That finding has been endorsed by the first appellate court on re-appreciation of the evidence, and therefore, the High Court in second appeal was not justified in upsetting the finding which is a pure question of fact. We have no hesitation to note that both the questions of law framed by the High Court are not substantial questions of law. Even if the finding of fact is wrong, that by itself will not constitute a question of law. The wrong finding should stem out on a complete misreading of evidence or it should be based only on conjectures and surmises. Safest approach on perversity is the classic approach on the reasonable man's inference on the facts. To him, if the conclusion on the facts in evidence made by the court below is possible, there is no perversity. If not, the finding is perverse. Inadequacy of evidence or a different reading of evidence is not perversity.

13. In Kulwant Kaur v. Gurdial Singh Mann (2001) 4 SCC 262, this Court has dealt with the limited leeway available to the High Court in second appeal. To quote para 34: (SCC pp.278-79)

> *"34. Admittedly, Section 100 has introduced a definite restriction on to the exercise of jurisdiction in a second appeal so far as the High Court is concerned. Needless to record that the Code of Civil Procedure (Amendment) Act, 1976 introduced such an embargo for such definite objectives and since we are not required to further probe on that score, we are not detailing out, but the fact remains that while it is true that in a second appeal a finding of fact, even if erroneous, will generally not be disturbed but where it is found that the findings stand vitiated on wrong test and on the basis of assumptions and conjectures and resultantly there is an element of perversity involved therein, the High Court in our view will be within its jurisdiction to deal with the issue. This is, however, only in the event such a fact is brought to light by the High Court explicitly and the judgment should also be categorical as to the issue of perversity vis-à-vis*

the concept of justice. Needless to say however, that perversity itself is a substantial question worth adjudication — what is required is a categorical finding on the part of the High Court as to perversity. In this context reference be had to Section 103 of the Code which reads as below:

'103. Power of High Court to determine issues of fact.- *In any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue necessary for the disposal of the appeal,—*

(a) which has not been determined by the lower appellate court or by both the court of first instance and the lower appellate court, or

(b) which has been wrongly determined by such court or courts by reason of a decision on such question of law as is referred to in Section 100."

The requirements stand specified in Section 103 and nothing short of it will bring it within the ambit of Section 100 since the issue of perversity will also come within the ambit of substantial question of law as noticed above. The legality of finding of fact cannot but be termed to be a question of law. We reiterate however, that there must be a definite finding to that effect in the judgment of the High Court so as to make it evident that Section 100 of the Code stands complied with."

14. In S.R. Tiwari v. Union of India (2013) 6 SCC 602, after referring to the decisions of this Court, starting with Rajinder Kumar Kindra v. Delhi Administration, (1984) 4 SCC 635, it was held at para 30: (S.R.Tewari case[6], SCC p. 615)

"30. The findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material. The finding may also be said to be perverse if it is "against the weight of evidence", or if the finding so outrageously defies logic as to suffer from the vice of irrationality. If a decision is arrived at on the basis of no evidence or thoroughly unreliable evidence and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, the conclusions would not be treated as perverse and the findings would not be interfered with. (Vide Rajinder Kumar Kindra v. Delhi Admn. [(1984) 4 SCC 635 : 1985 SCC (L&S) 131 : AIR 1984 SC 1805] , Kuldeep Singh v. Commr. of Police [(1999) 2 SCC 10 : 1999 SCC (L&S) 429 : AIR 1999 SC 677] , Gamini Bala Koteswara Rao v. State of A.P. [(2009) 10 SCC 636 : (2010) 1 SCC (Cri) 372 : AIR 2010 SC 589] and Babu v. State of Kerala[(2010) 9 SCC 189 : (2010) 3 SCC (Cri) 1179] .)"

This Court has also dealt with other aspects of perversity.

15. We do not propose to discuss other judgments, though there is plethora of settled case law on this issue. Suffice to say that the approach made by the High Court has been wholly wrong, if not, perverse. It should not have interfered with concurrent findings of the trial court and first appellate court on a pure question of fact. Their inference on facts is certainly reasonable. The strained effort made by the High Court in second appeal to arrive at a different finding is wholly unwarranted apart from being impermissible under law. Therefore, we have no hesitation to allow the appeal and set aside the impugned judgment of the High Court and restore that of the trial court as confirmed by the appellate court."

12. Bearing in mind the aforesaid exposition of law, it would be noticed that the plaintiff had initially filed a suit against the predecessor-in-interest of the defendant for grant of

mandatory injunction as well as prohibitory injunction, which was decreed by the then trial Court of Sub Judge 1st Class, Nahan vide its judgment and decree dated 21.9.1999. The defendants filed Civil Appeals No. 119-CA/13 of 1999 and 120-CA/13 of 1999 before the learned District Judge, Sirmaur District at Nahan, who vide his common judgment dated 12.9.2000 disposed of the appeals by modifying the judgment and decree passed by the trial Court. As regards the construction of the room measuring 12 ft. x 13 ft. by defendants No. 2 and 3, the same was upheld, whereas the suit of the plaintiff for demolishing the iron gate in front of the property from Naya Bazar as well as the staircase, bath room-cum-toilet and the water tank in the common Deori, was upheld.

13. Evidently, the property in dispute is comprised in Khasra Nos. 202, 221/1, 221/2, 222 and 225/1 measuring 105-79 sq. mtrs. and in addition thereto, the property comprised in Khasra Nos. 216/2, 217 and 268 total measuring 270-63 sq.mtrs. situated at Mohal, Naya Bazar Nahan for which an injunction was passed by the learned trial Court and affirmed upto this Court in RSA No. 633 of 2000 decided on 2.11.2006.

14. It is further not in dispute that despite the injunction order qua Khasra No. 217 has been affirmed by this Court, the plaintiff thereafter filed a suit for declaration to the effect that she alongwith her husband Anil Mohil had become owners by way of adverse possession of the suit property detailed in Khata Khatauni No. 81/119, Khasra No. 2142/216, measuring 161.43 sq.mtrs. and Khasra No. 217 measuring 80-40 sq.mtrs. total measuring 241.83 sq.mtrs. and also Khata Khatauni No. 82/120, Kitas 5, measuring 105-79 sq.mtrs. to the extent of half share therefrom, situated in Mohal Naya Bazar, Nahan. The suit was instituted on 21.02.2012 and registered as Case No.13/1 of 2012 and was withdrawn by the plaintiffs on 09.04.2014 as is evident from the order passed on the said date, which reads thus:

> *"09.04.2014*
>
> *Present: Shri V.C.Jain, learned counsel for the plaintiffs.*
>
> *Shri A.K. Rewal, learned counsel for the defendants.*
>
> *File taken up today on the application moved on behalf of the plaintiffs. Separate statements of the plaintiffs recorded. In view of separate statements of the plaintiffs, the suit of the plaintiffs is dismissed as withdrawn. The file after completion be consigned to record room."*

15. Evidently, it is only after withdrawal of the aforesaid suit that the present suit came to be filed, that too, based on the claim of easementary rights. Therefore, in this background, the moot question which arises for consideration is after the plaintiff having filed suit for adverse possession can claim easementary rights of the same land over which she claimed adverse possession by way of easement, obviously, the answer is in the negative. The easementary rights as claimed by the plaintiff is over Khasra No. 217 which she in the instant case admits to be in the ownership and possession of the defendant. Whereas, in the earlier suit while pleading adverse possession, obviously, she would have claimed herself to be not only in possession, but the owner of the same by efflux of time.

16. Plea of adverse possession and limitation pre-supposes that the title of the opposite party is admitted and that the defendants by virtue of their long, independent and continued possession claim in derogation of the title of the plaintiff.

17. On the other hand, the plea based on title would pre-suppose that the plaintiff asserts his/her title to the property and claims ownership by virtue of his rightful claim as a lawful owner based on a document of title. By claiming adverse possession, the title of the defendant is admitted but what is pleaded is a hostile, continuous possession to the knowledge of the defendant. Therefore, such a plea would necessarily be destructive to the plea based on title.

18. Both the pleas i.e. plea of title on the basis of sale deed and plea of adverse possession are vertically opposite pleas and are destructive in nature. Plea of adverse possession pre-supposes ownership of the plaintiff.

19. Adverse possession pre-supposes that the plaintiff admits title of the other but he/she is possessing the property denying the title of true owner. The Hon'ble Supreme Court in ***Karnataka Board of Wakf vs. Government of India and others, (2004) 10 SCC 779*** held as under:

> ***11. In the eye of 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 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. (See : S M Karim v. Bibi Sakinal AIR 1964 SC 1254, Parsinni v. Sukhi (1993) 4 SCC 375 and D N Venkatarayappa v. State of Karnataka (1997) 7 SCC 567). Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. 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 true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession. (Dr. Mahesh Chand Sharma v. Raj Kumari Sharma (1996) 8 SCC 128).***
>
> ***12. A Plaintiff, filing a title suit should be very clear about the origin of title over the property. He must specifically plead it. (See: S M Karim v. Bibi Sakinal AIR 1964 SC 1254). In P Periasami v. P Periathambi (1995) 6 SCC 523 this Court ruled that : (SCC p. 527, para 5)***
>
> > ***"Whenever the plea of adverse possession is projected, inherent in the plea is that someone else was the owner of the property."***
>
> ***The pleas on title and adverse possession are mutually inconsistent and the latter does not begin to operate until the former is renounced. Dealing with Mohan Lal v. Mirza Abdul Gaffar (1996) 1 SCC 639 that is similar to the case in hand, this Court held: (SCC pp. 640-41, para 4)***
>
> > ***" 4. As regards the first plea, it is inconsistent with the second plea. Having come into possession under the agreement, he must disclaim his right there under and plead and prove assertion of his independent hostile adverse possession to the knowledge of the transferor or his successor in title or interest and that the latter had acquiesced to his illegal possession during the entire period of 12 years, i.e., up to completing the period his title by prescription nec vi, nec clam, nec precario. Since the appellant's***

> ***claim is founded on Section 53-A, it goes without saying that he admits by implication that he came into possession of land lawfully under the agreement and continued to remain in possession till date of the suit. Thereby the plea of adverse possession is not available to the appellant."***

20. Thus, what can be taken to be well settled by now is that the plea of adverse possession pre-supposes and is based on the speculative intent of a person on account of default of true owner being not in possession of the property. That means, the right of adverse possession is a piratical right, mainly based on:

(i) Speculative and negative theory of default ;

(ii) wishful presumption that the owner has abandoned the property to the adverse possessor and;

(iii) that the true owner has not claimed the possession from the opposite side within a period of limitation, prescribed under Articles 64 and 65 of the Limitation Act, as the case may be and nothing else. It lacks any statutory recognition in this behalf.

This is for this precise reason that it can only be used as a shield of defence to protect the possession, but cannot be used as a sword, meaning thereby, the plaintiff cannot claim the ownership in the property in dispute by way of adverse possession. Though, the same may be pleaded by the defendant in defence in the written statement only for a limited purpose to protect the possession after expiry of the statutory period of limitation.

21. Therefore, this plea in the present suit in teeth of the earlier suit having been filed by the appellant for adverse possession wherein she claimed herself to be in possession of Khasra No. 217 is clearly not available to her and in fact the instant suit is nothing but an abuse of the process of the Court, as it is more than settled that for a right to be exercised by a person as an easement it is necessary to establish that the right was exercised by her on somebody else's property and not as an incident of her ownership of that property. For that purpose her consciousness during the statutory period that she was exercising that right on the property treating it as somebody else's property is a necessary ingredient in proof of the establishment of that right as easement. If the owner of the dominant tenement has during part of the period of prescription exercised the rights which she claims as an easement under the assertion or belief that she was the owner of the servient tenement then her exercise of those rights is not exercise "as easement" and she must fail in a claim to easement.

22. If a person has actually claimed ownership of the servient tenement in a previous litigation within the statutory period of twenty years it may be regarded as an important piece of evidence to show that she did not exercise that right as an easement. (Refer:***Raychand Vanmalidas vs. Maneklal Mansukhbhai AIR 1946 Bombay 266 (FB.).***

23. The Hon'ble Supreme Court in ***K.K.Modi vs. K.N.Modi and others,*** *reported in* ***(1998) 3 SCC 573*** has dealt in detail with the proposition as to what would constitute an abuse of the process of the Court, one of which pertains to re-litigation. It has been held at paragraphs 43 to 46 as follows:

> 43. The Supreme Court Practice 1995 published by Sweet & Maxwell in paragraph 18/19/33 (page 344) explains the phrase "abuse of the process of the Court" thus : "This terms connotes that the process of the Court must be used bona fide and properly and must not be abused. The Court will prevent improper use of its machinery and will in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation. . . . . The categories of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed but depend on all the relevant

circumstances. And for this purpose considerations of public policy and the interests of justice may be very material."

44. One of the examples cited as an abuse of the process of Court is re-litigation. It is an abuse of the process of the Court and contrary to justice and public policy for a party to re-litigate the same issue which has already been tried and decided earlier against him. The re-agitation may or may not be barred as res judicata. But if the same issue is sought to be re-agitated, it also amounts to an abuse of the process of the Court. A proceeding being filed for a collateral purpose, or a spurious claim being made in litigation may also in a given set of facts amount to an abuse of the process of the Court. Frivolous or vexatious proceedings may also amount to an abuse of the process of Court especially where the proceedings are absolutely groundless. The Court then has the power to stop such proceedings summarily and prevent the time of the public and the Court from being wasted. Undoubtedly, it is a matter of Courts' discretion whether such proceedings should be stopped or not; and this discretion has to be exercised with circumspection. It is a jurisdiction which should be sparingly exercised, and exercised only in special cases. The Court should also be satisfied that there is no chance of the suit succeeding.

45. In the case of Greenhalgh v. Mallard (1947) 2 All ER 255, the Court had to consider different proceedings on the same cause of action for conspiracy, but supported by different averments. The Court held that if the plaintiff has chosen to put his case in one way, he cannot thereafter bring the same transaction before the Court, put his case in another way and say that he is relying on a new cause of action. In such circumstances he can be met with the plea of res judicata or the statement or plaint may be struck out on the ground that the action is frivolous and vexatious and an abuse of the process of the Court.

46. In Mcllkenny v. Chief Constable of West Midlands Police Force (1980) 2 All ER 227, the Court of Appeal in England struck out the pleading on the ground that the action was an abuse of the process of the Court since it raised an issue identical to that which had been finally determined at the plaintiffs' earlier criminal trial. The Court said even when it is not possible to strike out the plaint on the ground of issue estoppel, the action can be struck out as an abuse of the process of the Court because it is an abuse for a party to re-litigate a question or issue which has already been decided against him even though the other party cannot satisfy the strict rule of res judicata or the requirement of issue estoppels.

24. Similarly, the Hon'ble Supreme Court in ***Kishore Samrite vs. State of Uttar Pradesh and others,*** reported in ***(2013(2) SCC 398,*** has dealt in detail with "abuse of process of Court" in the following terms:

Abuse of the process of Court :

"31. Now, we shall deal with the question whether both or any of the petitioners in Civil Writ Petition Nos. 111/2011 and 125/2011 are guilty of suppression of material facts, not approaching the Court with clean hands, and thereby abusing the process of the Court. Before we dwell upon the facts and circumstances of the case in hand, let us refer to some case laws which would help us in dealing with the present situation with greater precision.

32. The cases of abuse of the process of court and such allied matters have been arising before the Courts consistently. This Court has had many occasions where it dealt with the cases of this kind and it has clearly stated the principles that would govern the obligations of a litigant while approaching the court for redressal of any grievance and the consequences of abuse of the process of court. We may recapitulate and state some of the principles. It is difficult to state such

principles exhaustively and with such accuracy that would uniformly apply to a variety of cases. These are:

32.1. Courts have, over the centuries, frowned upon litigants who, with intent to deceive and mislead the Courts, initiated proceedings without full disclosure of facts and came to the courts with 'unclean hands'. Courts have held that such litigants are neither entitled to be heard on the merits of the case nor entitled to any relief.

32.2. The people, who approach the Court for relief on an ex parte statement, are under a contract with the court that they would state the whole case fully and fairly to the court and where the litigant has broken such faith, the discretion of the court cannot be exercised in favour of such a litigant.

32.3. The obligation to approach the Court with clean hands is an absolute obligation and has repeatedly been reiterated by this Court.

32.4. Quests for personal gains have become so intense that those involved in litigation do not hesitate to take shelter of falsehood and misrepresent and suppress facts in the court proceedings. Materialism, opportunism and malicious intent have over-shadowed the old ethos of litigative values for small gains.

32.5. A litigant who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands is not entitled to any relief, interim or final.

32.6. The Court must ensure that its process is not abused and in order to prevent abuse of the process the court, it would be justified even in insisting on furnishing of security and in cases of serious abuse, the Court would be duty bound to impose heavy costs.

32.7. Wherever a public interest is invoked, the Court must examine the petition carefully to ensure that there is genuine public interest involved. The stream of justice should not be allowed to be polluted by unscrupulous litigants.

32.8. The Court, especially the Supreme Court, has to maintain strictest vigilance over the abuse of the process of court and ordinarily meddlesome bystanders should not be granted "visa". Many societal pollutants create new problems of unredressed grievances and the Court should endure to take cases where the justice of the lis well-justifies it. [Refer : Dalip Singh v. State of U.P. & Ors. (2010) 2 SCC 114; Amar Singh v. Union of India & Ors. (2011) 7 SCC 69 and State of Uttaranchal v Balwant Singh Chaufal & Ors. (2010) 3 SCC 402].

33. Access jurisprudence requires Courts to deal with the legitimate litigation whatever be its form but decline to exercise jurisdiction, if such litigation is an abuse of the process of the Court. In P.S.R. Sadhanantham v. Arunachalam & Anr. (1980) 3 SCC 141, the Court held:

> "15. The crucial significance of access jurisprudence has been best expressed by Cappelletti:
>
> > "The right of effective access to justice has emerged with the new social rights. Indeed, it is of paramount importance among these new rights since, clearly, the enjoyment of traditional as well as new social rights presupposes mechanisms for their effective protection. Such protection, moreover, is best assured be a workable remedy within the framework of the judicial system. Effective access to justice can thus be seen as the most basic requirement the most basic 'human-right' of a system which purports to guarantee legal rights."

> 16. We are thus satisfied that the bogey of busybodies blackmailing adversaries through frivolous invocation of Article 136 is chimerical. Access to justice to every bona fide seeker is a democratic dimension of remedial jurisprudence even as public interest litigation, class action, pro bono proceedings, are. We cannot dwell in the home of processual obsolescence when our Constitution highlights social justice as a goal. We hold that there is no merit in the contentions of the writ petitioner and dismiss the petition."

34. It has been consistently stated by this Court that the entire journey of a Judge is to discern the truth from the pleadings, documents and arguments of the parties, as truth is the basis of the Justice Delivery System.

35. With the passage of time, it has been realised that people used to feel proud to tell the truth in the Courts, irrespective of the consequences but that practice no longer proves true, in all cases. The Court does not sit simply as an umpire in a contest between two parties and declare at the end of the combat as to who has won and who has lost but it has a legal duty of its own, independent of parties, to take active role in the proceedings and reach at the truth, which is the foundation of administration of justice. Therefore, the truth should become the ideal to inspire the courts to pursue. This can be achieved by statutorily mandating the Courts to become active seekers of truth. To enable the courts to ward off unjustified interference in their working, those who indulge in immoral acts like perjury, prevarication and motivated falsehood, must be appropriately dealt with. The parties must state forthwith sufficient factual details to the extent that it reduces the ability to put forward false and exaggerated claims and a litigant must approach the Court with clean hands. It is the bounden duty of the Court to ensure that dishonesty and any attempt to surpass the legal process must be effectively curbed and the Court must ensure that there is no wrongful, unauthorised or unjust gain to anyone as a result of abuse of the process of the Court. One way to curb this tendency is to impose realistic or punitive costs.

36. The party not approaching the Court with clean hands would be liable to be non-suited and such party, who has also succeeded in polluting the stream of justice by making patently false statements, cannot claim relief, especially under Article 136 of the Constitution. While approaching the court, a litigant must state correct facts and come with clean hands. Where such statement of facts is based on some information, the source of such information must also be disclosed. Totally misconceived petition amounts to abuse of the process of the court and such a litigant is not required to be dealt with lightly, as a petition containing misleading and inaccurate statement, if filed, to achieve an ulterior purpose amounts to abuse of the process of the court. A litigant is bound to make "full and true disclosure of facts". (Refer : Tilokchand H.B. Motichand & Ors. v. Munshi & Anr. [1969 (1) SCC 110]; A. Shanmugam v. Ariya Kshatriya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam & Anr. [(2012) 6 SCC 430]; Chandra Shashi v. Anil Kumar Verma [(1995) SCC 1 421]; Abhyudya Sanstha v. Union of India & Ors. [(2011) 6 SCC 145]; State of Madhya Pradesh v. Narmada Bachao Andolan & Anr. [(2011) 7 SCC 639]; Kalyaneshwari v. Union of India & Anr. [(2011) 3 SCC 287)].

37. The person seeking equity must do equity. It is not just the clean hands, but also clean mind, clean heart and clean objective that are the equi-fundamentals of judicious litigation. The legal maxim jure naturae aequum est neminem cum alterius detrimento et injuria fieri locupletiorem, which means that it is a law of nature that one should not be enriched by the loss or injury to another, is the percept for Courts. Wide jurisdiction of the court should not become a source of abuse of the process of law by the disgruntled litigant. Careful exercise is also

necessary to ensure that the litigation is genuine, not motivated by extraneous considerations and imposes an obligation upon the litigant to disclose the true facts and approach the court with clean hands.

38. No litigant can play 'hide and seek' with the courts or adopt 'pick and choose'. True facts ought to be disclosed as the Court knows law, but not facts. One, who does not come with candid facts and clean breast cannot hold a writ of the court with soiled hands. Suppression or concealment of material facts is impermissible to a litigant or even as a technique of advocacy. In such cases, the Court is duty bound to discharge rule nisi and such applicant is required to be dealt with for contempt of court for abusing the process of the court. [K.D. Sharma v. Steel Authority of India Ltd. & Ors. [(2008) 12 SCC 481].

39. Another settled canon of administration of justice is that no litigant should be permitted to misuse the judicial process by filing frivolous petitions. No litigant has a right to unlimited drought upon the court time and public money in order to get his affairs settled in the manner as he wishes. Easy access to justice should not be used as a licence to file misconceived and frivolous petitions. (Buddhi Kota Subbarao (Dr.) v. K. Parasaran, (1996) 5 SCC 530)."

25. Now, it is to be seen as to whether the conduct of the plaintiff was infact in abuse of the process of the Court. What is " abuse of process of Court" of course has not been defined or given any meaning in the Code of Civil Procedure. However, a party to a litigation can be said to be guilty of abuse of process of the Court in any of the following cases as held by the Hon'ble Madras High Court in ***Ranipet Municipality Rep. by its.... Vs. M. Shamsheerkhan,*** reported in ***1998 (1) CTC 66*** at paragraph 9. To quote:

"9. It is this conduct of the respondent that is attacked by the petitioner as abuse of process of Court. What is 'abuse of the process of the Court'? Of course, for the term 'abuse of the process of the Court' the Code of Civil Procedure has not given any definition. A party to a litigation is said to be guilty of abuse of process of the Court, in any of the following cases:-

(1) Gaining an unfair advantage by the use of a rule of procedure.

(2) Contempt of the authority of the Court by a party or stranger.

(3) Fraud or collusion in Court proceedings as between parties.

(4) Retention of a benefit wrongly received.

(5) Resorting to and encouraging multiplicity of proceedings.

(6) Circumventing of the law by indirect means.

(7) Presence of witness during examination of previous witness.

(8) Institution vexatious, obstructive or dilatory actions.

(9) Introduction of Scandalous or objectionable matter in proceedings.

(10) Executing a decree manifestly at variance with its purpose and intent.

(11) Institution of a suit by a puppet plaintiff.

(12) Institution of a suit in the name of the firm by one partner against the majority opinion of other partners etc."

The above are only some of the instances where a party may be said to be guilty of committing of " abuse of process of the Court".

26. Bearing in mind the aforesaid exposition of law, it would be noticed that being conscious of the fact that it was Khasra No. 217 that the plaintiff had laid her claim being in adverse possession thereof, she in the instant suit acknowledged the title of the defendant so as to set up the plea of easement which is nothing sort of being malafide. That apart, it would be

noticed that the plaintiff has miserably failed to prove this plea. In fact, the plaintiff had failed to establish on record that the wall in question had been constructed by her. As a matter of fact, it is concurrently found by the learned Courts below that the defendant was raising construction by way of pillars over his own land and the present suit had been filed only to harass him.

27. That apart, the plaintiff has not even pleaded her case as is required under the Indian Easement Act, more particularly, under Section 33 and the averments of easement were contained in para-5 of the plaint, which reads thus:

> *"5. That the defendant did not do any construction work for two or three days thereafter he has started raising construction of his building in the illegal manner just adjacent to the suit property. The defendant has not applied for demarcation as submitted by him till now. The defendant if is not restrained from causing interference or raising construction in illegal manner he will demolish the wall of the plaintiff and also close the window by raising construction in front of it. If the window is closed by the illegal acts of defendant the plaintiff will be deprived of enjoying/getting light and air to her house from the same and the injuries so suffered by her shall be of irreparable nature, which cannot be compensated in terms of money. The plaintiff being owner in possession of the suit property is entitled to enjoy the fruit of the same and she is entitled to get air and light to her house from the window as she has acquired the right by way of prescription being enjoyed continuously without interruption for the last more than 25 years, whereas the defendant has no right, title or interest to cause any kind of interference in the same."*

28. It would be evidently clear from the aforesaid averments that the plaintiff has neither pleaded obstruction of free passage to natural light and air nor obstruction to any easementary right of light and air which obviously is not her case that she had acquired. It is well recognized principle that unless easementary rights to light and air are obstructed the adjacent owner has a right to put up his own wall at the boundary of his property and the owner of the other adjacent property can have no grievance against the same.

29. As observed earlier, the present suit has been filed only to unnecessarily harass the defendant and waste the precious time of this Court. Now, in such a situation, can these present proceedings be termed as bonafide or are they frivolous, vexatious or oppressive? There can be no manner of doubt that the present proceedings are vexatious, obstructive apart from being a dilatory action in the Court of law whereby the plaintiff has abused the process of the Court by instituting multiplicity of proceedings for ones own aggrendisement.

30. Thus, what clearly emerges from the aforesaid is that no litigant can be permitted to indulge in re-litigation and file successive suits or petitions because the general principles underline the doctrine of res judicata is ultimately based on consideration of public policy. One important consideration of public policy is that the decision pronounced by the Court of competent jurisdiction should be final, unless modified or reversed by the appellate authorities and the other principle is that no one should be made to face the same kind of litigation twice, because such a process would be contrary to considerations of fair play and justice.

31. In view of the aforesaid discussion, the suit instituted by the plaintiff is not only vexatious but is the gross abuse of the process of Court whereby not only the defendant has been put to unnecessary harassment but even the precious time of this Court has been wasted. The plaintiff is thus made herself liable for being imposed punitive costs.

32. Accordingly, the present appeal is dismissed with costs of Rs.50,000/- to be paid by the appellant/plaintiff to the respondent/ defendant within a period of four weeks. In the event of the costs not being paid within the stipulated period, the respondent/defendant shall be free to execute this order and recover the costs in accordance with law.

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

Vishal Goswami. .....Petitioner.

Versus

State of Himachal Pradesh & ors. .....Respondents.

CWP No. 1253 of 2018.
Reserved on : 10.7.2018.
Decided on: 25.7.2018.

Constitution of India, 1950- Articles 14 and 19(1)(g)- Right to trade - Interference by Courts - Allotment of licences of retail liquor vends – Selection of site of liquor vend(s) – Pursuant to directions of High Court passed in previous writ petition, that allocation should be made keeping in mind viability, successful and fair operation of vends, Financial Commissioner (Excise) (F.C.) Himachal Pradesh directing petitioner to shift existing site of his liquor vend at Mcleodganj with consent of private respondent-another liquor contractor – Challenge thereto - Petitioner assailing the order on ground that it has been passed to favour private R5 – Also submitting that change of site would result in huge financial loss to him – State justifying order on ground that site of liquor vend of petitioner is nearer to site of respondent No.5 on Mcleodganj Bhagsu Road and present set up was not viable for both the liquor vends to survive – High Court found that petitioner of his own had shifted the site of his liquor vend from Mcleodganj Temple Road to Mcleodganj Main Square without approval from Competent Authority – 'Excise Announcements' however required that licencee was to get the premises approved from Addl./Joint/Deputy Excise & Taxation Commissioner of the zone concerned – Decision of Competent Authority regarding shifting of liquor vend of petitioner found to have been taken in view of viability as well as successful and fair operation of vends as liquor vends of petitioner and R5 were found operating within close proximity of each other – Held, No person has a right to stick to particular premises – However, the condition that he is to select new site with consent of R5 is set aside as he cannot be put at the mercy of R5 in matter of selection of land – High Court directed him to shift to his original site i.e. Temple Road Macleodganj or select some other site at a reasonable distance (400 -500 meters) from liquor vend of R5 – Petition disposed of. (Para-15)

For the petitioner : Mr. Sanjeev Bhushan, Senior Advocate with Ms. Abhilasha Kaundal, Advocate.

For the respondents: Mr. Ajay Vaidya, Senior Advocate with Mr. Vikas Rathore and Mr. Narinder Guleria, Addl. AGs, for respondents No. 1 to 4.

Mr. Shrawan Dogra, Senior Advocate with Mr. Anup Rattan, Advocate, for respondent No. 5.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, *J.*

In this petition order Annexure P-1 whereby the site at Macleodganj district Kangra the petitioner has chosen to run the liquor vend (L-2) allotted to him for the year 2018-19 has been rejected with a direction to select a new site/premises acceptable to M/S J.R. Wines, respondent No. 5 herein and shift the vend to such newly selected site in Macleodganj is under challegne. The allotment of liquor vend (L-2 Bhagsu Road, Tehsil Dharamshala, District Kangra) in favour of respondent No. 5 has also been sought to be cancelled on the grounds, inter-alia that one of its partner namely Ranjeet Singh is a defaulter and the said respondent has allegedly even not deposited the security i.e. 5% of the total licence fee in terms of condition No. 2.21 to the Excise Announcements Annexure P-3 issued for the Allotment of Retail Excise vends by draw of Lots during the current year 2018-2019.

2. The Announcements contain the procedure required to be followed for making the allotment of liquor vends in the State. The list of L-2 vends for Kangra district is Annexure-C to the Announcements. The L-2 vends in dispute in this list are at serial No. I i.e. Bhagsunag and serial No. 6 Macleodganj. While petitioner has applied for allotment of L-2 vend at Macleodganj, the private respondent (R. No. 5) for same vend at Bhagsunag. As per the final quota and Retail Excise duty list Annexure P-5 the L-2 at Macleodganj has been nomenclatured as "Macleodganj" without any suffixes and prefixes whereas the L-2 vend Macleodganj-Bhagsu Road at Bhagsu road meaning thereby that the liquor vend L-2 allotted to the petitioner has to be made functional in Macleodganj whereas the L-2 at a site on Macleodganj-Bhagsu Road.

3. Consequent upon their applications on draw of Lots L-2 Macleodganj was allotted to the petitioner, whereas L-2 Bhagsu Road to respondent No. 5. Besides L-2 Bhagsu Road the respondent No. 5 has also been allotted L-14 Macleodganj. The L-2 allotted in favour of the petitioner is Unit No. I "Macleodganj" and it was allotted to him at a cost of Rs. 2,30,76,298/-. The L-2 "Bhagsu Road" and L-14 "Macleodganj" Unit No. II allotted to respondent No. 5 have been priced at Rs. 3,61,11,275/-. The petitioner on allotment of the vend started operating the same from Macleodganj Main Square whereas respondent No. 5 at the previous site I.e. a place situated on Macleodganj-Bhagsu Road. The respondent-department vide corrigendum dated 4/5-5-2018 Annexures P-8/P-9 has changed the location of L-2 Unit-I allotted to the petitioner and L-2+L-14 Unit-II allotted to respondent No. 5 from Macleodganj to Macleodganj Temple Road and Macleodganj Main Square, respectively and thereby shifted the L-2 vend allotted to the petitioner to Macleodganj Temple Road whereas the L-2 vend allotted to respondent No. 5 to Macleodganj Main Square.

4. Aggrieved thereby the petitioner had approached this Court by way of filing civil writ petition No. 759 of 2018. Mr. Anup Rattan, Advocate, learned Counsel during the course of proceedings in that writ petition has stated at bar that respondent No. 5 is not interested in shifting the L-2 and L-14 allotted to it from the present site I.e.Macleodganj-Bhagsu Road to Macleodganj Main Square. This Court also noticed that in terms of condition Nos. 10.2 and 10.5(II) of the Announcements the site in the area to which the vend has been allotted required to be approved from the respective Additional/Joint/Deputy Excise and Taxation Commissioner concerned. Therefore, the corrigendum as issued has been quashed vide judgment Annexure P-2 passed in that writ petition with a direction to the petitioner to approach the Commissioner of Excise and Taxation of Himachal Pradesh, the 2nd respondent, for approval of the site from where he intend to make L-2 allotted to him functional. This judgment reads as follows:

> *".....2. Now, if coming to the claim of the petitioner that he has made the L-2 vend allotted to him functional at Macleodganj Main Square, the same hardly carry any substance for the reason that he has not obtained the approval as required in terms of Conditions No. 10.2 and 10.5(ii) of the announcements of excise allotments/renewals for the year 2018-2019.*
>
> *3. It is apparent from the perusal of the above condition that an allottee shall have to arrange for a site and also the salesmen and get the same approved from the respective Additional/Joint/Deputy Excise & Taxation Commissioner of the Zone concerned. The petitioner, admittedly, has not sought the approval of the existing site where the vend presently is functioning. The vend though is still functioning there, however, pursuant to the interim order passed in this writ petition on 2nd May, 2018.*
>
> *4. It was obligatory on the part of the petitioner to have sought the approval of the site from the respondent-department before making the same functional. Therefore, when no approval was obtained, there was no occasion to the respondents to have issued the corrigendum, Annexure P-7. The corrigendum, being uncalled for, is accordingly ordered to be quashed.*

5. Consequently, the writ petition is ordered to be finally disposed of with a direction to the petitioner to approach the Commissioner of Excise and Taxation, Himachal Pradesh, the second respondent, for approval of the site from where he intend to make his liquor vend functional, within three days from today. The Commissioner shall take a decision in the matter thereafter keeping in mind the viability, successful and fair operation of the vend by 26th May, 2018, positively. Till then, the interim order to continue……"

5. Consequent upon the judgment (Annexure P-2) *supra* passed by this Court in previously instituted writ petition the matter came to be decided by Financial Commissioner (Excise) Himachal Pradesh, Shimla. Since this Court has directed the Commissioner to take a decision in the matter keeping in mind the viability, successful and fair operation of the vends allotted to the petitioner and private respondents. Therefore, the Commissioner while passing the impugned order Annexure P-1 did not find the present site from where the petitioner is running his liquor vend by shifting the same from the previous site which was situated at a distance of 500 meters therefrom. Being so, in view of the distance between the two vends decreased substantially and the Commissioner on finding that the survival of both the vends is in danger has directed the petitioner to arrange for another site at Macleodganj on his own with the consent of respondent No. 5 and shift his vend there. The approval of the site so selected be obtained thereafter from the competent authority.

6. It is this order which has been assailed on the grounds, inter-alia, that the same has been passed with the only ideal to favour respondent No. 5. Also that the corrigendum Annexure P-9 has been issued to achieve the similar object i.e. to favour respondent No. 5. The L-2 Bhagsu Road allotted to respondent No. 5 has been renamed as L-2 Macleodganj Main Square simply to accommodate respondent No. 5 in the business of liquor. It has been submitted that Macleodganj is Ward No. 3 of Municipal Corporation, Dharamshala whereas Bhagsunag is Ward No. 2. The petitioner, as such, is legally entitled to run his vend from Macleodganj, the present site. The vend allotted to respondent No. 5 cannot be renamed as Macleodganj Main Square as it was sanctioned and allotted to be opened at a site on Macleodganj-Bhagsu Road. The L-2 allotted to the petitioner has been priced at a very heavy cost as compared to that of private respondent. Therefore, any change in the site of the vend allotted to him would certainly result in huge financial loss. In view of one of the partner namely Ranjeet Singh of respondent No. 5 is a defaulter and the said respondent even not deposited the security i.e. 5% of the total cost at which the liquor vend has been priced at the time of allotment, therefore, on this score also, the allotment of L-2 on Macleodganj-Bhagsu Road in favour of the said respondent is contrary to the terms and conditions in the announcements, hence the same has been sought to be cancelled.

7. The respondent-State in short reply to the writ petition has reiterated that the site from where the petitioner presently is running his liquor vend is nearer to the site of respondent No. 5 on Macleodganj-Bhagsu Road. As it was not viable for both the vends to survive, therefore, the Commissioner has rightly directed the petitioner to choose another site and shift the vend there at his own.

8. The respondent No. 5 in separate reply has, however, denied the contents of the writ petition being wrong. As per its version the vend (L-2 Macleodganj) previously was being run from a premises situated on Temple Road Macleodganj i.e. at a distance of 500 meters from the present site. The corrigendum Annexure P-9 being already quashed by this Court in the previously instituted writ petition could have not been pressed in service by the petitioner. It is also submitted that as per the terms and conditions of Announcements a Unit as a whole has been allotted during auction. Therefore, while the petitioner has purchased Unit No. I for a sum of Rs. 2.31 crores (approximately), the respondent No. 5 has purchased its unit in a sum of Rs. 3.61 crores (approximately). It is, therefore, denied that the cost of the Unit purchased by the petitioner is higher as compared to that of respondent No. 5. The liquor vends allotted to

respondent No. 5 was previously being run on Macleodganj-Bhagsu road. The said respondent has, therefore, not shifted the site and on allotment of the same during the current year i.e. 2018-2019 also has made the same functional from that very site. It is, however, the petitioner who has shifted the site of the liquor vend allotted to him from Macleodganj Temple Road to Macleodganj Main Square and thereby reduced the financial viability of the liquor vend allotted to respondent No. 5. It has been specifically pointed out in the reply that the petitioner seems to be aggrieved from the observation "....***He may choose sites/houses mutually acceptable to the respondents***....**"**, the same according to respondent No. 5 may be deleted from the impugned order Annexure P-1.

9. In rejoinder to the reply filed on behalf of respondent No. 5, the petitioner has reiterated the contentions he already raised in the writ petition and also further substantiated the averments qua Ranjeet Singh one of the partner of respondent No. 5 is a defaulter and the said respondent failed to deposit the security i.e. 5% of the bid amount in terms of the Announcements.

10. After hearing arguments and before dictating judgment, it transpired that neither respondent-State nor respondent No. 5 has controverted the averments in the writ petition and rejoinder that one of the partner of respondent No. 5 was a defaulter and that the said respondent had even not deposited 5% of the bid amount also, therefore, on the prayer made by the respondents they were permitted to file reply/sur-rejoinder. Consequently, the respondent-State has filed short reply to answer the averments in the writ petition hereinabove, whereas respondent No. 5 has controvered the same by way of filing sur-rejoinder.

11. It has been clarified that one of the partner of respondent No. 5 Ranjeet Singh was partner of M/S Vineet Khanna and Company during the previous year i.e. 2017-2018. Since the said company could not open few of its vends and those opened had also to be closed in view of the judgment of the Supreme Court, therefore, approached this Court by filing Civil Writ petition No. 2590 of 2017. The order passed in this petition is Annexure R-1 to the reply filed on behalf of respondent-State, whereas Annexure-SA1 to sur-rejoinder. The order reveal that in the interim the respondents have been directed not to charge licence fee from the petitioner in respect of those vends which on account of the judgment of the Apex Court either stood closed or could not at all be opened. As regard 5% of the bid amount the same was deposited vide E-treasury challans Annexures SA-4 (colly) dated 19.3.2018 whereas security deposited vide FDR dated 29.3.2018 Annexure SA-5.

12. The claim of the petitioner to quash the impugned order Annexure P-1 has thus to be determined in this background.

13. It is undisputed that petitioner is an allottee/licensee to whom foreign liquor vend 'L-2 Mcleodganj' has been allotted for the year 2018-19 and respondent No. 5 has been allotted liquor vend 'L-2 Bhagsu Road' along with liquor vend 'L-14 Mcleodganj'.

14. The ground of challenge that corrigendum whereby Unit-2 i.e. L-2 and L-14 Bhagsu Road has been shifted to Macleodganj Main Square to the detrimental of the petitioner is no more available to him for the reasons that as per the judgment Annexure P-2 passed in the previously instituted writ petition we have already quashed the same. Not only this, but learned Counsel representing respondent No. 5 during the course of proceedings in the said writ petition had stated at bar that the said respondent is no more interested in shifting L-2 and L-14 from the site on Macleodganj-Bhagsu Road to Macleodganj Main Square. Therefore, the grievance to this effect brought to this Court in this writ petition is without any substance.

15. Now if coming to the locations for which the liquor vends have been allotted to the petitioner and private respondent, there is no quarrel so as to the site of the petitioner is "Macleodganj" whereas that of the respondent No. 5 on "Macleodganj-Bhagsu Road" Dharamshala, District Kangra, (HP). There is again no dispute so as to respondent No. 5 is

running the vends allotted to it from the previous year's site itself i.e. Macleodganj-Bhagsu Road. However, petitioner at his own and without getting his site approved from the competent authority in the respondent department had shifted the same to Macleodganj Main Square from Macleodganj Temple Road. As a matter of fact this vend was being operated during the previous year i.e. 2017-18 from Macleodganj-Temple Road. Therefore, respondent No. 5 being under legitimate expectation that the petitioner will operate the vend during the current year also from that very location has not changed its previous year site from where it was operating the vends i.e. L-14 and sub vend L-2 (now upgraded as L-2). The map Annexure R5/A and R5/B to the reply filed on behalf of respondent No. 5 depicts the location of L-2 Macleodganj during the year 2017-18 before and after the judgment passed by the Supreme Court. The same was located at Macleodganj Main Square before the order of the Supreme Court whereas shifted to Temple Road Macleodganj after such order. The L-2 Bhagsu Road sub vend and L-14 Bhagsu Road has also been shown in this map. The petitioner during this year has shifted the vend at his own to Macleodganj Main Square as shown in the map Annexure R5/B which, however, has not been approved by the competent authority and rather rejected vide impugned order Annexure P-1 and rightly so because from Macleodganj Main Square the distance up to Bhagsu Road where the liquor vends of respondent No. 5 are situated has reduced considerably i.e. by 400 meters because in the map Annexure R5/B the distance in between temple road (the old site) and Macleodganj Main Square (the new one) is 400 meters. Both vends as such have come closure to each other. The anxiety of the respondent No. 5 and the opinion that survival and viability of both vends is not possible framed by learned Commissioner below is absolutely justified.

16. The response to the writ petition filed on behalf of respondent No. 5, therefore, amply demonstrate that by operating both set of vends from such a close distance, its survival is in danger. As a matter of fact, allowing the petitioner to operate the liquor vend from the present site i.e. Macleodganj Main Square is likely to result in huge financial loss and miscarriage of justice to respondent No. 5. True it is that the petitioner has been allotted the liquor vend at Macleodganj. There is again no dispute so as to Macleodganj is Ward No. 3 of Municipal Corporation, Dharamshala. There is again no quarrel so as to the Bhagsunag is Ward No. 2 of Municipal Corporation. However, the L-2 and L-14 allotted to respondent No. 5 are not for Bhagsunag but at a location on Macleodganj-Bhagsunag Road. The location of the liquor vends allotted to the said respondent, therefore, is right i.e. Bhagsu Road. The petitioner, however, is not justified in claiming that Macleodganj Main Square is the suitable place from where he is entitled to operate his vend. If he is allowed to operate his vend from this site, it may not cause any loss to him but certainly to respondent No. 5 as the distance between the two sets of liquor vends will considerably reduce thereby. The Commissioner, therefore, has rightly rejected the present site selected by the petitioner at his own and without seeking approval from the competent authority as required under Condition Nos. 10.2 and 10.5(II) of the Announcements. For the sake of convenience such conditions are reproduced here as under:

> **"10.2** The licensees shall have to make their own arrangements for procuring liquor and also for suitable vends (shops) to carry on their business in the localities for which particular licenses are sanctioned. It will be obligatory on the part of the licensee to get the premises and the name of the salesman approved along with his photograph, before starting the vends. The premises will be within a specific locality, where the location is not further specified, for which such licenses are sanctioned, but licensees cannot claim that the new premises should remain restricted within the area and premises in which the vends had been functioning previously. In case the licensee fails to arrange the premises for the vends to the satisfaction of the Additional/Joint/Deputy Excise & Taxation Commissioner of the Zone, he shall be liable to forfeiture of entire amount deposited by him and be further liable to penal action under the rules for any other loss of Government revenue, even if the business is not carried on:

Provided that when the licensee submits his application, for approval of the premises and the name of salesman, to the office of the Assistant Excise and Taxation Commissioner/Excise and Taxation Officer, Incharge of the district, on or before 1.4.2018 and obtains an acknowledgement from the office of the Assistant Excise and Taxation Commissioner/Excise and Taxation Officer, Incharge of the district in token of having submitted the application shall be deemed to be a provisional approval of the premises and the name of the salesman mentioned therein including provisional grant of a license.

10.5 (II) It will be obligatory on the licensees to get the premises approved, in writing, from the respective Addl./Joint/Deputy Excise & Taxation Commissioner (Collector) of the zone concerned."

17. That petitioner has been allotted liquor vend 'L-2 Mcleodganj' and after allotment, as provided under Clause 10-2 (supra) he was under obligation for not only to make arrangements for suitable vend in the locality concern but also to get the said premises, along with name of salesman, approved before starting the vend.

18. In the present case, liquor vend 'L-2' has been allotted to the petitioner in Mcleodganj. It is neither for Ward No. 2 Mcleodganj nor for Mcleodganj Main Square and therefore, the premises for running the said shop can be located within the locality 'Mcleodganj'. But at the same time, petitioner cannot claim any right to function it from the premises in which vend had been running previously prior to the directions of the Apex Court. The competent authority can refuse to grant approval to house the liquor vend in Mcleodganj locality also with regard to particular premises but certainly for valid reasons especially when liquor vend of the same category has been allotted in adjacent locality. Viability as well as successful and fair operation of vends viz-a-viz each other is also a valid point to be considered for approval or refusal to approve the premises proposed by the allottee.

19. No doubt, the petitioner cannot be pushed outside the locality allotted to him, but in the same locality, keeping in view the entire facts and circumstances including the location of surrounding similar liquor vend(s), competent authority may ask any allottee to shift from selected premises to somewhere else but for valid reasons. The allottee/petitioner, keeping in view location of another vend in adjacent locality, can be directed to house its liquor vend at a place from where viable as well as successful and fair operation of both allottees is expected. However, at the same time, the petitioner cannot be left at the mercy of respondent No. 5 for selection of premises for functioning L-2 shop allotted to him. Petitioner and respondent No. 5 are rival businessmen in the same field and thus it would be unjust to keep either of them upon mercy of another.

20. There cannot be an indefeasible or absolute right to stick to a particular premises. It is a function within the competence of and to be performed by the authority to take an appropriate decision in clear terms with respect to any allottee based on the rational, justifiable and valid reasons. Commissioner, Taxation and Excise with whose approval localities for allotment of liquor vends have been notified in 'Announcements', must have blue print of the notified areas/localities/liquor vend(s) and thus, is the best authority to resolve the issue.

21. Therefore, in view of express terms and conditions i.e. 10.2 & 10.5(II), the petitioner is not legally justified in claiming that he is entitled to run his liquor vend from Macleodganj Main Square. Learned Commissioner has, therefore, rightly rejected the site so selected by him at his own and directed to select some other site. The direction that he has to select the alternative site with the consent of respondent No. 5, however, is not legally justified, hence quashed because the petitioner is not at the mercy of respondent No. 5 so far as the selection of site by him is concerned. He, therefore, either to shift to the previous site i.e. Temple Road Macleodganj or select some other site in Macleodganj at a reasonable distance at least 400-500 meters from the site of the liquor vends of respondent No. 5 on Bhagsu Road within **five**

days from the date of receipt of the authenticated/certified copy of this judgment and thereafter inform the Additional/Joint/Deputy Excise and Taxation Commissioner, Kangra Zone at Dharamshala about the site so selected. Such Authority shall thereafter conduct the inspection of the site so selected by the petitioner and in case found viable from the point of view of successful and fair operation of the vends allotted to the petitioner and respondent No. 5 approve the same within **two days** thereafter. The petitioner thereafter will shift his business from the existing site i.e. Macleodganj Main Square either to the previous site i.e. Temple Road Macleodganj or the newly selected and duly approved site in Macleodganj bazar within **three days** thereafter. In the meanwhile, he shall be permitted to run his liquor vend from the existing site i.e. Macleodganj Main Square. However, if he failed to select any site and seek approval thereof within the time granted, his liquor vend at the existing site will stand closed automatically without any other and further order.

22. The second ground of challenge that one of the partner of respondent No. 5 Mr. Ranjeet Singh is a defaulter of previous year and also that the said respondent has failed to deposit 5% of the amount at which liquor vend (Unit-II) allotted to it is priced in terms of the announcements is again not available to the petitioner as the averments in the reply filed by respondent-State whereas sur-rejoinder filed by respondent No. 5 consequent upon the order dated 10.7.2018, make it crystal clear that L-2 and L-14 allotted to respondent No. 5 were priced at the cost of Rs. 3,61,11,275/-, 5% whereof by way of security was deposited by respondent No. 5 through E Treasury Challans, Annexure SA-4 and FDR Annexure SA-5. One of the partner Shri Ranjeet Singh of respondent No. 5 allegedly defaulter is a matter sub- judice before this Court in CWP No. 2590 of 2017 filed few of the liquor vends allotted to the firm M/S Vineet Khanna and Company during the previous year i.e. 2017-2018 in district Lahaul and Spiti could not at all be opened whereas those opened had to be closed as per the directions of the Hon'ble Apex Court . In view of the interim order Annexure R-1 to the reply filed on behalf of respondent-State passed in CWP No. 2590 of 2017 this Court has directed that with respect to those vends which stands closed or could not be opened solely on account of the judgment passed by the Hon'ble Apex Court licence fee shall not be charged. Therefore, any amount if due from Ranjeet Singh aforesaid in view of the interim order he cannot be treated as defaulter and the writ petition is yet pending adjudication in this Court.

23. Otherwise also, this point has been raised in this writ petition for the first time. The same was not raised in the writ petition filed previously decided vide judgment dated 21.5.2018 Annexure P-2. There is nothing on record that the petitioner has ever raised this objection at the time of draw of lots and allotment of L-2 Bhagsu Road to respondent No. 5. Therefore, irrespective of our findings hereinabove, if so advised, we leave it open to the petitioner to agitate this point before the competent authority at the time of seeking approval of the site to be selected by him pursuant to this judgment. If any such point is raised by the petitioner, we hope and trust that the competent authority shall consider and decide the same in accordance with law. However, so far as the relief qua cancellation of L-2 allotted to respondent No. 5 at location Bhagsu Road sought in this writ petition, no case is made out.

24. The writ petition is accordingly disposed of, so also the pending application(s), if any.

25. An authenticated copy of this judgment be supplied to learned Senior Additional Advocate General, learned Counsel representing the petitioner as well as learned counsel for the private respondent.

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

General Manager, Northern Railway ...Appellant

Versus

Sidhu Ram and others ...Respondents

RFA No. 35 of 2012 & CO No. 321 of 2013,
a/w others connected matters
Reserved on: 17.05.2018
Decided on: 26.07.2018

Land Acquisition Act, 1894- Sections 18 and 23- Reference – Enhancement of compensation – Market value of land – Determination – Collector awarding compensation on basis of classification of land – Additional District Judge reassessing market value and granting compensation for land irrespective of its classification – RFA by acquiring department and cross-objection by claimants – Department assailing award on ground that (i) reliance by ADJ on previous awards without proof of similarly of both the lands, is wrong and (ii) deduction towards development charges is on lesser side which ought to have been at 40% - High Court found that Reference Court had relied upon previous award in respect of lands in village Ajnauli, which was acquired for same purpose – Award in that case had become final – Lands in both cases were in the periphery of Una town and had same potentiality – Reference Court had determined market value on lower side – Land was acquired for construction of railway tract – Development charges not involved – No deduct can be made under that head – Award of Reference Court upheld – Appeals and cross-objections dismissed.

Cases referred:

Prakash Kaur and others versus LAC and others, 2015 (2) Shim. LC 864

Periyar and Parkeekanni Rubbers Ltd. versus State of Kerala, (1991) 4 Supreme Court Cases 195

Jai Prakash and others versus Union of India, (1997) 9 Supreme Court Cases 510

Kanwar Singh and others versus Union of India, (1998) 8 Supreme Court Cases 136

Manoj Kumar etc. versus State of Haryana, 2017 SCC Online SC 1262

General Manager Northern Railway versus Om Prakash & others, 2017 (2) Him LR 1009 : 2017 SCC Online HP 158

General Manager, Northern Railway versus Gian Chand & others and connected appeals, ILR 2014 (VI) HP I-685

For the appellant(s): Mr. Rahul Mahajan, Advocate.

For the respondents: Mr. Shiv Pal Manhans and Ms. Rameeta Kumari,Additional Advocate Generals, with Mr. Raju Ram Rahi, Deputy Advocate General, for respondents-State.

Mr. Dheeraj K. Vashisht, Advocate, for private respondents in RFAs No. 35, 37, 38, 40, 139, 141, 143 to 145, 167 and 552 of 2012.

Mr. Nitish Negi, Advocate, vice Mr. Jagdish Thakur, Advocate, for private respondents in RFAs No. 39, 140 and 142 of 2012.

Mr. Ajay Sharma, Advocate, for private respondents in RFA No. 168 of 2012.

None for private respondents in other RFAs.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge.

These appeals and cross objections, arising out of common award involve similar questions of facts and law, thus, have been heard and are being decided together by this common judgment.

2. By these appeals, challenge has been laid to enhancement of value of acquired land vide award, dated 30th April, 2011, passed by the learned Additional District Judge, Fast Track Court, Una, (hereinafter referred to as 'ADJ') in land reference cases, being LAC Petition No. 4/07, titled Sidhu Ram versus The Land Acquisition Collector (Railways) and others; LAC Petition No. 1/07, titled Kuldeep Krishan and another versus The Land Acquisition Collector (Railways) and others; LAC Petition No. 2/07, titled Bimla Devi and others versus The Land Acquisition Collector (Railways) and others; LAC Petition No. 3/07, titled Vijay Kumar versus The Land Acquisition Collector (Railways) and others; LAC Petition No. 5/07, titled Kanwal Krishan and others versus The Land Acquisition Collector (Railways) and others; LAC Petition No. 6/07, titled Mohan Lal versus Collector Land Acquisition and others; LAC Petition No. 7/07, titled Birbal versus The Land Acquisition Collector (Railways) and others; LAC Petition No. 8/07, titled Kuldeep Krishan and others versus The Land Acquisition Collector (Railways) and others; LAC Petition No. 9/07, titled Ram Kishan and others versus The Land Acquisition Collector (Railways) and others; LAC Petition No. 10/07, titled Rekha and another versus The Land Acquisition Collector (Railways) and others; LAC Petition No. 11/07, titled Atma Nand and others versus The Land Acquisition Collector (Railways) and others; LAC Petition No. 13/07, titled Shadi Lal and another versus The Land Acquisition Collector (Railways) and others; LAC Petition No. 14/07, titled Sat Pal and others versus The Land Acquisition Collector (Railways) and others; LAC Petition No. 24/09, titled Ram Piari and others versus The Land Acquisition Collector (Railways) and others; LAC Petition No. 27/09, titled Tripta Devi and others versus The Land Acquisition Collector (Railways) and others; LAC Petition No. 32/09, titled Nirmla Devi and others versus The Land Acquisition Collector (Railways) and others.

3. Land of respondents situated in Village Kotla Khurd in District Una was acquired for public purpose, i.e. construction of railway line from Nangal to Talwara. Notification under Section 4 of the Land Acquisition Act (hereinafter referred to as 'the Act') was notified for this purpose on 31st October, 2000, whereafter completing the process under the Act, Land Acquisition Collector announced the award under Section 11 of the Act on 13th January, 2001 determining the value of acquired land on the basis of classification, which reads as under:

Sr. No.	*Kind of land*	*Cost per kanal*
1	*Chahi*	*28804.00*
2	*Barani Abbal*	*24562.00*
3	*Ek Fasli Abbal & Do Fasli Doam*	*-*
4	*Barani Doam & Soam*	*14400.00*
5	*Banjar Kadim*	*246.00*
6	*Kharkana*	*4733.00*
7	*Gair Mumkin Abadi*	*-*
8	*Other Gair Mumkin*	*161.00*
9	*Kharaitar*	*246*

4. Being aggrieved by the value of land assessed by the Land Acquisition Collector, land owners preferred reference petitions under Section 18 of the Act, which were clubbed together and after leading common evidence in all the petitions, the same were decided by the

Learned ADJ vide impugned award redetermining the value of land at the rate of ₹ 90,000/- per kanal irrespective of classification of the same alongwith statutory benefits under the Act.

5. Before the Reference Court, Una, land owners have examined seven witnesses and have placed on record sale deeds Ex. PW-1/A to Ex. PW-1/F and also awards Ex. PA and PB, passed by the Reference Court with respect to acquisition of the land for the same purpose, but, in different villages of District Una. Land owners have also relied upon the map Ex. PW-4/A to establish the location of the land and effect of severability because of construction of railway line on the land holdings. Land owners have also tendered documents Ex. P-1 to P-14 to substantiate their claim praying for compensation by determining the value of land as ₹ 8 lacs and ₹ 10 lacs per kanal for *Barani Abbal and Chahi* land, respectively.

6. Appellant(s)-Northern Railway has examined two witnesses to rebut the evidence of land owners and have placed on record awards Mark RX and Ex. RY passed by the Reference Court, Una, with respect to acquisition of land for the same purpose, but, situated in different villages of District Una. Besides, appellant(s)-Northern Railway has also tendered in evidence charts containing details about acquired land as well as value thereof. Average value has also been placed on record as Ex. RW-2/A.

7. Learned ADJ, after considering the evidence on record, has taken into consideration the earlier awards Ex. PA, dated 1st December, 1998 and Ex. PB, dated 19th October, 2000, passed by Reference Court, Una, wherein value of land in Village Ajnauli and Village Dangoli was determined at the rate of ₹ 1,44,000/- and ₹ 1,00,000/- per kanal, respectively. After considering that Ex. RY was pertaining to Village Dangehra and as Village Dangehra was situated far away from Village Kotla Khurd, he had not considered the said award appropriate for determining the value of acquired land. Considering that land pertaining to Ex. PA and Ex. PB was situated in adjacent villages, he made deductions in the value determined in those awards and redetermined the value of acquired land, in present case, at the rate of ₹ 90,000/- per kanal irrespective of nature and classification of the land.

8. Mark RX produced by the appellant(s)-Northern Railway is a photo copy of certified copy of the award passed by Reference Court wherein, for acquisition of land in Village Ajnauli for the same purpose, the value of land was determined at the rate of ₹ 70,000/- per kanal. But, the said document was not considered by the learned ADJ as only photo copy of certified copy of the award was placed on record. However, as submitted by the learned counsel for the parties in the Court, value of land in that case was redetermined by this High Court at the rate of ₹ 1,58,400/- per kanal in **RFA No. 130 of 2006,** titled **Prakash Kaur and others versus LAC and others,** reported in **2015 (2) Shim. LC 864.**

9. Learned counsel for the appellant(s) has submitted that learned ADJ has committed an illegality by relying upon the awards Ex. PA and PB belonging to the different villages as there is no evidence on record to establish that nature and potential of the land in Village Kotla Khurd and that of Villages Ajnauli and Dangoli was same and in absence of evidence that Villages Ajnauli and Dangoli are adjacent to Village Kotla Khurd, these awards could not have been taken into consideration for determining the value of acquired land. According to him, land under acquisition, in the present case, is different in nature and there is no evidence of similarity of the same with the land of villages involved in Ex. PA and Ex. PB and, therefore, for different nature and potentiality of land, the compensation at different price is required to be determined.

10. He has further submitted that the learned ADJ has made deduction on lesser side and keeping in view the nature of evidence on record, at least 40% deduction, as permitted in RFA No. 21 of 2010, should have been made in present case also.

11. Learned counsel for the appellant(s) has relied upon pronouncement of the apex Court in case titled as **Periyar and Parkeekanni Rubbers Ltd. versus State of Kerala,** reported in**(1991) 4 Supreme Court Cases 195,** wherein it has been held that when the Courts are called upon to fix the market value of the land in compulsory acquisition, the best evidence of the value of property is the sale of the acquired land to which the claimant himself is a party, in its absence the sales of the neighbouring lands; and the transaction relating to the acquired land of recent dates or in the neighbourhood lands that possessed of similar potentiality or fertility or other advantageous features are relevant pieces of evidence.

12. Judgment of the apex Court in case titled as **Jai Prakash and others versus Union of India,** reported in **(1997) 9 Supreme Court Cases 510,** has also been relied upon by the learned counsel for the appellant(s) wherein it has been held that merely because in some neighbouring villages, valuation has been made at a higher rate, it cannot be said that the claimants-land owners must also be given same rate of compensation.

13. Reliance has also been placed by the learned counsel for the appellant(s) on para 9 of the judgment rendered by the apex Court in case titled as **Kanwar Singh and others versus Union of India,** reported in **(1998) 8 Supreme Court Cases 136,** wherein the apex Court has held that generally, there would be different situation and potentiality of land situated in two different villages and unless it is proved that the situation and potentiality of the land in two different villages are the same, the same rate of compensation, as awarded to the land owners of one village cannot be granted to the land owners of the another village for the acquisition of land for the same purpose.

14. Pronouncement of the apex Court in case titled as **Manoj Kumar etc. versus State of Haryana,** reported in **2017 SCC Online SC 1262,** has also been relied upon by the learned counsel for the appellant(s) wherein also it has been held that in absence of evidence of similarity of nature and potential of the land, previous judgment and award cannot be made basis for awarding same compensation to the land owners of the adjacent villages.

15. On the other hand, learned counsel appearing for land owners have justified the value redetermined by the learned ADJ on the basis of awards Ex. PA and Ex. PB with submissions that learned ADJ has not awarded the compensation at the same rate as has been awarded in Ex. PA and Ex. PB, but, he has awarded ₹ 90,000/-, which is less than the value of land as determined in Ex. PA and Ex. PB. Referring the judgments relied upon by the appellant(s), it has been submitted that in all the judgments, ratio of law is that in absence of evidence of similarity of nature and potentiality, rate of compensation, as awarded in the previous judgment/award for the land acquired in different village cannot be awarded, but, these pronouncements do not create any legal impediment to the Reference Court to consider such awards as exemplar awards for determination of the value of the acquired land and in present case also, keeping in view the nature and contents of the evidence on record, learned ADJ has rightly awarded ₹ 90,000/- per kanal against the value of ₹ 1,44,000/- and ₹ 1,00,000/- per kanal awarded in Ex. PA and Ex. PB.

16. Notification under Section 4 of the Act, in present case, was issued on 31st October, 2000. Sale deeds Ex. PW-1/A and Ex. PW-1/B are of the years 1992 and 1993. These pertain to the period seven years prior to the issuance of notification under Section 4 of the Act. The sale deed Ex. PW-1/F is of November, 2003, thus, was executed after issuance of notification under Section 4 of the Act. Therefore, these sale deeds were rightly discarded by the learned ADJ being not proximate in time to the notification issued under Section 4 of the Act.

17. Sale deeds Ex. PW-1/C, Ex. PW-1/D and Ex. PW-1/E were executed in July, 1999. There is a gap of more than one year between execution of these sale deeds and issuance of notification under Section 4 of the Act in the instant case. Therefore, these sale deeds were also not proximate in time to the acquisition of the land in the present case.

18. Documents Ex. P-1 to Ex. P-10 are certified copies of mutations attested pursuant to execution of sale deeds Ex. PW-1/A to Ex. PW-1/F and jamabandis with entries of respective mutations in sequel thereto. Ex. P-11 is a Shajra Kishatwar (map) of Village Kotla Khurd, which is corresponding the map Ex. PW-4/A tendered in evidence by the land owners. P-12 and P-13 are copies of jamabandis of Gair Mumkin Sadak. Therefore, these documents are of not of any relevance as the corresponding sale deeds have not been found proximate in time to the land acquisition in question. Ex. P-14 is a pamphlet circulated for advertisement by Shiksha Bharti wherein it has been mentioned that an Industrial Training Center and Vocational Training Institute of Shiksha Bharti are situated in Village Kotla.

19. One of the land owners, namely Sidhu Ram, has been examined by the land owners as PW-7. In his affidavit, tendered in evidence in examination-in-chief, he has deposed that Village Kotla Khurd is adjacent to Una Township having all urban facilities and there are industrial units, School, College, Vocational Training Institute, Industrial Training Center, Government Hospital, Veterinary Hospital and housing colony in the said village. He has also stated that the land owners were also having tube-wells and polyhouses in their respective land and, therefore, the land under acquisition was having great potential for earning. This part of his statement has not been questioned in lengthy cross-examination on behalf of the appellant(s)-Northern Railway.

20. The existence of these institutions and facilities has also been admitted by RW-2 Sham Lal, Patwari of the office of Land Acquisition Collector. Though, RW-2 Sham Lal, in his cross-examination, stated that Village Kotla Khurd is situated at a distance of two kilometers of Municipal Council, Una, but, in answer to a question, he has replied that he was not knowing the location of boundary of municipal area.

21. Both, RW-1 Joginder Singh, Kanungo in the office of Land Acquisition Collector and RW-2 Sham Lal, Patwari, have admitted that there was no up-gradation of revenue record of Village Kotla Khurd since 1912-13. RW-1 Joginder Singh has also admitted that average value of the land awarded by Land Acquisition Collector does not disclose the date of sale deeds, location of the land involved therein as well as khasra numbers thereof. He has further admitted that construction of railway line has resulted severability of the land holdings of land owners. Despite working in the office of Land Acquisition Collector and remained involved in the acquisition proceedings, in cross-examination, he has deposed that he could not say that Kotla Khurd is adjacent to Una. The fact remains that he has not denied the said fact, but, has avoided to depose so.

22. Ratio of law laid down in **Jai Prakash, Kanwar Singh and Manoj Kumar's cases (supra),** cited by the learned counsel for the appellant(s), are not in dispute and it is settled that unless there is evidence of similarity in nature and potential of the land of two villages, the same rate of land cannot be granted for determination of compensation for acquisition of land even for the same purpose. However, in present case, learned ADJ has not awarded the same rate as was awarded for acquisition of land for the same purpose in other villages situated in or around Una town, but, has determined value of land at a considerable lesser rate than as awarded in the awards relied upon by the land owners. Therefore, the said case law relied upon by the appellant(s) is not applicable in present case.

23. Some of the respondents-land owners have also raised the plea that no damages have been awarded on account of loss caused to them for severance of land as a result of acquisition. Learned counsel for the appellant(s) has submitted that there is no evidence on record with regard to injurious effect on the remaining land of land owners and also there is nothing on record to establish that land owners had to spend any amount to ameliorate the effect of severance, if any. He has placed reliance on **Periyar and Parkeekanni Rubbers Ltd.'s case (supra),** wherein the apex Court has held that where there is no evidence of injurious effect on the remaining land of the claimants/land owners and where the land owners had not expended

any money for either constructing any boundary walls, culverts, bridges or roads etc. for utilization of their remaining land after acquisition, the land owners are not entitled for severance charges as there is no damage due to severance. In present case also, though, RW-2 Joginder Singh, Kanungo, has admitted in cross-examination that there is severance of land holdings on account of acquisition of land, however, there is no evidence on record to substantiate the claim of land owners. Therefore, they are not entitled for any damage under this head.

24. In another judgment in case titled as **General Manager Northern Railway versus Om Prakash & others,** reported in **2017 (2) Him LR 1009 : 2017 SCC Online HP 158,** wherein co-ordinate Bench of this High Court, after setting aside the rate of ₹ 55,000/- per kanal determined by the Reference Court for acquisition of land for the same purpose in a village of District Una, has remanded the matters to the Reference Court for redetermination thereof on the basis of evidence on record. It is submitted that in that case also, Reference Court had determined the value of land on the basis of an award passed in another reference petition pertaining to a different village, but, there was no evidence of similarity of nature and potential of the land of those two villages.

25. On perusal of the said judgment, I find that there was not only absence of evidence of similarity, potentiality and utility of two different villages, but, the previous award relied upon for determining the value of acquired land was also not part of evidence on record and thus, the matters were remanded back by observing that such previous award which was not part of record of the case could not have been made basis for determining the value whereas, in present case, the awards relied upon by the Reference court has been tendered in evidence as Ex. PA and Ex. PB. Therefore, present case is on different footings than the case referred on behalf of the appellant(s).

26. The sale deeds produced by the land owners have not been found to be proximate in time with acquisition of land question. Appellant(s) has not produced any sale deed and the average value determined by the Land Acquisition Collector has become doubtful as RW-1 Joginder Singh himself has admitted that the said average value does not contain the details of sale deeds, location and khasra numbers of land considered for determining the average value and further that Parta (revenue record) of the said village has not been updated since 1912-13, which would have bearing on estimating the average value of land. There is no other evidence on record except the previous awards relied upon by the parties for determining the value of land. In such a situation, as also observed (supra), such awards in absence of evidence of similarity of nature, potential and utility cannot be made basis for awarding the same compensation for land of another village, but, such awards can always be taken into consideration for determining the value of land with the help of other evidence on record.

27. As noticed above, appellant(s) had also relied upon two previous awards. One of them has only been placed on record as Mark RX wherein land acquisition for the same purpose pertaining to Village Ajnauli, District Una, on the basis of notification, dated 21st March, 1998, issued under Section 4 of the Act, was under consideration. In that award also, previous award Ex. P-4 (which has been relied upon by land owners in present case as Ex. PA), wherein value of acquired land was determined at the rate of ₹ 1,44,000/- per kanal, was taken into consideration by the Reference Court and value of land was determined at the rate of ₹ 70,000/- per kanal. Being a document only marked, the same could not have been taken into consideration, but, as submitted by learned counsel for the land owners, which is also not in dispute, the said award was subject matter in **Prakash Kaur's case (supra),** wherein, vide judgment, dated 16th December, 2014, co-ordinate Bench of this High Court, discarding the award Ex. P-4 (in present case, Ex. PA), but, relying upon another previous award Ex. AX pertaining to the different village, has determined the value of land at the rate of ₹ 1,58,400/- per kanal. In this case also, notification under Section 4 of the Act was issued and published on 26th March, 1998 for acquisition of the land for the same purpose. The appellant(s) had itself relied upon the valuation

of land determined in Mark RX pertaining to land acquisition in Village Ajnauli for determination of value in present case and now, in the said case, the value of land has been enhanced by a co-ordinate Bench of this High Court from ₹ 70,000/- to ₹ 1,58,400/-.

28. Appellant(s) has also relied upon Ex. RY, a previous award pertaining to Village Dangehra wherein also, notification under Section 4 of the Act, for the same purpose, was issued on 21st March, 1998 and the value of the land was determined at the rate of ₹ 25,000/- per kanal. The said award was affirmed by this High Court by dismissing appeals filed by appellant(s)-Northern Railway in **RFA No. 163 of 2008,** titled **General Manager, Northern Railway versus Gian Chand & others** and connected appeals, reported in **ILR 2014 (VI) HP I-685.** There is no evidence for comparing the location of Village Dangehra viz-a-viz Village Kotla Khurd and also nature and potentiality of land of these two villages. Moreover, value of land determined in this award is lesser than the highest rate, i.e. ₹ 28,804/- awarded by Land Acquisition Collector. Thus, in view of provisions of Section 25 of the Act, this award cannot be relied for determining value of land in present case.

29. Land owners have relied upon previous award pertaining to the acquisition of land in Village Ajnauli for the same purpose for which notification under Section 4 of the Act was issued and published on 1st October, 1988. It is admitted fact that the said award was not assailed by appellant, but, was implemented as it was and the same has attained finality. In that case, the Reference Court had observed following facts at the time of determining the value:

> *"(i) That the aforesaid land of the petitioners which has been acquired happened to be situated on the boundary of Municipal Committee Una by the side of District Hospital, Una and a shopping complex named as Bhikha market.*
>
> *(ii) The acquired land abutted the main road leading from Una to Hamirpur.*
>
> *(iii) The acquired land happened to be situated in the vicinity of village Ajnauli.*
>
> *(iv) The petitioners were growing crop in the acquired land and one of the petitioner Siri Ram had built a shop on the land bearing khasra No. 1184."*

30. In present case also, as discussed (supra), PW-7 Sidhu Ram has categorically stated that Village Kotla Khurd is situated in periphery of Una Town. Even if version of RW-2 Shaml Lal, Patwari, is considered to be correct, this village is situated within two kilometers of MC limits of Una. Though, RW-2 Sham Lal, Patwari has stated that the said village is situated within two kilometers of MC limits, but, at the same time, he has also stated that he was not knowing the exact boundary of MC area. RW-1 Joginder Singh, Kanungo, has avoided to answer this question. The fact stated by PW-7 Sidhu Ram, that this village is in the periphery of Una Town, has not been disputed in cross-examination. Numerous schools, established institutions, industrial units, hospitals, etc. situated and other facilities available in the village, stated in the statement of PW-7 Sidhu Ram, have been endorsed by RW-2 Sham Lal, Patwari, in his cross-examination.

31. Therefore, from the evidence on record, it is apparent that Village Kotla Khurd is also having all the facilities which are available in Una township. Even if there is no specific averment of land owners that the land of Village Kotla Khurd is having th same and similar nature, potential and utility like the land of Village Ajnauli, it can easily be inferred that the land of Kotla Khurd was having nature, potential and utility like outskirts of a township. In award Ex. PA, in the year 1998, value of land situated in periphery of Una township, has been determined at the rate of ₹ 1,44,000/- per kanal whereas, in present case, value of land has been determined as ₹ 90,000/- per kanal only.

32. Land owners have also relied upon another previous award, Ex. PB, pertaining to Village Dangoli, wherein notification under Section 4 of the Act was issued on 3rd October, 2000, for acquisition of land for the same purpose. The said award was also passed after taking into

consideration the award Ex. PA, but, in the said award also, value of land was determined at the rate of ₹ 1,00,000/- per kanal. There is no evidence with respect to location of Village Dangoli on record. There is no relevant evidence on record to compare the said award with acquisition in present case. Therefore, Ex. PB cannot be made basis for determining value of land in present case.

33. Relying upon RFAs No.18 of 2009 and 21 of 2010, it is also canvassed on behalf of the appellant(s) that Reference Court should have made the deduction from 33% to 40% at the time of determining the value of land. First of all, the land has been acquired for construction of railway line for which purpose, appellant(s) had to do nothing for development of the said land, but, only to lay down the railway line. Therefore, principle of deduction on account of development charges is not relevant in present case. Sale deeds of small chunks, relied upon by land owners, have not been found to be relevant and, therefore, deduction on account of small chunk involved in the sale deeds in comparison to the large chunk of land acquired is also not applicable.

34. The Reference Court has relied upon previous awards, but, has not awarded the same rate. In **Prakash Kaur's case (supra),** for Village Ajnauli, as referred hereinabove, this High Court has awarded ₹ 1,58,400/- per kanal and in Ex. PA, appellant(s) itself has accepted the value of land determined in the same village, i.e. Village Ajnauli, at the rate of ₹ 1,44,000/- per kanal. Village Ajnauli is in periphery of Una Town and Village Kotla Khurd, in present case, is also in the periphery of Una Town. There is positive evidence of all facilities of urban area in Kotla Khurd, but, the Reference Court has awarded ₹ 90,000/- per kanal only, which is 43% lesser than the value determined in **Prakash Kaur's case (supra)** and also 38% less than the value determined in Ex. PA. Valuation at the rate of ₹ 90,000/- is also lesser than the value of land determined in award Ex. PB.

35. In the cross objections, a ground, general in nature, has been taken that the amount so awarded by the Reference Court is totally inadequate and insufficient and the Reference Court ought to have assessed the value of land at the rate of ₹ two lacs per kanal. Further, that the Reference Court has awarded ₹ 90,000/- per kanal by ignoring the evidence brought on record by the land owners and the same is based upon surmises and conjectures. Nothing has been pointed out to substantiate the ground of cross objections, as also evident from the discussions supra. Therefore, the cross-objections are also liable to be dismissed.

36. For aforesaid discussions, I find that for the evidence available on record, learned ADJ has rightly determined the value of land at the rate of ₹ 90,000/- per kanal after considering the evidence in its entirety. There is no illegality or perversity in the determination of the value of land. Therefore, no ground for interference is made out either in appeals or in cross objections.

37. Accordingly, the impugned award is upheld and all the appeals and the cross objections are dismissed. Needless to say that the land owners shall also be entitled to all statutory benefits available to them.

38. There shall be no order as to costs. Record be sent back.

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

The Executive Engineer,HPSEBL ..Appellant.
Versus
Sh. Jagdish Chand

..Respondent.

LPA No.15 of 2018
Date of Decision: 24th May, 2018

Industrial Disputes Act, 1947- Sections 25-G and 25-H- Retirement of employee- Delay in raising demand, Plea of, When can be raised? – Held, objection with regard to raising demand after considerable delay, if any, can be taken by employer before framing of terms of reference, and not thereafter – Labour Court is supposed to answer reference as is sent to it. (Para-10)

Industrial Disputes Act, 1947- Sections 25-G and 25-H- Retrenchment – When illegal? – Respondent worked as beldar from 25.11.1997 till 24.4.1998, but was disengaged thereafter- Claiming that he was intentionally given fictional breaks to prevent completion of 240 days in a year on work – Defendant claiming that respondent himself abandoned job – Labour Court found retrenchment illegal and directed department to re-engage respondent and also give seniority etc. to him but without back wages – Single Judge Bench of High Court dismissing writ petition of department – LPA – High Court found that after retrenchment of respondent many persons were employed and no opportunity of re-engagement was given to him – No proceedings were ever initiated against employee or notice issued for absence from duties and calling/advising him to resume duties – Held, on such facts abandonment of job by respondent not established – Retrenchment was illegal – LPA dismissed. (Paras-8, 9 and 13)

Cases referred:
Ocean Creations Vs. Manohar Gangaram Kamble 2013 SCC Online Bom 1537:2014)140 FLR 725
Mukand Ltd. V. Mukand Staff & Officers' Assn (2004) 10 SCC 460
Bhuvnesh Kumar Dwivedi vs. M/s Hindalco Industries Ltd. 2014 AIR SCW 3157

For the Appellant Mr. T.S.Chauhan, Advocate.
For the Respondent: Nemo.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (Oral)

CMP(M) No.145 of 2018

For the reasons set out in the application, delay of one year, one month and 25 days in filing the appeal, which in our considered view has been sufficiently explained, is condoned. Application stands disposed of. Appeal be registered.

LPA No. 15 of 2018

Instant Letter Patent Appeal is directed against the judgment dated 15.11.2016, passed by learned Single judge, in CWP No.9825 of 2013, whereby writ petition having been preferred by the appellant, laying therein challenge to the Award dated 15.10.2013, passed by learned Labour Court-cum-Industrial Tribunal Dharamshala, H.P., in reference No.281 of 2012, has been dismissed.

2. Briefly stated facts, as emerge from the record are that the respondent ***(for short 'workman')*** was employed as Beldar on 25.11.1997 and he worked as such upto 24.04.1998, whereafter his services were dispensed with by the appellant without following due procedure, as

envisaged under Industrial Disputes Act,1947 ***(for short 'Act')***. The workman claimed before the learned Tribunal below that though he was engaged on and w.e.f. 25.11.1997 as Beldar, but he was intentionally and purposely given fictional breaks to prevent him for completing 240 days in a year and ultimately on 25th April, 1998, his services were terminated by the appellant. Before the alleged termination of his services, neither any notice was served upon him nor he was charge sheeted. Similarly, there is no dispute that neither any inquiry for misconduct, if any, on the part the workman was ever conducted nor compensation, if any, was paid to him by the employer at the time of his termination. As per the workman, his services were terminated only on the pretext that works and funds are not available and he will be re-engaged as and when work is available. However, fact remains that when the workman was not reengaged despite repeated requests, he was compelled to approach the H.P. State Administrative Tribunal by way of Original Application, which subsequently came to be dismissed on 27.2.2002 for want of jurisdiction.

3. It also emerge from the record that appropriate Government failed to refer the dispute to the learned Industrial Tribunal on the ground that the workman did not complete 240 days preceding his retrenchment, however, this Court vide judgment dated 14.05.2012 set-aside the order dated 4.4.2008, passed by the Labour Commissioner, Shimla and directed the appropriate Government to refer the matter to learned Tribunal below for determination and adjudication. Appropriate Government in terms of Section 10 of the Act, made following reference to the Tribunal:-

> ***"Whether termination of the services of Shri Jagdish Chand s/o Sh. Tulsi Ram, Village & Post Office Chalarag, Tehsil Joginder Nagar, District Mandi by the Executive Engineer, H.P.S.E.B. Electrical Division, Joginder Nagar, District Mandi, H.P. w.e.f.25.4.1998 without following the provisions of the Industrial Dispute Act, 1947, is legal and justified? If not, to what amount of back wages, seniority, past service benefits and compensation the above workman is entitled to from the above employer?"***

4. Appellant-Department though specifically admitted the factum with regard to engagement of workman as Beldar on 25.11.1997 and his serving the department upto 24.4.1998, but claimed that the workman was never disengaged, rather he left the job voluntarily and never approached the Assistant Engineer or Junior Engineer for his re-engagement. Learned Tribunal below having perused the evidence led on record by the respective parties, found termination of services of the workman by the appellant-department w.e.f. 25.4.1998 to be illegal and unjustified and accordingly, set-aside and quashed the same with further direction to re-engage the workman forthwith. Learned Tribunal below further held the workman entitled to seniority and continuity in service from the date of his illegal termination i.e. 25.4.1998 except back wages. Apart from above, learned Tribunal also directed the appellant-department to consider the case of the workman for regularization of his services as per the policies framed by the State Government/Board from time to time and directed that if the services of any person junior to the workman have already been regularized, the workman shall be entitled to regularization from the date/month of the regularization of the services of his juniors.

5. Being aggrieved and dissatisfied with the aforesaid award, passed by the learned Tribunal below, appellant-Department approached this Court by way of Civil Writ Petition, as referred hereinabove, but same was dismissed as has been stated hereinabove.

6. Having carefully perused the impugned judgment passed by the learned Single Judge vis-a-vis material adduced on record by the respective parties, this Court finds no illegality and infirmity in the impugned judgment passed by the learned Single Judge, rather same appears to be based upon the correct appreciation of the evidence/material adduced on record.

7. Sh. Atul Mehta, Executive Engineer, HPSEB, Jogindernagar (RW-1), while tendering his affidavit Ex.RW1/A, categorically admitted in his cross-examination that no notice was served upon the workman for resuming the duties and no departmental proceedings were initiated. Above named official also admitted that persons junior to the workman are serving

under him till date. Most importantly, this witness admitted in his cross-examination that after 25.4.1998 i.e. when services of the workman were terminated, new/fresh hands have been employed and no opportunity of re-employment was afforded to the workman.

8. Mr. T.S.Chauhan, learned counsel representing the appellant-department, while referring to the pleadings adduced on record by the respective parties, made an endeavour to persuade this Court to agree with his contention that services of the workman were not terminated, rather he himself abandoned the job of his own. But having carefully perused the evidence led on record by the appellant-department, this Court is not inclined to agree with the aforesaid contention put forth by learned counsel representing the appellant. By now it is well settled that abandonment is to be established and not be presumed. In the case at hand, as has been noticed above, no notice was ever served upon the workman by the appellant calling upon him to resume his duties and as such, learned Single Judge, rightly arrived at a conclusion that abandonment cannot be attributed to the workman. Similarly, this Court finds that at no point of time proceedings, if any, were ever initiated against the workman by the appellant for willful absence from duty and as such, learned Single Judge rightly arrived at a conclusion that plea of willful abandonment by the workman raised by the employer is not proved, in accordance with law. Though, appellant-Department set up a case before the learned Tribunal below that workman himself abandoned the job, but as has been noticed hereinabove, Sh. Atul Mehta, Executive Engineer, HPSEB (RW-1), nowhere stated that after alleged abandonment of job, notice, if any, was ever served upon the workman for resuming the duties. There is no document available on record suggestive of the fact that at any point of time after alleged abandonment of work by the workman, notice, if any, was ever issued by the employer asking/advising workman to resume duty, failing which action shall be taken against him. In this regard, reliance is placed upon the judgment passed by Bombay High Court in case titled ***Ocean Creations Vs. Manohar Gangaram Kamble*** 2013 SCC Online Bom 1537:2014)140 FLR 725. It is profitable to reproduce paras No.8,9 and 10 of the judgment herein:-

> "8. The legal position is also settled that 'abandonment or relinquishment of service' is always a question of intention and normally such intention cannot be attributed to an employee without adequate evidence in that behalf. This is a question of fact which is to be determined in the light of surrounding circumstances of each case. It is well settled that even in case of abandonment of service, unless the service conditions make special provisions to the contrary, employer has to give notice to the workman calling upon him to resume duties and where he fails to resume duties, to hold an enquiry before terminating services on such ground.
>
> 9. In somewhat similar circumstances a Division Bench of this court comprising P.B.Sawant, J.(as he then was) and V.V.Vaze, J. in the case of Gaurishanker Vishwakarma v. Engle Spring Industries Pvt. Lted. Observed thus:
>
> > ".....it is now well settled that even in the case of the abandonment of service, the employer has to give a notice to the workman calling upon him to resume his duty and also to hold an enquiry before terminating his service on that ground. In the present case the employer has done neither. It was for the employer to prove that the workman had abandoned the service..... It is therefore difficult to believe that the workman who had worked continuously for six to seven years, would abandon his service for no rhyme or reason. It has also to be remembered that it was the workman who had approached the Government Labour Officer with a specific grievance that he was not allowed to join his duty. It was also his grievance that although he had approached the company for work from time to time, and the company's partner Anand had kept on promising him that he would be taken in service, he was not given work and hence he was forced to approach the Government Labour Officer. In the circumstances, it is difficult to believe that he would refuse the offer of work when it was given to him before the Labour Officer...."

10. Again a learned Single Judge of this court R.M.Lodha, J(as he then was) in the case of Mahamadsha Ganishah Patel v. Mastanbaug Consumers' Co-op. Wholesale & Retail Stores Ltd. Observed thus:-

> "….The legal position is almost settled that even in the case of abandonment of service, the employer has to give notice to the employee calling upon him to resume his duty. If the employee does not turn up despite such notice, the employer should hold inquiry on that ground and then pass appropriate order of termination. At the time when employment is scarce, ordinarily abandonment of service by employee cannot be presumed. Moreover, abandonment of service is always a matter of intention and such intention in the absence of supportable evidence cannot be attributed to the employee. It goes without saying that whether the employee has abandoned the service or not is always a question of fact which has to be adjudicated on the basis of evidence and attending circumstances. In the present case employer has miserably failed to discharge the burden by leading evidence that employee abandoned service. The Labour Court has considered this aspect, and, in my view rightly reached the conclusion that the employer has failed to establish any abandonment of service and it was a clear case of termination. The termination being illegal, the Labour Court did not commit any error in holding the act of employer as unfair labour practice under Item-I, Schedule IV of the MRTU & PULP Act….."

9. Similarly, as has been noticed hereinabove, Executive Engineer, HPSEB, Jogindernagar, has categorically admitted in his cross-examination that after alleged termination of the workman, new/fresh hands have been employed and no opportunity was afforded to the workman and as such, there is complete violation of Sections 25-H and 25-G of the Act and it stands duly proved on record that services of the workman were illegally terminated on 25.4.1998. Since, the workman worked with the appellant department, appellant is/ was under obligation to afford opportunity to the workman-respondent for job, if, available in terms of Section 25-H of the Act.

10. Another contention put forth by Mr. T.S.Chauhan, learned counsel representing the appellant that learned Tribunal below ought to have considered and decided the question of delay and latches in raising demand by the workman, deserve out right rejection. It is not in dispute that the respondent-workman, being aggrieved with the action of the appellant-department inasmuch as his prayer for referring the dispute to the Tribunal was rejected, approached this Court by way of Civil Writ Petition, as has been noticed hereinabove, and this Court vide judgment dated 14.5.2012, passed in CWP No.2758 of 2008, directed the appropriate Government to refer the dispute to the learned Industrial Tribunal. It is also not in dispute that in the aforesaid case specific plea with regard to delay and latches was raised by the appellant-department, but same was rejected and direction was issued to the appropriate Government to refer the matter to learned Industrial Tribunal for adjudication. Aforesaid judgment has attained finality because no appeal was ever filed against the said judgment and as such, at this stage, appellant cannot be allowed to raise plea with regard to delay and latches in raising demand by the respondent-workman. Otherwise also, by now it is well settled that Tribunal below could not go beyond terms of reference sent to it by the appropriate Government. Contention raised by Mr. T.S.Chauhan, learned counsel representing the appellant-department that since there was considerable delay in raising demand by the workman, learned Tribunal below ought to have dismissed their claim, on the ground of delay and latches, has no substance because learned Tribunal below is/ was bound to answer the specific terms of reference, made to it by the appropriate Government, under Section 10(2) of the Act. Objections, if any, with regard to raising demand after considerable delay, could be taken by the employer before framing of term of reference. Term of reference framed in the instant case for adjudication nowhere suggests that the learned Tribunal below was required to decide with regard to delay in raising demand. Rather, learned Tribunal below was called upon to answer reference that "whether termination of services of the workman without following the provisions of Industrial Tribunal Act, 1947, is legal and

justified". In this regard, reliance is placed upon the judgment passed by Hon'ble Apex Court in M**ukand Ltd. V. Mukand Staff & Officers' Assn** (2004) 10 SCC 460, the Hon'ble Apex Court has held as under:-

> "22.We shall now analyse the submissions made by the learned senior counsel appearing on either side with reference to the pleadings, documents, records and also with reference to the judgments cited. The Reference is limited to the dispute between the Appellant -Company and the `workmen' employed by it.
>
> 23.We have already referred to the order of Reference dated 17.2.1993 in paragraph supra. The dispute referred to by the order of Reference is only in respect of workmen employed by the appellant -Company. It is, therefore, clear that the Tribunal, being a creature of the Reference, cannot adjudicate matters not within the purview of the dispute actually referred to it by the order of Reference. In the facts and circumstance of the present case, the Tribunal could not have adjudicated the issues of the salaries of the employees who are not workmen under the Act nor could it have covered such employees by its a ward. Even assuming, without admitting, that the Reference covered the non- workmen, the Tribunal, acting within its jurisdiction under the Act, could not have adjudicated the dispute insofar as it related to the `non -workmen'.
>
> 95. The Industrial Tribunal did not have jurisdiction to adjudicate the present dispute inasmuch as it pertains to the conditions of service of non - workmen. The learned single Judge and the Division Bench of the High Court failed to appreciate that parties cannot by their conduct create or confer jurisdiction on an adjudicating authority when no such jurisdiction exists. We have already noticed that the Division Bench has erred in holding that there is community of interest between the workmen and the non-workmen and holding further that the workmen could raise a dispute regarding the service conditions of non -workmen."

11. Otherwise also,learned Tribunal below, taking note of the fact that dispute was raised after considerable time, has denied back wages to the aforesaid workman. Hence, this Court finds no illegality and infirmity in the impugned Award passed by learned tribunal below, which otherwise appears to be based upon the correct appreciation of the evidence and law and as such, learned Single Judge has rightly upheld the same.

12. Hon'ble Apex Court in **Bhuvnesh Kumar Dwivedi vs. M/s Hindalco Industries Ltd. 2014 AIR SCW 3157,** has categorically held that writ Court has very limited jurisdiction to re-appreciate findings of fact returned by the learned Tribunal below. In the aforesaid judgment, Hon'ble Apex Court has categorically held that courts while examining correctness and genuineness of the award passed by the Tribunal has very limited powers to appreciate the evidence adduced before the tribunal below, especially the findings of fact recorded by the tribunal below and same cannot be questioned in writ proceedings and writ court can not act as an appellate Court. An error of law, if any, which is apparent on the face of record, can be corrected by writ court, but not an error of fact, however grave it may appear to be. It would be profitable to reproduce following paras of the judgment herein:

> "16. .....The question about the limits of the jurisdiction of High Courts in issuing a writ of certiorari under Article 226 has been frequently considered by this Court and the true legal position in that behalf is no longer in doubt. A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior Courts or tribunals: these are cases where orders are passed by inferior Courts or Tribunals without jurisdiction, or is in excess of it, or as a result of failure to exercise jurisdiction. A writ can similarly be issued where in exercise of jurisdiction conferred on it, the Court or Tribunal acts illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of

natural justice. There is, however, no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the Court exercising it is no entitled to act as an Appellate Court. This limitation necessarily means that findings of fact reached by the inferior court or Tribunal as result of the appreciation of evidence cannot be reopened for questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by the Tribunal, a writ of certiorari can be issued if it is shown that in recording the said finding, the Tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a cannot be agitated before a writ Court. It is within these limits that the jurisdiction conferred on the High Courts under Article 226 to issue a writ of certiorari can be legitimately exercised. finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari. In dealing cannot be agitated before a writ Court. It is within these limits that the jurisdiction conferred on the High Courts under Article 226 to issue a writ of certiorari can be legitimately exercised. with this category of cases, however, we must always bear in mind that a finding of fact recorded by the Tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the Tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the interference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal, and the said points cannot be agitated before a writ Court. It is within these limits that the jurisdiction conferred on the High Courts under Article 226 to issue a writ of certiorari can be legitimately exercised.

13. Consequently, in view of the detailed discussion made hereinabove, this Court sees no reason to interfere in the well reasoned judgment passed by the learned Single Judge, which otherwise appears to be based upon proper appreciation law and as such, same is upheld. Pending application(s) if any, also stands disposed of.

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

Kashmir Singh alias Kashmiru .....Appellant

Versus

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

Cr. Appeal No.286 of 2014
Date of Decision: 02.07.2018

Protection of Children from Sexual Offences Act, 2012- Section 4- **Indian Penal Code, 1860-** Sections 452 and 506- House trespass and aggravated sexual assault – Special Judge holding accused guilty and sentencing him for aforesaid offences – Appeal against – Defence assailing judgment on ground of wrong appreciation of evidence – As per allegations, victim was sleeping with her grand-mother in ground floor of house, where accused came, ravished her and fled away – Accused had allegedly raped her after gagging her mouth – High Court found that (i) no injuries on mouth or any part of body of victim were there, (ii) On alleged date of incident, victim was menstruating and blood on her salwar could be her own, (iii) No other incriminatory material was found on her clothes or pubic hair, (iv) Grand-mother of victim, who had allegedly seen accused

fleeing from room was not cited as witness, (v) Statement of complainant (father) found contradictory vis-à-vis a version given in FIR – In his deposition before Court complainant (father) himself claims to have seen accused fleeing out of room whereas in FIR he had alleged of his mother having seen accused fleeing and (vi) Entry or escape of accused through main door found improbable - Held, on such improbable evidence accused could not be held guilty – Appeal allowed – Judgment and final order set aside. (Paras-6 to 11 & 15)

Cases referred:
C. Magesh and Ors. v. State of Karnataka (2010) 5 SCC 645
State of HP v. Sohan Lal, Latest HLJ 2016(HP) 1585

For the appellant: Mr. O.C. Sharma, Advocate.
For the respondent: Mr. S.C. Sharma and Mr. Dinesh Thakur, Additional Advocate Generals with Mr. Amit Kumar Dhumal Deputy Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Instant criminal appeal having been filed by the appellant-accused, is directed against the judgment of conviction and sentence dated 4.3.2014, passed by the learned Special Judge, Kangra at Dharamshala, H.P. in Session case No. 11-B/VII/2013, whereby learned court below while holding the accused guilty of having committed offence punishable under Section 4 of the Protection of Children from Sexual Offences Act, 2012 and Sections 452 & 506 of IPC, convicted and sentenced the accused as under:-

> ***"Under Section 4 of the Protection of Children from Sexual Offences Act, 2012, convicted and sentenced the accused to undergo rigorous imprisonment for a period of seven years and to pay fine of Rs. 5,000/-, In default of fine of payment, to undergo simple imprisonment for three months.***
>
> ***Under Section 452 IPC, accused is sentenced to rigorous imprisonment for a period of six months and to pay fine of Rs. 2000/-. In default, of payment of fine, to undergo simple imprisonment for a period of one month.***
>
> ***The accused is further sentenced to undergo rigorous imprisonment for a period of three months for the offence punishable under Section 506 IPC."***

2. Precisely the facts as emerge from the record are that on 26.1.2013, complainant (PW3) got his statement recorded under Section 154 Cr.PC., alleging therein that on 25.1.2013, his minor daughter, who is studying in class 9th after having meals, had gone to sleep alongwith her grandmother, in a room on the first floor of the house, whereas he (PW3) and his two sons, had gone to sleep in the ground floor. Grandmother of the prosecutrix woke him up at about 12:30 am and disclosed that accused had intruded into the house and had run out of the house. PW3/complainant though made an attempt to chase the accused, but in vain. Subsequently, prosecutrix (PW2) informed her father (PW3) that accused person had committed penetrative sexual assault with her without her consent and will. She also disclosed that accused was having knife with him and he had gagged her mouth, as such, she was unable to resist. Allegedly, accused had left his torch (make Orkia) at the scene of the crime, which was subsequently handed over to the police. One Shri Vijay Kumar, (brother of PW3) had also gone in the search of the accused on hearing screams of his mother, but in vain. PW3/complainant narrated the entire incident to Shri Vijay Kumar, who advised him and other family members to take action after dawn. Allegedly, PW3 and Vijay Kumar went in search of the accused person on the next date, but accused was not found at his house. On the basis of aforesaid complaint, formal FIR

(Ext.PW3/A), came to be lodged against the accused. After lodging of aforesaid FIR, police got the prosecutrix examined at Civil Hospital at Baijnath. Accused came to be arrested on 27.1.2013. After completion of investigation, police presented the challan in the competent court of law, who being satisfied that prima-facie case exists, against the accused, charged him for having committed offence punishable under Section 4 of the Protection of Children from Sexual Offences Act, 2012 and Sections 452 & 506 of IPC, to which he pleaded not guilty and claimed trial.

3. Learned trial Court on the basis of evidence collected on record by the prosecution held the accused guilty of having committed offence punishable under Section 4 of the Protection of Children from Sexual Offences Act, 2012 and Sections 452 & 506 of IPC and accordingly, convicted and sentenced him as per the description given herein above. In the aforesaid background, appellant-accused has approached this Court in the instant proceedings, praying therein for his acquittal after setting aside judgment of conviction recorded by the court below.

4. Mr. O.C. Sharma, learned counsel, representing the appellant-accused while inviting attention of this Court to the impugned judgment of conviction recorded by the learned trial Court, vehemently contends that same is not based upon proper appreciation of evidence and as such, same cannot be allowed to sustain. Mr. Sharma, further argues that learned court below has failed to appreciate the evidence in its right perspective, as a consequence of which, erroneous findings have come on record to the detriment of the accused, who has been falsely implicated in the case. With a view to substantiate his aforesaid argument, Mr. Sharma, made this Court to peruse the statements of prosecution witnesses to demonstrate that there are material contradictions and in-consistencies and as such, there was no occasion for the court below to hold the accused guilty of having committed offence punishable under the said sections. While specifically referring to the Sections 24 and 36 of Protection of Children from Sexual Offence Act, Mr. Sharma, argues that since Investigating Agency failed to carry out investigation strictly in terms of provision contained in the aforesaid section, entire investigation has vitiated and court below ought to have not placed any reliance upon the conclusion, if any, drawn by the Investigating Agency while ascertaining the guilt of the accused. Mr. Sharma, further contends that learned trial Court while holding accused guilty of having committed offence punishable under the Sections as referred herein above, has solely placed reliance upon the statement of prosecutrix-PW2 and medical evidence led on record, which has been further substantiated by PW11 Dr. Praveen Thakur, but if the statement of these two material prosecution witnesses are read in its entirety, it nowhere proves the case of the prosecution, rather creates serious doubt with regard to the correctness and genuineness of the story put forth by the prosecution. Lastly, Mr. Sharma contends that prosecution, for the reasons best known to it, failed to examine most important witnesses i.e. grandmother and brother of the complainant namely Vijay Kumar, who allegedly had an occasion to see the accused at the first instance after the alleged incident.

5. Mr. Dinesh Thakur, learned Additional Advocate General, while refuting the aforesaid submissions having been made by Mr. Sharma, contends that there is no illegality and infirmity in the impugned judgment of conviction recorded by the court below, rather same is based upon proper appreciation of evidence and as such, same needs to be upheld. Mr. Thakur, further contends that it stands duly proved on record that on the date of alleged incident, accused entered in the house of the prosecutrix and thereafter, ravished her against her wishes. While inviting attention of this Court to the seizure memo Ext.PW2/B (knife), Mr. Thakur, contends that accused himself got knife recovered from the tea garden and similarly, torch of the accused was recovered from the room of the prosecutrix. While referring to the medical evidence adduced on record by the prosecution, Mr. Thakur, contends that PW11 Dr. Praveen Thakur, has categorically opined that possibility of sexual assault cannot be ruled out and as such, there is no illegality and infirmity in the impugned judgment of conviction recorded by the court below and as such, same deserves to be upheld.

6. Having heard learned counsel for the parties and gone through the record vis-à-vis impugned judgment of conviction recorded by the Court below, it is quite apparent that the

learned court below has placed heavy reliance upon the statement of prosecutrix (PW2) and (PW11) Dr. Praveen Thakur, to hold accused guilty of having committed offence punishable under Section 4 of the Protection of Children from Sexual Offences Act, 2012 and Sections 452 & 506 of IPC. But if the statement of prosecutrix is read in its entirety, it does not inspire confidence and version put forth by her is wholly un-believable and untrustworthy and as such, raises serious doubt with regard to the correctness of the story put forth by the prosecution. Though prosecutrix in her statement has stated that she after having meals had gone to room at first floor alongwith grandmother, but she also categorically stated that her father and brothers were sleeping in a room on the ground floor. She has further stated that a person entered the room in midnight and lifted her blanket, but interestingly, this witness in her cross-examination has categorically admitted that she resides in two story building and there is one door plank in the ground floor, which was bolted from inside on the date of alleged incident. Though, she qualified her statement by stating that door usually gets opened with mere push, but version put forth by the prosecutrix (PW2), does not appear to be trustworthy at all. It is un-believable that accused after having opened door succeeded in climbing to the first floor because as per own statement of prosecutrix, her father and two brothers were sleeping in the ground floor. Had accused opened the door by pushing the same, father and brothers of the prosecutrix would have definitely heard the noise and sound of opening of the door. Similarly, though prosecutrix has claimed that her grandmother, who at that relevant time, was sleeping in room of the prosecutrix, is hard of hearing, but still it cannot be believed that she did not hear the screams of the prosecutrix, who was allegedly threatened by the accused by showing knife. Prosecutrix stated before the court below that she was sexually assaulted by the accused and she was unable to raise alarm as her mouth was gagged, but aforesaid version of her is not corroborated by the medical evidence adduced on record. Though medical evidence adduced on record shall be discussed in the later part of the judgment, but at this stage, if for limited purpose, it is taken into consideration to test the correctness of version put forth by the prosecutrix that she was threatened and gagged by the accused, same does not corroborate the version put forth by the prosecutrix because it has nowhere come in the medical evidence that injury, if any, was found on the mouth or any part of the body of the prosecutrix. As per prosecutrix, when she raised the alarm, her grandmother woke up and made an attempt to catch hold of the accused. She also stated that her grandmother made an attempt to light a match box, but she was unsuccessful. She further stated that accused while leaving room switched on the light, which version of her appears to be totally improbable because in such like situation, no person would switch on the light, rather he would make all efforts to hide his identity. Interestingly, it has nowhere come in the statement of prosecutrix that how in the dark room, she was able to identify the accused, because as per her own version, she had no prior acquaintance with the accused. As per the prosecutrix, her grandmother was the first person to see the accused on the spot, but unfortunately, she has not been examined for the reasons best known to the prosecution.

7. PW3 complainant, who happened to be father of the prosecutrix narrated altogether different story while deposing before the court below. He stated before the court below that he after having heard screams of his mother went to the first floor, where he saw the accused running out of the room, but this statement of him is in total contradiction of his statement recorded under Section 154 of Cr.PC, wherein he categorically reported that at around 12:30 am, his mother woke him up and informed that accused person had entered into the house and ran out of the house. If aforesaid statement recorded under Section 154 Cr.PC, is presumed to be correct, it is not understood that where was the occasion for the complainant (PW3) to see the accused running from the room on the date of alleged incident. Very interestingly, this witness in his statement recorded under Section 154 Cr.PC, reported that after having heard screams, his brother namely Vijay Kumar, came to the spot, who advised them to wait till dawn, but for the reasons best know to the prosecution, he has not been also cited as witness. PW3 deposed that he has two sons and one daughter. On 25.1.2018, he alongwith his two sons had gone to sleep in a room in ground floor, whereas victim-prosecutrix alongwith her grandmother had gone to sleep in the first floor. He also stated that his mother at about 12:30 am, came to his room and told him that the accused person has been noticed by her in the room, who had fled away. He

also stated that his brother Vijay was also woke up and he disclosed the incident to him. It also came in his statement that he noticed that accused had left his torch in the room. If the statements of complainant (PW3) and prosecutrix (PW2) are read in conjunction juxtaposing each other, it certainly persuades this Court to agree with the contention of Mr. O.C. Sharma, learned counsel representing the petitioner that no much reliance could be placed upon their version being contradictory and in-consistent. There are material contradictions in the statements of aforesaid material prosecution witnesses with regard to entry of the accused in the house and thereafter, his presence in the room, when alleged incident occurred. 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)***
>
> > ***"14. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witness is held to be creditworthy. The probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation."***
>
> ***46. In a criminal trial, evidence of the eye witness requires a careful assessment and must be evaluated for its creditability. Since the fundamental aspect of criminal jurisprudence rests upon the stated principle that "no man is guilty until proven so", hence utmost caution is required to be exercised in dealing with situations where there are multiple testimonies and equally large number of witnesses testifying before the court. There must be a string that should join the evidence of all the witnesses and thereby satisfying the test of consistency in evidence amongst all the witnesses."***

8. As has been noticed above, prosecution has omitted to cite two material spot witnesses i.e. grandmother and Sh. Vijay uncle of the prosecutrix, who could be the best persons to corroborate the version put forth by the prosecutrix, which otherwise does not appear to be trustworthy. Though in the instant case, prosecution has examined as many as 12 witnesses, but learned court blow has placed heavy reliance upon the statements of prosecutrix (PW2) and PW11. But if the statement of PW11 is read in its entirety, it nowhere proves commission of offence, if any, under Section 4 of the Protection of Children from Sexual Offences Act, 2012 and Sections 452 & 506 of IPC. PW11 namely Dr. Praveen Thakur, who medically examined the prosecutrix opined as under:

> ***"Alleged history of sexual assault around 12.30 a.m. On 26.01.2013. On examination well built average height, vital stable. Well conscious/oriented to time/place and person, breast well developed. Axillary hair present. Menarche occurred at the age of 11 years. Complaining of bleeding per vaginally since morning 5.30 a.m. on 26.01.2013.***

<u>Local Examination</u>

Pubic hair present) No injury present on breast,

Patient menstruating) abdomen inner aspect of
)forearm thighs, wrist, face)legs and pelvic region.

Perspeculam Examination

Bleeding per vaginal was present. No laceration injury was present. Cervix was healthy.

Pervaginal examination

Bleeding per vaginal was present. Vagina was healthy. Two fingers loose, non-tender. No other external injury was present.

Systemic examination-NAD.

As per my opinion, there are no injuries/abrasion present on the body and near internal organs and she is not unfit for sexual intercourse. She was referred to dental and X-rays examination for age verification. I handed over to the police the following articles:-

1. Vaginal swab,

2. Kameez, Salwar, bra, undergarment with pad

3. Pubic hair sealed in separate parcel with hospital seal and application to Chemical Analyzer through lady constable Vanita.

The victim was 14 years and she was examined with the consent of her mother. Per endorsement on MLC.

The final opinion was to be given after chemical analyses report. I issued MLC Ex.PW11/A which is in my hand and bears my signatures. Per chemical analyses report is Ext.PW11/B. Blood and semen could not be detected on the shirt of the victim. Human blood was detected on her Salwar, underwear, pad, bra and pubic hair, but semen was not detected. Blood was also detected on vaginal swab of the victim, but semen was not detected. In my final opinion, chances of sexual activity cannot be ruled out and my opinion in this context is Ex.PW11/C which is in my hand and bears my signatures. Ex.P-3 parcel sealed with court seal has been shown to me and it contains Salwar, shirt, undershirt and undergarment. Packet was allowed to be opened. On opening the parcel, one shirt, one Salwar, one undergarment and one undershirt have been taken out. Salwar Ext.P-4, shirt Ext.P-5, undershirt Ex.P-6 underwear with pad Ext.P-7 are the same. The victim was wearing all these cloths at the time of her examination.

xxxxx by Sh. Sudhir Samyal, Adv for accused.

I cannot rule out sexual penetrating assault in this case. It is correct to suggest that on victim being subjected to sexual penetrating assault for the first time she is likely to suffer injury on vabla labia majora. There is no such injury. I cannot say that the victim was habitual to intercourse voluntarily that she had been subject to intercourse earlier. It is incorrect that since the secondary character of the victim was well developed, she was more than 16 years. The dental and radiological reports were not shown to me. It is incorrect that the police told me the age of the victim. Self-stated that the victim herself and her grand mother apprised me about her age. It is incorrect that the victim did not tell me her age. It is incorrect that in the present case there is no evidence about commission of sexual penetrating assault."

Careful perusal of aforesaid statement given by the doctor PW11 as well as MLC adduced on record clearly suggests that on the date of alleged incident, prosecutrix was menstruating and no injury on any part of the body of the prosecutrix was noticed/found at the time of medical examination. Doctor has categorically stated that "as per my opinion, there are no injuries/abrasion present on the body and near internal organs and she is not unfit for sexual intercourse."

9. Doctor in his report has simply stated that he cannot rule out the chances of sexual intercourse. But if her statement is examined and perused in light of report submitted by the RFSL, this Court is persuaded to agree with the contention of Mr. O.C. Sharma that no case, if any, is made out against the accused under Section 4 of the Protection of Children from Sexual Offences Act, 2012 and Sections 452 & 506 of IPC. RFSL, Dharamshala has categorically reported that no blood and semen could be detected on the cloths and pubic hair of the accused. No doubt as per report of FSL, some human blood was found on the Salwar of the prosecutrix, but that could not be a ground to conclude that blood was on account of sexual assault, if any, committed by the accused, rather it has come in the report of the doctor that at the time of medical examination, victim was menstruating and as such, possibility of her own blood on her cloths cannot be ruled out, especially when there is no definite opinion of FSL with regard to the human blood present on the clothing of the prosecutrix. There is no definite opinion given by the PW11 or by FSL that human blood detected on the Salwar of the prosecutrix was of the accused. Similarly, human semen was detected on the underwear of the accused, but as per report no human semen was found on the undergarments of the prosecutrix as well as her pubic hair.

10. Having carefully examined/analyzed evidence led on record vis-à-vis story put forth by the prosecution, this Court has no hesitation to conclude that story put forth by the prosecution is wholly unbelievable and untrustworthy. Version put forth by the prosecutrix with regard to the entry of the accused in the room and thereafter, her being ravished by the accused that too in the presence of the grandmother, is highly improbable and cannot be accepted in the absence of any piece of corroborative evidence , if any, led on record by the prosecution. In the case at hand, though prosecution with a view to prove the version put forth by the prosecutrix has made an attempt to introduce grandmother by stating that she was able to identify the accused while he was leaving the room, but unfortunately, she has not been cited as prosecution witness. There is no cogent and convincing evidence led on record to prove its case by the prosecution and as such, no conviction, if any, could be recorded on highly improbable and unbelievable version put forth by the prosecutrix. There is another aspect of the matter that there is no explanation available on record that how accused could identify the prosecutrix in a dark room because admittedly two persons i.e. grandmother and prosecutrix were sleeping in the room, meaning thereby, accused could go to any room including the ground floor, where PW3 and his sons were sleeping. There is no evidence that at the first instance, accused after entering the room made efforts, if any, to ascertain or verify the identity of the victim, to whom the accused wanted to ravish and as such, story being highly improbable, deserves to be rejected outrightly. Reliance is placed on judgment passed by the co-ordinate Bench of this Court in case titled ***State of HP v. Sohan Lal, Latest HLJ 2016(HP) 1585***, relevant para whereof is reproduced herein below:

> ***"14. Version of PW-1, PW-6 and PW-10 that accused has committed offence in a room where his mother and other two daughters were sleeping is unbelievable, more particularly, for the reason that allegations of violation of person of victim by accused either for three months or 2-3 times is not corroborated by medical evidence but has been falsified. PW-7 Dr. Sangeeta Uppal has opined that possibility of sexual assault cannot be ruled out. However, she has admitted that as per MLC PW7/A issued by her, there was no sign of mark of injury to show that the child was sexually assaulted by accused. Opinion of Medical Board consisting of Chairperson Professor OBJ, Members Assistant Professor OBJ, Assistant Professor Forensic Medicine and Medical officer on emergency duty***

I.G.M.C. Shimla does not lend support to case of prosecution. As per opinion of Medical Board, there was nothing to suggest about recent or remote complete sexual intercourse as also in absence of any evidence in Microbiological and Chemical analysis. PW-1 Kanta Devi and PW-10 victim has specifically alleged that accused has committed sexual intercourse which had resulted into immense pain and bleeding in private part. Opinion and reports of Medical experts are contrary to the said version."

11. After having carefully perused medical evidence adduced on record and statement of prosecutrix, this Court has no hesitation to conclude that court below has fallen in grave error while concluding that prosecution successfully proved on record that the prosecutrix was subjected to sexual assault against her wishes. Though, this Court having discussed and analyzed the statement of PW3 and PW11, sees no need to elaborate the matter any further, however, even if statement of PW12 i.e. Inspector Rajinder Sharma, SHO, police station, Baijnath, is perused, it further casts serious doubt with regard to the correctness of the story put forth by the prosecution. He admitted in his cross-examination that house of the prosecutrix is duplex and there is only one door to enter in the house, which is situated in the ground floor. Most importantly, it has come in the cross-examination of this witness that father and brothers of the prosecutrix used to sleep in the ground floor and door of the ground floor was not found to be broken. He also admitted in his cross-examination that no independent witness was associated at the time of recording of disclosure statement of the accused under Section 27 of the Indian Evidence Act, which also raises serious doubt with regard to the recovery, if any, made by the prosecution of the alleged knife from the tea garden.

12. As per Section 24 of the Act, statement of victim/child is to be recorded either at his or her residence or at a place where he she resides or at place of his/her choice.

"24. Recording of statement of a child.-

1. The statement of the child shall be recorded at the residence of the child or at a place where he usually resides or at the place of his choice and as far as practicable by a woman police officer not below the rank of sub-inspector.

2. The police officer while recording the statement of the child shall not be in uniform.

3. The police officer making the investigation, shall, while examining the child, ensure that at no point of time the child come in the contact in any way with the accused.

4. No child shall be detained in the police station in the night for any reason.

5. The police officer shall ensure that the identity of the child is protected from the public media, unless otherwise directed by the Special Court in the interest of the child."

Aforesaid provision further provides that as far as practicable, statement of child should be recorded by a woman police officer not below the rank of sub-inspector. However, in the case at hand there appears to be total non-compliance of aforesaid provision of law, because admittedly, statement was recorded by PW12, SHO Rajinder Pal, and there is no explanation rendered on record that why statement was not recorded by a woman police officer. Similarly, statement of victim has not been recorded at her residence; rather same has been recorded at the police station. Section 24(3) further provides that police officer, while making the investigation shall ensure that while examining the child, child at no point of time should come into the contact in any way with the accused. If the Ext.PW12/C is perused carefully it clearly suggests that recovery was effected in the presence of the prosecutrix from the tea garden, meaning thereby, police failed to protect the identity of the child from the public/accused as envisaged under Section 24(3) of the Act.

13. Similarly perusal of Section 36 of the Act, suggests that at the time of recording statement of child, Special court should ensure that child is not exposed to the accused in any way at the time of recording of the evidence.

> ***"36. Child not to see accused at the time of testifying.-***
>
> ***1. The Special Court shall ensure that the child is not exposed in any way to the accused at the time of recording of the evidence, while at the same time ensuring that the accused is in a position to hear the statement of the child and communicate with his advocate.***
>
> ***2. For the purposes of sub-section (1), the Special Court may record the statement of a child through video conferencing or by utilising single visibility mirrors or curtains or any other device."***

14. It has been further provided that the Court may record the statement of a child through video conferencing or by utilizing single visibility mirrors or curtains or any other device**.** But in the instant case, if the statement of prosecutrix is read in its entirety, it clearly suggests that no such precaution was taken because prosecutrix specifically stated that accused person in Court is the same person, who had entered her room on the date of alleged incident.

15. Consequently, in view of the detailed discussion made herein above as well as law laid down by the Hon'ble Apex Court, this Court is of the view that court below has failed to appreciate the evidence as well as law on the point in its right perspective as a consequence of which erroneous findings have come on record. Accordingly, the appeal is allowed and judgment of conviction recorded by the learned court below is quashed and set aside. Accused is acquitted of the charges so framed against him. Bail bonds discharged. Release warrants be prepared accordingly. Appeal stands disposed of, so also pending applications, if any.

****

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

Laxmi Dhar ..Petitioner

Versus

Gurdial Singh ..Respondent

Cr. Appeal No.539 of 2010
Date of Decision No. 3.07.2018

Negotiable Instruments Act, 1881- Section 138- Dishonour of cheque – Cheque, whether for consideration? – Accused acquitted by Trial Court by holding that cheque was obtained from him by complainant under police pressure- Appeal against – Complainant alleging lending of amount to accused and of latter having given cheque in question to him at complainant's house – High Court found that (i) wife and sister-in-law of complainant had issued Special Power of Attorney in favour of accused to sell their land at Shimla, (ii) As there was some dispute regarding money having been received by accused after selling their land, accused was called to police station on that date and (iii) cheque was filled in by MHC of Police Station and not by accused – Held, defence of accused that cheque in question was procured under police pressure is probablised on record – Appeal dismissed – Judgment of Trial Court upheld. (Paras-18 to 20 and 25 & 26)

Cases referred:

Union of India versus Pramod Gupta by L.Rs and Ors, (2005) 12 SCC

M/s Laxmi Dyechem V. State of Gujarat, 2013(1) RCR(Criminal)

For the Petitioner: Mr. S.K.Sharma, Advocate.
For the respondents: Mr.Suneet Goel, Advocate with Mr.Rohit Chauhan, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

Instant Criminal Appeal is directed against the judgment, dated 26.7.2010, passed by learned Judicial Magistrate 1st Class, Kandaghat, District Solan, H.P., in Criminal Case No.15/3 of 2002, whereby the complaint under Section 138 of the Negotiable Instruments Act, having been filed by the appellant (***hereinafter referred to as the complainant)*** has been rejected.

2. Briefly stated facts as emerge from the record are that the complainant filed a complaint under Section 138 of the Negotiable Instruments Act ***(hereinafter referred to as the Act)*** against the respondent **(hereinafter referred to as the accused),** alleging therein that with a view to discharge liability and for consideration, accused had issued cheque bearing No. 465181, dated 20.9.2002, amounting to Rs. 1,80,000/- in favour of the complainant, drawn on UCO Bank, Kandaghat of his account No.7693. However, fact remains that aforesaid cheque issued by the accused was dishonoured on its presentation. UCO Bank Kandaghat returned the cheque in question with the remarks ***" insufficient funds" and " payment stopped by the drawer".*** After having received aforesaid information from the bank concerned, complainant got legal notice issued to the accused calling upon him to make the payment within stipulated period, but since accused failed to make the payment good within period prescribed in legal notice, he was compelled to initiate proceedings under Section 138 of the Act, in the competent Court of law.

3. Subsequently, learned trial Court on the basis of the material adduced on record by the respective parties, held accused not guilty of having committed offence punishable under Section 138 of the Act and accordingly, acquitted him and dismissed the complaint. In the aforesaid background, complainant has approached this Court in the instant proceedings, seeking therein conviction of accused, after setting aside the judgment of acquittal recorded by the learned trial court.

4. Mr. Sanjay Kumar Sharma, learned counsel representing the complainant, vehemently submits that impugned judgment of acquittal recorded by the learned trial Court is not sustainable in the eyes of law, as the same is not based upon the correct appreciation of the evidence adduced on record and as such, same deserve to be quashed and set-aside. Mr. Sharma, further contends that bare perusal of the evidence led on record by the respective parties would go to show that learned court below has not appreciated the evidence in its right perspective, as a consequence of which, erroneous findings have come on record to the detriment of the complainant, who had advanced a sum of Rs. 1, 80,000/- to the accused in good faith.

5. With a view to substantiate his aforesaid argument, Mr. Sharma, made this Court to peruse the evidence led on record by the respective parties to demonstrate that complainant successfully proved on record that he had provided certain amount of fund to the accused, who in turn had issued cheque for discharge of his lawful liability. He further states that it stands duly proved on record that cheque in question on its presentation was returned by the bank concerned and accused despite having received the legal notice, failed to make the payment good and as such, there was no occasion left for the Court below to dismiss the complaint and acquit the accused.

6. Lastly, Mr. Sharma, contends that accused has admitted his signature on the cheque in question in his statement recorded under Section 313 of the Code of Criminal Procedure and he has nowhere denied the factum with regard to issuance of the cheque, rather defence taken by him ought not to have accepted by the Court below being highly improbable. In the aforesaid background, Mr. Sharma, prayed that present appeal may be accepted and accused

be convicted of having committed the offence punishable under Section 138 of the Act, and suitable compensation may be awarded in favour of the complainant.

7. Mr. Suneet Goel learned counsel representing the respondent-accused, while supporting the impugned judgment of acquittal, contends that bare perusal of the same suggest that learned court below has appreciated the evidence in its right perspective and has rightly arrived at a conclusion that cheque in question was procured by the complainant under pressure. Mr. Goel, further contends that complainant has miserably failed to prove before the court below that he had advanced a sum of Rs. 1, 80,000/- to the respondent-accused because no agreement, if any, arrived *inter se* parties is placed before the learned court below and as such, Court below rightly came to the conclusion that cheque in question was procured forcibly with the aid of police by the complainant. While referring to the defence evidence adduced on record, Mr. Goel, argues that it stands duly proved on record that police at Kandaghat called the accused at police Station, Kandaghat on the insistence of complainant and procured cheque coercively . He further states that it has specifically come in the statements of DW-1, Sh. Bal Kishan and DW-4, MHC Daulat Ram that cheque Ex.CW1/A was filled by MHC, Daulat Ram and as such, it can be fairly concluded that cheque in question issued by the accused was not towards discharge of lawful liability, rather same was procured by the complainant under pressure with the aid of the police.

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

9. It is quite apparent that cheque Ex.CW1/A, amounting to Rs. 1, 80,000/- was signed by the accused. Accused in his statement recorded under Section 313 Cr.P.C. has admitted his signature on the cheque, but has alleged that same was procured forcibly by the complainant at police Station, Kandaghat. He further alleged that there is a land in the name of the complainant's wife and he had got the deal settled with one Jagdish at Solan ,who subsequently failed to pay the whole amount to the complainant's wife that's why complainant took him to police station and obtained cheque. Accused also examined four witnesses in support of his defence.

10. No doubt, in the case at hand, complainant with a view to prove its case placed on record cheque, dated 20.9.2002 Ex.CW1/A, cheque returning memos Ex.CW1/B and Ex.CW1/C issued by UCO Bank, copy of legal notice Ex.CW1/D, receipt of under postal receipt Ex.CW1/E and postal receipt CW1/F.

11. With a view to prove aforesaid documents, complainant himself examined as CW-1 and reiterated the averments made in the complaint. He deposed that cheque Ex.CW1/A issued by the accused was presented in the bank concerned, but same was returned with the remarks ***"insufficient funds" and payment stopped by the drawer.*** He further deposed that registered notice through advocate Ex.CW1/D was sent to accused under postal receipts Ex.CW1/F and Ex. CW1/E, but despite that accused failed to make the payment.

12. Complainant also examined Sh. Ranjeet Singh, Clerk of UCO Bank, Kandaghat as CW-2, who deposed that on 29.8.2002 cheque was presented by the complainant in the bank, but there was Rs.316/- in the account of the accused and memos Ex.CW1/B and Ex.CW1/C were issued by their bank. He also admitted that accused had written a letter to their bank to stop the payment. Cross-examination conducted on the **c**omplainant (CW-1) is very crucial for the adjudication of the case in the light of the defence taken by the accused. Complainant (CW-1) categorically admitted that he works in S.S.B, Delhi on the post of Constable and accused had procured loan amounting to Rs. 1, 80,000/- on 29.8.2002 from him. He also admitted that no agreement was executed regarding the advancement of loan and the cheque was issued by the accused to him at his house, which was filled by the accused in his own handwriting and signed by the accused. He also admitted that his wife and sister-in-law are having immovable property at District Shimla. Though, he feigned ignorance that his wife and sister-in-law had executed a Power of Attorney in favour of accused Gurdial Singh for sale of land situated at District Shimla, but admitted that her wife and sister-in-law are having immovable property in District Shimla.

This witness also denied the suggestion put to him that cheque in question was procured by him at police Station, Kandaghat with the aid of police. He categorically denied that he had ever visited the police station. He also denied that on the next day of issuance of cheque, accused had got the cheque payment stopped because cheque was procured under pressure.

13. On the other hand, accused with a view to prove its defence apart from examining himself also examined Sh. Bal Kishan as DW-1, who deposed that complainant, his wife and the accused are known to him and in his presence Kanta Devi executed a Power of Attorney Ex.DW1/A in favour of the accused. He also stated that cheque Ex.CW1/A was issued by the accused at police station, Kandaghat. The cheque was filed by SHO, Police Station, Kandaghat. He further deposed that cheque was procured from the accused under the pressure of police. In his cross-examination, he stated that Kanta Devi is sister-in-law of complainant Laxmi Dhar. He also admitted that he was called by the complainant to police station, Kandaghat.

14. Other defence witness Sh. Jai Ram (DW-2) also corroborated the version put forth by DW-1 that in his presence Basanti Devi and Geeta Devi had executed Power of Attorney Ex.DW2/A in favour of the accused. In cross-examination, he stated that Power of Attorney was given to accused to sell the land of Basanti Devi and Geeta Devi. He is one of the witness to the Power of Attorney.

15. Accused also examined Sh. Ramesh Chauhan, SHO, police Station, Kandaghat as DW-3. Though, he admitted the factum with regard to his posting at police Station, Kandaghat in the year, 2002, but feigned his ignorance regarding filling of cheque Ex.CW1/A.

16. DW-4, ASI Daulat Ram also deposed that in the year 2002, he was posted as MHC at police Station, Kandaghat. He specifically stated that on 29.8.2002 he was posted at Kandaghat and there was a dispute of money between the complainant and the accused. He deposed that complainant had produced the accused at police station and he had asked them to compromise the matter. He also admitted that words written in the cheque Ex.CW1/A, in circle A, B,C and D are written by him, thereafter cheque was handed over to the complainant. Though, he denied that cheque was procured by putting pressure on the accused, but in cross-examination, he stated that the cheque was handed over to him by the accused and on his request, he had filled that cheque. He also stated that the cheque in question was signed by the accused in his presence.

17. Accused himself examined as DW-5 and deposed that he had not taken any loan from the complainant and had not filed the cheque. He reiterated that complainant's wife Basanti Devi, his sister-in-law Kanta Devi and Geeta Devi executed Power of Attorney in his favour and there was money dispute between the owner and the purchaser and he had only executed the sale deed. He stated that cheque in question was procured from him at police Station, Kandaghat, where he was taken by the complainant and one police official. He deposed that at police station, he was searched by the police official and from his back cheque was taken by the police and complainant and thereafter, his signatures were procured by the police under pressure by threatening him that they will implicate him in a false case. He further stated that thereafter he went to bank and requested bank officials to stop the payment. In cross-examination, DW-5 admitted that one civil case against him is pending in the Court of learned Civil Judge, Court No.3, Shimla, wherein other party had levelled allegations of fraud against him. He specifically denied the suggestion put to him that he procured Power of Attorney by playing fraud. Though, he admitted his signature on the cheque, but claimed that his signatures were procured forcibly. He has admitted that Power of Attorney was prepared at Kandaghat. He also admitted that sale deed was executed in favour of Manju. He denied that he has taken money from the purchaser and it was not paid to the original owners.

18. Close scrutiny of the evidence led on record by the complainant certainly indicates that wife and sister-in-law of the complainant had some immovable property at District Shimla and they had executed Power of Attorney in favour of the accused for the sale of the land

situated at District Shimla. Though, complainant has denied the factum with regard to execution of Power of Attorney in favour of the accused for sale of the land, but if cross-examination conducted upon defence witnesses, especially DW-5, there appears to be some force in the argument of learned counsel representing the accused that wife and sister-in-law, who had immovable property at District Shimla had executed power of attorney in favour of the accused authorizing him to sell the land. Cross-examination conducted upon the accused and other defence witnesses further suggest that money allegedly received by the accused after selling the land in question in term of Power of Attorney executed by the wife and sister-in-law of the complainant was not paid and as such, complainant lodged complaint against the accused at police station, Kandaghat. Though, complainant has denied his visiting at police station, Kandaghat, but careful perusal of the statement made by two police officials i.e. DW-3 and DW-4 proves the case of the defence that he was called at police station, Kandaghat on the askance of the complainant. Statements having been made by police officials further reveal that there was some dispute of money between the complainant and the accused and as such, version put forth by the complainant was rightly not accepted by the court below being unreliable. Accused, who had taken defence in his statement recorded under Section 313 Cr.P.C that complainant in connivance with the police officials procured the signature of the accused on Ex. CW1/A, without his consent, successfully proved on record by examining DW-1, DW-2, DW-3 and most importantly DW-4 that cheque in question was not issued towards discharge of any liability, rather same was procured by the complainant under pressure with the aid of police. Power of Attorney executed by the complaint's wife and sister-in-law in favour of the accused has been duly proved by accused person by examining DW-1 and DW-2. Otherwise also, careful perusal of the statement made by complainant nowhere suggests that factum with regard to execution of power of attorney by his wife and sister-in-law in favour of the accused was denied candidly, rather he evasively replied to the aforesaid submission/assertion made on behalf of the accused. DW-4, MHC, Daulat Ram, has categorically stated that the complainant and the accused had some money dispute regarding the land transaction, which strengthen the case of the accused that Power of Attorney Ex.DW1/A was executed in his favour and he had sold the land to one Smt.Manju and dispute was with regard to the money.

19. Having carefully perused the entire evidence available on record, this court is in agreement with the findings returned by the learned court below that complainant did not approach the court with clean hands and made an attempt to suppress the material facts by coining the story that he had advanced the loan of Rs. 1, 80,000/- to the accused, who in turn issued cheque Ex.CW1/A with a view to discharge his liability. Though, there is no cogent and convincing evidence led on record by the complainant suggestive of the fact that he had advanced aforesaid amount to the accused, but to the contrary accused successfully proved on record that since there was money dispute between him and the accused on account of sale of land made by him on the strength of General Power of Attorney executed in his favour by wife and sister-in-law of the complainant, complaint was called at police station Kandaghat and police forcibly procured cheque in question from him. Aforesaid defence of the accused seems to be probable because DW-4 MHC, Daulat Ram, has categorically admitted the factum of filling of cheque by him. Though, in his statement he has stated that cheque in question was signed by the accused, but there is clear cut admission on his part that he himself filled the cheque, which clearly suggest that cheque in question was procured at police station, Kandaghat. At this stage, it would be relevant to take note of the averments made in the complaint as well as statement made by the complainant that accused with a view to discharge his liability issued cheque and same was filled up at his house, which version put forth by him is in total contradiction to the version of official witness DW-4, who categorically stated that cheque in question was filled by him at police station, Kandaghat.

20. It is well settled that accused can raise probable defence either by relying upon the documents, if any, placed on record by the complainant or by showing evidence to the effect that cheque in question was not issued by him towards discharge of any liability or consideration**.** In the case at hand, though accused has admitted his signatures on the cheque, but has

successfully proved that cheque in question was not towards the liability, rather same was procured by the complaint under pressure of the police that too against some sale transaction made by accused on the strength of General Power of Attorney executed in his favour by the wife and sister-in-law of the complainant.

21. Definitely, there cannot be any quarrel with the submission/ argument advanced by Mr. Sanjay Kumar Sharma, learned counsel representing the complainant that under Section 139 of the Act, there is presumption in favour of the holder of the cheque that cheque in question was for the discharge, in whole or in part, or any debt or other liability. Certainly Section 139 of the Act, creates a presumption in favour of the holder of a cheque, the said section provides that " it shall be presumed that, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in Section 138 for the discharge, in whole or in part, or any debt or other liability". But, aforesaid presumption can be rebutted by adducing evidence and the burden of proof is on the person who wants to rebut the presumption. Once a cheque is issued by a drawer, a presumption under Section 139 must follow and merely because the drawer issued notice to the drawee or to the bank for stoppage of payment it will not preclude an action under Section 138 of the Act by the drawee or the holder of the cheque in due course. But, as has been observed above, presumption as envisaged under Section 139 is rebuttable.

22. Section 118 of the Act provides that until the contrary is proved, it shall be presumed that negotiable instrument was made or drawn for consideration and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration. But, needless to say, presumption both under Sections 118(a) and 139 of the Act, are rebuttable in nature. What would be the effect of the expression " May Presume', ' Shall Presume' and ' Conclusive Proof has been considered by Hon'ble Apex Court in **Union of India versus Pramod Gupta by L.Rs and Ors,** (2005) 12 SCC in the following terms:-

> "It is true that the legislature used two different phraseologies "shall be presumed" and "may be presumed" in Section 42 of the Punjab Land Revenue Act and furthermore although provided for the mode and manner of rebuttal of such presumption as regards the right to mines and minerals said to be vested in the Government vis- `-vis the absence thereof in relation to the lands presumed to be retained by the landowners but the same would not mean that the words "shall presume" would be conclusive. The meaning of the expressions "may presume" and "shall presume" have been explained in Section 4 of the Evidence Act, 1872, from a perusal whereof it would be evident that whenever it is directed that the court shall presume a fact it shall regard such fact as proved unless disproved. In terms of the said provision, thus, the expression "shall presume" cannot be held to be synonymous with "conclusive proof""
>
> 29. In terms of Section 4 of the Evidence Act whenever it is provided by the Act that the Court shall presume a fact, it shall regard such fact as proved unless and until it is disproved. The words 'proved' and 'disproved' have been defined in Section 3 of the Evidence Act (the interpretation clause) to mean: -
>
> > "Proved" .-- A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.
> >
> > "Disproved".-- A fact is said to be disproved when, after considering the matters before it the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist."
>
> 30. Applying the said definitions of 'proved' or 'disproved' to principle behind Section 118(a) of the Act, the Court shall presume a negotiable instrument to be for

consideration unless and until after considering the matter before it, it either believes that the consideration does not exist or considers the non-existence of the consideration so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that the consideration does not exist. For rebutting such presumption, what is needed is to raise a probable defence. Even for the said purpose, the evidence adduced on behalf of the complainant could be relied upon.

23. It can be safely inferred from the aforesaid exposition of law laid down by the Hon'ble Apex Court that Court shall presume a negotiable instrument to be for consideration unless and until, it, after having considered the material before it, either believes that consideration does not exist or considers the non-existence of the consideration so probable that even a wise-man in the given facts and circumstance of particular case ought to have acted upon the supposition that it does not exist. No doubt for rebutting such presumption,probable defence is required to be raised and in this regard material relied upon by the complainant can also be relied upon.

24. The Hon'ble Apex Court in ***M/s Laxmi Dyechem V. State of Gujarat***, 2013(1) RCR(Criminal), has categorically held that if the accused is able to establish a probable defence which creates doubt about the existence of a legally enforceable debt or liability, the prosecution can fail. To raise probable defence, accused can rely on the materials submitted by the complainant. Needless to say, if the accused/drawer of the cheque in question neither raises a probable defence nor able to contest existence of a legally enforceable debt or liability, statutory presumption under Section 139 of the Negotiable Instruments Act, regarding commission of the offence comes into play if the same is not rebutted with regard to the materials submitted by the complainant. It would be profitable to reproduce relevant paras No.23 to 25 of the judgment herein:-

> "23. Further, a three judge Bench of this Court in the matter of Rangappa vs. Sri Mohan [3] held that Section 139 is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies the strong criminal remedy in relation to the dishonour of the cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. The Court however, further observed that it must be remembered that the offence made punishable by Section 138can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose money is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the defendant accused cannot be expected to discharge an unduly high standard of proof". The Court further observed that it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is all preponderance of probabilities.
>
> 24. Therefore, if the accused is able to establish a probable defence which creates doubt about the existence of a legally enforceable debt or liability, the prosecution can fail. The accused can rely on the materials submitted by the complainant in order to raise such a defence and it is inconceivable that in some cases the accused may not need to adduce the evidence of his/her own. If however, the accused/drawer of a cheque in question neither raises a probable defence nor able to contest existence of a legally enforceable debt or liability, obviously statutory presumption under Section 139 of the NI Act regarding commission of the offence comes into play if the same is not rebutted with regard to the materials submitted by the complainant.

> 25. It is no doubt true that the dishonour of cheques in order to qualify for prosecution under Section 138 of the NI Act precedes a statutory notice where the drawer is called upon by allowing him to avail the opportunity to arrange the payment of the amount covered by the cheque and it is only when the drawer despite the receipt of such a notice and despite the opportunity to make the payment within the time stipulated under the statute does not pay the amount, that the said default would be considered a dishonour constituting an offence, hence punishable. But even in such cases, the question whether or not there was lawfully recoverable debt or liability for discharge whereof the cheque was issued, would be a matter that the trial court will have to examine having regard to the evidence adduced before it keeping in view the statutory presumption that unless rebutted, the cheque is presumed to have been issued for a valid consideration. In view of this the responsibility of the trial judge while issuing summons to conduct the trial in matters where there has been instruction to stop payment despite sufficiency of funds and whether the same would be a sufficient ground to proceed in the matter, would be extremely heavy."

25. At the cost of repetition, it may be observed that in the case at hand, as has been observed hereinabove, accused has been able to establish probable defence that cheque in question allegedly issued by him was not towards discharge of liability, if any, rather same was procured by the complainant at police station under pressure that too not towards consideration/ amount, if any, payable by accused to the complainant. Rather, it stands proved that there was money dispute between the accused and the wife and sister-in-law of the complainant, who had executed Power of Attorney in favour of the accused authorizing him to sell their land.

26. Consequently, in view of the detailed discussion made herein above as well as the law laid down by the Hon'ble Apex Court, this Court sees no reason to interfere with the judgment dated 26.7.2010, passed by the learned Judicial Magistrate, 1st Class, Kandaghat, District Solan, Himachal Pradesh in Criminal Case No.15/3 of 2002, which is accordingly, upheld. In result, appeal fails and is accordingly dismissed. Bail bonds furnished by the accused are discharged. Pending applications, if any are disposed of.

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

Mohan Singh and others ....Petitioners.

Versus

Tilak Raj urf Ang ....Respondent.

CMPMO No.: 75 of 2017.
Reserved on : 11.04.2018
Decided on: 05.07.2018.

Code of Civil Procedure, 1908- Section 151- Inherent power – Exercise of – Principles – Adduction of additional evidence – Trial Court allowing adduction of additional evidence on behalf of plaintiff though it had heard arguments – And earlier, evidence of plaintiff was closed by Court itself when he failed to bring evidence despite various opportunities – Petition against – Held, Despite various opportunities no evidence was led by plaintiff and it was closed by Court - Order had attained finality – Exercise of inherent power should be prudent and cautious – Court must consider perspectives of both sides – No reason was given for allowing such application at belated stage – Petition allowed – Order set aside. (Paras-23 to 26)

For the petitioners : Mr. N.K. Thakur, Sr. Advocate with Mr. Divya Raj Singh, Advocate.
For the respondent : Mr. Bhupender Gupta, Sr. Advocate with Mr. Janesh Gupta, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge

By way of this petition filed under Article 227 of the Constitution of India, the petitioner has prayed for the following reliefs:-

> *"It is, therefore, most respectfully prayed that this petition may kindly be allowed and the impugned order dated 21.02.2017 passed by the Court of Chief Judicial Magistrate, Una, District Una, H.P. in CMP No. 442-VI-15, may kindly be quashed and set-aside and the application filed by the respondent/plaintiff for leading additional evidence may kindly be dismissed or the Hon'ble Court may please to pass any such or further order which may deem just and proper in the facts and circumstances of the case in the interest of justice and fair play."*

2. Brief facts necessary for adjudication of the petition are as under:-

A suit has been filed by the present respondent/ plaintiff against the present petitioners/defendants for declaration to the effect that the plaintiff was in possession as tenant at will and had become owner of the suit land by virtue of operation of H.P. Tenancy and Land Reforms Act and that defendants had no right, title or interest over the suit land and that entries of the suit land in favour of the defendants reflecting them as owners in possession of the same were wrong, void abinitio and ineffective and were not binding on the rights of the plaintiff. A decree for permanent injunction by way of consequential relief restraining defendants from interfering over the suit land or changing its nature was also prayed for.

3. This suit was instituted in the year 2006. Issues in the said suit stood framed on 07.01.2012. Thereafter, the matter was listed for recording statement of plaintiff's witnesses for 08.02.2012. As no plaintiff witness was present on 08.02.2012, the matter was adjourned for the said purpose for 20.03.2012. Again on 20.03.2012, plaintiff witness(s) were neither summoned nor present and accordingly, the matter was listed for said purpose for 23.06.2012. On the said date also, no plaintiff witness was present and the matter was adjourned for 19.11.2012 and last opportunity was granted to the plaintiff to lead evidence.

4. On 19.11.2012, three affidavits by way of evidence were filed by the plaintiff and the Court was also informed that defendant No. 27 had died. Thereafter further proceedings in the case took place and on 01.03.2014, case was ordered to be listed for 28.03.2014 for recording statement of plaintiff's witnesses.

5. On the said date, affidavit of one Shri Gandhrav Singh was filed and case was ordered to be listed on 11.12.2014 for the cross examination of Gandhrav Singh. It was also ordered that remaining witnesses be also summoned for the said date.

6. On 11.04.2014, again none of the plaintiff witness was present. Plaintiff was given one more opportunity to lead his evidence subject to cost of Rs.500 and the case was ordered to be listed on 3.5.2014.

7. On the said date, i.e. on 3.5.2014, evidence of the plaintiff was closed by an order of the Court and the matter was ordered to be listed on 29.5.2014 for recording the evidence of the defendant. Order dated 03.05.2014 is quoted herein-below:-

> *"No PW present. This is the last opportunity for plaintiff' evidence. This is an old case pertaining to th year 2006. Already sufficient opportunities have been granted to the plaintiff to produce his witnesses in the court. On previous date of hearing, final opportunity was granted to the plaintiff to produce his witnesses subject to costs of Rs.500/-, but despite this fact neither plaintiff nor any witness produced*

nor any steps have been taken by the plaintiff for production of his witnesses. Hence, evidence of the plaintiff is closed by the order of court. Now to come up for evidence of defendants on 29.5.2014 on taking steps within 3 days."

8. Thereafter, the matter was listed for recording of evidence of the defendants. On 20.06.2014, it was recorded that no defence evidence is to be led and the matter was accordingly listed for arguments on 11.08.2014.

9. On 11.08.2014, adjournment was sought by the parties for arguments and arguments were finally heard by the Court on 25.02.2015 and the case was listed for orders on 21.03.2015 but on 21.03.2015, the order could not be announced.

10. On 21.03.2015, the case was ordered to be listed for orders on 24.03.2015 and on the said date i.e. on 24.03.2015, for the same purpose, the case was ordered to be listed for 01.04.2015.

11. A perusal of the record of the learned trial Court demonstrates that on 01.04.2015, no judgment was announced and the following order was passed:-

"Time prayed for arguments. Allowed. Now to come up for arguments on 30.04.215."

12. Thereafter, the case was listed for arguments on 30.04.2015, 06.06.2015, 19.08.2015 and 12.10.2015. On 12.10.2015, the following order was passed:-

"Time prayed for arguments. Allowed. Now to come up for arguments on. At this stage ld. Counsel for plaintiff has moved an application u/s 151 of CPC. Copy supplied. It be registered. Now reply be filed on 20.11.2015."

13. Copy of the application filed under Section 151 of CPC is appended with the petition as Annexure P-5. Contents of the same are quoted herein-below:-

"Application under section 151 C.P.C. for providing and exhibiting all the documents attached with the plaint and recording the statement of Tilak Raj plaintiff by way of additional evidence.

Sir,

The plaintiff/applicant submits as under:-

1. That the above noted civil suit is pending in this Hon'ble Court in which today is the date of hearing.

2. That all the documents detailed in the plaint are already attached with the plaint at the time of filing this suit and placed the affidavit of Tilask Raj plaintiff in the form of examination in chief but the documents attached with the plaint have not been proved and exhibited and the plaintiff was not cross examined though his affidavit is already on the file but the evidence of the plaintiff was closed by the order of this court. The documents attached with the plaint and recording the statement of plaintiff are very relevant and material to pronounce the judgment as well as to decide the matter in controversy but the plaintiff could not prove and exhibit all the documents attached with the plaint and record his statement after the exercise of due diligence. Affidavit attached.

Prayer:-

It is, therefore, humbly prayed that all the documents attached with the plaint may please be allowed to be proved and exhibited and the statement of the plaintiff may also be allowed to be recorded by way of additional evidence by allowing this application in the interest of justice."

14. Reply to the said application was filed by the non-applicant who objected to the prayer so made in the application.

15. Vide order dated 21.02.2017, learned trial Court allowed the application and permitted the plaintiff to lead additional evidence in the form of cross examination of the witness whose affidavit has already been tendered and also for accepting the documents which are already on record. It was further mentioned in the impugned order that in case plaintiff intends to examine any or all the witnesses through the process of the Court, then the said witnesses be also summoned on filing process fee.

16. Feeling aggrieved, the defendants have filed the present petition.

17. I have heard learned Counsel for the parties and gone through the records of the case as also the order passed by the learned trial Court.

18. Order XX, Rule 1 of the Code of Civil Procedure provides that the Court, after the case has been heard, shall pronounce the judgment in an open Court, either at once, or as soon as, as may be practicable.

19. In the present case, it is not in dispute that the arguments in the case stood heard by the learned trial Court on 25.02.2015. It is also not in dispute that thereafter, the case was listed on various dates for the purpose of pronouncement of judgment and then for re-hearing. It is also not in dispute that it is at this stage that an application under Section 151 of the Code of Civil Procedure was filed by the plaintiff for leading additional evidence, which stood allowed by the learned trial Court.

20. Though the contention of learned Counsel for the defendants is that once the arguments in the suit stood heard by the learned trial Court and the judgment was reserved, learned Court below has erred in entertaining the application so fild under Section 151 of the Code of Civil Procedure for leading additional evidence, however, in my considerd view, such submission is not borne out from the records of the case because is a matter of record that after the judgment was reserved and before the same could be announced, the matter was ordered to be listed for re-hearing. Though the zimni orders passed by the learned trial Court are silent as to on whose request, the case was listed for re-hearing and re-arguments but the same was not opposed by learned Counsel for the plaintiff. Records further demonstrates that it was in the course of dates which were so granted by learned trial Court for re-hearing that plaintiff had filed the application for leading additional evidence. Thus, it is not a case wherein the application was filed by the plaintiff for leading additional evidence under Section 151 of CPC after the arguments were heard and the judgment was reserved.

21. Be that as it may, still it remains a fact that the application in issue was filed filed by the defendants praying for permission to allow him to lead additional evidence at a highly belated stage.

22. It is pertinent to mention at this stage that as far as exercise of inherent powers so vested in a Court under Section 151 of the Code of Civil Procedure for the purpose of allowing to leading additional evidence is concerned, there is no dispute that such discretion is vested in a Court and same stands recognized by the Hon'ble Supreme Court also in Salem Advocate Bar Association, T. N. Versus Union of India, (2005) 6 Supreme Court Cases 344. But then, such power can only be exercised by a Court of law in case an applicant approaches it bonafidely and where filing of such an application is not abuse of process of law.

23. It is apparent and evident from the records of the case that despite various opportunities, no evidence was led by the plaintiff except filing of the affidavit. It is not in dispute that as per the law so declared by Hon'ble Supreme Court after the deletion of the provisions of Order XVIII, Rule 17 of the Code of Civil Procedure, a Court may allow the application permitting a party to lead additional evidence under the provisions of Section 151 of the Code of Civil Procedure, but such inherent power has to be exercised by the Court cautiously after taking into consideration the facts of the case.

24. In the present case, in view of the fact that despite various opportunities, no evidence was led by the plaintiff, in my considered view, learned trial Court erred in exercising its

inherent power while allowing the application so filed by the plaintiff under Section 151 of the Code of Civil Procedure. It is not in dispute that evidence of the plaintiff in the suit was closed by an order of the learned Court, which attained finality as the same was not challenged by the plaintiff and thereafter, after affording two opportunities to the defendants to lead their evidence, the case was fixed for arguments and rehearing and at this stage the application was so filed by the plaintiff praying for permitting him to lead additional evidence.

25. As I have already quoted the contents of the application filed under Section 151 of the Code of Civil Procedure herein-above, which itself demonstrate that the said application is as cryptic and vague as it could have been. Exercise of inherent power so conferred upon a Court, as I have already discussed above, is not only to be exercised cautiously but also to be exercised prudently because the Court has not only to take into consideration the perspective of the applicant but also has to take into consideration the perceptive of the non-applicant, upon whom, rights stand accrued, on account of acts of omission on the part of the applicant. This important aspect of the matter has also not been taken into consideration by the learned trial Court while allowing the said application. No reasons have been assigned by the learned trial Court as to why it allowed the application filed to lead additional evidence at such a belated stage, save and except the fact that because affidavits stood filed by the plaintiff, therefore, it could not be said that no evidence was led by the plaintiff. While returning the said findings, learned trial Court erred in not appreciating that in the absence of said affidavits having been proved on record by the deponent of the same, they were having no evidentiary value. Therefore also, the order so passed by the learned trial Court of allowing the application so filed by the plaintiff under Section 151 of the Code of Civil Procedure is bad and not sustainable in law.

26. In view of above discussion, this petition is allowed and the impugned order dated 21.02.2017 so passed by learned Civil Judge (Sr. Division), Una District Una, is quashed and set aside.

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

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

M/s Mani Buildtech Private Limited .....Petitioner

Versus

Magic Landbase Private Limited .....Respondent

Arbitration No.32 of 2018
Date of Decision No.23.07.2018

Arbitration & Conciliation Act, 1996- Sections 11(6) and 12- Appointment of arbitrator – Neutrality Principle - Applicant seeking appointment of neutral and impartial person as arbitrator in place of person named arbitrator in agreement on ground that named Arbitrator remained architect of respondent – Respondent not disputing that named arbitrator was its architect – Held, in view of Section 12 of Act person having relation with parties or with subject matter of dispute falling in any categories specified in Schedule, is ineligible to be appointed as arbitrator – High Court appointed arbitrator of its own and asked him to enter into reference – Application allowed. (Paras-2, 3, 8 & 9)

Case referred:
Volestalpine Schienen GMBH v. Delhi Metro Rail Corporation Ltd., (2017) 4 SCC 665

For the Petitioner: Mr.Nimish Gupta, Advocate.

For the Respondent: Mr.Neeraj Gupta, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

By way of instant application filed under Section 11(6) of the Arbitration and Conciliation Act***(for short Act)***, prayer has been made on behalf of the petitioner for appointment of an Arbitrator to adjudicate the dispute *inter-se* parties.

2. Having heard learned counsel for the parties and perused the record, there appears to be no dispute as far as existence of dispute *inter se* parties as well as its resolution through Arbitration proceedings is concerned. Clause XV of Annexure A-2, i.e. Agreement provides as under:-

> "Save as provided above where decisions have as stipulated to be final and binding, in the event of any dispute(s), differences and/or claims under this Agreement or arising therefrom or related thereto including but not limited to any disputes, claims or differences as to the interpretation of any clauses of this Agreement and /or the reciprocal obligations of the parties and /or as to any amount(s) outstanding or due and/or claimed and/ or the *inter se* rights and obligations of any of the parties etc., the parties shall endeavor to resolve the issues amicably; and in case it is not possible to resolve the disputes, differences and/ or claims amicably, the same shall finally be referred to and resolved by Arbitration. All parties mutually agree that such arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996 or any amendment or re-enactment thereof by a single arbitrator. All parties agree to appoint Mr. Achal Kataria as the sole arbitrator . In the event Mr. Achal Kataria is not available Mr. Viraj Kataria will preside as the sole arbitrator. The venue of the arbitration shall be Newse Delhi and the proceedings of the arbitration shall be conducted in English Language."

3. It is also not in dispute before me that respondent while acceding to the request made on behalf of the petitioner for appointment of an Arbitrator, appointed Mr. Achal Kataria, who is otherwise, named in the aforesaid clause, as arbitrator**.** But petitioner is opposed to the appointment of above named person on the ground that in terms of amended Section 12 of the Act, neutral and impartial person can be appointed as an Arbitrator to adjudicate the dispute *inter se* parties, whereas person named in the clause not only remained Architect of respondent, but is also signatory to the agreement (Annexure A-2).

4. During the proceedings of the case, learned counsel representing the respondent, fairly admitted that as per amended Section 12 of the Act, neutral and impartial person is required to be appointed as an Arbitrator notwithstanding any agreement *inter se* parties. He further stated that as per instructions imparted to him, respondents have no objection in case arbitrator is appointed by this Court in terms of the prayer made in the present application.

5. At this stage, it would be profitable to take note of amended Section 12 of the Act.

> "12. Grounds for challenge.— (1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances ,-
>
> > a) Such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and b) Which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.

Explanation 1. –The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.

Explanation 2. – the disclosure shall be made by such person in the form specified in the Sixth Schedule.]

(2) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him.

(3) An arbitrator may be challenged only if—

(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or

(b) he does not possess the qualifications agreed to by the parties.

(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

[(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator: Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.]"

6. Bare perusal of aforesaid amended provision of Act clearly suggests that a person having direct/indirect control over the day to day affairs of the authority, cannot be appointed as an Arbitrator.

7. Hon'ble Apex Court in **Volestalpine Schienen GMBH** v. **Delhi Metro Rail Corporation Ltd**., (2017) 4 SCC 665, has held as under:-

"14. From the stand taken by the respective parties and noted above, it becomes clear that the moot question is as to whether panel of arbitrators prepared by the Respondent violates the amended provisions of Section 12 of the Act. Subsection (1) and Sub-section (5) of Section 12 as well as Seventh Schedule to the Act which are relevant for our purposes, may be reproduced below:

8. (i) for sub-section (1), the following Sub-section shall be substituted, namely

(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances—

(a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and

(b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.

Explanation 1.--The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.

Explanation 2.--The disclosure shall be made by such person in the form specified in the Sixth Schedule.;

(ii) after Sub-section (4), the following Subsection shall be inserted, namely—

(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator: Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this Sub-section by an express agreement in writing. (emphasis supplied)

THE SEVENTH SCHEDULE

Arbitrator's relationship with the parties or counsel

1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party. se

2. The arbitrator currently represents or advises one of the parties or an affiliate of one of the parties.

3. The arbitrator currently represents the lawyer or law firm acting as counsel for one of the parties.

4. The arbitrator is a lawyer in the same law firm which is representing one of the parties.

5. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration.

6. The arbitrator's law firm had a previous but terminated involvement in the case without the arbitrator being involved himself or herself.

7. The arbitrator's law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties.

8. The arbitrator regularly advises the appointing party or an affiliate of the appointing party even though neither the arbitrator nor his or her firm derives a significant financial income therefrom.

9. The arbitrator has a close family relationship with one of the parties and in the case of companies with the persons in the management and controlling the company.

10. A close family member of the arbitrator has a significant financial interest in one of the parties or an affiliate of one of the parties.

11. The arbitrator is a legal representative of an entity that is a party in the arbitration.

12. The arbitrator is a manager, director or part of the management, or has a similar controlling influence in one of the parties.

13. The arbitrator has a significant financial interest in one of the parties or the outcome of the case.

14. The arbitrator regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator or his or her firm derives a significant financial income therefrom. Relationship of the arbitrator to the dispute.

15. The arbitrator has given legal advice or provided an expert opinion on the dispute to a party or an affiliate of one of the parties.

16. The arbitrator has previous involvement in the case. Arbitrator's direct or indirect interest in the dispute.

17. The arbitrator holds shares, either directly or indirectly, in one of the parties or an affiliate of one of the parties that is privately held.

18. A close family member of the arbitrator has a significant financial interest in the outcome of the dispute.

19. The arbitrator or a close family member of the arbitrator has a close relationship with a third party who may be liable to recourse on the part of the unsuccessful party in the dispute.

Explanation 1.---The term "close family member" refers to a spouse, sibling, child, parent or life partner.

Explanation 2.--The term "affiliate" encompasses all companies in one group of companies including the parent company.

Explanation 3.--For the removal of doubts, it is clarified that it may be the practice in certain specific kinds of arbitration, such as maritime or commodities arbitration, to draw arbitrators from a small, specialized pool. If in such fields it is the custom and practice for parties frequently to appoint the same arbitrator in different cases, this is a relevant fact to be taken into account while applying the Rules set out above. (emphasis supplied)

15. It is a well known fact that the Arbitration and Conciliation Act, 1996 was enacted to consolidate and amend the law relating to domestic arbitration, inter alia, commercial arbitration and enforcement of foreign arbitral awards etc. It is also an accepted position that while enacting the said Act, basic structure of UNCITRAL Model Law was kept in mind. This became necessary in the wake of globalization and the adoption of policy of liberalisation of Indian economy by the Government of India in the early 90s. This model law of UNCITRAL provides the framework in order to achieve, to the maximum possible extent, uniform approach to the international commercial arbitration. Aim is to achieve convergence in arbitration law and avoid conflicting or varying provisions in the arbitration Acts enacted by various countries. Due to certain reasons, working of this Act witnessed some unpleasant developments and need was felt to smoothen out the rough edges encountered thereby. The Law Commission examined various shortcomings in the working of this Act and in its first Report, i.e., 176th Report made various suggestions for amending certain provisions of the Act. This exercise was again done by the Law Commission of India in its Report No. 246 in August, 2004 suggesting sweeping amendments touching upon various facets and acting upon most of these recommendations, Arbitration Amendment Act of 2015 was passed which came into effect from October 23, 2015.

16. Apart from other amendments, Section 12 was also amended and the amended provision has already been reproduced above. This amendment is also based on the recommendation of the Law Commission which specifically dealt with the issue of 'neutrality of arbitrators' and a discussion in this behalf is contained in paras 53 to 60 and we would like to reproduce the entire discussion hereinbelow:

> NEUTRALITY of ARBITRATORS
>
> 53. It is universally accepted that any quasi-judicial process, including the arbitration process, must be in accordance with principles of natural justice. In the context of arbitration, neutrality of arbitrators, viz. their independence and impartiality, is critical to the entire process. 54. In the Act, the test for neutrality is set out in Section 12(3) which provides
>
> > 12(3) An arbitrator may be challenged only if—
> >
> > (a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality..."
>
> 55. The Act does not lay down any other conditions to identify the "circumstances" which give rise to "justifiable doubts", and it is clear that there can be many such circumstances and situations. The test is not whether, given the circumstances, there is any actual bias for that is setting the bar too high; but, whether the circumstances in question give rise to any justifiable apprehensions of bias.

56. The limits of this provision has been tested in the Indian Supreme Court in the context of contracts with State entities naming particular persons/designations (associated with that entity) as a potential arbitrator. It appears to be settled by a series of decisions of the Supreme Court (See Executive Engineer, Irrigation Division, Puri v. Gangaram Chhapolia MANU/SC/0001/1983 : 1984 (3) SCC 627; Secretary to Government Transport Department, Madras v. Munusamy Mudaliar MANU/SC/0435/1988 : 1988 (Supp) SCC 651; International Authority of India v. K.D. Bali and Anr. MANU/SC/0197/1988 : 1988 (2) SCC 360; S. Rajan v. State of Kerala MANU/SC/0371/1992 : 1992 (3) SCC 608; Indian Drugs & Pharmaceuticals v. IndoSwiss Synthetics Germ Manufacturing Co. Ltd. MANU/SC/0139/1996 : 1996 (1) SCC 54; Union of India v. M.P. Gupta (2004) 10 SCC 504; Ace Pipeline Contract Pvt. Ltd. v. Bharat Petroleum Corporation Ltd. MANU/SC/7273/2007 : 2007 (5) SCC 304) that arbitration agreements in government contracts which provide for arbitration by a serving employee of the department, are valid and enforceable. While the Supreme Court, in Indian Oil Corporation Ltd. v. Raja Transport (P) Ltd. MANU/SC/1502/2009 : 2009 8 SCC 520 carved out a minor exception in situations when the arbitrator "was the controlling or dealing authority in regard to the subject contract or if he is a direct subordinate (as contrasted from an officer of an inferior rank in some other department) to the officer whose decision is the subject matter of the dispute", and this exception was used by the Supreme Court in Denel Proprietary Ltd. v. Govt. of India, Ministry of Defence MANU/SC/0010/2012 : AIR 2012 SC 817 and Bipromasz Bipron Trading SA v. Bharat Electronics Ltd. MANU/SC/0478/2012 : (2012) 6 SCC 384, to appoint an independent arbitrator Under Section 11, this is not enough.

57. The balance between procedural fairness and binding nature of these contracts, appears to have been tilted in favour of the latter by the Supreme Court, and the Commission believes the present position of law is far from satisfactory. Since the principles of impartiality and independence cannot be discarded at any stage of the proceedings, specifically at the stage of constitution of the arbitral tribunal, it would be incongruous to say that party autonomy can be exercised in complete disregard of these principles-even if the same has been agreed prior to the disputes having arisen between the parties. There are certain minimum levels of independence and impartiality that should be required of the arbitral process regardless of the parties' apparent agreement. A sensible law cannot, for instance, permit appointment of an arbitrator who is himself a party to the dispute, or who is employed by (or similarly dependent on) one party, even if this is what the parties agreed. The Commission hastens to add that Mr. PK Malhotra, the ex officio member of the Law Commission suggested having an exception for the State, and allow State parties to appoint employee arbitrators. The Commission is of the opinion that, on this issue, there cannot be any distinction between State and non State parties. The concept of party autonomy cannot be stretched to a point where it negates the very basis of having impartial and independent adjudicators for resolution of disputes. In fact, when the party appointing an adjudicator is the State, the duty to appoint an impartial and independent adjudicator is that much more onerous-and the right to natural justice cannot be said to have been waived only on the basis of a "prior" agreement between the parties at the time of the contract and before arising of the disputes.

58. Large scale amendments have been suggested to address this fundamental issue of neutrality of arbitrators, which the Commission believes is critical to the

functioning of the arbitration process in India. In particular, amendments have been proposed to Sections 11, 12 and 14 of the Act.

59. The Commission has proposed the requirement of having specific disclosures by the arbitrator, at the stage of his possible appointment, regarding existence of any relationship or interest of any kind which is likely to give rise to justifiable doubts. The Commission has proposed the incorporation of the Fourth Schedule, which has drawn from the Red and Orange lists of the IBA Guidelines on Conflicts of Interest in International Arbitration, and which would be treated as a "guide" to determine whether circumstances exist which give rise to such justifiable doubts. On the other hand, in terms of the proposed Section 12(5) of the Act and the Fifth Schedule which incorporates the categories from the Red list of the IBA Guidelines (as above), the person proposed to be appointed as an arbitrator shall be ineligible to be so appointed, notwithstanding any prior agreement to the contrary. In the event such an ineligible person is purported to be appointed as an arbitrator, he shall be de jure deemed to be unable to perform his functions, in terms of the proposed explanation to Section 14. Therefore, while the disclosure is required with respect to a broader list of categories (as set out in the Fourth Schedule, and as based on the Red and Orange lists of the IBA Guidelines), the ineligibility to be appointed as an arbitrator (and the consequent de jure inability to so act) follows from a smaller and more serious sub-set of situations (as set out in the Fifth Schedule, and as based on the Red list of the IBA Guidelines).

60. The Commission, however, feels that real and genuine party autonomy must be respected, and, in certain situations, parties should be allowed to waive even the categories of ineligibility as set in the proposed Fifth Schedule. This could be in situations of family arbitrations or other arbitrations where a person commands the blind faith and trust of the parties to the dispute, despite the existence of objective "justifiable doubts" regarding his independence and impartiality. To deal with such situations, the Commission has proposed the proviso to Section 12(5), where parties may, subsequent to disputes having arisen between them, waive the applicability of the proposed Section 12(5) by an express agreement in writing. In all/all other cases, the general Rule in the proposed Section 12(5) must be followed. In the event the High Court is approached in connection with appointment of an arbitrator, the Commission has proposed seeking the disclosure in terms of Section 12(1) and in which context the High Court or the designate is to have "due regard" to the contents of such disclosure in appointing the arbitrator. (emphasis supplied)

17. We may put a note of clarification here. Though, the Law Commission discussed the aforesaid aspect under the heading "Neutrality of Arbitrators", the focus of discussion was on impartiality and independence of the arbitrators which has relation to or bias towards one of the parties. In the field of international arbitration, neutrality is generally related to the nationality of the arbitrator. In international sphere, the 'appearance of neutrality' is considered equally important, which means that an arbitrator is neutral if his nationality is different from that of the parties. However, that is not the aspect which is being considered and the term 'neutrality' used is relatable to impartiality and independence of the arbitrators, without any bias towards any of the parties. In fact, the term 'neutrality of arbitrators' is commonly used in this context as well.

18. Keeping in mind the afore-quoted recommendation of the Law Commission, with which spirit, Section 12 has been amended by the Amendment Act, 2015, it is manifest that the main purpose for amending the provision was to provide for neutrality of arbitrators. In order to achieve this, Sub-section (5) of Section 12 lays down that notwithstanding any prior agreement to the contrary, any person whose relationship with the parties or counsel or the subject matter of the dispute falls under any of the

categories specified in the Seventh Schedule, he shall be ineligible to be appointed as an arbitrator. In such an eventuality, i.e., when the arbitration Clause finds foul with the amended provisions extracted above, the appointment of an arbitrator would be beyond pale of the arbitration agreement, empowering the court to appoint such arbitrator(s) as may be permissible. That would be the effect of non-obstante Clause contained in Sub-section (5) of Section 12 and the other party cannot insist on appointment of the arbitrator in terms of arbitration agreement."

8. It is quite apparent from the reading of aforesaid judgment rendered by Hon'ble Apex Court that main purpose for amending the provision is to provide for neutrality of the arbitrators. Hon'ble Apex Court has categorically held that in order to achieve neutrality as referred above, Sub-section (3) of Section 12 lays down that notwithstanding any prior agreement to the contrary, any person having relation with the parties or with the subject matter of dispute falling in any of the categories specified in Schedule, shall be ineligible to be appointed as arbitrator.

9. Consequently, in view of detailed discussion made herein above, as well as law laid down by Hon'ble Apex Court, present petition is allowed. Mr. Justice Anil Dev Singh, Former Chief Justice of Rajasthan High Court, F-10, Geetanjali Enclave, New Delhi-110017 is appointed as an arbitrator to adjudicate upon the dispute *inter se* parties. He is requested to enter into reference within a period of two weeks from the date of receipt of a copy of this order. It shall be open for the learned arbitrator to determine his own procedure with the consent of the parties. Otherwise also, entire procedure with regard to fixing of time limit for filing pleadings or passing of award stands prescribed under Sections 23 and 29A of the Act.

10. Though, clause providing for arbitration, clearly suggest that arbitration proceedings are to take place at Delhi, however it shall be open for the above named Arbitrator to hold proceedings at place other than Delhi with the consent of the parties.

11. Needless to say, award shall be made strictly as per provisions contained in Arbitration & Conciliation Act. A copy of this order shall be made available to the learned arbitrator named above, by the Registry of this court within one week, enabling him to take steps for commencement of the arbitration proceedings within stipulated period.

The petition stands disposed of.

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

Onkar Chand .....Petitioner.

Versus

Dharam Pal .....Respondent.

Cr. Revision No. 297 of 2017
Date of Decision: 24.07.2018.

Negotiable Instruments Act, 1881- Section 138- Dishonour of Cheque – Cheque, whether for consideration? Trial Court convicting accused for offence under Section 138 of Act – Additional Sessions Judge upholding conviction and sentence in appeal – Revision against – Accused taking plea that dishonoured cheque was issued as security in favour of one 'N' and not for discharge of any liability existing in favour of complainant – Accused however admitting his signatures on cheque in question – Not taking any such plea in statement recorded under Section 313 Cr.P.C. that it was a security cheque – 'N' was not examined in defence – Held, accused failed to discharge presumption that cheque was issued for consideration in complainant's favour – Other

ingredients of offence under Section 138 of Act also stand proved - Conviction and order of sentence upheld. (Paras -5, 12, 13 & 17)

Cases referred:
M/s Laxmi Dyechem V. State of Gujarat, 2013(1) RCR (Criminal)
State of Kerala Vs. Puttumana Illath Jathavedan Namboodiri" (1999) 2 Supreme Court Cases 452
Krishnan and another Versus Krishnaveni and another, (1997) 4 Supreme Court Case 241

For the petitioner: Mr. Ajay Sharma, Advocate.
For the respondent: Mr. Jagat Pal, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Instant criminal revision petition filed under Section 397 read with Section 401 of the Cr.PC., is directed against the judgment dated 28.8.2017, passed by the learned Additional Sessions Judge, Kullu, H.P., in Criminal Appeal No.26 of 2016, affirming the judgment/order of conviction dated 17.5.2016 and 19.5.2016, passed by the learned Judicial Magistrate, Ist Class, Manali, District Kullu, H.P., in Criminal Complaint No. 51-1/2013/55-II/2013, whereby the learned trial Court while holding petitioner-accused guilty of having committed offence punishable under Section 138 of the Negotiable Instruments Act (in short the "Act"), convicted and sentenced him to undergo simple imprisonment for a period of one year and to pay compensation to the tune of Rs. 7,00,000/-

2. Succinctly, fact necessary for adjudication of the present case are that respondent-complainant preferred a complaint against the petitioner-accused, under Section 138 of the Act, in the Court of learned Judicial Magistrate, Ist Class, Manali, District Kullu, H.P., alleging therein that he and petitioner-accused were having cordial relations with each other and as such, on the askance of the accused, complainant lent him a sum of Rs. 6,00,000/- on 10.4.2012. Petitioner-accused assured the complainant that he will return the aforesaid amount on demand by the complainant. Accused with a view to discharge his liability, issued a cheque bearing No. 019601 dated 16.12.2012, amounting to Rs. 6,00,000/-, drawn at Bank of India, Branch Manali, in favour of the complainant, however fact remains that on its presentation, same was returned with remarks "insufficient funds". Complainant after having received memo dated 24.12.2012, got served him with legal notice dated 29.12.2012, calling upon him to make the payment good within the stipulated period. Since petitioner-accused failed to make payment good within the stipulated period despite issuance of legal notice, respondent/complainant was compelled to initiate proceedings before the competent Court of law under Section 138 of the Act.

3. Learned trial Court on the basis of material adduced on record by the respective parties held the petitioner-accused guilty of having committed offence under Section 138 of the Act and accordingly, sentenced him as per the description given herein above.

4. Being aggrieved and dis-satisfied with the judgment of conviction recorded by the learned trial Court, the petitioner-accused preferred an appeal under Section 374(3) Cr.PC before the learned Additional Sessions Judge, Kullu, H.P., however, fact remains that the learned Additional Sessions Judge, vide judgment dated 28.8.2017, dismissed the appeal preferred by the petitioner-accused, as a result of which the impugned judgment passed by the learned trial Court, came to be upheld. In the aforesaid background, present petitioner-accused approached this Court in the instant proceedings, seeking therein his acquittal after setting aside the judgments of conviction recorded by the courts below.

5. Mr. Ajay Sharma, Advocate, representing the petitioner, while referring to the impugned judgment of conviction recorded by the courts below vehemently argued that same are

not based upon correct appreciation of evidence and as such, same deserve to be quashed and set-aside. Mr. Sharma, while making this Court to peruse the evidence adduced on record by the respective parties made a serious attempt to persuade this Court to agree with his contention that courts below have not appreciated the evidence in its right perspective, as a consequence of which, erroneous findings have come to the fore to the detriment of the petitioner-accused, who has been falsely implicated by the complainant. Mr. Sharma, further argued that it stands duly proved on record that cheque in question was issued as security and not towards discharge of any lawful liability and as such, both the courts below have fallen in grave error while holding petitioner-accused guilty of having committed offence punishable under Section 138 of the Act.

6. Per contra, Mr. Jagat Pal, learned counsel representing the respondent-complainant, supported the impugned judgment of conviction recorded by the court below and argued that there is no illegality and infirmity in the judgments of conviction recorded by the courts below and as such, same requires no intervention of this Court. Mr. Pal further argued that keeping in view of the concurrent finding of fact and law recorded by the courts below, there is very limited scope of interference of this Court. He further argued that while exercising revisionary power, this Court cannot re-appreciate the evidence and as such, impugned judgments passed by the courts below, being legally correct, need to be upheld by this Court. Mr. Pal further argued that since factum with regard to the issuance of cheque and signature thereupon of the accused are not in dispute, courts below rightly held him guilty of having committed offence under Section 138 of the Act and as such, present petition deserves to be dismissed being devoid of any merits.

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

8. Before ascertaining the correctness of the statements having been made by the learned counsel representing the parties vis-à-vis impugned judgments passed by the courts below, it may be noticed that this Court on the askance of the learned counsel representing the petitioner, repeatedly adjourned the matter to enable the petitioner-accused to settle the matter amicably inter-se him as well as respondent, but despite repeated opportunities, accused failed to pay the amount in terms of judgment passed by the learned trial Court. Mr. Ajay Sharma, learned counsel representing the petitioner-accused, fairly stated that despite there being written communication sent to the petitioner-accused, he is not coming forward to impart instructions and as such, matter may be disposed of on the merits.

9. Having carefully perused the material available on record, this Court finds it difficult to agree with Mr. Ajay Sharma, that courts below while holding the accused guilty of having committed offence punishable under Sections 138 of the Act mis-read, mis-represented and mis-construed the evidence available on record, rather this Court is convinced and satisfied that both the courts below have dealt with each and every aspect of the matter very meticulously and have arrived at correct conclusion that complainant has successfully proved that cheque in question was issued by the accused towards discharge of his liability and not as security.

10. In the case at hand, factum with regard to the issuance of cheque and signatures thereupon of accused, is not in dispute because accused in his statement recorded under Section 313 Cr.PC, though denied the case of the complainant, but stated that cheque in question was not given to the complainant for discharge of any legal liability and the complainant has mis-used the blank cheque, but no evidence in this regard is led on record by the accused. Similarly, complainant has successfully proved on record that since accused was well known to him and they had cordial relations with each other, he lent a sum of Rs. 6,00,000/- to him on 10.4.2012, who in turn with a view to discharge his liability, issued the cheque in question amounting to Rs. 6,00,000/- drawn at Bank of India, Branch Manali, in favour of the complainant. Signature of the accused on the cheque Ext.CW1/B is not disputed by the accused and as such, controversy, if any, which is required to be decided by this Court, is whether cheque in question was issued by the accused in discharge of his legal liability or same was issued towards security.

11. Careful perusal of statement made by the accused under Section 313 Cr.PC nowhere suggests that accused took defence that cheque in question was issued as security, but it appears that counsel representing him in the court of law made an attempt to carve out a defence for the accused that cheque in question was issued as security. The complainant, who examined himself in support of his case tendered his evidence by way of Affidavit Ext.CW1/A and deposed that accused approached him to lend some amount in order to meet his personal and domestic expenses and he on the demand of the accused, provided Rs. 6,00,000/- to him. He further deposed that accused with a view to discharge his liability issued cheque Ext.CW1/B in his favour, but when the cheque was presented in the bank for collection, same was dishonoured on account of insufficient funds. He further stated that he after having received memo from the bank served the accused with the legal notice calling upon him to make the payment good within the stipulated period. In his cross-examination, he categorically admitted that he is having 20-30 bighas of land and his annual income is more than rupees 7-8 lacs. It has also come in his cross-examination that he knows the accused for last 7-8 years and no other complaint of similar nature was ever filed by him before the Court. It has also come in his cross-examination that he advanced a loan to the accused in the month of April, 2012 in the presence of one Shri Nimat Ram. He denied the suggestion put to him that cheque in question was issued as security to Nimat Ram. Careful perusal of statement/deposition having been made by the complainant proves beyond reasonable doubt that cheque (Ext.CW1/B) was issued by the accused towards discharge of his lawful liability not as security.

12. Otherwise also as has been observed above, accused never took a defence that cheque in question was issued as security rather, he in his statement recorded under Section 313 Cr.PC categorically stated that he had not issued any cheque and his black cheque has been mis-used by the accused, which statement of him, is not corroborated by any evidence. Though, suggestion was put to the complainant that cheque was issued as security to the Nimat Ram, but there is no explanation rendered on record that why person namely Nimat Ram was not produced as witness by the accused in support of his aforesaid claim. Person namely Nimat Ram could be the best person to depose before this Court with regard to the issuance of cheque as security as claimed by the accused.

13. Leaving everything aside, since there is no dispute with regard to the issuance of cheque and signatures thereupon of the accused, statutory presumption as contemplated under Sections 118 and 139 of the Act is available in favour of the complainant, who otherwise by leading cogent and convincing evidence successfully proved on record factum with regard to the issuance of cheque Ext.CW1/B by the accused towards discharge of his lawful liability. Section 118 of the Act clearly provides that it shall be presumed that, until the contrary is proved the cheque was drawn for consideration, whereas Section 139 of the Act stipulates that unless the contrary is proved, it shall be presumed that holder of the cheque receives the cheque for the discharge of whole or part of any debt or liability.

14. Complainant has successfully proved that he having received cheque Ext.CW1/B presented the same in the bank, but on its presentation, same was returned vide memo Ext.CW1/C and Ext.CW1/D. It also stands proved on record that the complainant after having received memo served the accused with legal notice CW1/E, which fact has been otherwise not disputed by the accused. Ext.CW1/F and Ext.CW1/G i.e. postal receipt and acknowledgments prove the factum with regard to the receipt of legal notice Ext.CW1/E by the accused. No doubt, presumption as available to the complainant being holder of cheque as envisaged under Sections 118 and 139 of the Act, is rebuttable but in the case at hand, accused has not been able to put up probable defence that he had not issued cheque towards discharge of any lawful liability, rather cheque in question was issued as security. There is nothing led on record by the accused that cheque issued by him was not towards the discharge of legal liability, rather same was blank cheque issued as security. To the contrary, defence set-up by the accused while cross-examining the complainant is totally contrary to the stand taken by him in his statement recorded under Section 313 Cr.PC, wherein he stated that his blank cheque has been mis-used by the accused

and as such, Courts below have rightly returned the finding that in case cheque was mis-used, complaint ought to have been filed by the accused before the competent authority against the complainant, who allegedly misused his cheque, but interestingly, there is no evidence worth the name led on record by the accused in this regard. The Hon'ble Apex Court in ***M/s Laxmi Dyechem V. State of Gujarat***, 2013(1) RCR (Criminal), has categorically held that if the accused is able to establish a probable defence which creates doubt about the existence of a legally enforceable debt or liability, the prosecution can fail. To raise probable defence, accused can rely on the materials submitted by the complainant. Needless to say, if the accused/drawer of the cheque in question neither raises a probable defence nor able to contest existence of a legally enforceable debt or liability, statutory presumption under Section 139 of the Negotiable Instruments Act, regarding commission of the offence comes into play. It would be profitable to reproduce relevant paras No. 23 to 25 of the judgment herein:-

> ***"23. Further, a three judge Bench of this Court in the matter of Rangappa vs. Sri Mohan [3] held that Section 139 is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies the strong criminal remedy in relation to the dishonour of the cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. The Court however, further observed that it must be remembered that the offence made punishable by Section 138can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose money is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the defendant accused cannot be expected to discharge an unduly high standard of proof". The Court further observed that it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is all preponderance of probabilities.***
>
> ***24. Therefore, if the accused is able to establish a probable defence which creates doubt about the existence of a legally enforceable debt or liability, the prosecution can fail. The accused can rely on the materials submitted by the complainant in order to raise such a defence and it is inconceivable that in some cases the accused may not need to adduce the evidence of his/her own. If however, the accused/drawer of a cheque in question neither raises a probable defence nor able to contest existence of a legally enforceable debt or liability, obviously statutory presumption under Section 139 of the NI Act regarding commission of the offence comes into play if the same is not rebutted with regard to the materials submitted by the complainant.***
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> ***25. It is no doubt true that the dishonour of cheques in order to qualify for prosecution under Section 138 of the NI Act precedes a statutory notice where the drawer is called upon by allowing him to avail the opportunity to arrange the payment of the amount covered by the cheque and it is only when the drawer despite the receipt of such a notice and despite the opportunity to make the payment within the time stipulated under the statute does not pay the amount, that the said default would be considered a dishonour constituting an offence, hence punishable. But even in such cases, the question whether or not there was lawfully recoverable debt or liability for discharge whereof the cheque was issued, would be a matter that the trial court will have to examine having regard to the evidence adduced before it keeping in view the statutory***

presumption that unless rebutted, the cheque is presumed to have been issued for a valid consideration. In view of this the responsibility of the trial judge while issuing summons to conduct the trial in matters where there has been instruction to stop payment despite sufficiency of funds and whether the same would be a sufficient ground to proceed in the matter, would be extremely heavy."

15. Having carefully gone through the evidence adduced on record by the respective parties, this Court sees no reason to interference with the well reasoned judgments passed by the courts below, which otherwise are based upon the correct appreciation of evidence adduced on record by the respective parties. Moreover, this Court has a very limited jurisdiction under Section 397 of the Cr.PC, to re-appreciate the evidence, especially, in view of the concurrent findings of fact and law recorded by the courts below. In this regard, reliance is placed upon the judgment passed by Hon'ble Apex Court in case ***"State of Kerala Vs. Puttumana Illath Jathavedan Namboodiri"*** *(*1999) 2 Supreme Court Cases 452, wherein it has been held as under:-

"In its revisional jurisdiction, the High Court can call for and examine the record of any proceedings for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order. In other words, the jurisdiction is one of supervisory jurisdiction exercised by the High Court for correcting miscarriage of justice. But the said revisional power cannot be equated with the power of an appellate court nor can it be treated even as a second appellate jurisdiction. Ordinarily, therefore, it would not be appropriate for the High Court to re-appreciate the evidence and come to its own conclusion on the same when the evidence has already been appreciated by the Magistrate as well as Sessions Judge in appeal, unless any glaring feature is brought to the notice of the High Court which would otherwise tantamount to gross miscarriage of justice."

16. True it is that the Hon'ble Apex Court in ***Krishnan and another*** *Versus* ***Krishnaveni and another,*** **(1997) 4 Supreme Court Case 241**; has held that in case Court notices that there is a failure of justice or misuse of judicial mechanism or procedure, sentence or order is not correct, it is salutary duty of the High Court to prevent the abuse of the process or miscarriage of justice or to correct irregularities/incorrectness committed by inferior criminal court in its judicial process or illegality of sentence or order, but Mr. Sharma learned counsel representing the accused has failed to point out any material irregularity committed by the courts below while appreciating the evidence and as such, this Court sees no reason to interfere with the well reasoned judgments passed by the courts below.

17. Consequently, in view of the discussion made herein above as well as law laid down by the Hon'ble Apex Court, this Court sees no valid reason to interfere with the well reasoned finding recorded by the courts below, which otherwise, appears to be based upon proper appreciation of evidence available on record and as such, same is upheld. Present petition fails and dismissed accordingly. Order dated 13.10.2017, passed by this Court, whereby sentence imposed by the court below was suspended, is hereby vacated and the petitioner is directed to surrender himself before the learned trial Court forthwith to serve the sentence as awarded by the learned trial court.

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

Rajinder Singh Chawla .....Petitioner
Versus
Vivek Ahluwalia ...Respondent

CMPMO No. 416 of 2016
Reserved on 16.07.2018
Decided on: 24.07.2018

Indian Evidence Act, 1872- Section 73- Hand writing - Comparison of – Permissibility – Plaintiff filing suit for recovery and relying upon certain documents purportedly executed by defendant and his father, in support of his claim – Application of plaintiff for directing defendant and his father to give specimen handwriting for comparison with document in question, dismissed by trial Court – Petition against – Held, purpose of Section 73 of Act is to bring truth before Court – Plaintiff specifically stated on oath of said documents written by defendant and his father-cum-SPA – Further held, comparison of these documents with admitted writings necessary – Petition allowed – Order set aside – Matter remanded - Defendant and his father/SPA directed to give specimen handwriting before Trial Court for comparison. (Paras-9 to 10)

For the petitioner: Mr. Rajesh Kumar Verma, Advocate.
For the respondent: Mr. Ajay Kumar Sood, Senior Advocate with Mr. Dheeraj K. Vashisht, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present petition, under Article 227 of the Constitution of India, has been maintained by the petitioner, against the order dated 23.09.2016, passed by learned Civil Judge (Jr. Div.) Dehra, District Kangra, H.P., in Civil Suit, RBT No. 342/II/10, whereby an application filed by the petitioner, under Section 73 of the Indian Evidence Act, has been dismissed.

2. Briefly stating facts giving rise to the present petition are that the petitioner/plaintiff (hereinafter to be called as "the plaintiff") filed a suit for recovery of Rs. 38,000/- and Rs. 13,300/- as interest @ 12 % per annum w.e.f. 07.04.2007 to 02.03.2010 and future interest @ 12% per annum against the respondent/defendant (hereinafter to be called as "the defendant"). During the pendency of the suit an application, under Section 73 of the Indian Evidence Act has been moved by the plaintiff for comparison of handwriting of the defendant and his special attorney/father Sh. Ved Parkash Ahluwalia, on the ground that as the documents Mark X, Y and Z are bearing writing of the defendant and his father/special attorney, the same deserves to be got compared with their handwriting for effective adjudication of the controversy of the case.

3. The defendant, by filing reply contested the application on the ground that the same is not maintainable, as comparison of handwriting of defendant and his father with the disputed handwriting has no bearing on the outcome of the case. Lastly, a prayer for dismissal of the application alongwith costs has been made by the defendant.

4. Learned Court below, vide order dated 23.09.2016, dismissed the application of the plaintiff, hence the present petition.

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

6. Learned counsel for the petitioner has argued that the order passed by the learned Court below is without appreciating the facts, as well as without the application of

mind, thus the same deserves to be set aside and the present petition deserves to be allowed. On the other hand, learned Senior Counsel appearing on behalf of the respondent has argued that the learned Court below has rightly dismissed the application filed by the petitioner, as he has failed to bring anything on record which could suggest that as to how the comparison of handwriting is essential to decide the controversy in the suit.

7. To appreciate the arguments of learned counsel for the parties, this Court has gone through the record in detail.

8. Section 73 of the Indian Evidence Act reads as under:

> "**73. Comparison of signature, writing or seal with others admitted or proved**.- In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing, or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing, or seal has not been produced or proved for any other purpose.
>
> The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person.

9. It has come in the statement of PW-1 that the documents X, Y and Z bear the writing of the defendant and his father/special attorney and plaintiff wants to get those documents compared. The purpose of Section 73 of the Indian Evidence Act is to bring truth before the Court. Accordingly, the right of the party to bring truth before the Court cannot be taken away for mere technicalities. There is nothing on record to conclude that the application has been made with some ulterior motive. The plaintiff only wants to get handwriting of the defendant and his father compared with their admitted handwriting.

10. This Court finds that if the prayer of the petitioner/plaintiff is allowed, the same will propagate the justice. Accordingly, the present petition is allowed and impugned order is set aside by directing the defendant/respondent and his father/special attorney to give their handwritings in the learned Court below for comparison with the disputed entries in the documents Mark X, Y and Z to meet the ends of justice. Parties through their counsel are directed to appear before the learned Court below on **13th August, 2018**.

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

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

Sukha @ Sawrup Chand .....Appellant.
Versus
State of H.P. .....Respondent

Cr. A. No. 459 of 2008
Decided on: 24.07.2018

Code of Criminal Procedure, 1973- Section 386(b)(i)– Judgment of acquittal – Benefit of, by co-accused not appealing against judgment of conviction – Held, a co-accused convicted with help of same evidence is also entitled to be acquitted of charges framed against him if other co-accused convicted on same evidence stands acquitted by higher Court, though he had not filed any appeal against his conviction – Appellant, 'J', 'L', 'S' and 'P' were convicted and sentenced by Trial Court

for offences punishable under Sections 147 and 302 and 452 read with 149 of Penal Code – Appeals of 'J', 'L', 'S' and 'P' were allowed by High Court and their convictions were set aside – Appeals of State dismissed by Supreme Court – However, appeal of appellant remained pending in High Court – Held, conviction of appellant was also based on same evidence, and as conviction of other accused was set aside by High Court and their acquittal was upheld by Supreme Court, appellant was entitled for its benefit. (Paras- 9, 10 and 15)

For the appellant: Mr. Vinay Thakur and Ms. Rubeena Bhatt, Advocates.
For the respondent: Mr. Narinder Guleria and Mr. Vikas Rathore, Addl. A.Gs with Mr. Kunal Thakur, Dy. A.G.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)

One of convicts, Sukha @ Sawrup Chand has preferred the present appeal against his conviction along-with his co-convicts Jeevan Kumar, Lekh Raj, Shaitan Singh @ Ravinder Singh and Puran Chand for the commission of offence punishable under Sections 147,149,452 and 302 IPC. He along-with his co-convicts was consequently sentenced to undergo life imprisonment for the offence punishable under Section 302 IPC and to pay fine of Rs.25,000/- each. They all were sentenced to undergo simple imprisonment for one year for the offence punishable under Section 147 and rigorous imprisonment for five years for the offence punishable under Section 452 IPC and to pay fine of Rs.5,000/-.

2. His co-convicts had preferred different appeals against this very judgment, which is under challenge in the present appeal. Puran Chand and Shaitan Singh @ Ravinder Singh had filed Criminal Appeal No. 561 of 2004, whereas Lekh Raj Criminal Appeal No. 16 of 2005 and Jeevan Kumar Criminal Appeal No. 17 of 2005. All the three appeals were heard and decided by a common judgment, passed in Criminal Appeal No. 561 of 2004, dated 20.3.2008 by a Co-ordinate Bench of this Court on re-appraisal of the given facts and circumstances and also the evidence available on record. All the three appeals were allowed and the above-said convicts acquitted of the charges framed against each of them. Even the appeals preferred by the State of Himachal Pradesh in the Apex Court, registered as Criminal Appeal(s) No. 1368-1370/2009 also stand dismissed vide judgment dated 27.04.2015. Meaning thereby that the co-convicts of the appellant-convict herein, have been acquitted of the charge and set free.

3. In the present appeal preferred by convict Sukha @ Sawrup Chand (hereinafter to as 'accused No.1') through jail, he has sought the findings of conviction and sentence recorded against him by learned trial Court on the grounds *inter-alia* that the evidence has been misread and mis-construed. The incriminating circumstances relied upon were never put to him in his statement recorded under Section 313 of the Code of Criminal Procedure. The confessional statement allegedly managed by the investigating agency during the course of investigation by inducement, threat and promise has erroneously been relied upon while recording findings of conviction by learned trial Court.

4. The facts, in a nut shell, are that during the night intervening 9-10th April, 2003 around 12.00' O' Clock accused No. 1 accompanied by his co-accused Jeevan Kumar, Lekh Raj Shaitan Singh @ Ravinder Singh and Puran Chand have allegedly assaulted deceased Balbir Chand in his house situated in village Halehar with dandas, who succumbed to the injuries dealt with dandas by the accused persons and died. PW-1 Vijay Kumar watching programme on television came outside for urination and on attracted to an alarm ' **Bachao-Bachao'** being raised from the side of the house of deceased Balibir Chand rushed there. He noticed that the deceased was caught hold by accused No.1 being beaten up by his co-accused with dandas. PW-3 Ravi Dutt son of deceased Balbir Chand was crying "**Dady ko Maar Diya, Maar Diya".** On hearing cries of PW-3, accused persons threw Balbir Chand in the courtyard and ran away. In the meanwhile, Jyoti Prakash (PW-5) and his wife Swarna Kumari, Sanjay (PW-2) and Madhu also

arrived at the place of occurrence. On noticing blood oozing out of the injuries sustained by deceased Balbir Chand, they lifted him from the courtyard and made him to lay inside the room on floor. He was dead by that time. Vijay Kumar (PW-1) informed Gurdial Singh (PW-6), Ward Member and Raghubir Singh (PW-8), Pradhan of local Gram Panchayat, Amroh. The Pradhan visited the spot and thereafter returned to his house in village Amroh and informed the police of Police Chowki, Terrace. The Police arrived at the spot around 8.00 a.m. and recorded statement Ext. PW-1/A of Vijay Kumar (PW-1) under Section 154 of the Code of Criminal Procedure at 11.45 a.m on 10.04.2003. On the basis of statement Ext. PW-1/A, FIR Ext. PW-10/A was registered. The inquest papers were prepared and the dead body was sent for autopsy. The photographs Ext. PW-18/A-1 to Ext. PW-18/A-10 were also taken. The recovery of two sticks Ext. P-1 and Ext. P-2 also effected from the spot and the site plan Ext. PW-6/C prepared.

5. PW-4 Dr. Jatinder Saxena on conducting autopsy of the dead body has found the cause of death 'shock suffered due to the injuries on skull' of the deceased. The post-mortem report Ext. PW-4/A was also collected. On the basis of disclosure statement Ext. PW-7/C allegedly made by accused Lekh Raj, sticks were recovered from nearby bushes and taken into possession vide recovery memo Ext. PW-7/A. Another accused Puran Chand had also made disclosure statement Ext. PW-7/B and got recovered another danda, which was taken into possession vide recovery memo Ext. PW-7/E. The blood stained earth was also taken from the spot vide memo Ext. PW-5/A. A pair of shoes having label of "Gray Mark Wood-land" allegedly of accused No. 1 was also taken into possession vide recovery memo Ext. PW-16/E. The motive to kill the deceased was old enmity on account of accused persons having administered beatings to Ravi Dutt (PW-3) about two months back and in retaliation thereto, deceased Balbir Chand had administered beatings to accused No. 1 and his co-accused Shaitan Singh.

6. The Police on completion of the investigation has filed the challan. The charges against at all the accused persons were framed under Sections 147, 149, 452 and 302 IPC. The material prosecution witnesses are the complainant Vijay Kumar (PW-1), Sanjay Kumar (PW-2), Ravi Dutt (PW-3) and Jyoti Prakash (PW-5), the so called eye witnesses. The remaining prosecution witnesses are formal as PW-4 Dr. Jatinder Saxena has conducted autopsy and issued post-mortem report Ext. PW-4/B. He has proved the inquest papers Ext. PW-4/A. PW-6 Gurdial Singh is the Ward Member, whereas , PW-8 Raghubir Singh, the then Pradhan of Gram Panchayat, Amroh. They arrived at the scene of occurrence after the incident. PW-7 Julfi Ram is the witness to the disclosure statement qua the recovery of sticks allegedly made by the accused Lekh Raj and Shaitan Singh and Sticks Ext. P-4 to Ext. P-6 were taken into possession vide recovery memo Ext. PW-7/A. PW-9 Arvind Nath was working as Surveyor in H.P.P.W.D, Dadasiba at the relevant time. He had prepared the site plan Ext. PW-9/A of the place of occurrence. PW-10 Hem Raj on receipt of statement Ext. PW-1/A of PW-1 Vijay Kumar has registered the FIR Ext. PW-10/A in Police Station. Dehra. PW-11, The then SHO, Police Station, Dehra had prepared the charge sheet and filed the same in the Court. PW-12 Head Constable Dharam Paul of Police Post, Terrace has partly investigated the case, whereas PW-13 Head Constable Onkar Chand had proved the rapats daily diary Ext. PW-13/A and Ext. PW-13/B. PW-14 HHC Tarloki Prakash had taken the case property to Forensic Science Laboratory, Bharari vide RC No. 42/21 and deposited there, PW-15. Bir Singh has proved the disclosure statement Ext. PW-7/B and recovery of sticks thereby vide memo Ext. PW-7/D. PW-16 ASI Hoshiar Singh has partly investigated the case. Similarly, PW-17 ASI Karam Chand has also investigated the case partly. PW-18 Satish Kumar is the photographer who has proved the photographs Ext. PW-18/1 to Ext. PW-18/10 and the negatives thereof Ext. PW-18/11 to Ext. PW-18/19.

7. On the other hand, the accused persons in their statements recorded under Section 313 of the Code of Criminal Procedure have denied the prosecution case either being wrong or for want of knowledge. According to them, they were implicated in this case falsely due to enmity. Accused No. 1 Sukha @ Sawrup Chand, appellant in the present appeal, while answering question No. 29 has admitted that the statement Ext. P-Z was made by him and recorded by learned Chief Judicial Magistrate, Kangra at Dharamshala. In reply to question No.

33, It is submitted that he had quarreled earlier with deceased twice and even on that day also he had sic.. made by mistake and he was killed.

8. Learned trial Judge relying upon the statements of above-said eye witnesses and also the so called confessional statement Ext. P-Z made by accused No. 1 allegedly before learned Chief Judicial Magistrate, Kangra at Dharamshala and also the link evidence having come on record by way of testimony of official witnesses including remaining witnesses formal in nature, has convicted and sentenced all the accused persons, in the manner, as already pointed out, at the very out set.

9. Mr. Vinay Thakur and Ms. Rubeena Bhatt, learned defence counsel while inviting our attention to the common judgment of this Court reported in **Latest HLJ 2008(HP) 791,** passed in three different appeals filed by the co-convicts of accused-convicts Sukha and also that of the Hon'ble Apex Court in Criminal Appeal(s) No. 1368-1370/2009, whereby the appeals preferred against the judgment supra stand dismissed and they all have been acquitted of the charges has strenuously contended that the appellant -convict Sukha, convicted with the help of same evidence is also entitled to be acquitted of the charges framed against him. In order to substantiate his claim reliance has also been placed on the judgment of the Apex Court in **Md. Sajjad @ Raju @ Salim V State of West Bengal, Criminal Appeal No. 1953 of 2010, decided on 06.01.2017,** in which it has been held that the non-appealing accused-convict is also entitled to the benefit of doubt granted to similarly situated co-convicts. Nothing to the contrary was brought to our notice to controvert the arguments so addressed and the case law cited on behalf of the accused No.1 Sukha, appellant herein.

10. As noticed supra, a Co- ordinate Bench of this Court in *Puran Chand's* case cited supra has discussed the evidence having come on record by way of testimonies of so called eye witnesses and has held that the same is not cogent and reliable and sufficient to prove the prosecution case beyond all reasonable doubt. Vijay Kumar (PW-1) was not on the spot at the time when the accused allegedly started beating the deceased with dandas because he came there on hearing the alarm 'Bachao Bachao'. Being dead hours of night, how he could have stated with all exactness that it is the accused alone who were the assailants and had assaulted the deceased with dandas. Raghubir Singh (PW-8), the Pradhan on being informed by PW-1 and Gurdial Singh (PW-6) did not rush to the spot at once and rather told them, that being night hours, he could reach on the spot only in the morning. He therefore, visited the sport at 6.30 a.m. As per evidence having come on record, he went to his native place at Village Amroh and called the police of Police Post, Terrance therefrom. As is apparent from daily diary Ext. PW-13/A recorded by PW-13 Dharam Pal at the instance of PW-8, the Pradhan Gram Panchayat, assailants belonging to village Kraint came to village Amroh around 12.00 mid night and murdered deceased Balbir Chand there. Since as per version of PW-1 Vijay Kumar, the assailants were the accused persons and as it is he accompanied by the Ward Member give information qua the incident to PW-8, the Pradhan, therefore, it can reasonably be believed that he may have disclosed the names of assailants also to the latter. Raghubir Singh (PW-8) the Pradhan as such, should have disclosed the names of the assailants to the police while reporting the matter over telephone.

11. There is another glaring discrepancy in the prosecution story i.e the place of occurrence, which as per prosecution case is Padar- Pragpur, however, in Ext. PW-13/A, the name of place of occurrence finds mentioned as village Amroh. In the site plan prepared by the investigating Officer also, the place of alleged occurrence does not find mentioned. Interestingly enough, all the accused persons are resident of Village Halehar, whereas, as per Ext. PW-13/A, the unknown assailants were of village Kraint. The recording of statement Ext. PW-1/A of PW-1 Vijay Kumar has also been delayed because the same was recorded at 11.40. a.m. whereas the police had arrived on the spot at 7.40 a.m. No plausible explanation is forthcoming to this aspect of the matter also. In this view of the matter there being no hand of accused Sukha in the murder of deceased, he deserves to be acquitted of the charge.

12. Now if coming to the testimony of Ravi Dutt (PW-3), the minor son of deceased Balbir Chand, he was sleeping with his father in the same room. The door was locked. During the mid night at 12 'O' Clock, his father woke-up and switched on the light of the room and also that the courtyard. On opening the door, he saw the accused persons there with lathis in their hands. They attacked the deceased and he was taken outside the room to the courtyard. The deceased shouted 'Bachao Bachao' and he apprehended danger to his life did not went out and rather kept on staying at the door as well as cried for help '***Bachao Mere Dady Ko Maar Diya***'. It is on hearing the alarm he raised, Vijay Kumar (PW-1), Swarna, Jyoti (PW-5), Madhubala and Sanjay (PW-2) came there. On seeing them, the accused persons fled away. The witnesses arrived there lifted his father from the courtyard and kept him inside the room. However, as per version of PW-1 on hearing alarm '***Bachao Bachao***' he cried for help and on hearing him Jyoti Prakash (PW-5), Sawarna Devi, Sanjay (PW-2) and Madhu came there. Therefore, these four persons came after PW-1 reached on the spot. How PW-2 Sanjay could have come simultaneously with Jyoti Prakash (PW-5) and Madhu on hearing the noise '***Maro Maro***' because his house was situated at a distance of 600 meters from the house of the deceased. It may have taken 5-10 minutes to reach on the spot. Above all, it is not the prosecution case that the 'Lalkara' 'Maro Maro' was given by the accused or anyone else. Otherwise also, as per his version when he reached on the spot, he noticed the assailants fleeing away from that place. Jyoti Prakash (PW-5) woke-up on hearing the noise of sticks during the mid night. He noticed few persons were beating the deceased with sticks and when he arrived there along with Swarana, Madhu, Vijay Kumar (PW-1) and Sanjay (PW-2), the said persons fled away from the spot. He woke-up on hearing the noise of sticks. Nothing of the sort has come in his statement recorded under Section 161 of the Code of Criminal Procedure. The dead body of Balbir Chand was lying in a pool of blood inside the room. In case it was lifted by the above said witnesses from the courtyard, it is not known as to why their clothes not stained with blood. Therefore, on this score, also, the prosecution story is palpably false.

13. There is no plausible and dependable evidence to show as to when deceased breathed his last. As per medical evidence having come on record by way of testimony of PW-4 Dr. Jitender Saxena, probable time between injury and death was 1 to 3 hours, whereas time between death and post-mortem 12 to 24 hours. Irrespective of it, about the exact time of death, an opinion could have been formed as to when deceased, had taken last meal. The entries against column Nos. 4, 5 and 6 of post- mortem report record the remarks 'normal'. Therefore, there is not mention in the post-mortem report qua the digestive and non-digestive contents in the small or big intestines. On the other hand, as per version of PW-3 when his father was brought inside during the night, he was breathing. This witness came to know about his death only in the morning at 7.30 a.m., when he woke-up from sleep. Therefore, link evidence of also not suggestive of that deceased Balbir Chand was murdered in the manner as claimed by the prosecution. Interestingly enough, had the deceased been beaten-up in the presence of PW-3 Ravi Dutt and brought almost dead to the room, how the said witness could have uninterruptedly slept during that night. However, as per his version after the alleged incident he went to his bed and enjoyed sound sleep. He woke-up in the morning on his usual time. Therefore, the so called eye witness count having come on record is not suggestive of that there is hand of accused Sukha in the murder of deceased Balbir Chand.

14. Learned trial Judge has relied upon the so called confessional statement Ext. P-Z. Firstly, there is no such exhibited document in the document part of the trial Court record. We could lay our hand on a statement in challan part, recorded by learned Chief Judicial Magistrate, Kangra at Dharmashala on 02.09.2003. The same, however, does not bear P-Z as exhibit mark thereon. It has come in this document that accused Sukha quarreled with deceased Balbir Chand and his brothers Kishori, Sanjay and Vijay on 09.04.2003 at Piplu. The time was 7.00 - 8.00 and they all were lashed with sticks. During quarrel, it could not be ascertained as to who administered beatings to whom. The lathi of *Shahtoot* tree in the hand of deceased Balbir Chand though was snatched by him, however, he could not hold the same in his hand. He had given punch blow to deceased Balbir Chand and left for his house. He came to on the following morning that Balbir Chand had died. The Chief Judicial Magistrate, who has recorded this

statement has not been examined nor cited as witness. Nothing is there in the prosecution evidence including the statement of Investigation Officer(s) examined by the prosecution that confession was made by accused Sukha and recorded by learned Chief Judicial Magistrate. Therefore, the present in a case where no such incriminating circumstance has appeared in the prosecution evidence. In the statement recorded under Section 313 of the Code of Criminal Procedure, the only incriminating circumstances appeared in the prosecution evidence are required to be put to an accused. In that case in hand, irrespective of there being no such incriminating circumstances appeared in the prosecution evidence, question Nos 27, 28 and 29 that accused Sukha had written a letter to the Court from judicial lock-up on 08.08.2003, whereby expressed his desire to confess his guilt, on 01.09.2003, when brought to the Court at Dharamshala, he made the statement before Chief Judicial Magistrate, Kangra at Dharamshala despite warning that any such statement can be used against him and that subsequently learned Chief Judicial Magistrate had recorded his confessional statement Ext. P-Z were put to him. True it is that the questions so put him have been admitted as correct, however, the facts remain that when no such incriminating circumstances appeared in the prosecution evidence, no such questions could have been put to accused Sukha nor answers he had given thereto while recording his statement under Section 313 of the Code of Criminal Procedure can be used against him. Therefore, the findings to the contrary recorded by learned trial Court being illegal does not stand to the test of legal scrutiny.

15. In view of the what has been said hereinabove, coupled with the factum of the co-accused-convicts 4 in Nos, were acquitted by this Court vide common judgment passed in Puran Chand case cited supra which even has been affirmed by the Hon'ble Apex Court also vide order dated 27.4. 2015 passed by Criminal Appeals Nos. 1368-1370/2009, accused convict Sukha @ Sawrup Chand is also entitled to the benefit of doubt and consequently acquittal. The impugned judgment and order qua him, is therefore, quashed and set aside and he is also acquitted of the charge framed against him under Section 147,149,302 and 452 IPC he had set free forthwith if not required in any other case.

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

Nikhil ....Petitioner

Versus

State of Himachal Pradesh ....Respondent

Cr. MP (M) No. 500 of 2018
Decided on: 25.07.2018

Code of Criminal Procedure, 1973- Section 439- Regular bail- Grant of – Accused-petitioner alongwith others went to Dhaba and allegedly picked up quarrel with 'P' , its owner regarding quality of food – He allegedly fired pistol shot at 'P' and 'H' leading to death of 'P' and serious injuries to 'H' – High Court found direct involvement of petitioner–accused in case – In view of nature and gravity of accusation, severity of punishment and likelihood of accused to tamper with prosecution evidence, High court refused to grant bail – Petition dismissed. (Paras, 3, 5 and 9)

Cases referred:

Prasanta Kumar Sarkar vs. Ashis Chatterjee and another, (2010) 14 SCC 496
Manoranjana Sinh alias Gupta vs. Central Bureau of Investigation (2017) 5 SCC 218
Dataram Singhvs. State of Uttar Pradesh and another,(2018) SCC 22

For the petitioner : Mr. R.K. Bawa, Senior Advocate with Mr. Jeevesh Sharma, Advocate.

For the Respondent : Mr. Ashwani Sharma and Mr.P.K. Bhatti, Additional Advocate Generals.

For the complainant : Mr. Anand Sharma and Mr. Karan Sharma, Advocates.
ASI Rattan Singh, Police Post Subathu, Police Station Dharampur, District Solan, H.P. present alongwith the records.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge

The present bail application, under Section 439 of the Code of Criminal Procedure, is maintained by the petitioner for releasing him on bail, in case F.I.R. No. 68 of 2016, dated 27.06.2016, under Sections 302, 307, 147, 148 and 149 of the Indian Penal Code and Section 25-54-59 of the Arms Act, registered at Police Station Dharampur, District Solan, H.P.

2. As per the petitioner, he was not at all involved in the offence and he, being innocent, has been falsely implicated in the present case. The petitioner has further averred that on 26.06.2016, he alongwith his family members came to Dharamshala and Shimla. At about 4:30-5:00 p.m., while en-route back to their homes, when they stopped at Urban *Dhaba* at Sanawara for taking refreshment, they had an altercation with the service boy and nephew of the deceased qua the quality of the food and suddenly, the deceased, with an intention to kill, fired a gun shot upon them and he also sustained injury in the said occurrence. As per the petitioner, he is young man, having newly wedded wife and as he is in judicial custody for last more than one year and nine months, he may be released on bail.

3. Police report stands filed. As per the prosecution, on 26.06.2016 complainant Taran Jeet Kaur, got her statement recorded with the Police, under Section 154 Cr.P.C. in PGI Chandigarh, wherein she has stated that her husband, Paramjeet Singh (deceased) was running a leased *dhaba* at Lower Sanawara, Solan and nephew of her husband, Hansdeep Singh was also looking after the work in the *dhaba*. On 26.06.2016, around 5:00 p.m., a group of 10-15 people stopped at their *dhaba* and ordered bread toast, maggie etc., however an altercation over the quality of food, took place between the complainant party and the people of the group. During the said altercation a boy from the group fired shots from the pistol and husband of the complainant received bullet shot injuries. Thereafter, the aforesaid group ran away in a tempo traveler. The husband of the complainant was declared dead at CHC, Dharampur and Hansdeep Singh, who also sustained gun shot injuires on his chest, was referred to PGI, Chandigarh. The complainant in her complaint alleged that the people of the aforesaid group murdered her husband and appropriate action be taken against them. Accordingly, an FIR, under the aforesaid Sections was registered against the accused persons and on 27.06.2016, at 6:15 p.m. they were arrested from Parwanoo.

4. As per the prosecution, there is sufficient evidence qua involvement of the accused persons in the occurrence and it has been prayed that as the nature of the crime is heinous, the present bail application be dismissed.

5. Heard. Learned Senior Counsel appearing on behalf of the petitioner has argued that the petitioner is innocent and he also received injuries in the occurrence, as the complainant party fired upon him, qua which, a cross FIR was also their against them. He has further argued that the other co-accused have already been released on bail and as the petitioner is a young man and is behind the bars for more than one year and nine months, no fruitful purpose will be served by keeping him behind the bars for an unlimited period, as such, the present bail application may be allowed and the petitioner may be released on bail. In support of his arguments, learned Senior Counsel has placed reliance upon the judgment rendered by the Hon'ble Supreme Court in **Prasanta Kumar Sarkar** vs. **Ashis Chatterjee and another**, (2010) 14 SCC 496. The relevant extract of the judgment is as under:

"9. We are of the opinion that the impugned order is clearly unsustainable. It is trite that this Court does not, normally, interfere with an order passed by the High Court granting or rejecting bail to the accused. However, it is equally incumbent upon the High Court to exercise its discretion judiciously, cautiously and strictly in compliance with the basic principles laid down in a plethora of decisions of this Court on the point. It is well settled that, among other circumstances, the factors to be borne in mind while considering an application for bail are:

(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."

Learned Senior Counsel also placed reliance upon the judgment rendered by the Hon'ble Supreme Court in **Manoranjana Sinh alias Gupta** vs. **Central Bureau of Investigation** (2017) 5 SCC 218. The relevant extract of the judgment is as under:

"16. This Court in Sanjay Chandra v. CBI, also involving an economic offence of formidable magnitude, while dealing with the issue of grant of bail, had observed that deprivation of liberty must be considered a punishment unless it is required to ensure that an accused person would stand his trial when called upon and that 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 they duly tried and found guilty. It was underlined that the object of bail is neither punitive nor preventive. This Court sounded a caveat 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 a conduct whether an accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson. It was enunciated that since the jurisdiction to grant bail to an accused pending trial or in appeal against conviction is discretionary in nature, it has to be exercised with care and caution by balancing the valuable right of liberty of an individual and the interest of the society in general. It was elucidated that the seriousness of the charge, is no doubt one of the relevant considerations while examining the application of bail but it was not only the test or the factor and that grant or denial of such privilege, is regulated to a large extent by the facts and circumstances of each particular case. That detention in custody of undertrial prisoners for an indefinite period would amount to violation of Article 21 of the Constitution was highlighted.

Learned Senior Counsel further placed reliance upon the judgment rendered by the Hon'ble Supreme Court in **Dataram Singh**vs. **State of Uttar Pradesh and another**,(2018) SCC 22. The relevant extract of the judgment is as under:

"2. 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.

3. 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 investigation 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 of 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 436-A in the Code of Criminal Procedure, 1973"

6. On the other hand, learned Additional Advocate General has argued that there is a direct evidence against the petitioner and if he is released on bail, he will flee from justice and also tamper with the prosecution evidence, as such, the present bail application be dismissed.

7. Mr. Anand Sharma, Advocate, for the complainant has argued that the petitioner is involved in a serious offence and the husband of the complainant has been killed by him and in case, he is released on bail, he may tamper with the prosecution evidence and advance threatenings to the prosecution witnesses. Learned counsel for the complainant, In support of his arguments placed reliance upon the judgment rendered by the Hon'ble Supreme Court in **Saint Asha Ram** vs. **State of Rajasthan**, 2017 STPL 3185 SC.

8. This Court after perusing the record carefully, finds that as per prosecution story, the petitioner is directly involved in this case. The judgment cited by the learned Senior Counsel in **Prasanta Kumar Sarkar** vs. **Ashis Chatterjee and another's** case is not applicable to the facts of the present case as in the present case taking into consideration the nature and gravity of the accusation, severity of the punishment in the event of conviction and danger of the accused absconding or fleeing, if petitioner released on bail, no case is made out for grant of bail. Similarly, the judgment cited by the learned Senior Counsel for the petitioner in **Manoranjana Sinh alias Gupta** vs. **Central Bureau of Investigation's** case is also not applicable to the facts of the present case, as at this stage, balance lies in favour of rejecting the bail because the petitioner is in a position to tamper with the prosecution evidence and there is every likelihood that he will flee from justice. As far as **Dataram Singh** vs. **State of Uttar Pradesh and another's** case is concerned, the facts of the present case are totally different, as in this case the petitioner was arrested at the time of investigation and when there are every chances of his to tamper with the prosecution evidence, it cannot be said that he will not tamper with the prosecution evidence when trial is going on. On the other hand, the judgment cited by the learned counsel for the complainant is fully applicable to the facts of the present case, as in case the petitioner is released on bail, be may advance threatens to the prosecution witnesses.

9. Accordingly, after taking into consideration the nature and gravity of the accusation, severity of the punishment in the event of conviction and danger of the accused absconding or fleeing, if he is released on bail and his likelihood to tamper with the prosecution

evidence, this Court finds that there is no ground to exercise judicial discretion in favour of the petitioner at this moment, thus the present petition is dismissed, being devoid of any merits.

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

Oriental Insurance Company .....Appellant
Versus
Brij Lal and another .....Respondents

FAO No. 244 of 2011
Decided on: 25.07.2018

Workmens Compensation Act, 1923- Section 22- **Code of Civil Procedure, 1908-** Section 11- Resjudicata - whether applicable in proceedings before Commissioner? – Petitioner's application for compensation was dismissed by Motor Accidents Claims Tribunal, Mandi – Thereafter, application filed by petitioner's wife for compensation was also dismissed in default by Workmens Compensation Commissioner, Sadar Mandi on ground that said Authority had no territorial jurisdiction – Then petitioner filed application before Commissioner at Sarkaghat, which was allowed – Appeal by insurer - Arguing that application before Commissioner was barred by res judicata - Held, earlier applications were not decided on merit(s)- So, principle of res judicata, has no applicability in subsequent proceedings – Appeal of Insurer dismissed. (Para-9)

For the appellant: Mr. Pritam Singh Chandel, Advocate.
For the respondent: Mr. Lovneesh Kanwar, Advocate for respondent No.1.
Mr. Umesh Kanwar, Advocate for respondent No.2.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)

Award dated 23.12.2010 passed by learned Commissioner (SDM) under Workmen Compensation Act, Sarkaghat, District Mandi, H.P. in an application under Section 22 of the Act, registered as case No. 4/06, is under challenge in the present appeal.

2. Respondent No. 1 herein is the claimant. He was driving truck No. HID-4318 of respondent No. 2 Ramesh Chand. On 12.03.1998, the truck while on its way from Dehar to Kala Amb loaded with Khair wood met with an accident near tax barrier at Nahan, District Sirmour, H.P. The retaining wall of the road collapsed when the petitioner was giving pass to another vehicle. As a result thereof, the truck fell down and the petitioner received multiple injuries, grievous in nature on his person including head injury. He remained hospitalized at Nahan and PGI Chandigarh for about one year. In this accident, he has received 100% disability, permanent in nature. At the time of accident, he was being paid Rs. 4,000/- by way of his salary. The truck involved in the accident was admittedly insured with appellant-insurance Company, respondent No. 2 before learned Commissioner below. The petitioner, as such, has claimed the compensation to the tune of Rs. 15,00,000/-.

3. Respondent No. 2 herein owner of the truck when put to notice has contested the claim petition on the ground of maintainability and also being time barred. On merits, he has admitted that the petitioner was engaged as Driver by him with his truck No. HID-4318 and also that the truck met with an accident and the petitioner–claimant received injuries on his person. The monthly salary according to respondent-owner was Rs.300/-.

4. Respondent No. 2, appellant herein has also raised the preliminary objections qua limitation and the petition is hit by the principle of *res-judicata*. The claim of the petitioner was denied by the appellant.

5. Rejoinder was also filed.

6. On the pleadings of the parties following issues were framed:-

1.Whether the present petition is within limitation? OPR.

2.Whether the petition is barred by principle of res-judicata? OPR.

3.Whether the petition has been drafted under the proforma of WC Act? OPR

4.Whether the injured was workman within the purview of W.C. Act and injury sustained during the course of his employment and incidental to employment? OPP.

5.Whether the sustained injury has caused loss to the earning capacity of the petitioner and to what extent? OPP.

6. Relief.

7. Learned Commissioner below after taking on record the evidence and hearing the parties on both sides has condoned the delay as occurred in filing the claim petition while answering issues No. 1 to 3 against the respondents, whereas, issues No. 4 and 5 in favour of the petitioner and has awarded a sum of Rs.4,70,152/- as compensation to the petitioner-claimant vide impugned award dated 23.12.2010.

8. The legality and validity of the impugned award has been questioned on various grounds, however, mainly that the previously instituted petitions under the Motor Vehicles Act and under the Workmen Compensation Act having been dismissed, the claim petition filed subsequently was hit by the principle of *res-judicata*. Also that, the petition being time barred and there being no application filed for condonation of delay, should have not been entertained.

9. On hearing learned counsel representing the parties and going through the record, true it is that the petitioner initially instituted the claim petition before learned Motor Accident Claims Tribunal, Mandi. The same however, was dismissed in default, as is apparent from the order dated 26.03.1999 passed by learned Motor Accident Claims Tribunal (II), Mandi, certified copy whereof is available on record. Therefore, there is no adjudication on merits in the said claim petition. True it is that the wife of the petitioner-claimant Smt. Narmada has filed another application on 17.12.1999 before Commissioner (SDM), under Workmen Compensation Act, Sadar, Mandi, H. P. The same was also dismissed vide order dated 21.06.2002 on the ground of jurisdiction as in the opinion of learned Commissioner, it is the workmen Compensation Commissioner, Sarkaghat had the jurisdiction to entertain, try and decide the same. Certified copy of order whereof is also available on record. It is thus seen that there is no adjudication on merits. After dismissal of the claim petition filed by the wife of the petitioner on 21.06.2002, this petition was presented before learned Commissioner under Workmen Compensation Act, Sadar, Sub-Division, Mandi, H. P. on 17.04.2003. The same , however, was subsequently transferred vide order dated 24.10.2006 to the Commissioner under Workmen Compensation Act, Sarkaghat, District Mandi,H. P. vide order dated 24.10.2006. The same, therefore, came to be re-registered at Sarkaghat on 7.11.2006. It is , therefore, seen that the claim petition initially was filed in the Court of learned Motor Accident Claims Tribunal (I), Mandi, H. P. on 18.08.1998. The same was dismissed in default vide order dated 26.03.1999. The subsequent petitioner under workmen Compensation Act was filed by the wife of the petitioner on 17.12.1999. The same was dismissed for want of jurisdiction on 21.06.2012. The present petition thereafter came to be instituted on 17.04.2003. There is no question of the same being time barred. The claim petition is also not hit by the principle of *res-judicata* because there is no adjudication of the claim of the petitioner on merits and rather the two claim petitions earlier instituted were dismissed on technical grounds i.e. in default amendment and for want of jurisdiction. Otherwise also, by way of amendment in the amended claim petition, the explanation was given for delay as occurred and

learned Commissioner below has allowed the amendment in the petition. Therefore, the point urged on behalf of insurer-respondent No.2 that the petition being time barred, should have not been entertained, has also no legs to stand. Therefore, neither the claim petition is time barred nor the same is hit by the principle of *res-judicata*. Learned Commissioner below has decided such questions on appreciation of the pleadings of the parties and also the material available on record in its right perspective.

10. For all the reasons discussed hereinabove, there is no merit in this appeal and the same is accordingly dismissed. Pending application(s), if any, shall also stand disposed of.

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

Smt. Mansa Devi (since deceased) through her legal representatives Sh. Parkash Chand & ors. ...Petitioners.

Versus

Sh. Krishan Pal Sood (since deceased) through his legal representatives Smt. Anchala Devi Sood & ors. ...Respondents.

CR No. 27 of 2006.
Reserved on: 19.7.2018.
Decided on: 26.7.2018.

Himachal Pradesh Urban Rent Control Act, 1987- Sections 14(2)(i), 14(2)(ii) and 14(3)(c)- Eviction suit – Petitioner/landlord filing eviction suit against tenant (R1) on grounds of arrears of rent, subletting of premises in favour of R2 and reconstruction and rebuilding – Rent Controller allowing petition only on ground of arrears of rent – Appellate Authority, in appeal, additionally ordering eviction on ground of reconstruction subject to sanctioning of building plan by competent authority and obtaining consent of another landlord 'M' "owning" top floor of same building – Revision against – Tenant submitting that sanctioned plan was not filed in evidence and 'M' was also not examined to prove his consent – On facts, High Court found that building though was old but it required "repairs" only – Petitioner had no sanctioned building plan 'M' landlord of upper portion of same building not examined to prove his consent – Eviction order was based upon happening of certain events in future – Held, such order is not executable – Revision allowed – Order of Appellate Authority set aside. (Paras-13 & 14)

For the petitioners	Mr. G.D. Verma, Senior Advocate with Mr. B.C. Verma, Advocate.
For the respondents	Mr. K.D. Sood, Senior Advocate with Mr. Rajnish K. Lall, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, *J.*

Aggrieved by the judgment dated 12.1.2006 passed by learned Appellate Authority (F), Shimla in an appeal under Section 24 of the H.P. Urban Rent Control Act, 1987, hereinafter referred to as 'Act' in short, registered as CMA No. 18-S/14 of 05/03 the petitioners who are tenants, hereinafter referred to as respondents-tenants, have preferred the present revision petition with a prayer to quash and set aside the same.

2. The respondent, hereinafter referred to as petitioner-landlord, is the owner of house No. 97, Pursharthi Basti, Lower Bazar Shimla. One Shri Bahadur Singh, predecessor-in-interest of the respondents-tenants was inducted as tenant in ground floor comprising of two rooms, hereinafter referred to as the 'demised premises', of this building at the monthly rental of

Rs.96/-. Said Shri Bahadur Singh expired and on his death respondent-tenant Mansa Devi his widow occupied the demised premises. She allegedly is now residing in her village and the demised premises subleted by her to respondent No. 2. The respondents-tenants are also stated to be in arrears of rent as the rent has not been paid on and w.e.f. 1.1.1990. The demised premises being 120 years old is stated to be in dilapidated condition. The CGI sheets used to roof the building have outlived its life. The same even have got rotten at different places. The wooden work has also decayed and the foundation of the building is also damaged. The building, as such, is bonafidely required for reconstruction on old line without touching the other portion thereof. Therefore, in order to reconstruct the damaged portion of the building, the eviction of the respondents therefrom is required.

3. The respondents-tenants when put to notice have contested the petition on the grounds, inter alia, that the same is not maintainable, bad for non-joiner of necessary parties as well as lacking material particulars. Also that, even no enforceable cause of action exists in favour of the petitioner-landlord and he rather is estopped on account of his acts, deeds and conduct from filing the petition.

4. On merits, it is denied that respondent No. 1 had subleted the demised premises in favour of respondent No. 2. she rather is residing herself in the building in question. So far as respondent No. 2 she being the daughter-in-law of deceased Bahadur Singh, the original tenant, is residing in the demised premises since long. She being a family member as such is not a trespasser nor the demised premises can be said to be subleted to her by respondent No. 1. It is denied that they are in arrears of rent as according to them the rent @ Rs.96/- per annum stands paid up to date. It is denied that the building is in dilapidated condition and as such, the same is bonafidely required by the petitioner-landlord for reconstruction. The same rather is stated to be in good condition. It is the petitioner-landlord who had failed to carry out annual repairs and, as such, minor repairs required in the building can only be carried out without getting the same vacated and even they are also ready and willing to cooperate with the repair works if started on the spot. The petition, as such, was sought to be dismissed.

5. On the pleadings of the parties, learned Rent Controller has framed the following issues:

1. Whether the respondent is in arrears of rent, if so, at what rate and what is the amount due? OPA
2. Whether the respondent No. 1 has sublet the premises to respondent No. 2? OPA
3. Whether the premises are bonafide required by the petitioner for reconstruction, which cannot be carried out without vacating the premises? OPA.
4. Whether the petition is not maintainable? OPR
5. Whether the petitioner has no cause of action? OPR
6. Whether the petition is bad for min-joinder and non-joinder of parties? OPR
7. Whether the petitioner is estopped from filing the petition as alleged? OPR.
8. Relief.

6. The parties on both sides have produced the evidence. On the completion of the record and hearing the parties on both sides, learned Rent Controller has decided issue No. 1 in favour of the petitioner-landlord, whereas the remaining issues i.e. issues No. 2 and 3 against him and issues No. 4 to 7 against the respondents. The petition, as such, was partly allowed and the eviction of the respondents-tenants ordered only on the ground of arrears of rent with further observation that in case the arrears towards rent are deposited by them within one month from that date, they will not be evicted therefrom.

7. In appeal learned Appellate Authority had concluded that the building is bonafidely required by the petitioner-landlord for reconstruction which cannot be done without evicting the respondents-tenants from the demises premises. However, the execution of the

judgment to this effect was ordered subject to the sanction of plan by the competent authority and after taking into consideration the consent of Shri M.P. Gupta to whom top floor of the building was sold and as such was owner thereof.

8. The respondents-tenants have questioned the legality and validity of the judgment passed by learned Appellate Authority before this Court on the grounds, inter-alia, that the learned Lower Appellate Court has committed material irregularities and illegalities while deciding the appeal. The well reasoned judgment passed by learned Rent controller has been interfered without any justifiable reasons. The impugned judgment otherwise is stated to be not acceptable as neither the petitioner-landlord is having the sanctioned plan nor Mr. M.P. Gupta was examined to show his readiness and willingness to vacate the top floor of the building for the purpose of its reconstruction. The findings recorded by learned Appellate Court are stated to be vitiated.

9. On hearing Mr. G.D. Verma, Senior Advocate assisted by Mr. B.C. Verma, Advocate on behalf of the respondent-tenants, whereas Mr. K.D. Sood, Senior Advocate assisted by Mr. Rajnish K. Lall, Advocate on behalf of the landlord and also going through the entire record, the only point need determination in this petition is as to whether learned lower Appellate court was justified in holding that the building is bonafidely required for reconstruction or not.

10. The building is three storeyed in one side, whereas two storeyed in other side. The demised premises is in that side of the building in which it is three storeyed i.e. ground floor, first floor and top floor. The respondents-tenants are occupying the ground floor of the building whereas first floor is being used by the petitioner as his godown. The top floor has been sold by him to one Shri M.P. Gupta, who is residing there. The rebuilding of that portion of the building in which the demised premises situated is required.

11. In order to prove the age of the building besides the averments in the petition that the same is approximately 120 years of age, the petitioner while in the witness box as PW1 has also stated so. This part of his statement cannot be believed to be true because he has not constructed the same and rather purchased in the year 1989. The witness PW2 H.S. Bisht, he examined as an expert is retired Executive Engineer. As per his version, the building is approximately 100 years old. The material used in the building as per his version stands decayed and the same is now in dilapidated condition. The same according to him need repair which cannot be carried out without getting that portion of the building vacated. It is seen that not only the petitioner but the expert PW2 have stated only about the repairs of the building though they have stated about its reconstruction also but by way of passing reference in their respective statements.

12. Admittedly, Mr. M.P. Gupta, is the owner of top floor of that portion of the building, the repair/reconstruction whereof is required to be carried out. Admittedly the repair/re-construction is only possible in case the building is got vacated. It is the own admission of the petitioner-landlord that no petition for vacation of the top floor by said Shri M.P. Gupta has been filed by him. True it is that in his examination-in-chief it is stated that said Shri M.P. Gupta during negotiation with him has assured that he will vacate the top floor in the event of reconstruction of that portion of the building. The own statement of the petitioner, however, cannot be believed as a gospel truth. As a matter of fact, had M.P. Gupta been in favour of vacation of the top floor of the building in his possession the petitioner-landlord would have produced him and examined as a witness in this petition. In such a situation, the petitioner-landlord has failed to make out a case that the building is in dilapidated condition and the same can only be restored to its good condition only by way of reconstruction.

13. On the other hand his own case as emerged from the perusal of his own statement and that of PW2 the expert witness only the repair of the building is required. Such even is the case of the respondents-tenants also as according to them the repair of the building is due since long as the petitioner-landlord is not repairing the same annually. According to them, in case the repair of the building is required they are ready to cooperate with him.

14. Being so, the petitioner-landlord has failed to make out a case that the building is in dilapidated condition and that the same is bonafidely required for reconstruction and rebuilding. Learned Lower Appellate Court, as such, has erred in law and also on facts while holding to the contrary. Otherwise also, the judgment passed by learned lower Appellate Court based upon the happening of certain events i.e. the sanction of the plan by the competent authority and on consideration of the undertaking, if any, given by Shri M.P. Gupta aforesaid qua vacation of top floor of the building is not executable. As a matter of fact, petitioner-landlord if need be may carryout repairs of the building in question and for that the respondents-tenants are also ready and willing to cooperate with him.

15. For all the reasons hereinabove, this petition is allowed. Consequently, the impugned judgment is quashed and set aside.

16. Pending application(s), if any, shall also stand disposed of.

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

Sh. Sita Ram. ...Petitioner.

Versus

Sh. K.P. Sood & ors. ...Respondents.

Civil Revision No. 71 of 2012.
Reserved on:18.7.2018.
Decided on: 26.7.2018.

Himachal Pradesh Urban Rent Control Act, 1987- Sections 14(2)(i) and 14(3)(c)- Eviction suit on grounds of arrears of rent and reconstruction – Proof of – Petitioner-landlord wanted to rebuild structure with modern amenities – Also alleging that tenant was in arrears of rent – Tenant pleading that more floors with modern amenities can be added to existing structure without evicting him – Rent Controller dismissing eviction petition on both counts – Appellate Authority reversing order of Rent Controller and ordering eviction on ground of rebuilding and reconstruction – On facts, building was found quite old (40 years) - Modern amenities, lacking in said structure - Steps for obtaining building sanction were taken by landlord – Held, order of Appellate Authority is not improper – However, eviction order made subject to right of re-entry of tenant – Further, construction activity of landlord also directed to be time bound – Petition disposed of – Order modified. (Paras-10 to 13)

For the petitioner : Mr. Romesh Verma, Advocate.
For the respondents : Mr. Ashok Sood, Advocate.
Nemo for respondents No. 2 to 4.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, *J.*

Petitioner Sita Ram, hereinafter referred to as respondent No.1-tenant is aggrieved by the judgment dated 17.5.2012 passed by learned District Judge (Appellate authority), Shimla under the Urban Rent Control Act, Shimla, whereby on reversal of the order dated 30.5.2011, passed by learned Rent Controller in Rent Petition No. 31/2 of 2006, the eviction petition has been allowed and the eviction of respondent No. 1-tenant ordered from the demised premises on the ground of the same required bonafidely by respondent No. 1, hereinafter referred to as the petitioner-landlord, for reconstruction and rebuilding.

2. The petitioner-landlord is owner of the building "Shree Niwas East", New Block, Lal Pani, Shimla. Respondent No.1-tenant is residing in the two rooms accommodation having kitchen, bathroom etc. The rent is Rs.250/- per month inclusive of all taxes. According to the petitioner-landlord, the building is 35-40 years old. He had to occupy the same along with his other members of his family after reconstruction of the same in a manner to make provision of modern amenities therein. It is not possible to do so without getting the demised premises vacated. He has already taken steps to get the plan sanctioned from the competent authority. Besides, he has sufficient resources at his own required for reconstruction of the building. The respondent No. 1-tenant is also stated to be in arrears of rent w.e.f. 1.5.2006 @ Rs.250/- per month. On due and admissible amount towards arrears of rent, he has also claimed the interest @ 9% per annum. Since respondents No. 2 to 4 have also been shown to be owners of the building in the revenue record, hence impleaded so in the petition. The eviction of the respondent No. 1-tenant, as such, has been sought on the ground of he being in the arrears of rent and the demised premises is required for reconstruction and rebuilding.

3. In reply, the response of respondent No. 1-tenant is that the petition has been filed with malafide intention to harass him. The respondent No. 1-tenant is 61 years of age and suffering from various diseases. The demised premises occupied by him being ideally situated, facilitate him in his day to day life. On the other hand, the petitioner-landlord is not the only owner of the demised premises but proforma respondents No. 2 to 4 are also owners thereof. He is having huge property not only at Shimla but Delhi also where he settled for the last more than 40 years. He visits Shimla casually after the gap of 2-3 years. The demised premises is comprising of two rooms kitchen, bathroom, latrine, store and verandah. The store, however, is stated to be not in his possession and rather in the possession of respondents No. 2 and 3. The same is stated to be rented out to one Rattan Chand by proforma respondents No. 2 and 3. The building is not very old. The same rather is on RCC pillars. The demised premises is being maintained and repaired as and when required. The same need no reconstruction. The further construction on the first and subsequent floors can be raised without getting the demised premises vacated. In case he intend to make provision for modern amenities in the building, can easily do so on the first floor and the subsequent floors. It is also denied that the respondent No. 1-tenant is in arrears of rent. The rent rather stand paid up to date.

4. On such pleadings of the parties, learned Rent Controller has framed the following issues:

1. Whether the suit premises is bonafide required by the petitioner for rebuilding and reconstruction on old lines which is not possible without getting the same vacated as alleged? OPP
2. Whether the respondent is in arrear of rent if so to what amount as alleged? OPP
3. Whether the petition is not maintainable as alleged? OPR
4. Whether the petition is collusive as alleged? OPR
5. Whether the petitioner is estopped from filing the petition as alleged? OPR
6. Whether the petitioner has no cause of action as alleged? OPR
7. Relief.

5. The petitioner-landlord has himself stepped into the witness box as PW1 and examined Engineer B.C. Sharma PW2, Yashwant Singh Clerk, Municipal Corporation (AP Branch) Shimla PW3. On the other hand, respondent No. 1-tenant has stepped into the witness box as RW1 and examined Shri Des Raj, Proprietor of D.R. Sharma & Associates Architects and Consultant Engineer, Shimla as RW2. RW3 is Diwan Chand, Tax Inspector, Municipal Corporation, Shimla, who has produced the record and stated that one Shri Gian Chand is the owner of the demised premises who has inducted the respondent No. 1 as tenant. Shri Purshotam Ram , Draftsman, Municipal Corporation (AP Branch), Shimla is RW4. Besides reliance has also been placed on the technical report Ext.PW2/B and the photographs

Ext.PW2/C-1 to C-7 and Ext.PW2/A to Ext.PW2/G. The respondent No. 1-tenant has also relied upon the pay-in slips Ext.RW1/B and Ext.RW1/C and also the technical report Ext.RW2/G. The location plan is Ext.PW2/H.

6. Learned Rent Controller on holding full trial has concluded that neither any case qua the building is bonafidely required by the petitioner-landlord for reconstruction and rebuilding is made out nor the respondent No. 1-tenant is in arrears of rent. Issues No. 1 and 2 have, therefore, been answered against the petitioner-landlord. While answering issues No. 3 and 5 it is held that the petition is neither maintainable nor the petitioner-landlord has any cause of action to maintain the same. Issues No. 4 and 6 have, however, been answered against the petitioner-landlord. Consequently, the eviction petition has been dismissed.

7. In appeal, learned Appellate Authority has reversed the order passed by learned Rent Controller and ordered the eviction of the respondent No. 1-tenant on the grounds of the demised premises required bonafidely by the petitioner-landlord for reconstruction and rebuilding. The appeal is accordingly allowed subject to payment of cost of Rs.5000/-.

8. The respondent No. 1-tenant aggrieved by the impugned judgment has questioned the legality and validity thereof on the grounds, inter alia, that the evidence available on record has not been appreciated in its right perspective and to the contrary the well reasoned judgment passed by learned Rent Controller has been quashed and set aside illegally. The petitioner-landlord allegedly has failed to prove that the demised premises was bonafidely required by him for reconstruction and rebuilding. Also that, the building a pucca RCC structure could have otherwise been altered and modified to provide modern amenities therein without seeking the eviction of the respondent No. 1-tenant therefrom. As per the evidence available on record, the petitioner-landlord has no intention to settle in Shimla and on this ground also, neither any provision of modern amenities required to be made therein nor the same need reconstruction and rebuilding.

9. On hearing Mr. Romesh Verma, Advocate for respondent No. 1-tenant and Mr. Ashok Sood, Advocate for the petitioner-landlord and going through the record, it would not be improper to conclude that learned Appellate Authority has rightly ordered the eviction of respondent No. 1-tenant from the demised premises on the ground that the same is bonafidely required by the petitioner-landlord for reconstruction and rebuilding.

10. Learned Rent Controller while dismissing the rent petition has misconstrued and misunderstood the evidence as has come on record by way of the testimony of the petitioner-landlord because even if his son is residing at Bombay whereas his daughter in Newyork (USA) does not mean that the petitioner-landlord had no intention to settle in Shimla. The own testimony of respondent No. 1-tenant reveal that the petitioner-landlord is the owner of the building in question. It cannot be said by any stretch of imagination that his son is residing at Bombay and that he will also settle with his son there for the reasons that the son otherwise is residing at Bombay in connection with his job. It is not the case of either party that he has his own house/property there, hence after his retirement he will settle at Bomaby alone. The building as per own admission of respondent No. 1-tenant is 40 years of age. Therefore, even if it is presumed that the same is on RCC structure, it can reasonably be believed that the modern amenities as required in a residential house in the present era are lacking therein. The petitioner-landlord if intend to raise new construction make provision of such amenities therein, the respondent No. 1-tenant cannot be said to be aggrieved thereby in any manner whatsoever for the reasons that in that event he will have the right of his re-induction in the similar area as is presently in his occupation. The plea that the petitioner-landlord has not persuaded the matter qua sanction of the building plan and also not produced any evidence qua the availability of sufficient funds with him for raising construction is also not available to respondent No. 1-tenant. Anyhow, the petitioner-landlord has proved by producing evidence that he has submitted the building plan to Municipal Corporation, Shimla for sanction. The same, no doubt, has been returned to him as has come in the statement of PW3 Yashwant Singh. True it is that as per the testimony of RW4 Purshotam the plan so submitted by the petitioner-landlord was returned to

him on 28.10.2009 for removal of certain objections raised by the Municipal Corporation, Shimla. As per his further version the plan has not yet been resubmitted by the petitioner-landlord after removal of the objections. The facts, however, remain that the petitioner-landlord had already submitted the plan of building to Municipal Corporation, Shimla which, however, has been returned to him for removal of objections. Otherwise also, no such objection can be raised by respondent No. 1-tenant.

11. The evidence produced by the parties on both sides, therefore, lead to the only conclusion that the reconstruction of the building is required and the petitioner-landlord has already taken steps for the same. The Appellate Authority though has rightly ordered the eviction of respondent No. 1-tenant from the demised premises. However, the eviction order should have been made executable only after the petitioner-landlord obtains the approval of the building plan from the Municipal Corporation, Shimla and ensure that the construction work is completed in a time bound manner.

12. Therefore, it is now clarified that respondent No. 1-tenant shall handover the vacant possession of the demised premises to the petitioner-landlord within two months from the date of sanction of the building plan by the competent authority. The petitioner-landlord thereafter shall start the demolition/construction work and to complete the same within two years from the date of delivery of possession by respondent No. 1-tenant. On the completion of construction work, respondent No. 1-tenant shall be inducted in equal area as presently is in his possession in the newly constructed building, of course, on settlement of the rent as per the rates prevalent in the market and in adjoining area.

13. The parties on both sides shall adhere to the time schedule as prescribed hereinabove and any deviation therefrom shall entail in penal consequences including to compensate each other i.e. in case respondent No. 1-tenant failed to handover the vacant possession to the petitioner-landlord as directed, the payment in the form of damages i.e. the difference on account of escalation in the prices of construction to the petitioner-landlord. Similarly, the petitioner-landlord will have to compensate respondent No. 1-tenant by way of payment of the rent of the accommodation if hired by him in the interregnum from the expiry of the period of two years as granted till his induction in the newly constructed building.

14. The impugned judgment, as such, is upheld, however, with the modification as indicated hereinabove. This petition is accordingly disposed of.

15. Pending application(s), if any, shall also stand disposed of.

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

Kapil Dev Bansal. ...Appellant.

Versus

H.P. Urban Development Authority. ...Respondent.

Arb. Appeal No. 10 of 2017
Date of Decision: 27.7.2018

Arbitration and Conciliation Act, 1996- Section 34- Objections to award regarding grant of interest - Arbitrator granting pre and post pendente lite interest on amount found due to contractor – District Judge relying upon clause 33 of agreement prohibiting grant of any such interest, setting aside award of arbitrator and remitting matter to him for reconsideration – Appeal against – Held, said condition (Clause 33) applies to parties to agreement and not to arbitrator – Clause has relevance with respect to routine transaction during execution of work

before arising of dispute and reference thereof to arbitrator – Appeal allowed – Judgment of District Judge set aside – Award of arbitrator upheld. (Paras-7, 8 and 11)

Cases referred:
Ambica Construction Vs. Union of India, reported in (2017) 14 SCC 323
Raveechee and Co. Vs. Union of India, 2018 SCC online SC 654

For the Appellant: Mr.Suneet Goel, Advocate.
For the Respondent: Mr.C.N. Singh, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur Judge (oral)

Present appeal has been filed against the judgment dated 31.8.2017 passed by learned District Judge, Shimla in Arbitration Case No. 28-S/2 of 2014, whereby, after holding that the arbitrator has granted relief of pre-pendente lite and post pendent lite interest in violation of terms and conditions of the agreement, has been remanded the matter to the Arbitrator to decide afresh in accordance with law.

2. Brief facts of the case are that respondent had awarded work of construction of Social Housing Colony at Shoghi vide award letter dated 12.6.1997 to the appellant herein. On arising a dispute between the parties, matter was referred to Arbitrator for adjudication, wherein the Arbitrator besides awarding other reliefs has also awarded pre-pendent lite and post pendent lite interest on the amount awarded in favour of appellant, as detailed under:-

> *"(I) Pre-pendentelite and pendentelite interest @8% on Rs.7,59,072/- for the period 10/2004 to 3/2014 minus the pendentelite period lengthened due to non attendance of hearings by claimant/contractor. As per record of this tribunal the contractor did not attend 5 of the total 24 hearings resulting in lengthening of pendentelite period by 3 years and one month. Thus the period qualifying for interest works out to 6 years and 5 months.*
>
> *(II) Post pendentelite interest @ 18% P.A. on the total sum of claim(s) for the period three months from date of award to the actual date of payment as per clause 31 (7) (b) of Arbitration and Reconciliation Act, 1996."*

3. Respondent had preferred objections before learned District Judge on the main ground of award of pre-pendent lite and post pendent lite interest by the Arbitrator in favour of appellant inter-alia amongst other grounds as reproduced in the impugned judgment by learned District Judge. Relying upon clause 33 of the agreement between the parties learned District Judge has held that the interest awarded by the Arbitrator was in violation of terms and conditions of the agreement and thus has remanded the matter to the Arbitrator to decide afresh in accordance with law.

4. I have heard learned counsel for the parties and also peruse the documents placed on record.

5. Clause 33 of the agreement between the parties, as reproduced in the judgment passed by learned District Judge, undisputedly reads as under:-

> *"The contractor shall not be entitled to any interest in case of non-payment of bills/in any manner."*

6. The issue with regard to competence of the Arbitrator to award interest is no longer res-integra. Considering similar clause in the agreement, prohibiting award of interest, the Apex Court in ***Ambica Construction Vs. Union of India,*** reported in ***(2017) 14 SCC 323*** has held as under:-

"5. The impugned order passed by the High Court dated 17-6-2005, limited to the determination with reference to pendente lite interest, has been assailed by the appellant, through the instant civil appeal. During the course of hearing It was not disputed, that the contractual obligation between the parties expressly provided, that interest could not be claimed, either on earnest money or on the Security deposit, and even on amounts payable to the claimant. The relevant Clause affirming the above position is extracted hereinbelow:

> *"(2) Interest on amounts.-No interest will be payable upon he earnest money or the security deposit or amounts payable to the contractor under the contract, but government securities deposited in terms of sub-clause (1) of this clause will be repayable with interest accrued thereon."*

The aforesaid clause has been relied upon by the learned counsel representing the Union of India to contend, that when interest was not payable even on the principal amount, there was no question of the same being payable during the period the matter remained pending for adjudication. It is therefore apparent that the learned counsel for the respondent, relied upon the contractual obligation contained in the clause, extracted hereinabove, to counter the claim of pendente lite interest and to support the impugned order passed by the High Court.

6. The only contention advanced at the hands of the learned counsel for the appellant, was based on the judgment of this Court in Union of India vs. Ambica Construction, (2016) 6 SCC 36, wherein, having examined the legal position declared by this Court by a Constitution Bench in Irrigation Deptt., State of Orissa Vs. G. C. Roy, (1992) 1 SCC 508, it was held as under: (Ambica Construction case, SCC p. 59, para 34)

> *"34. Thus, our answer to the reference is that if the contract expressly bars the award of interest pendente lite, the same cannot be awarded by the arbitrator. We also make it clear that the bar to award interest on delayed payment by itself will not be readily inferred as express bar to award interest pendente lite by the Arbitral Tribunal, as ouster of power of the arbitrator has to be considered on various relevant aspects referred to in the decisions of this Court, it would be for the Division Bench to consider the case on merits."*

A perusal of the conclusions drawn by this Court in the above judgment, rendered by a three-Judge Division Bench, leaves no room for any doubt, that the bar to award interest on the amounts payable under the contract, would not be sufficient to deny payment of pendente lite interest. In the above view of the matter, we are satisfied, that the clause relied upon by the learned counsel for the Union of India, to substantiate his contention, that pendente lite interest could not be awarded to the appellant, was not a valid consideration, for the proposition being canvassed. We are therefore satisfied, that the arbitrator, while passing his award dated 28-6-1999, was fully justified in granting interest a pendente lite to the appellant."

7. Similarly in a recent decision rendered on 3rd July, 2018, the Apex Court in case ***Raveechee and Co. Vs. Union of India, 2018 SCC online SC 654*** has held as under:-

"11. On behalf of the Union of India, it is contended that the Arbitrators by reason of Clause 16(3) could not have awarded interest pendente lite. This contention is incorrect. Ex facie the clause does not deal with interest pendente lite. In terms, the clause only bars interest upon earnest money and security deposits or amounts payable to the contractor under the contract. The above mentioned amounts are amounts which in a sense belong to the contractor. They are amounts voluntarily deposited with the other contracting party in order to be refunded or forfeited depending on performance of the contract. As such they are

not amounts of which the contractor is deprived the use of against his wishes, so as to attract interest.

12 ....

13 ....

14. A claimant becomes entitled to interest not as compensation for any damage done but for being kept out of the money due to him. Obviously, in a case of unascertained damages such as this, the question of interest would arise upon the ascertainment of the damages in the course of the lis. Such damages could attract interest pendente lite for the period from the commencement of the arbitration to the award.

15. Thus, the liability for interest pendente lite does not arise from any term of the contract, or during the terms of the contract, but in the course of determination by the Arbitrators of the losses or damages that are due to the claimant. Specifically, the liability to pay interest pendente lite arises because the claimant has been found entitled to the damages and has been kept out from those dues due to the pendency of the arbitration i.e. pendent lite.

16. We are, therefore, of the view that the Arbitrators rightly awarded interest pendente lite for the period from 26.09.1988 to 23.03.2001 which is the date of the award, on the amounts found due to the claimant. Undoubtedly, such a power must be considered inherent in an Arbitrator who also exercises the power to do equity, unless the agreement expressly bars an Arbitrator from awarding interest pendente lite. An agreement which bars interest is essentially an agreement that the parties will not claim interest on specified amounts. It does not bar an Arbitrator, who is never a party to the agreement from awarding it."

8. In present case, undisputedly, Arbitrator has awarded interest on the amount payable on account of difference of rates, amounts deducted by respondent and damages for prolongation of work. Respondent is banking upon clause 33 of the agreement, wherein it is provided that the contractor shall not be entitled to any interest in case of non-payment of bills/in any manner. In the light of exposition of such condition, the Apex Court has held that the said condition applies to the parties to the agreement, but not to the Arbitrator. This clause has relevance with respect to routine transaction during execution of work before arising of dispute and reference thereof to the Arbitrator.

9. It is not a case of respondent that there is another clause in the agreement expressly barring the Arbitrator from awarding interest, as awarded by him. In absence of expressed ouster of inherent power of the Arbitrator by incorporating specific clause/condition in the agreement to that effect, it cannot be said that the Arbitrator has committed any mistake, error or illegality by awarding pre-pendente lite and post pendente lite interest on the awarded amount.

10. Mr. C.N. Singh, learned counsel for respondent-HIMUDA has further contended that the objections before learned District Judge were not limited to the issue of awarding pre-pendent lite and post pendent lite interest only, but the award of the Arbitrator had been challenged on other grounds also which were re-iterated by learned District Judge in paras 2 to 6 of impugned judgment.

11. In paras 2 to 6 in impugned judgment, it is not those issues which were argued/agitated at the time of arguments, but it is reproduction of grounds including grounds related to pendente lite interest which were stated in memorandum of objections preferred by respondent as immediately thereafter in para 7 of the judgment preliminary objection raised by petitioner in reply to objection have been reiterated and in para 8, reply on merits has been referred. Thereafter, points for determination has been framed in para 9. In reasons, after relying various judgments of the Apex Court dealing with scope of interference in award of

Arbitrator, awarding of pre-pendente lite and post-pendente lite interest has been held to be contrary to clause 33 of the agreement. There is no discussion on other issues which have been reiterated in paras 2, 3 and 6 of the judgment. In this regard, learned counsel for the appellant has submitted forcefully that he has clear instructions from the counsel conducting the case for appellant in the Court of learned District Judge that no arguments on other issues/objections were advanced before learned District Judge. His plea is substantiated from para 18 of the judgment, wherein after discussion on the issue of pendente lite (pre and post) interest, after relying upon the judgment of Apex Court, it is observed that award of Arbitrator can be interfered partly and thus after holding that award of pre and post pendente lite interest is contrary to clause 33 of the agreement, it is observed that entire award is to be set aside. Further learned District Judge in para 20 has categorically stated that no other point has been urged or argued. Respondent has not expressed any grievance against such observation till date, even after receiving notice in present appeal. Respondent has not assailed judgment for not remanding/deciding the objections on other issues, which indicates that respondent was not aggrieved by not returning findings on other issues which fortifies the submission of appellant that other grounds were neither argued nor agitated before learned District Judge. Therefore, plea of learned counsel for respondent-HIMUDA is not sustainable, as now it is not open to respondent to raise other issues which were neither urged nor argued before learned District Judge.

12. In view of above discussion, this appeal is allowed and impugned judgment passed by learned District Judge is set aside and award passed by Arbitrator is upheld.

****

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

M/s Ranjeet Singh and Company .....Petitioner

Versus

HP State Electricity Board Ltd. and Anr. .....Respondents.

Arb. Case No. 38 of 2018
Date of Decision: 30.7.2018

Arbitration and Conciliation Act, 1996- Sections 12, 14 & 15- Termination of mandate of arbitrator – Appointment of fresh arbitrator – Circumstances – Failure to act – After setting aside of previous award by High Court and on request of petitioner-contractor, department appointing Chief Engineer (Commercial) as fresh arbitrator – Such arbitrator failed in conducting single hearing in six years since appointment despite requests of petitioner – Contractor approaching High Court and seeking termination of mandate and appointment of fresh arbitrator – Held, Section 14 of Act provides for termination of mandate when there is failure on part of arbitral tribunal to discharge its function either de jure or de facto - Aggrieved party can approach court for termination of mandate – High Court found failure on part of arbitrator to perform his function – Mandate of Chief Engineer (Commercial) ordered to be terminated High Court appointed a Senior Advocate as arbitrator and asked him to enter into reference. (Para-5)

Cases referred:

Volestalpine Schienen GMBH v. Delhi Metro Rail Corporation Ltd., (2017) 4 SCC 665

Union of India and Ors. v. Uttar Pradesh State Bridge Corporation Limited, (2015) 2 SCC 52

For the petitioner: Mr.J.S. Bhogal, Senior Advocate with Mr. Parmod Negi, Advocate.

For the respondents: Mr. Vikrant Thakur, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J. ***(Oral)***

By way of instant application filed under Sections 14 and 15 of the Arbitration and Conciliation Act, 1996 (in short "the Act"), a prayer has been made on behalf of the petitioner, to terminate the mandate of the Arbitrator and appoint independent and impartial Arbitrator to adjudicate the dispute *inter-se* parties.

2. Despite repeated opportunities, respondents have failed to file reply to the petition. Vide order dated 10.7.2018, this Court while granting two weeks' time as last opportunity to file reply, had made it clear that in case reply is not filed on or before the next date of hearing, right to file the same shall be deemed to have been closed and matter shall be decided on the basis of material adduced on record by the respective parties. Since right to file the reply stands already closed vide order dated 10.7.2018, this Court is unable to accede to the vehement request made by the learned Additional Advocate General, for grant of further time to file reply.

3. Briefly stated facts as emerge from the pleadings adduced on record by the petitioner, are that the petitioner had entered into an agreement with respondent No.1 for construction of "220KV line (Erection) D/C Sungra-Shimla-Mohali transmission line". Pursuant to aforesaid agreement executed inter-se parties, petitioner undertook the works relating to "Erection of 220 KV Transmission line from Sungra to Kunihar, but since certain dispute arose inter-se parties on account of final payment, petitioner vide communication dated12.2.2004, invoked arbitration clause of the agreement and ultimately, matter came to be referred to the Arbitrator vide letter dated 5.5.2004. Arbitrator passed award on 30.7.2007, which was challenged by the petitioner in this Court by way of Arbitration Case No. 22 of 2007. This Court vide judgment dated 22.2.2010, set-aside the award and reserved liberty to the petitioner to go for fresh arbitration. Pursuant to aforesaid judgment rendered by this Court, petitioner again requested the respondent to appoint an Arbitrator for adjudication of the dispute inter-se parties and accordingly, Chief Engineer (MM), Sh. R.K. Sharma, came to be appointed as an Arbitrator. Above named Arbitrator conducted number of hearings till 2012, whereafter Chairman-cum-Managing Director (HPSEBL) substituted the Arbitrator by appointing the Chief Engineer (Commercial) as sole Arbitrator vide order dated 15.10.2012 (Annexure P1). However, fact remains that newly appointed Arbitrator i.e. Chief Engineer (Commercial) HPSEBL, failed to conduct even single hearing till date without any reason despite repeated requests having been made by the petitioner and as such, petitioner has approached this Court in the instant proceedings, praying therein to terminate the mandate of Arbitrator appointed by the respondent vide order dated 15.10.2012.

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

5. Careful perusal of Annexure P-1 annexed with the petition clearly suggests that Chairman-cum-Managing Director (HPSEBL) Shimla, had earlier appointed the Chief Engineer (Commercial) HPSEBL, Shimla, as sole Arbitrator to adjudicate upon the claims and counter claims of the parties in accordance with the provisions contained in the Act, but above named Chief Engineer (MM) was later on substituted by the Chief Engineer (Commercial). Factum with regard to execution of agreement dated 7.1.1984 is not in dispute and similarly, there is no dispute inter-se parties with regard to the provision of Arbitration contained in agreement executed inter-se parties and as such, this Court sees no impediment in accepting the prayer made in the present application. Since Chief Engineer (Commercial) has failed to conduct the proceedings after his appointment made vide order dated 15.10.2012, matter is hanging fire for the last six years and as such, it would be in the interest of justice in case mandate of Chief Engineer (Commercial) HPSEBL, who was appointed as Arbitrator vide order dated 15.10.2012, is ordered to be terminated.

6. Section 14 of the Act clearly provides that mandate of an Arbitrator shall terminate and he shall be substituted by another Arbitrator if he becomes de jure or de facto

unable to perform his functions or for other reasons fails to act without undue delay. Section 14 of the Act, is reproduced herein below:-

> ***14. Failure or impossibility to act.—***
>
> ***(1) The mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator, if—***
>
> ***(a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and***
>
> ***(b) he withdraws from his office or the parties agree to the termination of his mandate.***
>
> ***(2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.***
>
> ***(3) If, under this section or sub-section (3) of section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of section 12.***

Since in the case at hand, respondents despite sufficient opportunity afforded to them, have failed to file response, this Court has no option but to rely upon the averments contained in the application, which is duly supported by an affidavit. Section 15 of the Act, provides that where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules applicable to the appointment of the arbitrator being replaced. Section 15 of the Act is reproduced herein below.

> ***15. Termination of mandate and substitution of arbitrator.—***
>
> ***(1) In addition to the circumstances referred to in section 13 or section 14, the mandate of an arbitrator shall terminate—***
>
> ***(a) where he withdraws from office for any reason; or***
>
> ***(b) by or pursuant to agreement of the parties.***
>
> ***(2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.***
>
> ***(3) Unless otherwise agreed by the parties, where an arbitrator is replaced under sub-section (2), any hearings previously held may be repeated at the discretion of the arbitral tribunal.***
>
> ***(4) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal.***

7. Though, in the instant case, perusal of agreement in question suggests that Chairman-cum-Managing Director, is competent to appoint an Arbitrator, who admittedly on the request of the petitioner, appointed the arbitrators twice, but as has been observed above, Arbitrator appointed by the aforesaid authority failed to act without undue delay and as such, prayer made in the instant application for appointment of impartial and independent arbitrator deserves to be accepted. Otherwise also, perusal of amended Section 12 of the amended Act 3 of 2016, clearly suggests that notwithstanding any agreement *inter-se* parties, impartial/neutral person is required to be appointed as an Arbitrator. Aforesaid Section further provides that a person having direct or indirect connection or relationship or interest in any of the parties or in relation to the subject matter in dispute, cannot be appointed as an Arbitrator and his/her appointment as arbitrator can be laid challenge. At this stage, it would be apt to reproduce Section 12 of the Act, herein below:-

"12. Grounds for challenge.—

(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances ,-

a) Such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and

b) Which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.

Explanation 1. –The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.

Explanation 2. – the disclosure shall be made by such person in the form specified in the Sixth Schedule.]

(2) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him.

(3) An arbitrator may be challenged only if—

(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or

(b) he does not possess the qualifications agreed to by the parties.

(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

[(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.]"

8. Perusal of aforesaid amended provision of Act clearly suggests that person having direct/indirect control over the day to day affairs of the authority, cannot be appointed as an Arbitrator.

9. Hon'ble Apex Court in ***Volestalpine Schienen GMBH v. Delhi Metro Rail Corporation Ltd***., (2017) 4 SCC 665, has held as under:-

"14. From the stand taken by the respective parties and noted above, it becomes clear that the moot question is as to whether panel of arbitrators prepared by the Respondent violates the amended provisions of Section 12 of the Act. Subsection (1) and Sub-section (5) of Section 12 as well as Seventh Schedule to the Act which are relevant for our purposes, may be reproduced below:

8. (i) for sub-section (1), the following Sub-section shall be substituted, namely-

(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances—

(a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and

(b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.

Explanation 1.--The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.

Explanation 2.--The disclosure shall be made by such person in the form specified in the Sixth Schedule.;

(ii) after Sub-section (4), the following Subsection shall be inserted, namely—

(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator: Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this Sub-section by an express agreement in writing. (emphasis supplied)

THE SEVENTH SCHEDULE

Arbitrator's relationship with the parties or counsel

1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.

2. The arbitrator currently represents or advises one of the parties or an affiliate of one of the parties.

3. The arbitrator currently represents the lawyer or law firm acting as counsel for one of the parties.

4. The arbitrator is a lawyer in the same law firm which is representing one of the parties.

5. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration.

6. The arbitrator's law firm had a previous but terminated involvement in the case without the arbitrator being involved himself or herself.

7. The arbitrator's law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties.

8. The arbitrator regularly advises the appointing party or an affiliate of the appointing party even though neither the arbitrator nor his or her firm derives a significant financial income therefrom.

9. The arbitrator has a close family relationship with one of the parties and in the case of companies with the persons in the management and controlling the company.

10. A close family member of the arbitrator has a significant financial interest in one of the parties or an affiliate of one of the parties.

11. The arbitrator is a legal representative of an entity that is a party in the arbitration.

12. The arbitrator is a manager, director or part of the management, or has a similar controlling influence in one of the parties.

13. The arbitrator has a significant financial interest in one of the parties or the outcome of the case.

14. The arbitrator regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator or his or her firm derives a significant financial income therefrom. Relationship of the arbitrator to the dispute

15. The arbitrator has given legal advice or provided an expert opinion on the dispute to a party or an affiliate of one of the parties.

16. The arbitrator has previous involvement in the case. Arbitrator's direct or indirect interest in the dispute.

17. The arbitrator holds shares, either directly or indirectly, in one of the parties or an affiliate of one of the parties that is privately held.

18. A close family member of the arbitrator has a significant financial interest in the outcome of the dispute.

19. The arbitrator or a close family member of the arbitrator has a close relationship with a third party who may be liable to recourse on the part of the unsuccessful party in the dispute.

Explanation 1.---The term "close family member" refers to a spouse, sibling, child, parent or life partner.

Explanation 2.--The term "affiliate" encompasses all companies in one group of companies including the parent company.

Explanation 3.--For the removal of doubts, it is clarified that it may be the practice in certain specific kinds of arbitration, such

as maritime or commodities arbitration, to draw arbitrators from a small, specialized pool. If in such fields it is the custom and practice for parties frequently to appoint the same arbitrator in different cases, this is a relevant fact to be taken into account while applying the Rules set out above. (emphasis supplied)

15. It is a well known fact that the Arbitration and Conciliation Act, 1996 was enacted to consolidate and amend the law relating to domestic arbitration, inter alia, commercial arbitration and enforcement of foreign arbitral awards etc. It is also an accepted position that while enacting the said Act, basic structure of UNCITRAL Model Law was kept in mind. This became necessary in the wake of globalization and the adoption of policy of liberalisation of Indian economy by the Government of India in the early 90s. This model law of UNCITRAL provides the framework in order to achieve, to the maximum possible extent, uniform approach to the international commercial arbitration. Aim is to achieve convergence in arbitration law and avoid conflicting or varying provisions in the arbitration Acts enacted by various countries. Due to certain reasons, working of this Act witnessed some unpleasant developments and need was felt to smoothen out the rough edges encountered thereby. The Law Commission examined various shortcomings in the working of this Act and in its first Report, i.e., 176th Report made various suggestions for amending certain provisions of the Act. This exercise was again done by the Law Commission of India in its Report No. 246 in August, 2004 suggesting sweeping amendments touching upon various facets and acting upon most of these recommendations, Arbitration Amendment Act of 2015 was passed which came into effect from October 23, 2015.

16. Apart from other amendments, Section 12 was also amended and the amended provision has already been reproduced above. This amendment is also based on the recommendation of the Law Commission which specifically dealt with the issue of 'neutrality of arbitrators' and a discussion in this behalf is contained in paras 53 to 60 and we would like to reproduce the entire discussion hereinbelow:

NEUTRALITY of ARBITRATORS

53. It is universally accepted that any quasi-judicial process, including the arbitration process, must be in accordance with principles of natural justice. In the context of arbitration, neutrality of arbitrators, viz. their independence and impartiality, is critical to the entire process.

54. In the Act, the test for neutrality is set out in Section 12(3) which provides-

12(3) An arbitrator may be challenged only if—

(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality..."

55. The Act does not lay down any other conditions to identify the "circumstances" which give rise to "justifiable doubts", and it is clear that there can be many such circumstances and situations. The test is not whether, given the circumstances, there is any actual bias for that is setting the bar too high; but, whether the circumstances in question give rise to any justifiable apprehensions of bias.

56. The limits of this provision has been tested in the Indian Supreme Court in the context of contracts with State entities naming particular persons/designations (associated with that entity) as a potential arbitrator. It appears to be settled by a series of decisions of the Supreme Court (See Executive Engineer, Irrigation Division, Puri v. Gangaram Chhapolia MANU/SC/0001/1983 : 1984 (3) SCC 627; Secretary to Government Transport Department, Madras v. Munusamy Mudaliar MANU/SC/0435/1988 : 1988 (Supp) SCC 651; International Authority of India v. K.D. Bali and Anr. MANU/SC/0197/1988 : 1988 (2) SCC 360; S. Rajan v. State of Kerala MANU/SC/0371/1992 : 1992 (3) SCC 608; Indian Drugs & Pharmaceuticals v. IndoSwiss Synthetics Germ Manufacturing Co. Ltd. MANU/SC/0139/1996 : 1996 (1) SCC 54; Union of India v. M.P. Gupta (2004) 10 SCC 504; Ace Pipeline Contract Pvt. Ltd. v. Bharat Petroleum Corporation Ltd. MANU/SC/7273/2007 : 2007 (5) SCC 304) that arbitration agreements in government contracts which provide for arbitration by a serving employee of the department, are valid and enforceable. While the Supreme Court, in Indian Oil Corporation Ltd. v. Raja Transport (P) Ltd. MANU/SC/1502/2009 : 2009 8 SCC 520 carved out a minor exception in situations when the arbitrator

"was the controlling or dealing authority in regard to the subject contract or if he is a direct subordinate (as contrasted from an officer of an inferior rank in some other department) to the officer whose decision is the subject matter of the dispute", and this exception was used by the Supreme Court in Denel Proprietary Ltd. v. Govt. of India, Ministry of Defence MANU/SC/0010/2012 : AIR 2012 SC 817 and Bipromasz Bipron Trading SA v. Bharat Electronics Ltd. MANU/SC/0478/2012 : (2012) 6 SCC 384, to appoint an independent arbitrator Under Section 11, this is not enough.

57. The balance between procedural fairness and binding nature of these contracts, appears to have been tilted in favour of the latter by the Supreme Court, and the Commission believes the present position of law is far from satisfactory. Since the principles of impartiality and independence cannot be discarded at any stage of the proceedings, specifically at the stage of constitution of the arbitral tribunal, it would be incongruous to say that party autonomy can be exercised in complete disregard of these principles-even if the same has been agreed prior to the disputes having arisen between the parties. There are certain minimum levels of independence and impartiality that should be required of the arbitral process regardless of the parties' apparent agreement. A sensible law cannot, for instance, permit appointment of an arbitrator who is himself a party to the dispute, or who is employed by (or similarly dependent on) one party, even if this is what the parties agreed. The Commission hastens to add that Mr. PK Malhotra, the ex officio member of the Law Commission suggested having an exception for the State, and allow State parties to appoint employee arbitrators. The Commission is of the opinion that, on this issue, there cannot be any distinction between State and nonState parties. The concept of party autonomy cannot be stretched to a point where it negates the very basis of having impartial and independent adjudicators for resolution of disputes. In fact, when the party appointing an adjudicator is the State, the duty to appoint an impartial and independent adjudicator is that much more onerous-and

the right to natural justice cannot be said to have been waived only on the basis of a "prior" agreement between the parties at the time of the contract and before arising of the disputes.

58. Large scale amendments have been suggested to address this fundamental issue of neutrality of arbitrators, which the Commission believes is critical to the functioning of the arbitration process in India. In particular, amendments have been proposed to Sections 11, 12 and 14 of the Act.

59. The Commission has proposed the requirement of having specific disclosures by the arbitrator, at the stage of his possible appointment, regarding existence of any relationship or interest of any kind which is likely to give rise to justifiable doubts. The Commission has proposed the incorporation of the Fourth Schedule, which has drawn from the Red and Orange lists of the IBA Guidelines on Conflicts of Interest in International Arbitration, and which would be treated as a "guide" to determine whether circumstances exist which give rise to such justifiable doubts. On the other hand, in terms of the proposed Section 12(5) of the Act and the Fifth Schedule which incorporates the categories from the Red list of the IBA Guidelines (as above), the person proposed to be appointed as an arbitrator shall be ineligible to be so appointed, notwithstanding any prior agreement to the contrary. In the event such an ineligible person is purported to be appointed as an arbitrator, he shall be de jure deemed to be unable to perform his functions, in terms of the proposed explanation to Section 14. Therefore, while the disclosure is required with respect to a broader list of categories (as set out in the Fourth Schedule, and as based on the Red and Orange lists of the IBA Guidelines), the ineligibility to be appointed as an arbitrator (and the consequent de jure inability to so act) follows from a smaller and more serious sub-set of situations (as set out in the Fifth Schedule, and as based on the Red list of the IBA Guidelines).

60. The Commission, however, feels that real and genuine party autonomy must be respected, and, in certain situations, parties should be allowed to waive even the categories of ineligibility as set in the proposed Fifth Schedule. This could be in situations of family arbitrations or other arbitrations where a person commands the blind faith and trust of the parties to the dispute, despite the existence of objective "justifiable doubts" regarding his independence and impartiality. To deal with such situations, the Commission has proposed the proviso to Section 12(5), where parties may, subsequent to disputes having arisen between them, waive the applicability of the proposed Section 12(5) by an express agreement in writing. In all/all other cases, the general Rule in the proposed Section 12(5) must be followed. In the event the High Court is approached in connection with appointment of an arbitrator, the Commission has proposed seeking the disclosure in terms of Section 12(1) and in which context the High Court or the designate is to have "due regard" to the contents of such disclosure in appointing the arbitrator. (emphasis supplied)

17. We may put a note of clarification here. Though, the Law Commission discussed the aforesaid aspect under the heading "Neutrality of Arbitrators", the focus of discussion was on impartiality and independence of the arbitrators which has relation to or bias towards one of the parties.

In the field of international arbitration, neutrality is generally related to the nationality of the arbitrator. In international sphere, the 'appearance of neutrality' is considered equally important, which means that an arbitrator is neutral if his nationality is different from that of the parties. However, that is not the aspect which is being considered and the term 'neutrality' used is relatable to impartiality and independence of the arbitrators, without any bias towards any of the parties. In fact, the term 'neutrality of arbitrators' is commonly used in this context as well.

18. Keeping in mind the afore-quoted recommendation of the Law Commission, with which spirit, Section 12 has been amended by the Amendment Act, 2015, it is manifest that the main purpose for amending the provision was to provide for neutrality of arbitrators. In order to achieve this, Sub-section (5) of Section 12 lays down that notwithstanding any prior agreement to the contrary, any person whose relationship with the parties or counsel or the subject matter of the dispute falls under any of the categories specified in the Seventh Schedule, he shall be ineligible to be appointed as an arbitrator. In such an eventuality, i.e., when the arbitration Clause finds foul with the amended provisions extracted above, the appointment of an arbitrator would be beyond pale of the arbitration agreement, empowering the court to appoint such arbitrator(s) as may be permissible. That would be the effect of non-obstante Clause contained in Sub-section (5) of Section 12 and the other party cannot insist on appointment of the arbitrator in terms of arbitration agreement."

10. In the judgment referred herein above, it has been categorically laid down by the Hon'ble Apex Court that main purpose for amending the provision is/was to provide for neutrality of arbitrators and in order to achieve the neutrality, Sub-section (5) of Section 12 lays down that notwithstanding any prior agreement to the contrary, any person, whose relationship with the parties or subject matter of dispute falls under any of the categories specified in the schedule, he shall be ineligible to be appointed as an arbitrator.

11. In the case titled Union of India and Ors. v. Uttar Pradesh State Bridge Corporation Limited, (2015) 2 SCC 52, the Hon'ble Apex Court has held as under:-

11. At this stage, we may take note of the scheme of the Act as well, by noticing those provisions which would be attracted to deal with such a situation. Relevant provisions are extracted below for ready reference:

"14. Failure or impossibility to act.—(1) The mandate of an arbitrator shall terminate if—

(a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and

(b) he withdraws from his office or the parties agree to the termination of his mandate.

(2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.

(3) If, under this section or sub-section (3) of Section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of Section 12.

15. Termination of mandate and substitution of arbitrator.—(1) In addition to the circumstances referred to in Section 13 or Section 14, the mandate of an arbitrator shall terminate—

(a) where he withdraws from office for any reason; or

(b) by or pursuant to agreement of the parties.

(2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

(3) Unless otherwise agreed by the parties, where an arbitrator is replaced under sub-section (2), any hearings previously held may be repeated at the discretion of the Arbitral Tribunal.

(4) Unless otherwise agreed by the parties, an order or ruling of the Arbitral Tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the Arbitral Tribunal.

* * *

32. Termination of proceedings.—(1) The arbitral proceedings shall be terminated by the final arbitral award or by an order of the Arbitral Tribunal under sub-section (2).

(2) The Arbitral Tribunal shall issue an order for the termination of the arbitral proceedings where—

(a) the claimant withdraws his claim, unless the respondent objects to the order and the Arbitral Tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute,

(b) the parties agree on the termination of the proceedings, or

(c) the Arbitral Tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(3) Subject to Section 33 and sub-section (4) of Section 34, the mandate of the Arbitral Tribunal shall terminate with the termination of the arbitral proceedings." (emphasis supplied)

12. As is clear from the reading of Section 14, when there is a failure on the part of the Arbitral Tribunal to act and it is unable to perform its function either de jure or de facto, it is open to a party to the arbitration proceedings to approach the court to decide on the termination of the mandate. Section 15 provides some more contingencies when mandate of an arbitrator can get terminated. In the present case, the High Court has come to a categorical finding that the Arbitral Tribunal failed to perform its function, and rightly so. It is a clear case of inability on the part of the members of the Tribunal to proceed in the matter as the matter lingered on for almost four years, without any rhyme or justifiable reasons. The members did not mend their ways even when another life was given by granting three months to them. Virtually a peremptory order was passed by the High Court, but the Arbitral Tribunal remained unaffected and took the directions of the High Court in a cavalier manner. Therefore, the order of the High Court terminating the mandate of the Arbitral Tribunal is flawless. This aspect of the impugned order is not even questioned by the appellant at the time of hearing of the present appeal. However, the contention of the appellant is that even if it was so, as per the provisions

of Section 15 of the Act, substitute arbitrators should have been appointed "according to the rules that were applicable to the appointment of the arbitrator being replaced". On this basis, it was the submission of Mr Mehta, learned ASG, that the High Court should have resorted to the provision contained in Clause 64 of GCC.

13. No doubt, ordinarily that would be the position. The moot question, however, is as to whether such a course of action has to be necessarily adopted by the High Court in all cases, while dealing with an application under Section 11 of the Act or is there room for play in the joints and the High Court is not divested of exercising discretion under some circumstances? If yes, what are those circumstances? It is this very aspect which was specifically dealt with by this Court in Tripple Engg. Works. Taking note of various judgments, the Court pointed out that the notion that the High Court was bound to appoint the arbitrator as per the contract between the parties has seen a significant erosion in recent past. In paras 6 and 7 of the said decision, those judgments wherein departure from the aforesaid "classical notion" has been made are taken note of. It would, therefore, be useful to reproduce the said paragraph along with paras 8 and 9 hereinbelow: (SCC pp. 291-93)

> *"6. The 'classical notion' that the High Court while exercising its power under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter for short 'the Act') must appoint the arbitrator as per the contract between the parties saw a significant erosion in ACE Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corpn. Ltd. 2007 5 SCC 304, wherein this Court had taken the view that though the contract between the parties must be adhered to, deviations therefrom in exceptional circumstances would be permissible. A more significant development had come in a decision that followed soon thereafter inUnion Of India v. Bharat Battery Manufacturing Co. (P) Ltd. 2007 7 SCC 684 wherein following a three-Judge Bench decision in Punj Lloyd Ltd. v. Petronet Mhb Ltd. Punj Lloyd Ltd. v. Petronet Mhb Ltd., 2006 2 SCC 638, it was held that once an aggrieved party files an application under Section 11(6) of the Act to the High Court, the opposite party would lose its right of appointment of the arbitrator(s) as per the terms of the contract. The implication that the Court would be free to deviate from the terms of the contract is obvious.*
>
> *7. The apparent dichotomy in ACE Pipeline and Bharat Battery Mfg. Co. (P) Ltd. was reconciled by a three-Judge Bench of this Court in Northern Railway Admn., Ministry of Railway v. Patel Engg. Co. Ltd. Northern Railway Admn., Ministry of Railway v. Patel Engg. Co. Ltd., 2008 10 SCC 240, wherein the jurisdiction of the High Court under Section 11(6) of the Act was sought to be emphasised by taking into account the expression 'to take the necessary measure' appearing in sub-section (6) of Section 11and by further laying down that the said expression has to be read along with the requirement of sub-section (8) of Section 11 of the Act. The position was further clarified in Indian Oil Corpn. Ltd. v. Raja Transport (P) Ltd. 2009 8 SCC 520 Para 48 of the Report wherein the scope of Section 11 of the Act was summarised may be quoted by reproducing sub-paras (vi) and (vii) hereinbelow: (Indian Oil case, SCC p. 537)*

> ***'48.(vi) The Chief Justice or his designate while exercising power under sub-section (6) of Section 11 shall endeavour to give effect to the appointment procedure prescribed in the arbitration clause.***
>
> ***(vii) If circumstances exist, giving rise to justifiable doubts as to the independence and impartiality of the person nominated, or if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed, the Chief Justice or his designate may, for reasons to be recorded, ignore the designated arbitrator and appoint someone else.'***
>
> ***8. The above discussion will not be complete without reference to the view of this Court expressed in Union Of India v. Singh Builders Syndicate Union Of India v. Singh Builders Syndicate , 2009 4 SCC 523, wherein the appointment of a retired Judge contrary to the agreement requiring appointment of specified officers was held to be valid on the ground that the arbitration proceedings had not concluded for over a decade making a mockery of the process. In fact, in para 25 of the Report in Singh Builders Syndicate this Court had suggested that the Government, statutory authorities and government companies should consider phasing out arbitration clauses providing for appointment of serving officers and encourage professionalism in arbitration.***
>
> ***9. A pronouncement of late in Deep Trading Co. v. Indian Oil Corpn. 2013 4 SCC 35followed the legal position laid down in Punj Lloyd Ltd. which in turn had followed a two-Judge Bench decision in Datar Switchgears Ltd. v. Tata Finance Ltd. 2000 8 SCC 151 The theory of forfeiture of the rights of a party under the agreement to appoint its arbitrator once the proceedings under Section 11(6) of the Act had commenced came to be even more formally embedded in Deep Trading Co. subject, of course, to the provisions of Section 11(8), which provision in any event, had been held in Northern Railway Admn. not to be mandatory, but only embodying a requirement of keeping the same in view at the time of exercise of jurisdiction under Section 11(6) of the Act." (emphasis in original)***

12. It is quite apparent from the aforesaid exposition of law that when there is failure on the part of the Arbitral Tribunal to act and it is unable to perform its function either de jure or de facto, it is open to a party to the arbitration proceedings to approach the court to decide on the termination of the mandate. Section 15 provides some more contingencies when mandate of an arbitrator can be terminated. In the case at hand, it is quite apparent that Arbitral Tribunal failed to perform its functions and as such, prayer made in the instant application for termination of mandate and to appoint new arbitrator deserves to be accepted.

13. Consequently, in view of aforesaid detailed discussion as well as law laid down by the Hon'ble Apex Court supra, instant petition is allowed and order dated 15.10.2012, whereby new arbitrator i.e. Chief Engineer (Commercial) came to be appointed, is quashed and set-aside and with the consent of the learned counsel representing the parties, **Shri N.K. Thakur, Senior Advocate, HP High Court, Shimla**, is appointed as an arbitrator to adjudicate the dispute inter se parties. His consent/declaration under Section 11(8) of the Arbitration & Conciliation Act has been obtained. He has no objection to his appointment as an arbitrator in the present matter. He is requested to enter into reference within a period of two weeks from the date of receipt of a copy of this order. It shall be open to the Arbitrator to determine his own procedure with the consent of the parties. Otherwise also, entire procedure with regard to fixing of time limit for filing pleadings or passing of award stands prescribed under Sections 23 and 29A of the Act.

14. Needless to say, award shall be made strictly as per provisions contained in Arbitration & Conciliation Act. A copy of this order shall be made available to the learned arbitrator named above, by the Registry of this court within one week enabling him to take steps for commencement of the arbitration proceedings within stipulated period.

The petition is disposed of.

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

Reliance General Insurance Co. Ltd. ..Appellant.

Versus

Bachittar Singh & others ..Respondents.

FAO No. 517 of 2017.
Decided on : 30.7.2018.

Employees Compensation Act, 1923- Section 3(1)- Accident – "Arising out and in" due course of employment – Meaning – Deceased, a driver, employed by owner of vehicle was found dead in vehicle – Commissioner allowing claim application of legal representatives and directing insurer to indemnify award – Appeal against – Insurer assailing award on ground that deceased was found dead in vehicle and cause of his death was not ascertainable – And it is not case of death arising out some fortuitous event or mishap, being so, insurer has no liability – Held, in view of innate spirit and intent of legislative expression 'accident arising out and in course of employment cannot be given narrow meaning – It takes within its fold or ambit even fortuitous misfortune of an employee unless there exists no causal connection inter se fortuitous event or mishap vis-à-vis vocation performed by deceased workman – On facts, High Court found that there was causal nexus between death and performance of duties by employee concerned – Appeal dismissed.

(Paras-2,7 & 8)

Cases referred:

Oriental Insurance Co. Ltd. Versus Sheela Bai Jain and another, 2007 ACJ 1126
P.E. Davis and co. vs. Kesto Bouth, AIR 1968 Calcutta 129

For the Appellant: Mr. Chandan Goel, Advocate
For Respondents Mr. Devinder K. Sharma, Advocate, for respondents No. 1 and 2.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral.

The instant appeal arises, from, the verdict recorded by the learned Commissioner, while, his exercising powers under the Employee's Compensation Act, 1923, (for short the "Commissioner"), whereby, he allowed the application preferred therebefore, by the claimants herein, and, proceeded to assess, vis-à-vis, the successors-in-interest/claimants, of, deceased Sanjay alias Sanju, compensation amount comprised in a sum of Rs. 4,07,700/- along with simple interest at the rate of 12% per annum w.e.f. 2.8.2007, till, occurrence of deposit, of, whole of the compensation amount including interest, in, the Court, and also quantified the apt costs, besides stanting apt indemnificatory liability(ies) thereof stood fastened, upon, the Reliance General Insurance Company, appellant herein. He also directed qua the aforesaid quantified compensation amount being equally shared, by, all the claimants.

2. The Insurance company-appellant herein, standing aggrieved by the rendition, recorded by the learned Commissioner, hence, concert(s) to assail it, by preferring an appeal therefrom, before this Court.

3. This Court admits the appeal, instituted herebefore by the Insurance Company-appellants herein, on, the hereinafter extracted substantial question of law:-

> 1. Whether the Whether the learned Commissioner under Employees Compensation Act below was justified in coming to conclusion that the deceased died during the course of employment in the absence of any cogent evidence showing exact cause of death?

4. Uncontrovertedly, the aforesaid Sanjay @ Sanju, died during his employment under his apt employer. The employer was proceeded against ex-parte, hence, obviously he omitted, to, contest the factum of his engaging the aforesaid, upon vehicle bearing No. HR-46B-1151, as a driver, thereon (a) besides, he did not controvert the trite factum of, the, deceased, at the relevant time, hence performing the relevant callings of his avocation, upon, the aforesaid vehicle in his employed capacity, as a driver thereon. The effects thereof, are, qua all the uncontroverted factum aforesaid, rather acquiring credibility.

5. However, the learned counsel appearing, for, the Insurance Company-appellant herein, has, contended with vigor, (a) that the signification, carried, by the hereafter apt underlined portion, of, sub-section (1) of Section 3, of, the Employee's Compensation Act, 1923 (hereinafter referred to as the Act), "If personal injury is caused to [an employee] by accident arising out of and in the course of his employment", (b) hence being limited besides standing trammeled, only, within the domain of a *stricto sensu,* fortuitous event or a fortuitous mishap, (c) whereas the ill event, if any, of rather the deceased employee, hence being purportedly murdered, falling outside its purview. The aforesaid narrow ascription vis-a-vis the connotation(s), borne by the apt underlined portion, of, sub-section (1) of Section 3 of the Act, is, palpably, outside, the true nuance, innate spirit and the intent of the legislature, (d) inasmuch as, the true signification or scope besides parlance borne by the aforesaid statutory coinage, (e) is, of its encompassing, befalment upon a workman all fortuitous events or mishaps, conspicuously, "if all" evidently arise out of, and, occur in the course, of, the apt employment. The aforesaid broad ascription vis-a-vis the signification borne, by, the relevant statutory coinage, hence, occurring in sub-section (1) of Section 3 of the Act, rather hence takes within its field or ambit, even the fortuitous misfortune of an employee rather "dying", "unless" there exists evidently no casual connection inter-se the fortuitous event or mishap, vis-a-vis, thereat the apt callings,of, the apt avocation, hence being performed by the deceased workman, (f) also when its befalment, upon, the workman concerned, evidently, neither arise(s) from nor occurs in the course of his performing employment, under, his employer, thereupon too, the apt idemnifictory liability being amenable qua its fastening upon the employer, of, the deceased workman. The learned counsel for the appellants further submits, qua, the effects, of, the apt employer, not, controverting the aforestated trite factum, (g) rather merely spurs an inference of the claimants proving qua the deceased, their precessor-in-interest, performing the apt employment, incontemporanity, vis-a-vis the occurrence of his demise, also engenders merely an inference qua incontemporanity thereof, his performing the apt callings, of, his avocation, upon, the relevant vehicle, (h) yet, the rearing, of, the aforesaid inference, not per-se, establishing the factum, qua, rather with his being merely found dead in the relevant vehicle, also begetting any concomitant inference, qua, there hence existing, any, imperative nexus, inter-se, his thereat performing, the, callings of his employment, vis-a-vis, his demise, (i) whereas rather hence existence of evidence qua his demise being ascribable, vis-a-vis, his thereat evidently performing, the, callings of the apt avocation, obviously was hence imperative (i) besides the ill-event of his demise also imperatively enjoined adduction of potent evidence, qua, it, arising from the nature, condition, of, obligations, of, the apt callings, of, the relevant avocation, (j) contrarily with the post-mortem report, evidently, omitting to with specificity hence ascribe the reason, for, the demise of the deceased workman, thereupon, the, befitting therefrom conclusion, is, qua the aforestated imperative condition, as, borne in paras 12

and 13, of , the judgment reported in a case titled as ***Oriental Insurance Co. Ltd. Versus Sheela Bai Jain and another, 2007 ACJ 1126***, not begetting any satiation, hence he contends qua the impugned verdict rather warranting reversal. The relevant paragraphs No. 12 and 13 whereof stand extracted hereinafter:-

> "12. In Oriental Insurance Co. Ltd. v. Veena Sethi, 2002 ACJ 843 (Orissa), it was held that murder arose out of and in the course of employment, murder took place while driver had taken the vehicle for delivering goods and was returning when he was killed by someone, it was held that driver was discharging his duties on behalf of the employer and very nature of his employment made it imperative for him to drive the vehicle and put it at the spot where he was killed. It was held that accident arose out of and in the course of employment. The Supreme Court in Employees' State Insurance Corporation v. Francis De Costa, 1996 ACJ 1281 (SC) , has laid down that while interpreting the meaning of the expression 'arising out of and in course of employment', there has to be causal connection between the accident and employment. The Apex Court has observed:
>
> > "(29) ...In order to succeed, it has to be proved by the employee that (1) there was an accident, (2) the accident had a causal connection with the employment and (3) the accident must have been suffered in course of employment...."
>
> 13. The Supreme Court in Mackinnon Mackenzie & Co. Pvt. Ltd. v. Ibrahim Mahmmod Issak, 1969 ACJ 422 (SC), has held that the words 'in the course of employment' mean 'in the course of the work which the workman is employed to do and which is incidental to it'. The words 'arising out of employment' are understood to mean that 'during the course of the employment'; injury has resulted from some risk incidental to the duties of the service. The Apex Court held:
>
> > "(5) To come within the Act the injury by accident must arise both out of and in the course of employment. The words 'in the course of the employment' mean 'in the course of the work which the workman is employed to do and which is incidental to it'. The words 'arising out of employment' are understood to mean that 'during the course of employment, injury has resulted from some risk incidental to the duties of the service which, unless engaged in the duty owing to the master, it is reasonable to believe the workman would not otherwise have suffered'. In other words, there must be causal relationship between the accident and employment. The expression 'arising out of employment' is again not confined to the mere nature of employment. The expression applies to employment as such to its nature, its conditions, its obligations and its incidents. If by reason of any of those factors the workman is brought within the zone of special danger, the injury would be one which arises 'out of employment'. To put it differently, if the accident had occurred on account of a risk which is an incident of the employment, the claim for compensation must succeed, unless of course the workman has exposed himself to an added peril by his own imprudent act...."""

7. However, even if there is no direct evidence, existing on record, vis-a-vis, the precise cause, vis-a-vis, the demise of the apt predecessor-in-interest, of the claimants, nor when hence evidence surges forth qua, the existence, of, an imperative nexus, inter-se, the demise of the deceased, vis-a-vis, its occurrence, arising from or taking place, hence during the course of the deceased workman rather performing the apt callings, of, his avocation, (a) yet, want, of, the aforesaid evidence, cannot ex-facie, coax any, conclusion from this Court, qua, hence with the apt evidence, for, begetting satiation of the imperative principle, for, validly fastening, the, apt idemnificatory liability, upon, the Insurance Company, hence being grossly amiss, (b) thereupon it being befitting to record any conclusion, qua, the demise, of, the apt predecessor-in-interest of the claimants, not occurring, during, the course of his performing, his apt employment under his

apt employer, (c) rather an inevitable conclusion is garnered, qua the demise of the deceased workman, being ascribable, vis-a-vis, his incontemporanity thereof, rather performing, the, apt callings of his avocation, and, concomitant thereof sequel, is, qua his demise arising from, and, also occurring during the course of his performing, the, apt callings of his avocation, (d) prominently given lack of best befitting evidence qua the exact precise cause, of, demise of the deceased workman, (f) whereas, its, adduction rather constituted, the, best evidence, for, making an apt conclusion qua hence existence, of, apt nexus inter-se his demise, vis-a-vis, his thereat hence performing, the, callings of his avocation, (g) contrarily lack, of, the aforesaid evidence, rather, constrains a conclusion qua hence with imminent uncertainty surrounding, the, exact cause of his demise, uncertainty whereof stands expostulated, in, the apt post-mortem report, (i) thereupon, when his successors' interest, cannot, be excepted to adduce, the, best evidence in respect thereto, rather when the employer of the deceased workman, held, the best evidence, who however rather chose to be proceeded against an ex-parte, (ii) thereupon it is to be concluded, qua even when, the insurer, has merely depended upon, the uncertain imprecise pronouncements, borne, in the apt post-mortem report, vis-a-vis, the exact cause, of, demise of the deceased employee for his hence making the aforesaid submissions, (iii) thereupon, it cannot be firmly concluded qua the insurer rather efficaciously proving, of, the apt exculpatory onus, qua the imperative nexus inter-se, the, demise of the deceased workman, vis-a-vis, his thereat performing, the, apt callings rather standing satisfactorily discharged, nor, thereupon it can be concluded, qua, the apt idemnificatory liability, being not, fastenable upon it. Conspicuously, with the deceased at the relevant time being the sole occupant of the relevant vehicle, hence also disabling emanation , of, proof, qua the exact cause of his demise.

8. Furthermore, the ensuing effect, of, the aforestated lack of best evidence, for hence making, a, precise inference, qua, the, existence of the apt nexus, inter-se the demise, of, the deceased workman rather arising from, and, occurring during the course of his performing, the, apt callings of his avocation, under his employment, is, qua hence rather the claimants being entitled, to, the hereinafter expostulated legal stance, borne in a judgment in a case reported **AIR 1968 Calcutta 129 P.E. Davis and co. vs. Kesto Bouth,** the relevant portion whereof stand extracted hereinafter:

> " ….The principle underlying all these cases is that an act which is reasonable or necessary, having regard to all the circumstances, though not one which is part of the workman's original duty may be within the sphere of his employment. What is necessary is that there should be a casual connection between the accident and the employment and further that the cause should be a proximate cause and not a very remote cause. But at the same time it has been held repeatedly that if a workman in the course of his employment has to be in a particular place and by reason of his being in that particular place has to face a situation in which he receives injuries that fact itself would be a sufficient casual connection between the employment and accident."

(b) wherein it stands propounded qua, upon, the workman concerned, being enjoined, to, during the course of his employment be in a particular place, and, by reason of his being in a particular place, his facing a situation wherein, he has received injuries, thereupon ipso-facto, the, apt causal nexus rather hence existing inter-se, the, accident and his employment, (c) the reason for garnering, the aforesaid conclusion, arises from the factum of the post-mortem report, tentatively making an ascription qua the demise of the deceased, spurring, from 'asphyxia' (d) the sequel whereof, is, qua it being permissible for this Court to conclude, qua the purportedly fatal asphyxia entailed upon the deceased workman, being a sequel of noxious gases, hence emanating from the apt vehicle, (d) conspicuously when the best evidence, for, negating the aforesaid inference remains unadduced, even by the insurer. Furthermore, the effect of the insurer hence omitting to adduce, the, best scientific evidence for dispelling, the afore reared inferences, is qua, this Court being constrained, to, conclude qua their existing a causal nexus, inter-se, the demise of the deceased workman, vis-a-vis, his thereat hence performing the apt callings of his avocation. The substantial question of law is answered accordingly.

8. In view of the above, there is no merit in this appeal, the same is accordingly dismissed. Impugned verdict is maintained and affirmed. All pending applications stand disposed of accordingly.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, ACJ AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Court on its own motion ....Petitioner.
Versus
State of H.P and others ....Respondents.

CWPIL No.: 124 of 2018.
Decided on: 31.07.2018.

Constitution of India, 1950- Article 226- **Forest Conservation Act, 1980-** Land, use of - Non-forest purpose – Public interest litigation- High Court took suo motu cognizance on basis of letter alleging non-forest use of Forest Land in and around Hatu Temple – Such use causing inconvenience to devotees visiting temple – Allegations found correct – In the meantime, State authorities removed tents pitched alongside temple road in DPF Hatu and DPF Jhamunda, as also tents raised on private land without permission from Tourism Department – State also decided not to give permission for pitching tents except on recommendations of Gram Panchayat concerned – Matter closed – Petition disposed of. (Paras-2 to 9)

For the petitioner Mr. Rajnish Maniktala, Advocate as Amicus Curiae.
For the respondents Mr. Ashok Sharma, Advocate General with Mr. Adarsh K. Sharma, Ms. Ritta Goswami and Mr. Nand Lal Thakur, Additional Advocates General, for the respondents- State.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

This Court had taken *suo motu* cognizance of a letter petition, addressed to it by the President and Secretary of Hatu Mata Mandir Committee, District Shimla, in which it was mentioned that area abutting the said temple, i.e. government land as also forest area was being used for non-forest activities, without any valid permissions, which was causing threat/danger to the forest wealth as well as causing inconvenience to the devotees who visit the temple.

2. On 09.07.2018, this Court, while issuing notice to the respondents, had directed Sub Divisional Magistrate, Kumarsain, to visit the spot and ascertain the factual position. Also, on the said date, Mr. Rajnish Maniktala, learned Counsel, who was present in the Court, was requested to assist the Court as Amicus.

3. Apparently, contents of the letter petition are correct. Equally true, grievances so vented out remained unheeded by the authorities, forcing the letter petitioners to directly write to this Court.

4. Today, pursuant to the directions of this Court, Sub Divisional Magistrate, Kumarsain has filed his affidavit/ status report, in which it has been mentioned that illegal tents established alongside road at various places in DPF Hatu and DPF Jhamunda, have been removed, so also those tents which were found on the private land without any permission from the Tourism Department. It is further mentioned in the status report that on a complaint dated 10.05.2018 received from President, Hatu Temple Committee, DFO Kotgarh had been requested

to take all necessary actions for removal of temporary/illegal tents established on the way from Silikandi (Narkanda) to Hatu peak. It is also mentioned in the status report that DFO Kotgarh had intimated that a meeting with eco-tourism was conducted on 22.05.2018, in which President of Hatu Temple was also present. It was decided in the said meeting that no permission for pitching of tents will be accorded after 04.06.2018 from Silikandi (Narkanda) to Hatu peak, except on the recommendations of the Gram Panchayat concerned.

5. On the basis of the averments so made in the status report, learned Advocate General has persuaded us that as all measures stand taken to remove illegal tents from Silikandi (Narkanda) to Hatu peak, this petition may be closed.

6. Learned Amicus Curiae has expressed his satisfaction with regard to the status report so filed by Sub Divisional Magistrate, Kumarsain.

7. Accordingly, we close this petition with the observation that the respondents shall ensure that no non-forest activity is carried out in the said area in violation of the provisions of the Forest Conservation Act, 1980.

8. Before parting, we wish to place on record appreciation qua the efforts put in by Mr. Rajnish Maniktala, learned Amicus Curiae, who, on the instructions of this Court obtained necessary feedback.

9. Registry is directed to send a copy of this judgment to the Director, Tourism & Civil Aviation Department, Block No. 28, SDA Complex, Kasumpati, Shimla-09 (respondents No.6), The Deputy Commissioner, Shimla (respondent No. 7) and the D.F.O. Kotgarh, District Shimla, HP (respondent No. 8), for necessary action as well as to the letter petitioners to enable them to take follow up action, if any, with the authorities concerned.

Petition stands disposed of in above terms.

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

Smt. Besri Devi & ors. ....Appellants.

Versus

Smt. Ramku & ors. ...Respondents

RSA No: 151 of 2003
Reserved on: 10.5.2018
Decided on: 1.8.2018

Specific Relief Act, 1963- Sections 5 and 34- Suit for declaration & Injunction - In alternative for possession also – Plaintiff by alleging of having married to R as per 'Nath Chadar' custom after death of her husband 'T', claiming succession to R's estate – Also alleging that revenue entries showing defendant No.1 (D1) as widow of 'R', and of her having succeeded to estate of 'R' are wrong – Defendants No.2 and 3, purchasers from D1 pleading that plaintiff was widow of 'T' and no customary marriage took place between her and 'R' – Also asserting that D1 infact was widow of 'R' and she executed sale of land in their favour – Trial Court dismissing suit by holding that neither dissolution of marriage between 'R' and D1 nor prevalence of custom of 'Nath Chadar' in community of 'R' was proved – Trial Court disbelieving entries of voter list and Pariwar register showing plaintiff as wife of 'R'- In appeal, District Judge allowing plaintiff's appeal by holding that oral as well as documentary evidence clearly revealed that D1 had married 'P' after death of first wife of 'P' and was so recorded throughout as his wife in records of Panchayat – District Judge also held plaintiff having married to 'R' as per customary rites and decreeing suit – RSA by defendants- On facts, High Court found that (i) D1 did not file any written statement and never controverted case of plaintiff (ii) Written statement was only of persons who had purchased

property from D1, (iii) plaintiff was married to R as per Nath Chadar, as this marriage was attended by witnesses 'S' and 'H' examined by plaintiff (iv) Plaintiff was consistently recorded as wife of "R' in voter list (v) Foster son of D1 proved that D1 was married to his father 'P' after death of his mother 'B' - D1 is recorded wife of 'P' in vote list and other records of Panchayat – Held, District Judge was justified in reversing decree of trial court – RSA dismissed. (Paras- 14 to 20)

For the appellants Mr. Sanjeev Kuthiala, Advocate.
For the respondents Mr. Praneet Gupta, Advocate, for respondents No.1(a) and 1(b).
None for respondent No.2 stands deleted.
Mr. R.K. Bansal, Advocate, for respondents No.3 and 4.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge

By way of this appeal, the appellant has challenged the judgment and decree passed by the Court of learned District Judge, Bilaspur in Civil Appeal No.99/95 dated 17.3.2003, vide which learned Appellate Court while allowing the appeal filed by the appellant therein set aside the judgment and decree passed by the Court of learned Sub Judge First Class, Ghumarwin, District Bilaspur in Case No.190-1 of 1988 titled Smt. Ramku Vs. Smt. Rameshwaru and others dated 31.3.1995, whereby the learned Trial Court had dismissed the suit filed by the plaintiff Smt. Rumku.

2. This appeal was admitted on 5.9.2003 on the following substantial question of law:

"1) Whether the findings of the reversal of the District Judge that plaintiff was not the legally wedded wife of Ram Dittu is against the evidence on record and based on inadmissible evidence?

3. Thereafter on 9.5.2018, during the pendency of the appeal, following additional substantial questions of law were framed and the learned counsel for the parties were also heard on the said substantial questions of law:-

"1(a) Whether on the material on record the inference drawn by the Court below in respect of a presumption of marriage of Ramku with Ram Dittu is sustainable and the presumption of truth attached to the revenue records could be assumed to be rebutted?

2 Whether the defendants No.2 and 3 who are appellants No.1 and 2 were bonafide purchaser for consideration and the sale affected by the defendant No.1 could be questioned or set aside in the present suit and a decree for possession of half share granted?

3. Whether the ingredients of Order 41 Rule 27 and Order 18 Rule 17A CPC made out and judicial discretion exercise in allowing the additional evidence and reliance thereon is sustainable particularly when in Ex.RX-3, Remeshwari was shown as widow of Prabhu and not Ram Dittu."

4. Brief facts necessary for the adjudication of the present appeal are that the respondent-plaintiff (hereinafter referred to as the 'plaintiff') filed a suit for declaration that she was owner in possession of land measuring 14 biswas comprising in Khasra No.64 Khewat Khatoni No.56/67 as also land measuring 5-11 bighas out of total land measuring 15-15 bighas comprising in khasra Nos.65, 71, 59, 66, 68, Khewat No.69, Khatoni No.68 situated in village Panoh, Pargana Tiun, Tehsil Ghumarwin, District Bilaspur, with further prayer that defendants be restrained permanently from dis-possessing the plaintiff from the suit land. In the alternative,

plaintiff had prayed for decree for possession, if she failed to prove her possession over the suit land or was dis-possessed from the suit land by the defendants.

5. As per the plaintiff, the suit land was earlier owned and possessed by Ram Dittu, who died issueless. Plaintiff being successor-in-interest, succeeded to the said property, as Ram Dittu had married her through the custom of 'Nath Chadar' prevalent in the community of the plaintiff. It was further her case that after the performance of the custom of 'Nath Chadar', she and Ram Dittu lived as husband and wife till the death of Ram Dittu. As per plaintiff, earlier she was married to Tota Ram, who died and after the death of Tota Ram, custom of 'Nath Chadar' was performed with Ram Dittu. Said Ram Dittu had succeeded to the share of Narainu, son of Nagdu. According to the plaintiff, after the death of one Smt. Bohri, her estate also dwelled upon the plaintiff, as Bohri was the mother of late Ram Dittu. It was further the case of the plaintiff that after the death of Ram Dittu, defendant No.1 had started interfering in the suit land and had threatened to dispossess the plaintiff from the suit land by claiming herself to be owner in possession of the suit land. It was further the case of the plaintiff that when she inquired from the revenue authorities, she came to know that the name of plaintiff was not entered in the revenue records and it was defendant No.1, who was reflected as widow of late Ram Dittu, which entries as per the plaintiff were incorrect. It was on these pleadings that the suit was filed by the plaintiff seeking a decree of declaration as also injunction.

6. Defendant No.1 did not file any written statement. However, written statement was filed by defendants No.2 and 3, who denied the claim of the plaintiff. As per defendants No.2 and 3, plaintiff was widow of Tota Ram and she had falsely alleged that she was widow of Ram Dittu. As per said defendants, defendant No.1 was the widow of Ram Dittu, who had re-married one Prabhu Ram. After the death of Ram Dittu, defendant No.1 had succeeded to the suit land being widow of Ram Dittu. Mother of Ram Dittu namely Bohri Devi had also executed a will in favour of defendant No.1, vis-a-vis., her share in the suit land. Said defendants also denied the performance of the ceremony of 'Nath Chadar' between plaintiff and Ram Dittu. Further, as per said defendants, it was defendant No.1, who was the owner in possession of the suit land and who had sold the same vide sale deed dated 6.8.1988 and 21.2.1989 in favour of defendant No.2 and vide sale deed dated 10.4.1989 in favour of defendant No.3. On these basis, the claim of the plaintiff was denied by the said defendants. In the replication, plaintiff re-iterated her claim.

7. On the basis of the pleadings of the parties, learned Trial Court framed the following issues:-

"1) Whether the plaintiff is owner in possession of land measuring 14 biswas to the extent of 1/12 share out of total land comprised in Khasra No.65/71/59/66/68? OPP

2) Whether the plaintiff is entitled for decree of permanent injunction? OPP

3) Whether the sale deed dated 6.8.1988 and 21.2.1989 executed in favour of defendant No.2 by defendant No.1 and sale deed dated 10.4.1989 in favour of defendant No.3 are wrong, illegal and void and has no bearing on the right, title and interest of the plaintiff? OPP

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

5. Whether the suit is time barred? OPD

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

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

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

9. Whether this court has no jurisdiction to hear and decide the case? OPD

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

11. Whether the defendant No.1 is owner in possession of the suit land if so its effect? OPD

12. Relief."

8. On the basis of evidence lead by the parties, following findings were returned by the learned Trial Court to the issues so framed:

"Issue No.1.	***No***
Issue No.2.	***No***
Issue No.3	***No***
Issue No.4	***No***
Issue No.5	***No***
Issue No.6	***No***
Issue No.7	***No***
Issue No.8	***No***
Issue No.9	***No***
Issue No.10	***No***
Issue No.11	***Yes***
Relief	***The suit of the plaintiffs dismissed with costs as per the operative portion of the judgment."***

9. Learned Trial Court dismissed the suit filed by the plaintiff by holding that it was defendant No.1, who was the first wife of Ram Dittu and that there was nothing on record to demonstrate that there was any dissolution of marriage between them. Learned Trial Court held that the custom of 'Nath Chadar' could be solemnized either with the elder brother or younger brother of deceased husband. It held that custom of 'Nath Chadar' could not be proved by examining witnesses unless and until it was sufficiently shown that the said custom was prevalent in the community of deceased Ram Dittu and that Ram Dittu happened to be either 'Devar' nor 'Jeth' of the plaintiff. Learned Trial Court also hold that plaintiff had failed to prove the ingredients of alleged custom of 'Nath Chadar' and plaintiff was in fact wife of one Tota Ram and there was nothing on record to show that Ram Dittu was the brother of Tota Ram. It further hold that mere entries in voter list and family register reflecting plaintiff as wife of Ram Dittu were of no relevance, as defendants had adduced more cogent and convincing evidence to the effect that defendant No.1 was the first wife of late Ram Dittu. On these basis, learned Trial Court dismissed the suit.

10. Feeling aggrieved, plaintiff filed an appeal. Learned Appellate Court while allowing the appeal set aside the judgment and decree passed by the learned Trial Court. Learned Appellate Court held that in order to establish her relationship with Ram Dittu, plaintiff had examined Prem Singh PW/5, who was Secretary of the Gram Panchayat, Gahar and said Secretary had stated that he was secretary of Gram Panchayat, Gahar in the year 1972-73 and had carried out entry in the books of Gram Panchayat (Ext.PW5/A) as per which defendant No.1 was shown as wife of one Shri Prabhu. Learned Appellate Court also hold that PW/5 had deposed that Prabhu had reported his marriage with defendant No.1 in person in Gram Panchayat, Gahar on 2.2.1973 and had signed relevant column of the register, abstract of which was Ext.PW5/A. Learned Appellate Court also hold that no exception could be taken by

defendant No.1 to the statement of PW/5. Learned Appellate Court also hold that records demonstrated that Prabhu had reported his marriage with defendant No.1 to the Gram Panchayat more than 10 years before the death of Ram Dittu and there was no occasion for either the plaintiff or PW/5 to fabricate record against defendant No.1 as far back as in the year 1973. Learned Appellate Court also hold that PW4 Hem Raj had stated that his father Prabhu had married Bohri on 2.12.1972 and at the time of marriage of defendant No.1 with Prabhu, his age, i.e., the age of PW/4 was about 10 to 12 years and thus, he was old enough to notice the events. Learned Appellate Court also hold that as mother of PW/4 was dead, it was thereafter that defendant No.1 married Prabhu and in the books of Gram Panchayat, Gahar, she was consistently recorded as wife of Prabhu. Learned Appellate Court also took note of the fact that defendants No.2 and 3 did not examine Prabhu with a view to establish that he was not related to defendant No.1 in any manner. Learned Appellate Court also observed that defendant No.1 despite notice had not contested the suit and she was proceeded against ex parte vide order dated 19.2.1990. It further hold that record demonstrated that immediately after the death of her husband, plaintiff had started claiming ownership and possession over the share in the estate of Ram Dittu.

11. Learned Appellate Court further held that Trial Court had committed an error by holding that the plaintiff had failed to prove her marriage through the ceremony of 'Nuth Chadar' with Ram Dittu. It held that scrutiny of oral and documentary evidence on record demonstrated that the plaintiff stood married to Shri Tota Ram some time in the year 1950 and that she had been putting up with her husband in her matrimonial house. Tota Ram died, which resulted in the dissolution of marriage and after the demise of her first husband, plaintiff settled as wife of Ram Dittu some time in the year 1970. It further held that there was evidence on record that Ram Dittu had married plaintiff and ceremonies of widow re-marriage stood performed. It further held that the factum of the marriage of plaintiff with Ram Dittu stood proved on record by plaintiff witnesses. Learned Appellate Court also held that the plaintiff, defendant No.1 as also Ram Dittu were low caste Hindus and widow re-marriage through the ceremony of 'Nath Chadar' was stated to be prevalent amongst such communities. It also held that there was nothing to suggest that widow re-marriage through the ceremony of 'Nath Chadar' could be performed only with the elder or younger brother of the deceased husband. Learned Appellate Court also held that statements of PW1 Smt. Ramku, PW2 Sukhia and PW/3 Gopala clearly proved re-marriage of plaintiff with Ram Dittu in the year 1970 after the performance of all ceremonies. It also held that as marriage had taken place as far back as in the year 1970, it was not possible for the plaintiff and her witnesses to re-produce all the details of marriage after such a long time. Learned Appellate Court also held that books of Gram Panchayat and electoral rolls reflected plaintiff to be wife of Ram Dittu from the year 1972-73 onwards and it could not be believed that the plaintiff was so recorded erroneously in the books of Gram Panchayat or electoral roll. Learned Appellate Court also held that during the course of the cross-examination of plaintiff, defendants No.2 and 3 never suggested to the plaintiff that she had indicated in the FIR that defendant No.1 was the first wife of Ram Dittu. Learned Appellate Court also took note of the fact that DW/6 had admitted that as per FIR DW6/A, plaintiff was the wife of Ram Dittu. On these basis, it was held by the learned Appellate Court that learned Sub Judge had not taken into consideration the oral and documentary evidence on record in its correct perspective and had erred in appreciating the contents of documents especially Ext.P/16 and Ext.P/17, which clearly demonstrated that the plaintiff was the legally wedded wife of Ram Dittu. Learned Appellate Court also held that record demonstrated that Ram Dittu during his life time was a member of Geharwin Co-operative Agricultural Services Society, Ghumarwin, who had purchased one share of said Society and had nominated the plaintiff as his legal heir, by referring plaintiff to be his wife. Learned Appellate Court took note of the fact as per record said share subsequently stood transferred in the name of plaintiff. On these basis, learned Appellate Court allowed the appeal, by reversing the judgment and decree passed by the learned Trial Court.

12. Feeling aggrieved, the defendants have filed this appeal. I have heard learned counsel for the parties and I have also gone through the judgments and decrees passed by both the learned Courts below as well as the records of the case.

13. I will firstly deal with the first substantial question of law:

"1) Whether the findings of the reversal of the District Judge that plaintiff was not the legally wedded wife of Ram Dittu is against the evidence on record and based on inadmissible evidence?

14. It is not in dispute that defendant No.1 did not file any written statement to the plaint. In other words, the pleadings of the plaintiff were not refuted by way of written statement by defendant No.1. Incidentally, written statement on record is of persons, who purchased the suit land from defendant No.1. In my considered view, the best person to have had controverted the contention of the plaintiff, that she was not the legally wedded wife of Ram Dittu, was defendant No.1. However, she chose not to file the written statement. It is not in dispute that defendant No.1 was duly served in the Civil Suit and was also duly represented by counsel before the learned Appellate Court, whereas she was proceeded against ex parte before the learned Trial Court and order of having been proceeded against ex parte was never assailed by her. Be that as it may the fact is that defendant No.1 chose not to contest the case of the plaintiff by way of filing written statement. It is pertinent to mention here that it is not the case of defendants No.2 and 3 that the suit was filed by the plaintiff in collusion with defendant No.1. This is further evident from the fact that both in the first appeal as also in the present appeal, defendant No.1 was being represented by the same counsel as defendants No.2 and 3.

15. Now, in this background, this Court has to examine as to whether the findings of reversal so recorded by the learned Appellate Court to the effect that the plaintiff was legally wedded wife of Ram Dittu and not defendant No.1 are based on inadmissible evidence? As already mentioned above, learned Appellate Court while holding that it was the plaintiff who was the legally wedded wife of Ram Dittu and not defendant No.1 has relied upon the statements of plaintiff's witnesses as also on documentary evidence on record including Ext.P-16 and Ext,P-17, as also copy of FIR Ext.DW6/A. A perusal of the record of the case demonstrates that plaintiff entered into the witness box as PW/1 and she stated in the Court that she was the owner in possession of land in dispute in her capacity as legally wedded wife of Ram Dittu. She also deposed in the Court that she was earlier married to Tota Ram and after his death, she married Ram Dittu through the performance of the ceremony of 'Nath Chadar'. Sukhia, who deposed in the Court as PW/2, supported the case of the plaintiff and he deposed in the Court that Ram Dittu was the husband of plaintiff. He also stated in the Court that they were married through the performance of the ceremony of 'Nath Chadar'. He also deposed that he knew the first husband of plaintiff, i.e., Tota Ram. He also deposed that when the ceremony of 'Nath Chadar' was performed, he was present there and he had also worked in the marriage. Similarly, PW/3 Gopala has also supported the case of the plaintiff. He deposed in the court that he knew Ram Dittu and that the plaintiff was the first wife of Ram Dittu. He also stated that plaintiff was earlier married to Tota Ram and after his death, she married Ram Dittu by performance of ceremony of 'Nath Chadar'. He further deposed that he had attended the marriage. He also deposed that in their community, custom of marriage by way of 'Nath Chadar' was prevalent. There is also on record the statement of Hem Raj, who is the foster son of defendant No.1. This witness deposed in the Court that name of his mother was Burfi Devi and after the death of his mother, his father married defendant No.1 on 2.12.1972. He stated that he remembered the factum of the marriage of his father with defendant No.1, as he was around 12 years old at the relevant time. He further deposed that after the said marriage, defendant No.1 lived in the house of his father and even at the time of recording of the statement, she was residing there. Shri Prem Singh, Secretary of Gram Panchayat deposed as PW/5. He proved the fact that as per Ext.PW5/A, which was the Panchayat record pertaining to marriage registration, against Sr.No.23 dated 2.12.1972, Prabhu Ram was entered as married with Rameshwaru, i.e., defendant No.1.

16. In my considered view, whereas, besides the statement of the plaintiff, the statements of PW/2 and PW/3 unequivocally prove the factum of plaintiff being married to Ram Dittu, the statements of PW/4 and PW/5 prove the fact that defendant No.1 was married to Prabhu Ram. In fact, statement of PW/4, who is the son of Prabhu Ram clearly demonstrates that defendant No.1 married Prabhu Ram in the year 1972. Said statement coupled with the statement of PW/5 and also contents of Ext. PW5/A leave no room of doubt that in the year 1972, defendant No.1 was married to Prabhu Ram. Besides this, there is on record Ext.P-12, which is a copy of voter list pertaining to the year 1983, in which the plaintiff is reflected as wife of Ram Dittu. Similarly, in Ext.P-13, which is also copy of the voter list, defendant No.1 is reflected as wife of Prabhu Ram. Perusal of Ext,P-16 and P-17 also demonstrates that the plaintiff was reflected as wife of Ram Dittu, in the records of Geharwin Co-operative Agricultural Services Society, Ghumarwin of which Ram Dittu was a member and after the death of Ram Dittu, his share stood devolved upon defendant No.1 by way of nomination.

17. In this view of the matter, in my considered view, it cannot be said that the findings returned by the learned Appellate Court that it was the plaintiff, who was the wife of Ram Dittu are either not based on true and correct appreciation of evidence on record or said findings have been returned by relying upon inadmissible evidence. In fact, during the course of arguments, learned counsel for the appellant could not substantiate as to how the evidence on the basis of which findings were so returned by the learned Appellate Court was inadmissible evidence. This substantial question of law is answered accordingly.

18. Now, I will deal with remaining substantial questions of law.

"1(a) Whether on the material on record the inference drawn by the Court below in respect of a presumption of marriage of Ramku with Ram Dittu is sustainable and the presumption of truth attached to the revenue records could be assumed to be rebutted?

19. While deciding substantial question of law No.1, this Court has already held that the findings returned by the learned Appellate Court that it was plaintiff, who was wife of Ram Dittu and not defendant No.1 are based on correct appreciation of evidence on record and the same are not based on inadmissible evidence. In this view of the matter, the present substantial question of law is also required to be answered in favour of the plaintiff for the reason that it is not as if learned Appellate Court has drawn wrong inference with respect to presumption of marriage of plaintiff with Ram Dittu because, the conclusion arrived at in this regard by the learned Trial Court is based on substantive evidence on record. This substantial question of law is answered accordingly.

20. Substantial question of law No.2 is re-produced as under:-

2 Whether the defendants No.2 and 3 who are appellants No.1 and 2 were bonafide purchaser for consideration and the sale affected by the defendant No.1 could be questioned or set aside in the present suit and a decree for possession of half share granted?

21. As far as this substantial question of law is concerned, in my considered view, when defendant No.1 had no right over the suit land, which stood sold by the said defendant in favour of defendants No.2 and 3, then the said sale cannot be protected on the ground that appellants No.1 and 2 are bona fide purchasers. In fact, as I have already mentioned above, the suit filed by the plaintiff was not contested by defendant No.1. It were defendants No.2 and 3 therein, i.e., present appellants No.1 and 2, who contested the suit by taking the stand that the suit land was owned by defendant No.1, who executed valid sale deeds in their favour and further that the plaintiff was not the legally wedded wife of Ram Dittu. Even otherwise, appellants No.1 and 2 cannot have any grievance against the plaintiff because it was not she, who sold the land to the said appellants. They purchased the land from defendant No.1, who had no title over the same and for that, they can take recourse to such remedies in law as may be available to them against defendant No.1. However, on this plea, the sale entered into by defendant No.1 with

defendants No.2 and 3 cannot be protected. This substantial question of law is answered accordingly.

22. Substantial question of law No.3 is re-produced as under:-

> ***3. Whether the ingredients of Order 41 Rule 27 and Order 18 Rule 17A CPC made out and judicial discretion exercise in allowing the additional evidence and reliance thereon is sustainable particularly when in Ex.RX-3, Remeshwari was shown as widow of Prabhu and not Ram Dittu."***

23. Record of the learned Appellate Court demonstrates that the application to lead additional evidence was allowed by the learned Appellate Court vide order dated 15.3.2003. A perusal of order dated 15.3.2003 demonstrates that the learned Appellate Court held that in its opinion, the documents, which were being intended to be placed on record, were relevant and necessary for just and appropriate decision of the appeal. Now, the documents which were permitted to be exhibited were (a) Death Certificate of Prabhu Ram; (b) copy of the books of the Gram Panchayat and (c) copy of mutation No.1752 dated 15.5.1997. This order also demonstrates that opportunity was granted to the present appellants to produce evidence to rebut the said documents but it was stated on their behalf before the learned Appellate Court that they did not want to produce any evidence to rebut the documents. Incidentally, order dated 15.3.2003, so passed by the learned Appellate Court on an application filed under Order 41 Rule 27, CPC, was never assailed by the present appellants during the pendency of the first appeal. Though this Court is not suggesting that this point could not have been raised by the appellants in the present appeal but the conduct of the present appellants is self speaking that they were not aggrieved by the factum of the application so filed before the learned Appellate Court being allowed, because they did not even take time to produce any evidence to rebut the documents on record. Therefore, no illegality was committed by the learned Appellate Court while allowing the said application. This substantial question of law is also answered accordingly.

24. Before parting, it is relevant to mention that during the pendency of this appeal, application under Order 41 Rule 27, Civil Procedure Code was filed by the appellants, which stood registered as CMP No.10682 of 2016 alongwith which, certain documents stood appended by the appellants. During the course of arguments, learned counsel for the appellants could not give any cogent explanation as to why these documents were not placed on record by the appellants either before the learned Trial Court or before the learned Appellate Court. Order 41 Rule 27 of the Civil Procedure Code clearly provides that such an application can be allowed provided (i) the Court from whose decree appeal is preferred has refused to admit such evidence as ought to have been admitted or (ii) the party seeking to produce additional evidence, establishes that notwithstanding due diligence, such evidence was not within its knowledge or despite exercise of due diligence could not be produced earlier or (iii) the Appellate Court requires any document to be produced to enable it to pronounce judgment. Appellants have failed to demonstrate that either Courts below refused to admit evidence which ought to have been admitted or despite exercise of due diligence, they could not produce on record the documents appended alongwith this application earlier. Besides, in my considered view, the documents already on record are sufficient to enable this Court to pronounce the judgment and the documents which stand appended alongwith this application so filed under Order 41 Rule 27 of the Civil Procedure Code are not required for the pronouncement of the judgment. This application is accordingly rejected.

25. In view of the above reasons, this appeal is dismissed. Pending application(s), if any, shall also stands disposed of. No order as to costs.

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

Jagdeep Singh. .....Petitioner.

Versus

Lokinder Singh & ors. .....Respondents.

Cr.MMO No. 277 of 2018.
Date of decision: August 01, 2018.

Code of Criminal Procedure, 1973- Section 482- Inherent Powers- Exercise of -Fixing of date – Trial Court fixing long dates ranging 7-8 months in cases which are at stage of service of opposite party – Petition against – Trial Judge in his comments justifying order on account of huge pendency in his Court – Held, cases which are at stage of service, filing of pleadings do not consume much time of Court, therefore, cannot be adjourned for such longer dates – High Court directed Trial Court to prepone the said case – Copy of order also ordered to be sent to Sessions Judge concerned for circulation amongst Presiding Judges of his division. (Paras-3 to 7)

For the petitioner	Mr. Neeraj Maniktala, Advocate.
For the respondents	Mr. R.P. Singh and Mr. Kunal Thakur, Dy. AGs, for respondent No. 3-State. Nemo for respondents No. 1 and 2.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. ***(Oral)***

Heard.

2. The comments furnished by learned trial Judge consequent upon the order passed on the previous date have been perused and not found satisfactory.

3. The pendency in the Court may be on higher side, however, the solution is not to fix long dates ranging 7-8 months that too in the cases which are at the stage of service of the opposite party. At a later stage i.e. recording of the evidence etc. one can adjust the cause list of course as per the Norms and High Court Rules and Orders so that large number of cases are not fixed for the purpose rendering thereby the Court in a state of helplessness in recording the evidence in all the cases. However, the cases at the stage of service, not consumes much time, cannot be adjourned for such a longer date(s).

4. Therefore, while disagreeing with the comments submitted by the learned trial Judge, there shall be a direction to prepone the date fixed in the pending criminal case State vs. Jyoti Thakur etc. and fix the same at an early date by way of suitable adjustment of cause list. There shall also be a direction to learned trial Judge not to fix such long dates in the cases which are at service stage, filing reply/written statement, replication and settlement of issues etc.

5. The parties through learned Counsel representing them are directed to appear in the trial Court on *20.8.2018.*

6. The petition is accordingly disposed of, so also the pending application(s), if any,

7. An authenticated copy of this judgment be sent to learned District Judge, Kangra at Dharamshala for circulation amongst the Presiding Judges of each and every court in Kangra Civil & Sessions Division (HP) and learned trial Judge, for compliance.

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

Shri Naresh Kumar alias Sonu ....Appellant.
Vs.
Shri Mehar Singh .....Respondent.

RSA No.: 245 of 2008
Reserved on: 18.05.2018
Date of Decision: 01.08.2018

Torts – Damages – Quantum - Determination of – Plaintiff filing suit for damages on ground that defendant by assaulting with a drat, caused grievous injuries to him - And on account of which, he suffered permanent disability to the extent of 15% - Plaintiff also claiming medical expenses and damages towards future prospects – Defendant denying allegations in toto – Trial Court assessing monthly income of plaintiff at Rs.3,000/- and on basis of 15% permanent disability determining annual loss of income at Rs.5,400/- - Trial Court taking average age of an individual at 60 years and deducting actual age (21 years) of plaintiff - Court assessing total loss of income for remaining 39 years at 5400 x 39 = Rs. 2,10,600/- but, confining decreeing to Rs.1,30,000/- what was claimed in plaint and partly decreeing suit – Appeal of defendant dismissed by District Judge – RSA by defendant – Defendant arguing that Lower Courts were influenced by findings of conviction recorded by criminal Court against him and there was no independent evidence in Civil proceedings regarding defendant having caused such injuries – High Court though found that there was independent evidence proving that defendant had caused permanent disability by inflicting injuries to plaintiff with a drat, but held that multiplier of '39' was highly unreasonable – In view of age of plaintiff, multiplier of '18' was applied and damages reduced to Rs.97,200/- - RSA partly allowed – Decree modified. (Paras-14 to 20)

Case referred:
Sarla Verma and others Vs. Delhi Transport Corporation and another,(2009) 6 Supreme Court Cases 121

For the appellant: Mr. Anand Sharma, Advocate.
For the respondents: Mr. J.L. Bhardwaj, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *:*

By way of this appeal, the appellant has challenged the judgment and decree, dated 15.03.2008, passed by the Court of learned District Judge, Kangra at Dharamshala in Civil Appeal No. 170-D/XIII/2006, vide which, learned Appellate Court while dismissing the appeal so filed by the present appellant, upheld the judgment and decree dated 04.11.2006, passed by the Court of learned Civil Judge (Senior Division), Kangra at Dharamshala in Civil Suit No. 80 of 2002, whereby the learned Trial Court allowed the suit filed by the present respondent partially by passing a decree for recovery of Rs.1,55,400/- with costs alongwith future interest @4% per annum from the date of decree.

2. Brief facts necessary for the adjudication of the case are that respondent/plaintiff (hereinafter referred to as 'the plaintiff') filed a suit for recovery of an amount of Rs.2,00,000/- against the present appellant on the ground that the plaintiff was an unemployed youth 25 years of age and used to help his father in grazing sheep and goats. As per the plaintiff, on 24.04.1998, plaintiff alongwith his father and brother were proceeding alongwith their cattle towards Bharmaur, District Chamba. When they reached at Village Jhir Balla, Tehsil Shahpur, District Kangra, they had their meals there and also took some rest. During this period, defendant, who

was a shop keeper at Village Jhir Balla, Tehsil Shahpur, District Kangra, came out from his shop and started abusing the plaintiff and asked him to remove his lamb from a Tiala. Defendant also started abusing the father and brother of the plaintiff. Plaintiff requested the defendant that he would remove the lamb from the Tiala and that defendant should not abuse his father and brother. On this, defendant got enraged and went back to his shop and came out with a *drat* and attacked the plaintiff with the same on his left forearm. Brother of the plaintiff tried to save him, but he (brother) also was attacked by the defendant. On account of the blows so given by the defendant, plaintiff sustained grievous injury on his person and blood started oozing out from his arm. The matter was reported to the Police at Police Station, Shahpur, whereafter FIR No. 63/98 was recorded. As the plaintiff was bleeding profusely, he was taken to Shahpur Hospital, where he was examined. The nature of injuries suffered by him were found to be serious and it was also found that the plaintiff had suffered a fracture. He was referred to Zonal Hospital, Dharamshala on the same day. He remained admitted at Zonal Hospital, Dharmshala from 24.04.1998 to 11.05.1998, i.e., for a period of 18 days. Accused was convicted for commission of offences under Sections 324 and 326 of the Indian Penal Code by the Court of learned Judicial Magistrate, 1st Class (1), Dharamshala vide judgment, dated 03.08.2001. According to the plaintiff, during the period when he remained under treatment, he incurred expenditure of Rs.50,000/- towards his treatment and medicines. Further as per him, he had to take medicines even after his discharge. It was further the case of the plaintiff that he had passed higher secondary examination, was good at sports and had played sports at Zonal level, but on account of injuries suffered by him, his entire career had been spoiled as he had suffered 15% permanent disability and in fact he was crippled. On these basis, plaintiff prayed that a decree for Rs.2,00,000/-, i.e., Rs.1,50,000/- on account of having suffered permanent disability to the extent of 15% on his person and Rs.50,000/- on account of necessary expenses, which the plaintiff had incurred on account of injuries, be passed in his favour and against the defendant.

3. The suit was contested by the defendant, who denied the academic qualification of the plaintiff or the factum of his having any agricultural land etc. Defendant denied inflicting any injury upon the person of the plaintiff with *drat*. He in fact denied the contents of FIR No. 63/98 and also denied the factum of his being convicted, as alleged by the plaintiff. Defendant denied the factum of plaintiff having incurred an amount of Rs.50,000/- as expenses for treatment and medicines etc. He also denied the claim of the plaintiff of being good at sports or having suffered disability etc.

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

"1. Whether the defendant had caused grievous hurt to the plaintiff, as alleged? OPP

2. If issue No. 1 is proved in affirmative, whether the plaintiff is entitled to recover the suit amount as damages? OPP

3. Whether the plaintiff has no cause of action?

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

5. Whether the suit is not maintainable? OPD

6. Relief.

5. On the basis of the evidence led by the respective parties, the issues framed were adjudicated by the learned trial Court in the following terms:

"Issue No. 1: Yes, the plaintiff had suffered permanent disability to the extent of 15%.

Issue No. 2: Partly yes. The plaintiff is entitled to recover an amount of Rs.1,55,400/- from the defendant i.e. Rs.1,50,000/- for loss of earning throughout life and Rs.5400/- as expenses on treatment of the grievous injury.

Issue No. 3: *No.*

Issue No. 4: *No.*

Issue No. 5: *No.*

Issue No. 6: *Suit partly decreed to the extent of Rs.1,55,400/-costs of suit and interest @4% P.A. from the date of decree till the amount is recovered in full as per operative part of the judgment."*

6. The suit so filed by the plaintiff was partly decreed with costs. A decree for recovery of Rs.1,55,400/- with costs and future interest @4% per annum was passed in favour of the plaintiff. While partly allowing the suit, it was held by the learned Trial Court that evidence on record demonstrated that grievous injuries were caused to the plaintiff by the defendant, on account of which, plaintiff remained hospitalized for 18 days. It further held that permanent disability of 15% stood proved on record. While arriving at the said conclusion, learned Trial Court took into consideration the statement of plaintiff, his brother, as also a chance witness, who had witnessed the occurrence of the incident, namely, Guzaro Devi. Learned Trial Court also took into consideration the statement of PW-5 Pankaj Gupta, the Medical Officer, who had examined the plaintiff, who proved the factum of plaintiff having received grievous injuries on his person. Learned Trial Court held that said Medical Officer had noted that there was incised wound on the left upper limb forearm of the plaintiff, which was caused by a sharp edged weapon. Learned Trial Court also took note of the statement of PW-6 Dr. S.M. Mehta, Asstt. Professor, Ortho, RPMGC, Dharamshala, who had proved the factum of plaintiff having been hospitalized from 24.04.1998 to 11.05.1998. Learned Trial Court also took into consideration the disability certificate Ex. PW2/G, which was issued by a duly constituted Medical Board. Learned Trial Court also observed that as far as defendant was concerned, though he deposed in the Court as DW-1, but he did not examine any other witness in his support. Learned Trial Court thereafter held that on the basis of the evidence placed on record by the plaintiff, independent of the adjudication made by the learned Trial Court, wherein criminal proceedings stood initiated, the plaintiff had been able to substantiate the factum of his having suffered grievous injuries on his body, which were caused by the defendant and his having remained hospitalized on this count. Learned Trial Court thus concluded that plaintiff had proved that defendant had caused voluntary injuries on the body of the plaintiff, which had resulted into permanent injury to the extent of 15%. It further held that though plaintiff had not proved that he had spent an amount of Rs.50,000/- on his treatment etc., but had proved on record that he remained hospitalized. On these basis, it was held by the learned Trial Court that the plaintiff was entitled for an amount of Rs.5400/- on this count by adjudging that the plaintiff might have spent Rs.300/- per day for the treatment of grievous injury. Learned Trial Court further held that the age of the plaintiff at the time of accident was 21 years and taking his average age to be 60 years, the factum of earning capacity of plaintiff having been reduced to 15% less for the future years, i.e., around 39 years, the plaintiff was entitled for damages as under:

"(a) minimum monthly income of the plaintiff be taken as Rs.3000/- or say Rs.36000/- per annum;

(b) 15% disability means that per month he suffered a loss of Rs.450/- or say Rs.5400/- per annum; and

(c) taking the life expectancy of plaintiff to be 60 years, loss suffered by him would come to Rs.5400/- per annum (loss of income per annum Rs.5400 x 39 multiplier =Rs.2,10,600/-)."

Thereafter, learned Trial Court held that as the plaintiff had confined his damages to Rs.1,50,000/-, therefore, he was entitled to claim damages of Rs.5400/- as medical expenses plus Rs.1,50,000/-as loss of earning capacity. On these reasonings, learned Trial Court partly decreed the suit of the plaintiff.

7. Feeling aggrieved, defendant filed an appeal. Learned Appellate Court vide judgment and decree dated 15.03.2008, dismissed the appeal so filed, by upholding the judgment

and decree dated 04.11.2006 passed by the learned Trial Court. Learned appellate Court after discussing the evidence on record, concluded that it stood demonstrated from the record, i.e., statement of the plaintiff, his brother, as also the doctors who had examined him that plaintiff had suffered serious injuries which were inflicted on his body by the defendant. It also took note of the fact that the factum of defendant having been convicted by the Criminal Court on the basis of an FIR lodged by the plaintiff stood denied by the defendant, which was contrary to records. It further held that evidence on record clearly demonstrated that the plaintiff had suffered 15% permanent disability on account of the injuries inflicted on his body by the defendant. Learned Appellate Court also held that there was no infirmity with the findings returned by the learned Trial Court that defendant had caused injuries with *drat* on the left upper limb forearm of the plaintiff. With regard to the amount of compensation so assessed by the learned Trial Court, it was held by the learned Appellate Court that the amount of damages granted by the learned lower Court seemed to be quite proper, just, reasonable and adequate and the same was based on strict application of legal principles and on proper appreciation of the evidence on record. It further held that taking into consideration the age of the plaintiff learned lower Court took the expected age as 60 years and thereafter assessed the monthly income of the plaintiff to be Rs.3000/- and the plaintiff was held to be in loss to the extent of Rs.450/- per month on account of his handicap, which came to Rs.5400/- per annum, on which a multiplier of 39 was applied to arrive at a figure of Rs.2,10,600/-, which was confined to the amount, as prayed for by the plaintiff. As per the learned Appellate Court, findings returned by the learned lower Court while determining the damages to which the plaintiff was entitled to, were correct findings, based on proper application of legal principles. On these basis, it upheld the judgment and decree passed by the learned Trial Court.

8. Feeling aggrieved by the said judgments and decrees, defendant has filed this appeal.

9. The present appeal was admitted on 10.09.2008 on the following substantial questions of law:

> *"1. Whether the judgments and decrees passed by both the learned Courts below are based on mis-reading, mis-construction and mis-appreciation of oral as well as documentary evidence?*
>
> *2. Whether the learned Courts below have rightly held that the appellant is entitled to pay the damages when there is no evidence on record and solely influenced by the judgment passed by the learned trial Court in criminal case whereby the appellant was released on probation for a period of one year?*

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

11. I will deal with both the substantial questions of law together.

12. Learned counsel for the appellant has argued that the findings returned by both the learned Courts below to the effect that defendant voluntarily caused serious injuries to the plaintiff were perverse findings as there was no material on record placed to this effect by the plaintiff and in fact learned Courts below were persuaded solely by the findings returned by the learned Trial Court in a criminal case, which could not have been done. On the other hand, learned counsel for the respondent has argued that the findings to this effect returned by both the learned Courts below were based on evidence placed on record by the plaintiff and not under any influence of the judgment passed by the learned Trial Court in the criminal case.

13. In my considered view, there is no merit in the said contention of the learned counsel for the appellant. I have in detail dealt with the findings returned by the learned Courts below. It is not only mentioned in the findings returned by the learned Courts below, but is also evident from the evidence on record that the plaintiff had independently substantiated the factum of his having received serious injuries on account of *drat* blows inflicted upon him by the defendant on the fateful day.

14. Head Constable Surjit Singh, who entered the witness box as PW-1, produced on record the copy of FIR No. 63/98, which was registered by the plaintiff against the defendant after the occurrence of the incident. Occurrence of the incident stands proved not only by the statement of the plaintiff, who entered the witness box as PW-2, but also by statement of his brother PW-3 Sh. Jago Ram, who was alongwith him at the time when the incident took place and the statement of PW-7 Smt. Guzaro Devi, who happened to be at the spot when the incident took place. Besides this, Dr. Subhash Kaushal entered the witness box as PW-4 and proved the disability certificate issued in favour of the plaintiff Ex. PW2/G by the competent Board. Dr. Pankaj Gupta, who had medically examined the plaintiff after the incident on 24.04.1998, also entered the witness box as PW-5 and he has proved the factum of plaintiff having received injuries on the date of incident. In addition, there is also on record statement of Dr. S.M. Mehta (PW-6), Asstt. Professor, Ortho, RPMGC, Dharamshala, who has stated before the Court that plaintiff was admitted in the said hospital with injuries on 24.04.1998 and he was discharged on 11.05.1998. In view of the said evidence on record, which has been taken into consideration by both the learned Courts below, it cannot be said that the findings returned by the learned Courts below that the appellant is liable to pay damages on account of his having inflicted injuries on the body of the plaintiff, are not based on evidence on record, but is a result of the influence of the judgment passed by the learned Trial Court in a criminal case. At this stage, it is pertinent to mention that in its judgment passed by the learned Trial Court in the Civil Suit, said Court has expressly stated that in the present suit, the factum of defendant having caused bodily injuries to the plaintiff had to be substantiated by the plaintiff independent of the criminal proceedings.

15. Learned counsel for the appellant has also argued in the alternative that even otherwise the judgments and decrees passed by both the learned Courts below are not sustainable in the eyes of law, as the compensation which has awarded by the said Courts in favour of the plaintiff is highly exaggerated as the same is not based on any evidence on record, but is based on conjectures and surmises. He further argued that by no stretch of imagination multiplier of 39 could have been applied by the learned Courts below while calculating the damages, to which the plaintiff was entitled. On the other hand, learned counsel for the respondent has argued that there was no infirmity with the judgments passed by both the Courts below as far as the amount of compensation is concerned, because the amount so decreed was reasonable and just and the same called for no interference.

16. In my considered view, there is merit in the contention of the learned counsel for the appellant to the extent that both the learned Courts below have erred in not appreciating that multiplier of 39 could not have been applied for assessing the damages, to which the plaintiff was entitled. At this stage, this Court is not going into this issue as to whether amount of Rs.3000/- which was taken by both learned Courts below as the presumptive monthly salary of the plaintiff was correct or incorrect, nor the Court is going into this aspect as to whether the amount of Rs.450/-, which was calculated by both the learned Courts below as monthly loss suffered by the plaintiff on account of 15% disability, was excessive or not, as learned counsel for the appellant has very fairly stated that even if the said amounts are taken as they are, then also, the amount of compensation awarded is highly unreasonable, as by no stretch of imagination multiplier of 39 could have been applied. In the present case, damages have been awarded by the learned Trial Court in favour of the plaintiff on the ground that on account of the injuries which were received by the plaintiff as a result of voluntary hurt caused to him by the defendant, he suffered 15% disability. In other words, the plaintiff is suffering 15% disability on account of the voluntary hurt caused to him by defendant is the genesis of the damages having been granted by the learned Trial Court to the plaintiff. Now the factum of plaintiff having received 15% disability on account of above, is not in dispute. Similarly, as already mentioned above, this Court is also not interfering with the findings returned by both the learned Court below that the annual loss which the plaintiff could be stated to have suffered on account of such physical disability is Rs.5400/- per month. The sole question which arises for consideration of this Court is as to whether the multiplier of 39 applied by the learned Trial Court and affirmed by the learned Appellate Court is just and reasonable or the same requires interference.

17. In my considered view, the multiplier of 39 applied by the learned Trial Court is highly excessive.

18. Grant of compensation to a victim, who may suffer physical disability on account of acts of omission and commission of the other party, is provided under various laws of the land. To name a few, such provisions are there under the Workmen Compensation Act and Motor Vehicles Act etc. In addition, in a situation like the present one, an aggrieved party can file a suit for damages also in a Civil Court. However, the fact of the matter still remains that the principles which have to be taken into consideration by a Court of law while awarding damages or compensation have to be uniform and not arbitrary or based on conjectures and surmises. Even in the cases of death under the Motor Vehicles Act, the maximum multiplier which is being applied by the Courts is that of 18 and that too in a case where age of deceased is 21 to 25 years {See ***Sarla Verma and others*** Vs. ***Delhi Transport Corporation and another***,(2009) 6 Supreme Court Cases 121)}.

19. Coming to the facts of this case, the formula applied by the learned Trial Court while arriving at the multiplier is quite arbitrary. Learned Trial Court held that as the age of the victim at the time of accident was 21 years and if average age is to be taken as 60 years, then difference between two comes to 39 years and the same should be the multiplier. The system so adopted by the learned Trial Court to arrive at the multiplier is highly unreasonable to say the least. Learned Trial Court should have had undertaken the exercise of going through contemporaneous adjudications as to in such like cases what was the maximum multiplier being applied either by the Courts or by the Tribunals under various Statutes. Failure on the part of the learned Trial Court to do the same has resulted in great injustice to the appellant-defendant, as learned Trial Court has applied an extremely exhorbitant multiplier in favour of the claimant. In this view of the matter, taking into consideration the fact that the plaintiff was 21 years of age at the time when the accident took place, in my considered view, multiplier of 18 would be reasonable in the peculiar facts and circumstances of the case. Grant of multiplier of 39 by the learned Trial Court, as upheld by the learned Appellate Court, is not sustainable in law and the same is liable to be modified to 18. Substantial questions of law are answered accordingly.

20. Accordingly, this appeal is partly allowed and the judgment and decree dated 04.11.2006, passed by the learned Trial Court in Civil Suit No. 80/02 is modified to the extent that the plaintiff shall be entitled to damages @Rs.5400/- per annum multiplied by 18, i.e., Rs.97,200/- alongwith interest and other damages as awarded by the learned Trial Court.

The appeal stands disposed.

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

Sh. Praveen Kumar. ....Petitioner.

Versus

Sh. Bhupinder Singh & anr. ....Respondents.

CMPMO No. 565 of 2017.
Date of decision: August 01, 2018.

Legal Services Authority Act, 1987- Section 21- Award of Lok Adalat – Appeal against by insured – National Lok Adalat passing award in motor accident claims case - Held, Award of Lok Adalat is not appealable - It cannot be entertained. (Para-5)

Legal Services Authority Act, 1987- Section 21- Award of Lok Adalat – Validity - Award passed by Lok Adalat on basis of statement given by Advocate of party – However, party was not present before Lok Adalat – Party challenging award on ground of its having been passed behind his back

- Held, it is valid award as Advocate would not give statement without authorization/instructions of party – Petition dismissed. (Para-4)

Case referred:
Bharvagi Construction and Anr. v. Kothakapu Muthyam Reddy and Ors., AIR 2017 Supreme Court 4428

For the petitioner	Mr. Y.P.S. Dhaulta, Advocate.
For the respondent	Mr. Ajay Sharma, Advocate, for respondent No. 1.
	Mr. Raman Sethi, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. ***(Oral)***

Award dated 9.9.2017 (Annexure P-1) passed by a Bench of National Lok Adalat in MACP No. 42 of 2017 is under challenge on the grounds, inter alia, that the petitioner herein (respondent No. 1-Insured before learned Motor Accident Claims Tribunal below) was not present before the Bench of National Lok Adalat and the impugned award has been passed behind his back and without recording his statement.

2. The record reveal that ever since the service of petitioner-respondent No. 1 in the claim petition the same continued to be listed on different dates for filing reply. The reply, however, was not filed and it is on 25.8.2017 learned Tribunal below was informed that there are chances of amicable settlement of the disputes involved. Consequently, the conciliation was tried on 26.8.2018 and the following order passed by learned Claims Tribunal:

> *"Conciliation tried and the same seems to be successful, as such, matter is ordered to be listed in the National Lok Adalat scheduled to be held on 9.9.2017."*

3. It is apparent from the order *ibid* that the claim petition was ordered to be fixed before National Lok Adalat for recording compromise with a direction to the parties to remain present in person on the date fixed. The petitioner-respondent No. 1 was also present in person along with learned Counsel representing him when the conciliation tried by learned Motor Accident Claims Tribunal on 26.8.2017. He, however, failed to attend the National Lok Adalat on the date fixed i.e. 9.9.2017. However, Shri K.K. Chaudhary, Advocate, learned Counsel representing him in his statement recorded separately has stated that the parties have compromised the matter and that the petitioner-respondent No. 1 is ready and willing to pay a sum of Rs.2,50,000/- to Shri Bhupinder Singh, respondent No. 1 herein towards full and final settlement of his claims in the claim petition. The respondent No. 1-claimant Bhupinder Singh was also present in person. In his statement recorded separately he also stated about the amicable settlement having been arrived at between the parties and as a result thereof a sum of Rs.2,50,000/-is the mutually agreed amount payable to him towards full and final settlement in the claim petition. The Bench of National Lok Adalat, as such, proceeded to pass the final award on the basis of amicable settlement so arrived at.

4. As has said hereinabove, petitioner-respondent No. 1 was a party to the amicable settlement arrived at between the parties. Had it been not so he would have appeared before the Bench of National Lok Adalat on 9.9.2017 and apprised the Bench that no amicable settlement was arrived at during the course of conciliation tried in the Court by learned Motor Accident Claims Tribunal on 26.8.2017. Not only this, but there was a direction to the parties to appear before the Bench of National Lok Adalat. He was present on 26.8.2017 before learned Tribunal below when such direction was passed. He, no doubt, was not present before the Bench of National Lok Adalat, however, duly represented by learned Counsel representing him. The possibility of he having authorised/instructed learned Counsel to make statement on his behalf cannot be ruled out.

5. In such peculiar circumstances, it cannot be believed by any stretch of imagination that the amicable settlement as arrived at in this matter is behind his back and without associating him during the course of conciliation tried. On the other hand, the award passed by the National Lok Adalat is not appealable as is provided under Section 21 of the Legal Services Authority Act, 1987. The ratio of the judgment in ***AIR 2017 Supreme Court 4428***, title ***Bharvagi Construction and Anr.*** v. ***Kothakapu Muthyam Reddy and Ors.*** is not attracted in the given facts and circumstances of this case and rather distinguishable.

6. For all the reasons hereinabove, this petition fails and the same is accordingly dismissed.

7. Pending application(s), if any, shall also stand disposed of.

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

Ashwani Kumar alias Faquir Chand and others ....Appellants.

Vs.

State of Himachal Pradesh .....Respondent.

Cr. Appeal No.: 310 of 2008
Date of Decision: 03.08.2018

Indian Penal Code, 1860- Section 304-B and 201- **Indian Evidence Act, 1872 (Act)-** Section 113-B- Dowry death – Presumption, when can be drawn? – 'R', wife of 'A' went missing from her matrimonial house and her dead body recovered from canal – Death found having taken place because of consumption of poison and not by drowning – Trial Court by drawing presumption under Section 113-B of Act convicting husband 'A' for offence under Section 304-B and 201 and other relatives (co-accused) for offence under Section 201 I.P.C.- Appeal against on ground of judgment being based on conjectures and surmises – Held, for drawing presumption under Section 113-B of Act it must be shown by way of some evidence that soon before her death, woman was subjected to cruelty or harassment for or in connection with demand of dowry – No evidence on record that 'R' was subjected to any such cruelty immediately before her death – No such allegations of dowry harassment were made in complaint by mother of 'R', when missing report was filed by her – Other evidence regarding demand of dowry and quarrel with 'R' by 'A' contradictory – Appeals allowed – Conviction and final order of sentence set aside.

(Paras-21 to 26)

For the appellants: Mr. Ajay Chandel, Advocate.

For the respondent: M/s Desh Raj & Sanjeev Sood, Additional Advocates General, with Mr. Kamal Kant, Deputy Advocate General.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

By way of this appeal, the appellants/accused have challenged judgment, dated 28.04.2008, passed by the Court of learned Additional Sessions Judge, Fast Track Court, Una in Sessions Case No. 7/2007, vide which, accused Ashok Kumar was convicted for commission of offences punishable under Sections 304-B and 201 of the Indian Penal Code and accused Ashwani Kumar, Rakho Devi, Suresh Kumari and Tarsem Lal were convicted for commission of offence punishable under Section 201 of the Indian Penal Code. Whereas accused Ashok Kumar was sentenced to undergo rigorous imprisonment for a period of seven years and also to pay a fine of Rs.5,000/- for commission of offence punishable under Section 304-B of the Indian Penal

Code, he was sentenced to undergo simple imprisonment for a period of one year and to pay a fine of Rs.2000/- for commission of offence punishable under Section 201 of the Indian Penal Code. Accused Ashwani Kumar, Rakho Devi, Suresh Kumari and Tarsem Lal were sentenced to undergo imprisonment for a period of one year and to pay a fine of Rs.2000/- each, for commission of offence punishable under Section 201 of the Indian Penal Code.

2. During the pendency of this appeal, appellant No. 1 Ashok Kumar and appellant No. 3 Smt. Rakho Devi died.

3. The case of the prosecution was that accused Ashok Kumar was the husband of deceased Ranjana Devi, accused Rakho Devi was the mother of accused Ashok Kumar, whereas accused Ashwani Kumar was his brother, accused Suresh Kumari alias Nisha Devi was his sister and accused Tarsem Lal was the husband of Suresh Kumari. Complainant Smt. Surinder Kaur was the mother of deceased, who was a resident of Village Bathri, District Una. Complainant had two sons and two daughters. Deceased Ranjana was married to accused Ashok Kumar in the year 2002. Further as per the prosecution, out of this marriage, a son was born, who was about 2 ½ years old. Immediately after marriage, accused started harassing Ranjana Devi on the issue of insufficient dowry. Deceased used to make a grievance of this fact whenever she visited her parental house. She also used to complain that accused Ashok Kumar was in the habit of demanding money. On 06.02.2006, deceased Ranjana had come to Village Pangla in Punjab to attend the marriage of the son of her mother's sister (*Mossi*). Thereafter, on 07.02.2006, accused Ashok Kumar also reached Pangla, where he had a quarrel with the deceased on demand of dowry. He left Village Pangla without attending the marriage. Ranjana returned to the house of her in-laws at Village Kangar after attending the marriage along with her son on 10.02.2006. On the same day, i.e., 10.02.2006, at about 8:00 p.m., accused Nisha informed the complainant on telephone that Ranjana had left her matrimonial house without informing anyone after leaving her son there. Thereafter, Ashok Kumar also intimated the complainant of this fact. On this, the complainant alongwith her family members started searching for Ranjana, but she could not be traced. On 13.02.2006, complainant made a missing report of Ranjana devi at Police Station, Haroli vide report No. 10, Ex. PW3/A. On the basis of this report, information was sent about the factum of Ranjana Devi being missing to different places through Wireless. In response, information was received on 16.02.2006 that dead body of a female had been found in Ganguwal Power House. After receipt of the said information, on 17.02.2006, ASI Raghubir Singh alongwith other police officials and relatives of the deceased went to Ganguwal Power House. The dead body of the deceased was identified by her relatives and thereafter the dead body was sent to Civil Hospital Anandpur Sahib in Punjab, where her post mortem was conducted. This was followed by recording of the statement of the complainant under Section 154 of the Code of Criminal Procedure, on the basis of which, FIR Ex. PW7/A was recorded at Police Station, Haroli on 17.02.2006. As per the post mortem report Ex. PW 9/A and report of Chemical Examiner Ex. PW9/B, the cause of death of the deceased was found to be aluminium phosphide poisoning. Investigation revealed that on 07.02.2006 at Pangla, accused Ashok Kumar had a quarrel with the deceased on account of dowry demand and had also threatened her that the marriage which the deceased was attending would be her last such like function and he will not spare the deceased in future. Further as per the prosecution, investigation also revealed that the accused used to harass the deceased for not bringing sufficient dowry and had killed her by administering poison.

4. After completion of the investigation, charge sheet was filed against the accused and as a *prima facie* case was found against them, they were charged for commission of offences punishable under Sections 498-A, 304-B and 201 read with Section 34 of the Indian Penal Code, to which they pleaded not guilty and claimed trial.

5. In order to prove its case, prosecution examined 15 witnesses. Learned Trial Court for the purpose of adjudication of the case, framed the following points:

"1. Whether it is proved that on or about 10.2.2006 at Village Kangar, the accused Ashok Kumar being the husband of Ranjana Devi (now deceased) subjected her to cruelty and caused dowry death?

2. Whether it is proved that on or about 10.2.2006 the other accused being the relatives of deceased Ranjana Devi subjected her to cruelty and caused dowry death?

3. Whether it is proved that on or about 10.2.2006 at Village Kangar the accused in furtherance of their common intention caused the dead body of deceased Ranjana Devi to disappear with an intention to screen the offenders from legal punishment, knowing that dowry death of Ranjana Devi had been committed?

4. Final order."

6. The points so framed, were answered by the learned Trial Court as under:

"*Point No. 1:* *Yes.*

Point No. 2: *No.*

Point No. 3: *Yes.*

Final Order: *Accused Ashok Kumar convicted for the offence punishable under Sections 304- B and 201 of IPC and acquitted of the offence punishable u/s 498-A IPC while all other accused are convicted of the offence punishable u/s 201 IPC and acquitted of the offence punishable u/s 304-B and 498-A of I.P.C. per operative portion of the judgment."*

7. Learned Trial Court held that prosecution had been able to establish its case against the accused Ashok Kumar beyond all reasonable doubt that at the relevant time, he caused dowry death of Ranjana Devi. While arriving at the said conclusion, learned Trial Court relied upon the statements of Smt. Surinder Kaur, i.e., the complainant, who deposed in the Court as PW-5. Learned Trial Court held that the statement of PW-5 was duly corroborated by the brother of the deceased Sunny Kumar, who entered the witness box as PW-6. Learned Trial Court also held that PW-14 Pawan Kumar, who was the brother-in-law of the deceased, also fully corroborated and proved the case of the prosecution. Learned Trial Court thus held that from the evidence of PW-5, PW-6 and PW-14, it stood proved that marriage of the deceased took place with the deceased in the year 2002 and that they had also proved the factum of cruelty and harassment meted out to the deceased on the part of accused Ashok Kumar. Learned Trial Court held that their statements were cogent, convincing and trustworthy. It further held that medical and other evidence on record established that death took place on or about 10.02.2006 or between 10.02.2006 to 16.02.2006, during the period when the deceased was missing. It further held that death had taken place within 7 years of the marriage and further that there was sufficient evidence on record to prove that the death was not natural or accidental death. Learned Trial Court also held that the fact that body was found in a canal and death had not taken place due to drowning, led to the inference that the death had not taken place in normal circumstances. Learned Trial Court thereafter held that as such crimes are generally committed in privacy of residential houses and in secrecy, it was not easy to get independent and direct evidence. It further held that there was sufficient evidence on record to prove that soon before the death of the victim, she was subjected to cruelty on account of demand of dowry by accused Ashok Kumar. Learned Trial Court also held that the conduct of accused was also unusual, because accused Ashok Kumar between 10.02.2016 and 16.02.2016 did nothing except informing his mother-in-law. He did not even report the matter in the Police Station nor he made any other to search his wife. Learned Trial Court held that such conduct was unnatural and reflected that there was something wrong on his part. Learned Trial Court also held that though it was true that neither deceased nor her parents had made any complainant against the accused

to the Panchayat or Police prior to the occurrence of the incident, but this did not mean that they were deposing falsely. It further held that it was common knowledge that in rural areas, people from rural background try to settle the dispute amicably, because the intention of the parents of the victim or even that of wife is to bear the sufferings with the hope that with the passage of time, things will be automatically settled. As far as the factum of dowry not being referred to in the first report dated 13.02.2006, Ex. PW3/A is concerned, learned Trial Court observed that at the relevant time, probably complainant was not thinking that her daughter had been killed or harassed on account of dowry demand. Learned Trial Court held that it could be inferred that the deceased had suffered mental agony and cruelty on the part of accused Ashok Kumar, when he quarrelled with her in the presence of her relatives and when she returned to her matrimonial house on 10.02.2006, she was not welcomed, rather she had to face the anger and wrath of her husband and she might have thought to bring an end to her life by consuming aluminium phosphide. It further held that there was no explanation on the part of accused Ashok Kumar that if he had not harassed the deceased, then what was the reason for the deceased to have had ended her life. On these basis, learned Trial Court held that as it stood proved that the deceased had died under unnatural circumstances within 7 years of her marriage with Ashok Kumar accused and the cause of her death was cruelty or harassment by him on account of demand of dowry, thus, he was guilty of offence punishable under Section 304-B of the Indian Penal Code. It further held that as far as other accused were concerned, though there was not sufficient evidence on record to connect them with the commission of offence punishable under Section 304-B or 498-A of the Indian Penal Code, however, the circumstances point out that it was they who had thrown the body of the deceased in the canal so that evidence of her death or cause of her death disappear. On these basis, learned Trial Court convicted the accused under Section 201 of the Indian Penal Code.

8. Feeling aggrieved, accused filed this appeal, out of which, two have already died, as already mentioned above.

9. Mr. Ajay Chandel, learned counsel for the appellants has strenuously argued that the judgment of conviction passed by the learned Trial Court was not sustainable in the eyes of law, as the same was completely perverse, as the findings returned by the learned Trial Court were based on conjectures and surmises. According to Mr. Chandel, prosecution had not been able to prove its case against the accused beyond reasonable doubt and this very important aspect of the matter was ignored by the learned Trial Court. Mr. Chandel also argued that the contents of the judgment itself were self indicative that learned Trial Court had passed the judgment of conviction on conjectures and not on the basis of conclusions drawn from the evidence on record. According to Mr. Chandel, learned Trial Court had very conveniently ignored the crucial evidence on record, which clearly and categorically demonstrated that the accused were not guilty of the offences alleged against them. He argued that there was nothing on record from which it could be inferred that the deceased allegedly consumed poison on account of harassment meted out to her by accused Ashok Kumar. He further argued that there was no evidence on record that the body of the deceased was thrown into a canal by all the accused, as has been held by the learned Trial Court. Mr. Chandel argued that it was settled principle of law that an accused had the right to be presumed innocent until proved guilty and that it was not for the accused to prove their innocence, rather the onus was upon the prosecution to prove their guilt. As per him, despite the prosecution not having led any cogent evidence to prove that either the deceased had allegedly consumed poison on account of alleged harassment caused to her by the accused or that the accused had thrown dead body of the deceased in the canal, the accused stood convicted for the said offences by the learned Trial Court, which amounted to travesty of justice. Accordingly, he prayed that the judgment of conviction may be set aside.

10. On the other hand, learned Additional Advocate General has argued that the judgment passed by the learned Trial Court was a well reasoned judgment, which was passed on correct appreciation of evidence on record and the same called for no interference. He further argued that the learned Trial Court had taken into consideration all aspects of the matter and

after discussing the evidence on record, it had returned the findings of guilt against the accused, which findings did not warrant any interference.

11. I have heard the learned counsel for the parties and also gone through the judgment passed by the learned Trial Court, as also the records of the case.

12. In order to prove its case, prosecution examined 15 witnesses.

13. PW-1 is one Shri Tara Singh, who stated that he was working as a T-Mate in Ganguwal Hydel Project and that on 16.02.2006, he was on duty on a Crane and when he lifted Gate No. 7, he saw a dead body of a female, which fact he informed to the person Incharge. He further deposed that in the evening, Police from Police Station Haroli reached there, but at that time as it was already 5 p.m., he asked the police to come with some identifier on the next day. Police again came with the relatives of deceased next day at around 10:00 a.m. This witness also deposed that the dead body was identified by the mother, brother and husband of the deceased, who disclosed name of the deceased as Ranjana Devi.

14. PW-2 Nand Lal stated that he was Pradhan of Gram Panchayat Bathari from December, 2000 to December, 2005. He further stated that he knew complainant Surinder Kaur. He deposed that deceased Ranjana was daughter of Surinder Kaur, who was married to accused Ashok Kumar on 17.02.2006. He further stated that at the instance of SHO, Police Station Haroli, he went to Hydel Project Ganguwal alongwith mother and other relatives of deceased and they had taken out the dead body from the canal, which was identified to be that of Ranjana Devi. He further deposed that Surinder Kaur had only told him that her daughter had disappeared and nothing else. He thereafter stated that she had also told him that there was a dispute between the deceased and her in-laws. This witness was declared as a hostile witness and in his cross-examination by the learned Public Prosecutor, he denied that Surinder Kaur had told him that in-laws of Ranjana Devi used to harass her on the pretext of bringing less dowry. Further in his cross-examination by the accused, he admitted it to be correct that during his tenure as Pradhan, neither Surinder Kaur nor any of the relatives of the deceased had ever made any complaint against harassment of the deceased by her in-laws.

15. The next relevant witness is PW-5 Surinder Kaur, i.e., the complainant. This witness deposed in the Court that her husband was dead and she was having four children. She stated that Ranjana Devi was her youngest daughter, who was married to accused Ashok Kumar in the year 2002. Ranjana had given birth to a male child. Accused used to demand dowry from her daughter since the date of her marriage and deceased used to make such complaints to her about accused torturing the deceased. She further deposed that about 1 ½ years back, they had gone to attend a marriage of her sister's son at Pangla, where her daughter and accused Ashok Kumar were also present. She stated that in the said marriage, accused Ashok Kumar had quarrelled with her daughter on the demand of dowry. Accused Ashok had also left the place of marriage before the completion of ceremonies. Deceased thereafter went to her in-laws on 10th day of that month. Next day, she received an information that her daughter had left the house of her in-laws without information and that her son was ill. She further deposed that they made search for Ranjana Devi in the houses of their relatives. She further stated that after 7 days, they received intimation from Pradhan that dead body of Ranjana was lying at Ganguwal. She went there and identified the body of deceased Ranjana Devi. She also stated that she made a statement before the Police, which was Ex. PW5/A. In her cross-examination, she stated that she was not aware as to who was the mediator in the settlement of marriage of her daughter with accused Ashok Kumar. She further stated that father of the accused was a bed ridden person. She further stated that marriage of sister of Ashok Kumar took place prior to the marriage of Ashok Kumar and that husband of the sister of Ashok Kumar, namely Nishi Devi was owning a truck. She stated that Nisha Devi was living with her in-laws in Village Daroli in Punjab. She further stated that she had gone to Police Post Haroli for lodging the missing report of her daughter with her *Devar* Sodhi Ram. She further stated that she had informed the Police about harassment meted out by the accused to her daughter, but Police did not reduce this fact into writing. She stated that she had never informed Nand Lal, Pradhan about the harassment of her

daughter by the accused. She denied the suggestion that one *Bikkar* had informed her that she had seen Ranjana with her brother-in-law Pawan Kumar at Santoshgarh on the evening of 10th February. She admitted it to be correct that they never reported the matter about harassment of their daughter to Panchayat etc. She denied the suggestion that there was a talk in the Village that her daughter was last seen with her elder son-in-law Pawan Kumar before she went missing.

16. Brother of the deceased, namely, Sunny Kumar entered the witness box as PW-6. He deposed that he resided at Amritsar. He stated that his sister Ranjana was married to Ashok Kumar in the year 2002. She gave birth to a male child. After 6-7 months of marriage, Ranjana started complaining that her husband was harassing her on account of dowry. He further stated that on 08.02.2006, there was a marriage of their cousin at Village Pangla and to attend that marriage his sister came there on 06.02.2006. Accused Ashok Kumar reached there on 07.02.2006. He started demanding money from them and heated arguments took place. At that time, Ranjana was also present there. This witness further stated that they showed their inability to fulfill his demand, on which Ashok Kumar returned back. He further stated that Ashok Kumar had asked his sister to accompany him to his village as he did not wanted her to attend the marriage and he threatened her that otherwise she will face dire consequences. He further stated that Ashok Kumar left the place on 08.02.2006, whereas Ranjana Devi went to the house of her in-laws on 10.02.2006. He further stated that on 11.02.2006, a telephonic call was received from the house of in-laws of his sister that Ranjana Devi had left their house without informing and they wanted to inquire whether she had come to them or not. He further stated that after one hour, they received another telephonic call of Ashok Kumar, who also informed that Ranjana Devi had left their house. He further stated that on 12.02.2006, they went to the house of accused to make inquiries. He further stated that on 12.02.2006, they had gone to Police Station Haroli to lodge a complaint, but police did not lodge their report. He further stated that on 13.02.2006, they again went to Police Station Haroli alongwith some respectable persons of their village and then a report was lodged by the police. He further stated that they searched for Ranjana for 6-7 days at different places. On 16.02.2006, they also organized a *Dharna* before Police Station Haroli to take action in the matter. He deposed that on 17.02.2006, they received an information from their Pradhan that a dead body of female was found in Ganguwal Power House and when they went there, they identified the dead body to be that of accused Ranjana Devi. He further stated that his sister died due to ill-treatment meted out to her by her husband. In his cross-examination, he admitted it to be correct that after the marriage of his sister in 2002 till her death, they had never reported to the police or Panchayat or to any other relative in the village regarding harassment meted out to the deceased by the accused. He denied the suggestion that *Bikkar* had told him that on 10.02.2006, he had seen Ranjana with his elder brother-in-law Pawan at Santoshgarh Chowk.

17. Next relevant witness is Dr. Anand Ghai, PW-9, who had conducted the post mortem of deceased Ranjana Devi. He stated that as per viscera report, the cause of death was poisoning. He deposed that at the time of post mortem, there was no water in the lungs of the dead body. He admitted the suggestion that probable time between death and post mortem had been given merely on guess.

18. Investigating Officer, ASI Raghubir Singh entered the witness box as PW-12 and he deposed about the mode and manner under which the investigation was carried out in the matter. In his cross-examination, he stated that neither mother of the deceased nor her other family members ever came to the Police Station in his presence. He admitted the suggestion that parents of Ranjana Devi never organized any *Dharna* before the Police Station Haroli regarding alleged inaction of police. He admitted it to be correct that before 17.02.2006, PWs. Surinder Kaur, Sunny, Pawan Kumar and Sanjana Devi never made any complaint regarding harassment of Ranjana Devi by the accused. He admitted it to be correct that it had come in his investigation that Ranjana had gone alone on 10.02.2006 by bus from Kangar to Haroli side. He further stated that in Kangar Village, none told him that accused used to harass Ranjana Devi.

19. PW-14 Pawan Kumar, brother-in-law of deceased deposed that Ranjana was married to accused in the year 2006 and that whenever Ranjana used to meet him, she used to inform him that her husband and other family members used to demand dowry. Thereafter, he deposed about the marriage of cousin of his wife at Village Pangla, where deceased was also present alongwith Ashok Kumar. He deposed that on 07.02.2006, there was a quarrel between Ranjana and her husband, but he did not knew the cause of the same. He further stated that Ashok Kumar left on the morning of next day, whereas Ranjana went back on 10.02.2006 after attending the marriage. He further stated that on 11.02.2006, he received a telephone call from his in-laws that they had received a message from the in-laws of Ranjana that Ranjana was not there and whether she had come to his house, upon which he told that she was not there. He further stated that thereafter he rang his mother-in-law and told her about the same. Thereafter, he started searching for Ranjana, but she could not be traced. He also stated that on 13.02.2006, they reported the matter to the Police at Police Station Haroli and on 17.02.2006, in the morning they came to know that the dead body of Ranjana Devi was found in Ganguwal Power House. In his cross-examination, he stated that his marriage took place in the year 2006. He admitted the suggestion that at the time of settlement of marriage of Ranjana and Ashok Kumar, no demand was made by her in-laws regarding dowry. He also admitted the suggestion that on 11.02.2006, wife of his elder brother-in-law had telephonically inquired about Ranjana's presence in their house.

20. Before proceeding further, it is also relevant to refer to the contents of the statement of the complainant so recorded under Section 154 of the Code of Criminal Procedure and the contents of the missing report made by her. Ex. PW3/A is the copy of the *rapat* dated 13.02.2006. The *rapat* was entered at the behest of Surinder Kaur (PW-5). It is mentioned in the said *rapat* that complainant had a daughter, namely Ranjana, who was married in November, 2002 with Ashok Kumar. On 10.02.2006 at around 8 p.m., Nisha had telephonically informed her that Ranjana had left the house of her in-laws on 10.02.2006 without informing anyone. Complainant also mentioned that she was informed that Ranjana had left her young son behind who was ill. It is further mentioned in this report that at 8:30 p.m., Ashok Kumar telephonically inquired from the complainant as to whether Ranjana was with her and when she informed Ashok that Ranjana was not with her, Ashok told her that she had left for her parental house without informing anyone. It is further mentioned in the report that thereafter complainant had searched for her daughter at various places and as Ranjana was not found, therefore, appropriate action in this regard be taken.

21. Statement of complainant made under Section 154 of the Code of Criminal Procedure is on record as Ex. PW5/A and copy of FIR is on record as Ex. PW7/A. In the statement made under Section 154 of the Code of Criminal Procedure *inter alia* it was mentioned that daughter of the complainant had committed suicide as a result of cruelty inflicted upon her by her husband, mother-in-law, brother-in-law, sister-in-law and husband of sister-in-law. It is evident from the perusal of contents of missing report Ex. PW3/B and the contents of statement recorded under Section 154 of the Code of Criminal Procedure, as also the contents of FIR that there is variation in the same. Whereas in the missing report Ex. PW3/B, there is no mention made therein by Surinder Kaur that Ranjana might have left the house of her in-laws because of cruelty being meted out to her by her husband and other family members, this fact was introduced by the complainant first time in her statement recorded under Section 154 of the Code of Criminal Procedure after discovery of dead body of Ranjana.

22. Be that as it may, the fact of the matter remains that this allegation that deceased was treated with cruelty by her husband and other family members from her in-laws side has not been substantiated by the prosecution by producing any evidence worth its name. Mother, brother and brother-in-law of the deceased, who entered into the witness box as PW-5, PW-6 and PW-14, respectively have clearly admitted in their cross-examinations that as from the date of marriage of the deceased with the accused and till her death, they had never made any complaint whatsoever either with Panchayat or police etc. or with any other relative that the deceased was being ill-treated by her in-laws, who were demanding dowry from her.

23. This Court is not oblivious of the fact that in the present case, deceased has died an unnatural death and that too within seven years of the marriage. Of course, as per the provisions of Section 113-B of the Indian Evidence Act, when the question is as to whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death. However, still this presumption has to be substantiated by some evidence worth its name by the prosecution, which in my considered opinion, in the present case, the prosecution has failed to do. As already mentioned above, there is no evidence on record except the statements of mother, brother and brother-in-law of the deceased that the deceased was subjected to cruelty on demand of dowry either by her husband or other accused. Besides this, it has come on record that the cause of death of the deceased was consumption of poison. Recovery of the dead body from the water canal is also not in dispute. Now, there is no witness, who has seen either the deceased consuming poison or the dead body of the deceased being thrown by the accused in the canal. In fact the findings returned by the learned Trial Court while convicting the accused for commission of offence punishable under Section 201 of the Indian Penal Code by holding that circumstances point out that it was the accused who had thrown away the dead body of the deceased in the canal, are perverse findings, because these findings are not based on any evidence on record. Rather these findings are merely based on conjectures and surmises by the learned Trial Court. It is not understood as to how learned Trial Court has returned said findings, especially when it has come on record in the statement of the Investigating Officer himself that as per his investigation, Ranjana was seen going alone on 10.02.2006 by bus from Kangar to Haroli side. Similarly, as nothing has been produced on record by the prosecution to suggest that the deceased was subjected to harassment on the demand of dowry either by the husband or other accused, the conviction of husband for commission of offence under Section 304-B of the Indian Penal Code is also not sustainable. In fact while holding accused, being guilty of the offences, for which they were convicted, learned Trial Court erred in not appreciating that no conviction can be ordered by a Court of law until and unless prosecution has been able to prove its case against the accused beyond reasonable doubt. In the facts and circumstances of the present case, on the strength of the evidence on record, in my considered view, by no stretch of imagination it could be said that the prosecution had proved its case against the accused beyond reasonable doubt. This Court is not suggesting that evidence on record did not create suspicion that the accused might have committed the crime, for which they were charged, but then the fact of the matter remains that suspicion is not a substitute for proof. In the absence of there being cogent and reliable proof that the deceased had consumed poison on account of cruelty meted out to her by Ashok Kumar on the demand of dowry and further that her dead body was thrown in the canal by the accused, the accused could not have been convicted.

24. No independent witness has corroborated the case of the prosecution that deceased was subjected to cruelty by the accused. As far as the testimonies of mother, brother and brother-in-law of the deceased are concerned, they being close relatives of the deceased and interested parties, their statements are liable to be scrutinized carefully. In my considered view, the testimonies of neither of the said three witnesses are trustworthy. This is for the reason that there is no explanation as to why when the missing report was lodged, the factum of deceased being harassed by the accused for demand of dowry was not mentioned there, especially when according to the complainant, accused Ashok Kumar allegedly had entered into a quarrel with the deceased on the demand of dowry on 7th February, 2006, i.e., about three days before the date when the deceased went missing. In addition, the explanation given by all these witnesses as to why earlier matter was not reported to Panchayat or Police etc. also does not inspires confidence in the absence of any material produced by the prosecution on record to suggest that the deceased was being harassed by the accused on the demand of dowry. Besides this, there is variation in the version of mother and brother of the deceased with regard to the alleged incident, which took place on 7th February, 2006. Whereas the version of the mother is that accused Ashok Kumar demanded money from the deceased and when deceased expressed her inability to provide any money to the accused, he took up a quarrel with her parents, the version of the brother is

that the accused initially demanded money from them, i.e., the family members of the deceased and when they expressed their inability to pay any amount to the accused, he took up a quarrel with the deceased. This variation in the statement of the mother and the brother of the deceased could not be satisfactorily explained during the course of arguments by the learned Additional Advocate General.

25. Not only this, as far as PW-14 Pawan Kumar is concerned, he has deposed in the Court that he was not aware as to what was the cause of quarrel on the evening of 7th February, 2006 between the accused and the family members of the deceased.

26. Therefore, in my considered view, the judgment of conviction passed by the learned Trial Court against the accused is perverse, contrary to the records of the case and, therefore, not sustainable in the eyes of law. On the strength of the evidence on record, it cannot be said that the prosecution was able to connect the accused with the commission of the offences for which they were charged. Therefore, as the prosecution had not been able to prove its case against the accused beyond reasonable doubt, they were entitled for benefit of doubt. This very important aspect of the matter has also been overlooked by the learned Trial Court while convicting the accused.

27. In view of above discussion, this appeal is allowed and the judgment dated 28.04.2008, passed by the Court of learned Additional Sessions Judge, Fast Track Court, Una in Sessions Case No. 7/2007 is set aside. The accused are acquitted of the offences charged against them. It is further directed that the fine amount, if any, deposited by the accused, shall be refunded in their favour, in accordance with law. Bail bonds, if any, furnished by the accused are discharged.

Appeal stands disposed of.

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

Daulat Ram ..Petitioner.

Versus

State of Himachal Pradesh ..Respondent.

Cr. Revision No.152 of 2018 a/w
Cr.MP(M). No.1004 of 2018
Date of Decision No.3.8.2018

Narcotic Drugs and Psychotropic Substances Act, 1985 (Act)- Section 25- **Registration of Foreigners Act, 1939-** Section 5- **Registration of Foreigners Rules, 1992-** Rule 14- **Code of Criminal Procedure, 1973-** Section 216- Framing of charge – Material to be looked into – During raid, police recovering huge quantity of Hashish, Hashish oil, Ganja, syringes etc. from building owned by petitioner but given on rent to 'V', a foreigner – During investigation 'V' disclosing that petitioner had been occasionally visiting premises and knew of activities – Trial Court charging petitioner for offences under Sections 20 and 21 of Act and 5 of Registration of Foreigners Act without assigning any reason - Challenge thereto – Charge-sheet filed by police no where alleging that petitioner was also involved in commission of offences under Sections 20 and 21 of Act- Allegations against him were regarding offence under Section 25 of Act and Registration of Foreigners Act only – Order of Trial Court also did not record any reason for framing charges under Section 20 & 21 of Act- Held, No doubt, court can frame charges under other provisions/sections of law not specifically included in charge-sheet but clearly made out from material on record – However, it is obligatory for Court to given reasons for framing charges under other Sections of law - Impugned order did not give any reason for framing charges under Section 20 & 21 of Act against petitioner – Petition allowed – Order set aside. (Paras-13 to 15)

Cases referred:
Varun Bhardwaj versus State of H.P (Latest HLJ 2017 (HP) 707
L.Krishna Reddy V. State by Station House officer and Ors, (2004) SCC 401
Prasanta Kumar Sarkar v. Ashis Chatterjee and Another (2010) 14 SCC 496

For the Petitioner	Mr. N.S.Chandel, Advocate.
For the Respondent	Mr. S.C.Sharma, Additional Advocate General, with Mr. Amit Kumar Dhumal, Deputy Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

By way of instant Criminal Revision Petition filed under Section 397 read with Section 401 of the Code of Criminal Procedure, challenge has been laid to impugned order, dated 28.10.2017, passed by learned Special Judge-II, Kullu, District Kullu,H.P., whereby petitioner ***(for short 'Accused')*** came to be charged under Sections 20 & 21 of the Narcotic Psychotropic Substances Act, Section 14 of the Registration of Foreigner Rules of 1992 and Section 5 of the Foreigners Act, 1939.

2. Briefly stated facts, as emerge from the record are that on 16.02.2017, police on the basis of the secret information raided the house/building owned by the present petitioner, namely Sh. Daulat Ram, situate at village, Naggar, District Kullu, H.P., wherein co-accused namely, Visvambhar Isiah Streisand was found to be residing. Allegedly, huge commercial quantity of 120.772 Kgs Ganja with plastic bags, nine litres Hashish oil, 15 syringes of 20 ML each filled with Hashish oil total weight 626 grams, 36 syringes of 10 ML each filled with Hashish oil total weighing 670 grams, one electric cooker/pot containing Hashish oil in solid form and total weight alongwith Hashish oil weighing 2.792 grams came to be recovered from the conscious possession of co-accused Visvambhar Isiah Streisand. It also emerge from the record that at the time of search of the aforesaid house/premises, investigating agency associated the present petitioner being owner of the house as well as other independent witnesses and thereafter arrested co-accused Visvambhar Isiah Streisand on 17.2.2017 and since than he is behind the bars.

3. During the investigation, it also emerged that petitioner-accused had rented the premises situated in secluded place surrounded by orchard at village Naggar to co-accused Visvambhar Isiah Streisand on the yearly rent of Rs.95,000/-. Petitioner-accused with a view to substantiate aforesaid factum with regard to renting out of premises by him to co-accused, also placed on record rent deed, which is not in dispute, rather has been made part of the record. During investigation, co-accused, named hereinabove, disclosed to the police while he was in remand that petitioner-accused had rented accommodation on yearly rent of Rs.95000/- and he oftenly used to visit his premises. On the basis of the aforesaid statement made by the co-accused, police interrogated the present petitioner-accused and ultimately arrested him on 22.3.2017 on the allegations that factum with regard to illegal/unauthorized use of premises for preparation and manufacture of psychotropic substance i.e. Hashis, Ganja, Hashis oil and cannabis by the co-accused was in his knowledge. After completion of the investigation, police filed challan under Section 173 of Cr.P.C, in the competent Court of law, perusal whereof, suggest that police on the basis of the investigation arrived at a conclusion that petitioner-accused had knowledge with regard to illegal activities of co-accused, who used to reside in the rented premises of the petitioner-accused and accordingly, booked/charged him for having committed the offence punishable under Section 25 of the Narcotic Psychotropic Substances Act**(for short 'Act'),** Section 14 of Registration of Foreigner Rules of 1992, and Section 5 of the Registration of Foreigners Act, 1939.

4. On 28.10.2017, learned Special Judge-II, Kullu having perused the final report under Section 173 Cr.P.C as well as documents annexed therewith, charged co-accused Visvambhar Isiah Streisand under Section 20 & 21 of the Narcotic Psychotropic Substances Act, and Section 40 of the Himachal Pradesh Excise Act, 2011, whereas present petitioner came to be charged under Sections 20 & 21 of the Narcotic Psychotropic Substances Act, Section 14 of the Registration of Foreigner Rules of 1992 and Section 5 of the Registration of Foreigners Act, 1939.

5 In the aforesaid background, petitioner has approached this Court by way of instant revision petition, praying therein to quash the charge framed against him being unsustainable.

6. Mr. N.S.Chandel, learned counsel representing the petitioner, while referring to the impugned order of charge framed by learned Special Judge-II, Kullu, vehemently argued that same is not sustainable in the eyes of law as the same is not based upon the proper appreciation of the material adduced on record by the Investigating Agency. Mr. Chandel, further argued that bare perusal of impugned order, dated 28.10.2017, clearly suggests that learned court below while arriving at a conclusion that prima-facie case under Sections 20 & 21 of the Narcotic Psychotropic Substances Act, and Section 14 of the Registration of Foreigner Rules of 1992 and Foreigners Act, 1939 is made out against the present petitioner-accused not bothered at all to go through the material collected on record by the investigating agency.

7. Per contra, Mr. S.C.Sharma, learned Additional Advocate General, while supporting the impugned order, dated 28.10.2017, contended that there is no illegality and infirmity, rather same is based upon proper appreciation of material adduced on record by the investigating agency. He further argued that it is well settled that at the time of framing charge court is not required to sift the entire evidence, rather needs to arrive a conclusion whether prima-facie case, if any, is made out against the accused or not. However, Mr. S. C. Sharma, learned Additional Advocate General fairly admitted that as per the documentary evidence available on record there is no direct evidence save and except statement of co-accused that present petitioner being owner of the premises in question used to visit his house frequently, suggestive of the fact that factum with regard to illegal manufacturing and preparation of prohibited drugs by co-accused was in the know of the accused, but he vehemently argued that it has specifically come in the statement of co-accused during the remand that petitioner, who had rented him his house, use to visit his house oftenly and he knew that co-accused used to prepare the medicine for cancer.

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

9. Having carefully perused the final report submitted by the Investigating Agency under Section 173 Cr.P.C and the material placed therewith vis-a-vis impugned order, dated 28.10.2017, this Court is of the definite view that court below while framing charge has not bothered at all to examine the material placed before it while inferring prima-facie case, if any, against the accused. Learned Special Judge while framing charge has very conveniently concluded that having heard the parties and perused the record a prima-facie case under Section 20 and 21 of the Narcotic Drugs and Psychotropic Substances Act is made out and as such, they are charged with Section 20 and 21 of the Narcotic Drugs and Psychotropic Substances Act, apart from other provisions of law as stands mentioned in the instant order.

10. There cannot be any quarrel with the proposition of law that at the time of framing of charge, Court is not required to sift the entire evidence, as repeatedly held by Hon'ble Apex Court, but to arrive at a conclusion that prima-facie case is made out, Court is under obligation to at-least peruse the material placed before it by investigating agency and thereafter records its findings on what basis it has come to the conclusion that prima-facie case is made out against person proposed to be charged. Recently, this Court in case titled as ***Varun Bhardwaj versus State of H.P*** *(*Latest HLJ 2017 (HP) 707, has elaborately dealt with the aforesaid aspect of the matter taking note of various pronouncements made by the Hon'ble Apex Court and has

concluded that at the initial stage of framing of charge, the court is concerned not with proof but with the strong suspicion whether the accused has committed an offence, which if put to trial, could prove him guilty. In the aforesaid judgment, it has been specifically held that at the time of framing of charge, court should come to the conclusion that prima-facie case, if any, exists to the satisfaction of the court against the accused.

11. The Hon'ble Apex Court in case titled as ***L.Krishna Reddy V. State by Station House officer and Ors,*** (2004) SCC 401, which has been taken note of in the judgment passed by this Case in ***Varun Bhardwaj case (supra),*** has held that though Courts need not undertake an elaborate enquiry while sifting and weighing the material but court needs to consider whether evidenciary material on record, if generally accepted would reasonably connect the accused with the crime or not. In the aforesaid judgment, which has been also taken note of by this Court in ***Varun Bhardwaj case supra,*** has further held that once a case is presented to the Court by the prosecution, it is the duty of the Court to sift through the material to ascertain whether prima-facie case has been established against the accused or not?. Hon'ble Apex Court in L***. Krishna Reddy's case supra*** has specifically held that while framing charge under Section 228 of the Cr.P.C, court must keep in mind the interest of the person arraigned as an accused, who may be put to the ordeals of trial on the basis of flippant and vague evidence.

12. Having carefully perused the impugned, order dated 28.10.2017 juxtaposing final report under Section 173 Cr.P.C, this Court has every reason to conclude and hold that learned court below merely in stereotype manner proceeded to frame charge even without looking into the conclusion drawn in the final report submitted by the police under Section 173 Cr.P.C and the material annexed therewith. Though, having perused the record made available on record, this Court is not in agreement with the submissions made by learned Additional Advocate General that there is ample evidence available on record, suggestive of the fact that petitioner-accused was in know of the fact that premises let out by him is/was being used for illegal manufacturing and preparation of prohibited drugs by the co-accused because admittedly at this stage, there is nothing on record save and except statement of co-accused to the effect that present petitioner being owner of the premises used to visit his premises oftenly, however, in view of the order proposed to be passed by this Court in the instant proceedings, it may not be appropriate of this Court to record findings qua this aspect of the matter and as such, same is left to be considered and decided by the court below.

13. Interestingly, perusal of final report filed under Section 173 Cr.P.C, nowhere suggest that during investigation, police found involvement of present petitioner-accused as far as commission of offence punishable under Section 20 and 21 of the Act, rather police arrived at a conclusion that petitioner has committed offence punishable under Section 25 of the Act apart from Section 14 of the Registration of Foreigner Rules of 1992 and Section 5 of the Registration of Foreigners Act, 1939. But it is not understood on what basis trial Court proceeded to frame charge against the accused under Section 20 and 21 of the Act. No doubt, Court while considering the material placed before it alongwith report filed under Section 173 Cr.P.C, can frame charge under other sections and other provisions of law, which may not have been included by the investigating agency, but in that regard, it is obligatory on the part of the judge concerned to state/assign reason that on what basis he/she has arrived at conclusion that person concerned is required to be charged under other sections, which are otherwise not included in the final report. But in the instant case, impugned order dated 28.10.2017, nowhere reveals grounds/reasons, if any, assigned by the judge for charging the present petitioner-accused under Section 20 and 21 of the NDPS Act. It would be appropriate to reproduce impugned order dated 28.10.2017 herein:-

> ***" Heard and record perused. A prima-facie case under Sections 20 and 21 of the Narcotic Drugs and Psychotropic Substances Act and Section 40 of the H.P. Excise Act is made against the accused Visvambhar Isiah and Sections 20 an d21 of the NDPS Act Section 14 of the Registration of Foreigners Rules of 1992 and Foreigners Act, 1939 is made out against the***

accused Daulat Ram, Ami Chand. Accordingly, charges put to them to which they pleaded not guilty and claimed to be tried.

Let, Pws cited at serial No. 1,2, 4 and 5 be summoned for 18.01.2018 and Pws at Sr. No.6 to 9 be summoned for 19.1.2018. the custody of both the accused is extended till 18.1.2018, on which date they be produced before this Court at 10:00 am sharp."

14. It would be also profitable to reproduce charge framed by the learned court below herein:-

"That on 16.2.2017 at about 4:30 PM at place Naggar, District Kullu, HP, you accused allowed your premises to be used for commission of an offence by your co-accused Visvambhar Isiah a foreign National, who was found in exclusive and conscious possession of 120.772 Kgg Ganja/ contraband with plastic bags, nine litres Hashish oil, 15 syringes of 20 ML each filed with Hashish oil total weight 626 grams, 36 syringes of 10 ML each filled with Hashish oil total weight weighing 670 grams, one electric cooker/pot containing Hashish oil in soild form and total weight alongwith Hashish oil weighing 2.792 grams as per the proceedings conducted before the Magistrate under Section 52A of the NDPS Act and thereby committed offences punishable under Sections 20 and 21 of Narcotic Drugs and Psychotropic Substances Act, 1985 and within my cognizance.

Secondly, on the aforesaid date, time and place you rented out your premises in favour of your co-accused without filling From-C under the provisions of Registration of Foreigners Rules 1939 and thereby committed an offence punishable under Section 14 of the Registration of Foreigner Rules of 1992 and Foreigners Act, 1939 and within my cognizance."

15. Close scrutiny of impugned order dated 28.10.2017 as well as charge, nowhere persuade this Court to agree with the contention of learned Additional Advocate General that learned court below while framing charge carefully examined the final report and material annexed therewith, rather, this Court at the cost of repetition wish to observe that court below in most casual and cavalier manner without going/looking into the material placed on record, proceeded to pass order dated 28.10.2017 and same being not based upon the proper appreciation of material as well as final report filed under Section 173 Cr.P.C cannot be allowed to sustain.

Cr.MP(M) No.1004 of 2018

16. By way of instant application filed during the pendency of the present petition, prayer has been made on behalf of the applicant/petitioner for grant of bail during the pendency of trial, which is pending adjudication before the learned Special Judge-II, Kullu.

17. Having carefully perused the final report and the documents annexed therewith, prima-facie, this Court is of the view that there is no evidence available on record save and except statement of co-accused, suggestive of the fact that petitioner-accused, who had rented his premises to co-accused on the yearly rent of Rs.95000/- was in know of the illegal activities of co-accused being carried out in his premises and as such, prayer made in the accompanying application filed under Section 439 of the Code of Criminal Procedure, for grant of bail deserves to be considered.

18. It is not the case of the prosecution that petitioner-accused did not join the investigation, rather it clearly emerge from the record that from the date of occurrence i.e. 16.2.2017 petitioner has been fully cooperating with the investigating agency. This court is fully conscious of the fact that rigour of Section 37 of the Act are attracted in the cases where the person/accused is charged for having committed offence punishable under section 20 and 21 and 25 of the Act and also for having possessed commercial quantity of contraband.

However,section 37 of the Act, provides that if court after having afforded opportunity to public prosecutor to oppose the application, is satisfied that there are reasonable grounds for believing that applicant is not guilty of such offence and he is not likely to commit any offence while on bail, can proceed to grant bail for having committed the offence under ND&PS Act.

19. At this stage, it would be profitable to reproduce Section 37 of the Act herein-below:-

"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 (offence under section 19 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 prosecution 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.

20. In the instant case, as has been discussed hereinabove, investigating agency in its final report filed under Section 173 Cr.P.C, has found present petitioner/ accused guilty of having committed offence punishable under Section 25 of the Act, whereas learned court below while framing charge has charged present petitioner/accused under Sections 20 and 21 of the Act, but no specific reason, whatsoever has been assigned in the order framing charge that on what basis/material court prima-facie found accused having committed the offence punishable under Section 20 and 21 of the Act. In the earlier part of the judgment, this Court has categorically held that Court below ought to have disclosed grounds/reasons, if any, for charing petitioner/accused for having committed the offence punishable under Section 20 and 21 of the Act, especially when police had not found him involved in the commission of offence punishable under Sections 20 and 21 of the Act. This Court cannot loose sight of the fact that petitioner-accused is behind the bar since 23.3.2017 i.e.1 ½ years and in the peculiar facts and circumstances of the case, which have been discussed hereinabove in detail, this Court is convinced and satisfied after having heard learned counsel for the parties that petitioner deserves to be enlarged on bail during the pendency of the trial.

21. By now it is well settled that freedom of an individual is of utmost importance and cannot be curtailed for indefinite period. Till the time guilt of accused is not proved, in accordance with law, he is deemed to be innocent. In the case at hand, the guilt, if any, of the bail petitioner is yet to be proved, in accordance with law.

22. 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 categorically held that freedom of an individual is of utmost importance and same cannot be curtailed merely on the basis of suspicion. Hon'ble Apex Court has further held that till the time guilt of accused is not proved, in accordance with law, he is deemed to be innocent. The relevant paras No.2 to 5 of the judgment are reproduced 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.

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.

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.

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

23. 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.

24. 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:

(A) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

(B) nature and gravity of the accusation;

(C) severity of the punishment in the event of conviction;

(D) danger of the accused absconding or fleeing, if released on bail;

(E) character, behaviour, means, position and standing of the accused;

(F) likelihood of the offence being repeated;

(G) reasonable apprehension of the witnesses being influenced; and

(H) danger, of course, of justice being thwarted by grant of bail.

25. Consequently, in view of the detailed discussion made hereinabove as well as law laid down by the Hon'ble Apex Court and this Court, the present revision petition as well as bail application are allowed and impugned order dated 28.10.2017 passed by the court below is quashed and set-aside, however, the matter is remanded back to the learned court below to consider the matter afresh in the light of the findings/observations returned/made in the instant judgment passed by this Court. Parties are directed to remain present before the learned court below on **30.8.2018**, to enable it to consider the matter afresh as directed above. The order passed in the bail application bearing Cr.MP(M) No.1004 of 2018 is subject to applicant's furnishing personal bond in the sum of Rs. 5,00,000/- (Rs. Five lakh) with one local surety in the like amount, to the satisfaction of the learned trial Court, with 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 temper 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 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 him.

26. 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.

27. 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 revision petition as well as application alone.

28. Records of the case alongwith copy of judgment be also sent forthwith.

Pending applications, if any, are also disposed of.

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

Narinder Kumar ..Petitioner.

Versus

Rohit Madan & others ..Respondents.

Civil Revision No.125 of 2016
Reserved on: 23.05.2018
Date of Decision: August 3 , 2018.

Code of Civil Procedure, 1908- Section 89- **High Court of Himachal Pradesh Civil Procedure Alternative Dispute Resolution and Mediation Rules, 2005-** Rules 24 and 25- Mediation- Nature of proceedings – Role of Mediator etc. – Held, Mediation is a process by which mediator so appointed mediate in dispute between parties – Role of mediator is to facilitate discussion between parties by whatever mode – He is to assist parties in identifying issues, reduce misunderstandings, clarify priorities and explore areas of compromise – Mediator is not an Arbitrator. (Para-38)

Code of Civil Procedure, 1908- Section 89- **High Court of Himachal Pradesh Civil Procedure Alternative Dispute Resolution and Mediation Rules, 2005-** Rules 24 and 25- Rules specifically require that agreement before Mediator if made shall be reduced into writing and signed by parties or their power of attorney holder(s) – If Counsel have represented parties, they shall attest the signatures of their respective clients – Mere statements of parties or counsel made before mediator have no relevance – Proceeding before mediator do not form settlement as an executable decree – Unless and until court passes an order in terms of and as stipulated in Rule 25, compromise recorded by Mediator cannot be said to be binding on parties – On facts, High Court found that Settlement arrived at before Mediator was on account of misunderstanding of instructions conveyed to advocate by client- Held, parties had not amicably settled their dispute and thus settlement was not binding on landlord. (Para- 45)

Himachal Pradesh Urban Rent Control Act, 1987- General- Mesne Profits – Determination – Demised premises in possession of petitioner situated in heart of Shimla Town – Status of petitioner being of trespasser – High Court determined mesne profit @ 250/- per Sq. feet and directed payment thereof since 30.6.2011, when eviction order was passed by Rent Controller against tenant. (Para-72)

Himachal Pradesh Urban Rent Control Act, 1987- Section 24(5) – Revision – Whether a third party is a person "aggrieved"? – Petitioner though in settled possession of demised premises yet he was not party to eviction proceedings initiated by landlord against tenant – Rent Controller had passed eviction order against tenant and same was upheld by Appellate Authority in appeal – Petitioner then filing revision in High Court and assailing eviction order as "collusive" – Held, on meaning of words 'person aggrieved' may vary according to context of statute – Normally one is required to establish that he has been denied or deprived of something to which he is legally entitled in order to make him "person aggrieved" – In circumstances, question whether petitioner was a "person aggrieved" left open inasmuch as revision petition was hopelessly time barred – Eviction order was passed by Rent Controller on 30.6.2011, order was upheld by Appellate Authority on 27.7.2013, whereas revision was filed by petitioner on 10.8.2016 – Petition dismissed. (Para-69)

Cases referred:

Salem Advocate Bar Association, T.N. vs. Union of India, (2003) 1 SCC 49

Salem Advocate Bar Association, T.N. vs. Union of India, (2005) 6 SCC 344

Afcons Infrastructure Ltd. & Another vs. Cherian Varkey Constructions Co. Pvt. Ltd., & others (2010) 8 SCC 24

Banwari Lal vs. Chando Devi (Smt) (Through LR.S.) and another, (1993) 1 SCC 581
Byram Pestonji Gariwala vs. Union Bank of India and others, (1992) 1 SCC 31
Molla Sirajul Haque and etc. vs. Gorachand Mullick and others, AIR 1993 Calcutta 58
Som Dev and others vs. Rati Ram and another, (2006) 10 SCC 788,
Ghulam Nabi Dar and others vs. State of Jammu and Kashmir and others, (2013) 3 SCC 353
Bimal Kumar vs. Ram Kumar & others, AIR 2007 Himachal Pradesh 70
Shobha Suresh Jumani vs. Appellate Tribunal Forfeited Property and another, (2001) 5 SCC 755
Thammanna vs. K. Veera Reddy and others, (1980) 4 SCC 62
Bar Council of Maharasthra vs. M. V. Dabholkar and others, (1975) 2 SCC 702,
Atma Ram Properties (P) Ltd. vs. Federal Motors (P) Ltd., (2005) 1 SCC 705
Marshall Sons & Co. (I) Ltd. vs. Sahi Oretrans (P) Ltd. and another, (1999) 2 SCC 325
H. Seshadri vs. K.R. Natarajan and another, (2003) 10 SCC 449
Abdul Sattar vs. Khutejabi and others, (2003) 5 SCC 647
P. John Chandy and Co. (P) Ltd. vs. John P. Thomas, (2002) 5 SCC 90

For the Petitioner:	Mr. Y.P. Sood, Advocate, for the petitioner.
For the Respondents:	Mr. R.L. Sood, Sr. Advocate with Mr.Sanjeev Kumar, Advocate, for respondent No.1. Mr.Anupinder Rohal, Advocate, for respondents No.2(a) & 2(b).

The following judgment of the Court was delivered:

Sanjay Karol, ACJ

Following questions of law arise for consideration in the present petition:

(a) As to whether compromise arrived at between the parties to the *lis* through their counsel, as recorded in the record of proceedings of the learned Mediator is binding upon them and that the Court is bound to accept the same as such, making it executable in law?

(b). As to whether an unauthorized person claiming to be a sub-tenant/trespasser can be said to be "any aggrieved party", having any right to prefer a petition under Sub-Section (5) of Section 24 of the Himachal Pradesh Urban Rent Control Act, 1987 (hereinafter referred to as the Act).

(c). Whether the petitioner has got any locus to challenge the findings returned by the authorities under the Act?

(d). Whether findings returned by the authorities below are based on correct and complete appreciation of material placed on record?

(e) Whether such findings are a result of collusion between the landlord and the tenant?

(f) Whether the petitioner is liable to pay use and occupation charges @ 52,500/- per month and if so? then for what period and from which date?

2. Facts are simple.

3. In the year, 1997, Dr.Kailash Kumar Kashyap (hereinafter referred to as the tenant) took shop No.2, Ground Floor, Long Acre Estate, The Ridge, Shimla (hereinafter referred to as the demised premises), on rent for commercial purposes. On 03.03.2006, Rohit Madan (hereinafter referred to as the landlord-successor of original landlord Sh.Narinder Nath Madan), instituted a petition for ejectment of the tenant on the ground of carrying out additions and alterations which cannot be carried out without the premises being vacated and the tenant having made substantial additions and alterations, impairing the value and utility of the demised

premises. According to the landlord, tenant had vertically divided the demised premises into two portions and constructed a mezzanine floor, causing damage to the property.

4. Despite the tenant hotly contesting the petition, the Rent Controller-I, Shimla, H.P. allowed the same, vide order dated 30.06.2011, passed in Rent Application No.8-2 of 2006, titled as *Rohit Madan vs. Dr. Kailash Kumar Kashyap.* Findings of fact and the order of ejectment sands affirmed by the Appellate Authority i.e. the District Judge Shimla, vide order dated 27.07.2013, passed in Rent Appeal No.59-S/14 of 2011, titled as *Dr. Kailash Kumar Kashyap vs. Rohit Madan.*

5. Both the tenant and the landlord have accepted the findings of fact and the order of ejectment.

6. However, Sh.Narinder Kumar (petitioner herein) lays challenge to the same by way of present petition, so filed under Section 24(5) of the Act, instituted on 10.08.2016 in the following factual backdrop.

7. It appears that since October, 2009, the tenant allowed the demised premises to be occupied by the petitioner, on a monthly rental of Rs.5000/-, subsequently increased to Rs.6000/-. Both the tenant and the petitioner continued to maintain cordial relationship till November, 2010. Only when the tenant tried to interfere with the possession, petitioner filed a Civil Suit seeking protection, which relief, interim in nature, was granted vide order dated 19.09.2011, passed by Civil Judge(Junior Division), Court No.(6), Shimla, H.P., in Application No.122-6 of 2010, titled as *Narinder Kumar vs. Sh. Kailash Kumar Kashyap* (Page-53).

8. Alongwith the instant petition, petitioner has filed three applications: (i) CMP(M) No.1489 of 2016 –seeking condonation of delay in filing the revision petition; (ii) CMP No.7228 of 2016 – seeking leave to file the revision petition; and (iii) CMP No.7227 of 2016 – seeking stay of operation of order(s) of ejectment.

9. Notice in the all the applications and the revision petition was issued on 22.09.2016.

10. Record reveals that on 28.04.2017, all the parties i.e. the petitioner, landlord and the legal heirs of the tenant were duly represented and certain offers of settlement were exchanged. On 05.05.2017 with the consent of the parties, so accorded through their learned counsel, matter was referred to the mediation of a Learned Senior Counsel, a trained Mediator of this Court. Record of proceedings of the learned Mediator, reveals that proceedings took place on two dates. On 05.05.2017, learned counsel for the landlord and the tenant stated that they were not in a position to make any statement with regard to the compromise and thus took time to produce the parties.

11. On the following date i.e. 23.06.2017, contesting parties i.e. the petitioner and the landlord compromised the matter on the terms recorded by the learned Mediator, as under:-

> "Present: Mr.Y.P.Sood, Advocate, alongwith petitioner Sh.Narinder Kumar.
>
> Sh.J.L.Kashyap, Advocate, for respondent No.1.
>
> Respondent No.1 is not present, however, with the help of the learned counsel for the parties, mediation proceedings have been carried out. Learned counsel for the parties have settled the dispute in the manner that the petitioner shall vacate the accommodation in question on or before 31.3.2021. The petitioner shall pay use and occupation charges at the rate of Rs. 12,000/- per month w.e.f. 1.6.2017 onwards. The petitioner shall not change nature and use of the accommodation in question nor he will sublet or alienate the accommodation in question in any other manner. The matter stands amicably settled and it may be placed before the Hon'ble Court on 14.7.2017.
>
> Sh. J.L. Kashyap, Advocate has agreed that his client will give no objection certificate and co-operate in obtaining electricity and water connection in the accommodation in question. Certificate will be supplied to the petitioner within one

month from the date of passing of order by the Hon'ble Court. The petitioner has undertaken to regularly deposit the use and occupation charges in the bank account of respondent No.1, details of which have been supplied today to the petitioner."

12. On 14.07.2017, when record of the learned Mediator was placed before the Court, learned counsel, representing the landlord expressed his desire of filing an affidavit in relation to the proceedings of the learned Mediator.

13. On 26.07.2017, Sh.J.L. Kashyap, learned counsel, filed his personal affidavit (Page-105) stating that his client, who is in England, could not be contacted directly, and as per usual practice, he contacted Ms.Smriti Madan, sister of the landlord with whom he had always been discussing legal matters. On telephone, he had informed her of the matter being taken up for mediation. Further on account of his "impaired hearing and advanced age" he "failed to comprehend" the "instructions so imparted to him" for what was instructed was that use and occupation charges would be acceptable on the agreed terms, from the date of passing of the order of ejectment (30.06.2011) instead of 01.06.2017, the date so recorded in the mediation proceedings. When he informed Ms.Smriti Madan, of the proceedings, immediately he was told that the order of mediation was not in accordance with the instructions imparted to him.

14. Supplementing, Ms.Smriti Madan, a legal practitioner at Delhi, has also filed her personal affidavit dated 21.07.2017 (Page-102), stating that the error, in the proceedings of the Mediator, crept in on account of lack of proper communication and incorrect comprehension by her counsel (Sh.J.L. Kashyap), who is aged, 80 years, and has age related health problems.

15. Crucially, in both the affidavits there is no denial of (a) proceedings being correctly recorded by the learned Mediator; (b) intent of the parties to enter into a compromise; (c) agreement with regard to the period by when petitioner was allowed to hand over the demised premises to the landlord; and (d) the amount agreed to be paid as use and occupation charges. The only confusion/dispute being as to whether petitioner was to pay the said amount of use and occupation charges from the date of passing of the order of ejectment i.e. 30.06.2011 or 01.06.2017, the date of compromise so recorded by the learned Mediator and all this having arisen solely on account of incorrect comprehension of instructions by the learned counsel for the landlord.

16. It be only observed that even subsequent efforts put in by this Court did not yield any fruitful result, in having the matter resolved, which indeed is highly unfortunate.

17. Again on 08.12.2017, the landlord made certain offers, unacceptable to the petitioner, which stand recorded in the order dated 08.12.2017 as under:-

> "Without prejudice to respective rights and contentions of the parties, Mr. R.L. Sood, Ld. Senior Counsel under instructions from Mr.Sanjeev Kumar, Ld. Counsel for respondent No.1, states that the respondent is willing to settle the matter with the present petitioner, who otherwise has neither any locus to institute the petitioner nor any right in the premises, on the following terms:
>
> (a) If the petitioner were to handover vacant and peaceful possession of the demised premises to the respondent on or before 31st March, 2018, the landlord shall give up all claims with regard to use and occupation charges.
>
> Offer so given by the respondent is rejected with the insistence that compromise already stands entered into before the learned Mediator, fixing the rate at which use and occupation charges are to be paid, which the petitioner is ready and willing to pay and abide by.
>
> Further even as on date, right from the year 2009, petitioner is in possession of whole of the premises and not the half, as is being so projected."

18. It is a matter of record that petitioner filed another application being CMP No.10315 of 2017, with a prayer that revision petition be ordered to be decided in terms of report of the learned Mediator, incorporating the terms of settlement arrived at between the parties.

19. Also landlord filed an application being CMP No.6299 of 2017, praying for fixation of use and occupation charges @ Rs.52,500/-, per month w.e.f 01.07.2011 (@ Rs.250/- per sq.ft.), in which, on 22.11.2017, by way of an interim measure, Court directed the petitioner to pay a sum of Rs.12,000/- per month, at least w.e.f. 01.09.2016 onwards.

20. It is in this backdrop, Court is called upon to adjudicate the issues enumerated supra.

21. It is not in dispute that the order of ejectment dated 30.06.2011 as affirmed vide order dated 27.07.2013, has attained finality insofar as the landlord and the tenant are concerned. Even before this court, tenant does not lay any challenge to the same.

22. Undisputedly whole of the demised premises, as on date, is in the physical possession of the petitioner.

23. Petitioner himself claims to have been inducted into the premises sometime in the month of October, 2009, since when he has been paying certain amounts as rent to the tenant. From the record, there is nothing to establish that such induction was with the implicit or tacit much less written, consent of the landlord. There is nothing on record to even *prima facie* establish that the landlord acquiesced to such arrangement/relationship. It is also not the pleaded, much less, proven case of the petitioner that any sub-tenancy was created by obtaining consent of the landlord.

24. In fact, perusal of order dated 19.09.2011, passed by Civil Judge (Junior Division), Court No.(6), Shimla (Annexure P-2), reveals that even when the petitioner himself instituted Civil Suit against the tenant, he did not implead the landlord as a party. Observations made and findings returned by the said Court, while disposing of application for grant of interim relief, are not disputed by the petitioner. What was the final outcome of suit remains un-disclosed. But be that as it may, petitioner seeks reliance on the same and from the said order itself, it is evident that he himself made certain admissions, which, for just determination of the issues in question, this Court deems it necessary to reproduce as under:-

> "... ... ...Plaintiff has taken said premises on monthly rent of Rs. 5000/- from the defendant in the month of October, 2009. The rent of the premises was enhanced to Rs. 6000/- per month is averred that since 2004 the applicant is in the peaceful possession of the tenanted premises and he was having cordial relation with defendant." ... ...
>
> "... ... ...It is submitted that respondent is himself a <u>tenant in the demised premises and its original owner has filed the rent petition against him</u>. It is submitted that applicant cannot claim any right against respondent qua tenancy." ... ...
>
> "<u>Respondent has taken a plea that rent petition with regard to premises in question has already been decided wherein order of eviction of the premises in question has already been passed</u>. Though the eviction petition has already been decided and shop in question is ordered to be vacated and the respondent is not the land lord of petitioner in the rent petition, therefore, he cannot be evicted except without due course to law." (Emphasis supplied)

<u>CMP No.10315 of 2017, for passing order on the basis of settlement</u>

25. Fundamental issue which arises for consideration is as to whether the agreement arrived at between the parties, as recorded in the record of proceedings of the learned Mediator, through their learned counsel, is binding on them and as to whether, Court can bind the parties to the same and record a settlement making it an executable decree?

26. Mediation is a concept emanating from Section 89 of the Code of Civil Procedure. Relevant provisions whereof read as under:-

> "89. Settlement of disputes outside the Court.
>
> (1) Where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and

give them to the parties for their observations and after receiving the observations of the parties, the court may reformulate the terms of a possible settlement and refer the same for –

… … …

(d) Mediation.

(2) Where a dispute has been referred –

… … …

(d) for mediation, the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed."

27. The High Court of Himachal Pradesh, has notified Rules, dated 19.12.2005, termed as "High Court of Himachal Pradesh Civil Procedure Alternative Dispute Resolution and Mediation Rules, 2005 (hereinafter referred to as the Rules) as amended from time to time. The relevant clauses thereof are reproduced as under:-

"24. Settlement Agreement:-(1) Where an agreement is reached between the parties in regard to all the issues in the suit or some of the issues, the same shall be reduced in writing and signed by the parties or their power of attorney holder. If any counsel have represented the parties they shall attest the signature of their respective clients.

(2) The agreement of the parties so signed and attested shall be submitted to the mediator who shall with a covering letter signed by him forward the same to the Court in which the suit is pending.

(3) Where no agreement is arrived at between the parties, before the time limit stated in Rule 18 or where the mediator is of the view that no settlement is possible, he shall report the same to the said Court in writing.

25. Court to fix a date for recording settlement and passing decree:- (1) Within seven days of the receipt of any settlement, the Court shall issue notice to the parties fixing a day for recording the settlement, such date not being beyond a further period of fourteen days from the date of receipt of settlement and the Court shall record the settlement, if it is not collusive.

(2) The Court shall then pass a decree in accordance with the settlement so recorded, if the settlement disposes of all the issues in the Suit.

(3) If the settlement disposes of only certain issues arising in the suit, the Court shall record the settlement on the date fixed for recording the settlement: and

(i) If the issues are severable from other issues and if a decree could be passed to the extent of the settlement covered by those issues, the Court may pass a decree straightaway in accordance with the settlement on those issue without waiting for a decision of the Court on the other issues which are not settled.

(ii) If the issues are not severable, the Court shall wait for a decision of the Court on the other issues which are not settled."

(Emphasis supplied)

28. What is "settlement by mediation" is defined in the Rules as under:-

"4. Court to give guidance to parties while giving direction to opt- (1) … … …"

… … …

(v) … … ..

(c) Settlement by Mediation means the process by which a mediator appointed by parties or by the Court, as the case may be, mediates the dispute between the parties to the suit by the application of the provisions of the High

Court of Himachal Pradesh Mediation Rules, 2005 in Part II, and in particular, by facilitating discussion between parties directly or by communicating with each other through the mediator, by assisting parties in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise, generating options in an attempt to solve the dispute and emphasizing that it is the parties own responsibility for making decisions which affect them."

(Emphasis supplied)

29. In *Salem Advocate Bar Association, T.N. vs. Union of India,* (2003) 1 SCC 49 *(Commonly referred to as Salem Bar-I),* the Apex Court observed that Section 89 of CPC was a new provision and concept of mediation was introduced by amending the provisions of CPC, to reduce the burden of the Court.

30. Further in *Salem Advocate Bar Association, T.N. vs. Union of India,* (2005) 6 SCC 344, *(Commonly referred to as Salem Bar-II),* the Court observed that:-

"57. A doubt has been expressed in relation to clause (d) of Section 89 (2) of the Code on the question as to finalisation of the terms of the compromise. The question is whether the terms of compromise are to be finalised by or before the mediator or by or before the court. It is evident that all the four alternatives, namely, Arbitration, Conciliation, judicial settlement including settlement through Lok Adalat and mediation are meant to be the action of persons or institutions outside the Court and not before the Court. Order 10, Rule 1-C speaks of the 'Conciliation forum' referring back the dispute to the Court. In fact, the court is not involved in the actual mediation/conciliation. Clause (d) of Section 89(2) only means that when mediation succeeds and parties agree to the terms of settlement, the mediator will report to the court and the court, after giving notice and hearing the parties, 'effect' the compromise and pass a decree in accordance with the terms of settlement accepted by the parties. Further, in this view, there is no question of the Court which refers the matter to mediation/conciliation being debarred from hearing the matter where settlement is not arrived at. The Judge who makes the reference only considers the limited question as to whether there are reasonable grounds to expect that there will be settlement and on that ground he cannot be treated to be disqualified to try the suit afterwards, if no settlement is arrived at between the parties."

... ...

"62. When the parties come to a settlement upon a reference made by the Court for mediation, as suggested by the Committee that there has to be some public record of the manner in which the suit is disposed of and, therefore, the Court has to first record the settlement and pass a decree in terms thereof and if necessary proceed to execute it in accordance with law. It cannot be accepted that such a procedure would be unnecessary. If the settlement is not filed in the Court for the purpose of passing of a decree, there will be no public record of the settlement. It is, however, a different matter if the parties do not want the court to record a settlement and pass a decree and feel that the settlement can be implemented even without decree. In such eventuality, nothing prevents them in informing the Court that the suit may be dismissed as a dispute has been settled between the parties outside the Court." (Emphasis supplied)

31. Later on in *Afcons Infrastructure Ltd. & Another vs. Cherian Varkey Constructions Co. Pvt. Ltd., & others* (2010) 8 SCC 24, the Apex Court elaborately discussed the scope of Section 89 CPC in the following terms:-

"39. Where the reference is to a neutral third party ('mediation' as defined above) on a court reference, though it will be deemed to be reference to Lok Adalat, as court retains its control and jurisdiction over the matter, the mediation settlement will have to be placed before the court for recording the settlement and disposal. Where the matter is referred to another Judge and settlement is arrived at before him, such settlement

agreement will also have to be placed before the court which referred the matter and that court will make a decree in terms of it".

... ...

"43. We may summarize the procedure to be adopted by a court under section 89 of the Code as under :

... ...

(f) If the parties are not agreeable for arbitration and conciliation, which is likely to happen in most of the cases for want of consensus, the court should, keeping in view the preferences/options of parties, refer the matter to any one of the other three other ADR processes : (a) Lok Adalat; (b) mediation by a neutral third party facilitator or mediator; and (c) a judicial settlement, where a Judge assists the parties to arrive at a settlement.

(g) If the case is simple which may be completed in a single sitting, or cases relating to a matter where the legal principles are clearly settled and there is no personal animosity between the parties (as in the case of motor accident claims), the court may refer the matter to Lok Adalat. In case where the questions are complicated or cases which may require several rounds of negotiations, the court may refer the matter to mediation. Where the facility of mediation is not available or where the parties opt for the guidance of a Judge to arrive at a settlement, the court may refer the matter to another Judge for attempting settlement.

(h) If the reference to the ADR process fails, on receipt of the Report of the ADR Forum, the court shall proceed with hearing of the suit. If there is a settlement, the court shall examine the settlement and make a decree in terms of it, keeping the principles of Order 23 Rule 3 of the Code in mind.

(i) If the settlement includes disputes which are not the subject matter of the suit, the court may direct that the same will be governed by Section 74 of the AC Act (if it is a Conciliation Settlement) or Section 21 of the Legal Services Authorities Act, 1987 (if it is a settlement by a Lok Adalat or by mediation which is a deemed Lok Adalat). If the settlement is through mediation and it relates not only to disputes which are the subject-matter of the suit, but also other disputes involving persons other than the parties to the suit, the court may adopt the principle underlying Order 23 Rule 3 of the Code. This will be necessary as many settlement agreements deal with not only the disputes which are the subject matter of the suit or proceeding in which the reference is made, but also other disputes which are not the subject matter of the suit.

(j) If any term of the settlement is ex facie illegal or unenforceable, the court should draw the attention of parties thereto to avoid further litigations and disputes about executability." (Emphasis supplied)

32. Mediation undoubtedly provides an efficient, effective, speedy, convenient and inexpensive process to resolve disputes with dignity, mutuality, respect and civility where parties participate in arriving at a negotiated settlement rather than being confronted with a third party adjudication of their disputes. The very fact that it enables warring parties to sit across the table and negotiate, even if unsuccessful in dispute resolution, undergoing the process creates an atmosphere of harmony and peace in which parties learn to 'agree to disagree'.

33. Further what is referred to mediation is not really the *lis* before the Court, but the parties thereto, irrespective of the nature, type and number of disputes before the Court, for in a voluntary process, with the facilitation of the Mediator, parties may agree to settle amongst themselves not only what is subject matter of the *lis,* but all other disputes existing or which are likely to exist in future. Even historically mediation is well recognized concept which finds mentioned in 'Mahabharata' and 'Durga Saptshati'.

34. As already observed by the Apex Court, Mediator does not pass any order or judgment. All he does is, forward the agreement arrived at between the parties to the Court. Such agreement is to be signed by the parties and countersigned by the Advocates whereafter only as is required in law, the Court shall record the statements of the parties, may be through their learned counsel and then pass a decree, after satisfying the conditions stipulated under the Code of Civil Procedure {Section 89 as also the High Court of Himachal Pradesh Civil Procedure Alternative Dispute Resolution and Mediation Rules, 2005 (Rules 24 & 25)}. The mechanism provided is unlike that of the order passed by Arbitrator or the proceeding conducted under Lok Adalat. The Mediator is required to maintain confidentiality with regard to the proceedings. In fact, the Delhi High Court in its decision dated 17.10.2017, passed in Cr. Reference No.1 of 2016, titled as *Dayawati vs. Yogesh Kumar Gosain,* has held that agreement arrived at between the parties cannot be used as evidence. When the matter reaches the Court, the Court has to be satisfied also with regard to the fulfillment of the requirements envisaged under Order 23 Rule 3 CPC.

35. The Delhi High Court in *Dayawati* (supra) has summarized certain principles with regard thereto, in the following terms:-

> "101. ... ...
>
> (i) For a compromise to be held to be binding, it has to be signed either by the parties or by their counsels or both, failing which Order XXIII Rule 3 of the CPC would not be applicable. (Ref. : (1988) 1 SCC 270, Gurpreet Singh v. Chatur Bhuj Goel; (2009) 6 SCC 194, Sneh Gupta v. Devi Sarup & Ors.)
>
> (ii) Order XXIII Rule 3 of the CPC casts an obligation on the court to be satisfied that the settlement agreement is lawful and is in writing and signed by the parties or by their counsels. (Ref. : (1978) 2 SCC 179, Suleman Noormohamed & Ors. v. Umarbhai Janubhai; (2006) 1 SCC 148, Amteshwar Anand v. Virender Mohan Singh & Ors.).
>
> (iii) An obligation is cast on the court under Order XXIII Rule 3 of the CPC to order the agreement to be recorded and pass a decree in accordance thereof.
>
> (Ref. : (2006) 1 SCC 148, Amteshwar Anand v. Virender Mohan Singh & Ors. (paras 26 and 27)).
>
> (iv) A consent decree is really a contract between the parties with the seal of the court superadded to it.
>
> (Ref. : (1969) 2 SCC 201, Baldevdas Shivlal & Anr. v. Filmistan Distributors (India) P. Ltd. & Ors.; (2002) 100 DLT 278, Hindustan Motors Ltd. v Amritpal Singh Nayar & Anr.; (2007) 14 SCC 318, Parayya Allayya Hittalamani v. Sri Parayya Gurulingayya Poojari & Ors.).
>
> (v) A consent decree may operate as an estoppel as well.
>
> [Ref. : AIR 1956 SC 346, Raja Sri Sailendra Narayan Bhanja Deo v. State of Orissa; (2007) 14 SCC 318, Parayya Allayya Hittalamani v. Sri Parayya Gurulingayya Poojari & Ors. (para 15)].
>
> 102. The practice followed by the civil court before whom the settlement in writing, duly signed by the parties, is placed, is to record the statements of parties confirming that the settlement was entered into voluntarily, without any force, pressure or undue influence; that it contained the actual terms of the settlement; and undertakings of the parties to remain bound by the terms thereof. Upon being satisfied that the settlement was voluntary and lawful, the civil court takes it on record accepting the undertaking and passing a decree in terms thereof."

36. Even a Coordinate Bench of this Court in CMPMO No. 75 of 2014, titled as *Jiwan Lal Sharma vs. Kashmir Singh Thakur,* decided on 06.09.2014, has taken a similar view.

37. The Apex Court in *Banwari Lal vs. Chando Devi (Smt) (Through LR.S.) and another,* (1993) 1 SCC 581, has held that:-

> "9. Section 96(3) of the Code says that no appeal shall lie from a decree passed by the Court with the consent of the parties. Rule 1-A(2) has been introduced saying that against a decree passed in a suit after recording a compromise, it shall be open to the appellant to contest the decree on the ground that the compromise should not have been recorded. When Section 96(3) bars an appeal against decree passed with the consent of parties, it implies that such decree is valid and binding on the parties unless set aside by the procedure prescribed or available to the parties. One such remedy available was by filing the appeal under Order 43, Rule 1(m). If the order recording the compromise was set aside, there was no necessity or occasion to file an appeal against the decree. Similarly a suit used to be filed for setting aside such decree on the ground that the decree is based on an invalid and illegal compromise not binding on the plaintiff of the second suit. But after the amendments which have been introduced, neither an appeal against the order recording the compromise nor remedy by way of filing a suit is available in cases covered by Rule 3-A of Order 23. As such a right has been given under Rule 1-A(2) of Order 43 to a party, who challenges the recording of the compromise, to question the validity thereof while prefering an appeal against the decree. Section 96(3) of the Code shall not be a bar to such an appeal because Section 96(3) is applicable to cases where the factum of compromise or agreement is not in dispute."

38. Settlement by mediation is a process by which a Mediator, so appointed by the parties or the Court, mediates the dispute between the parties. Role of a Mediator is to facilitate the discussion between the parties, by whatever mode. Significantly Mediator is to assist the parties in identifying issues, reduce misunderstandings, clarify priorities, explore areas of compromise, generate options with an attempt to solve the dispute and most importantly emphasize "that it is the parties own responsibility for making decisions which affect them". Thus Mediator is not an Arbitrator.

39. Now in the instant case, the agreement recorded by the learned Mediator is neither signed by the parties nor their duly constituted attorney(s). Also learned counsel representing the parties have not attested/signed the same. Be that as it may, this Court is not going to discount the agreement merely on account of the learned counsel not having signed the same, for the learned counsel, of long standing, do not lay challenge to the factum of its recording in writing.

40. What is argued is that purely on account of instructions, mistakenly understood, on account of impaired hearing and advanced age, and failure to comprehend the instructions properly, did the learned counsel agree for the mesne profit to be paid at the agreed rate w.e.f. 01.06.2017 and not 30.06.2011, the date of passing of the order of ejectment.

41. Significantly factum of old age or physical disability of the learned counsel is not disputed by the petitioner or his counsel. Equally contents of the affidavit of the learned counsel for the landlord and Ms.Smriti Madan, who imparted instructions, remain uncontroverted. All that is stated in the application dated 07.10.2017 (CMP No.10135 of 2017), filed much after affidavits dated 21.07.2017 (Page-102) and 26.07.2017 (Page-105) were filed, is that "on 05.05.2017 the parties had expressed their willingness for amicable settlement of the dispute, however, as Shri J.L. Kashyap, Ld. Counsel for Respondent No.1 wanted to seek instructions from Respondent No.1 to settle the terms of settlement, the mediation proceedings were adjourned to 22.6.2017", and "That on 22.6.2017 the mediation proceedings were again taken up by the Ld. Mediator and with the consent of the parties the dispute was amicably settled and the terms of settlement have been recorded by the Ld. Mediator in his report submitted to this Hon'ble Court. The settlement as arrived in the mediation proceeding was acted upon and the applicant had deposited a sum of Rs.12,000/- in Account No.15096 in Punjab & Sind Bank, Ritz

Building, Shimla-1 in the name of Mrs. Manju Madan, General Power of Attorney of the respondent No.1. The details of Bank Account were supplied to the applicant by Shri J.L. Kashyap, Advocate. The above amount however, was later on after few days was returned to the applicant by way of cheque."

42. Now in the instant case, at the first opportune moment, without any delay, learned counsel for the landlord raised the issue of the date from which mesne profits were to be paid. Repetitive though it may seem, but with profit, it can be recorded that on 14.7.2017 when the matter first came up before the Court for passing appropriate orders on the proceedings of the Learned Mediator (dated 23.6.2017), the learned counsel had expressed his intent of filing his affidavit in relation to the mediation proceedings.

43. Significantly such proceedings, by itself, do not form a settlement as an executable decree. As per Rule 24, Mediator merely forwards the agreement arrived at by the parties, based on his endeavour in helping the parties to themselves arrive at an amicable solution. The settlement agreement becomes binding only with the Court recording the statements of the parties, accepting the agreement and passing a decree or an order, after satisfying "that the parties have amicably settled their dispute" and that it is not collusive, illegal or unworkable. Only then would "settlement between parties" become final in respect of the proceedings pending before the Court. Unless and until the Court passes an order in terms of and as stipulated under Rule 25 of the Rules, compromise recorded by the Mediator cannot be said to be binding in nature. Record of the proceedings by the Mediator cannot be termed to be judicial settlement as distinctive from the settlement arrived in the Lok Adalats etc. Settlement arrived at during mediation proceedings can only become final and binding upon the parties, with the same having been recorded and accepted by the Court, forming part of the decree or an order.

44. The Apex Court in *Byram Pestonji Gariwala vs. Union Bank of India and others,* (1992) 1 SCC 31, held as under:-

> "11. A compromise is, however, not binding and is liable to be set aside in circumstances which would invalidate agreements between the parties.
>
> > "A compromise by counsel will not bind the client, if counsel is not apprised of facts the knowledge of which is essential in reference to the question on which he has to exercise his discretion, for example that the terms accepted had already been rejected by the client. Where counsel enters into a compromise in intended, pursuance of terms agreed upon between the clients, and, owing to a misunderstanding, the compromise fails to carry out the intentions of one side, the compromise does not bind the client, and the Court will allow the consent to be withdrawn. Where, acting upon instructions to compromise, counsel consents under a misunderstanding to certain terms which do not carry into effect the intentions of counsel and the terms are thought by one party to be more extensive than the other party intends them to be, there is no agreement on the subject-matter of the compromise, and the Court will set it aside. But a person who has consented to a compromise will not be allowed to withdraw his consent because he subsequently discovers that he has a good ground of defence".
>
> (Emphasis supplied)

45. It is in the aforesaid factual backdrop, this Court safely concludes that the parties had not "amicably settled their dispute". It is not as an afterthought, that, only with a view of gaining undue advantage, causing undue and unfair disadvantage to itself or loss to the petitioner, the landlord seeks to resile therefrom.

46. Here parties themselves did not appear. Only learned counsel for the contesting parties appeared before the learned Mediator at the time of recording of proceedings of settlement. Such terms were recorded under misconception of fact and that being instructions imparted to the learned counsel who undisputedly on account of his age suffers from hearing impairment.

47. Settlement by mediation has to be on the lines and terms of the compromise as understood in terms of Rule 3 of Order XXIII of CPC.

48. Compromise made out of Court must necessarily be signed by the parties or their authorized representatives. It must itself be capable of being embodied in a decree. In the instant case, though the agreement is reduced into writing, but then not signed by the parties or their learned counsel, so as to meet the requirement of the statutory provisions and in the absence thereof petitioner cannot insist of passing of the order in terms of the record of proceedings of the learned Mediator. The Apex Court in *Molla Sirajul Haque and etc. vs. Gorachand Mullick and others,* AIR 1993 Calcutta 58, has held the purported compromise not signed by the parties liable to be rejected.

49. The matter needs to be examined from another angle and that being as to whether the agreement is legal or not. Chapter-II of the Indian Contract Act, 1872 (hereinafter referred to as the Contract Act), deals with voidable contracts and void agreements. Section 10 of the Contract Act provides that all agreements are contracts, if they are made by free consent of the parties competent to contract, for a lawful consideration, with a lawful object and not declared to be void.

50. Consent under Section 13 of the Contract Act, is defined to mean that "two or more persons are said to consent when they agree upon the same thing in the same sense".

51. The Apex Court in *Som Dev and others vs. Rati Ram and another,* (2006) 10 SCC 788, has held that a compromise decree can be passed only on compliance with the requirements of Rule 3 of Order 23 of the Code and unless a decree is passed in terms thereof, it may not be possible to recognize the same as a compromise decree.

52. Learned counsel for the petitioner seeks reliance on *Ghulam Nabi Dar and others vs. State of Jammu and Kashmir and others,* (2013) 3 SCC 353 and the ratio of law laid down therein does not advance the case of the petitioner any further, for issue before the Court was totally different. There the parties had entered into a compromise in the Court in a lawful manner.

53. Again reliance upon the decision rendered by a Coordinate bench of this Court in *Bimal Kumar vs. Ram Kumar & others*, AIR 2007 Himachal Pradesh 70, is also of no consequence inasmuch as the Court found the compromise to have been not only recorded in writing, but also signed by the parties and their learned counsel, which is not the case in hand.

54. Hence the settlement under misconception of fact cannot be said to be a settlement in law. Since this Court, thus far has not recorded the statements of the parties with regard to the agreement or passed any order with regard thereto about its acceptability or legality, the agreement dated 23.06.2017, purportedly arrived at between the parties as recorded in the record of the proceedings of the learned Mediator cannot be said to be binding and no order/decree in terms thereof can be passed.

55. Thus, for the reasons assigned supra application stands dismissed.

<u>CMP(M) No.1489 of 2016-seeking condonation of delay & CMP(M) No.7228 of 2016-seeking leave to file the revision petition</u>

56. It be observed that the petitioner, on affidavit has made following averments:-

> "That the delay in filing the Revision Petition has taken place on account of the fact that the applicant was not party to the eviction petition and <u>had no knowledge about the passing of order of eviction till 20-7-2016</u>. The revision is being filed after obtaining the record without any unnecessary delay."
>
> (Emphasis supplied)

57. This averment, *ex-facie* is false as is evident from the observations made by the Civil Court in its order dated 19.09.2011 (P-58), reproduced supra. He was fully aware of such

fact. In any event, this Court is of the considered view that there has been inordinate, unexplainable delay in filing the present petition. Even though, order of ejectment was passed in the year, 2011, yet petitioner chose not to assail the same before the Appellate Authority. He kept on enjoying the property, sitting by the stands. His act and conduct cannot be said to be bonafide.

58. The intent of the Legislature is evidently clear and that being that litigation by a person, who is not a party, need not be encouraged, in fact discouraged, for we are dealing with a special legislation of tenancy. All proceedings under the special enactment, either which way, must come to an end, with certainty and expeditiously. Evidence is to dissuade persons, who are not party to the *lis,* nor to drag or procrastinate the proceedings, so as to prevent a successful party, from enjoying the benefits accrued to them, by virtue of an order of adjudication. He was fully aware of all proceedings and ought to have apprised the Court at the earliest. As such, these applications need to be rejected. Ordered accordingly. Petitioner's conduct totally disentitles him for such relief.

59. Notwithstanding the same, Court otherwise proceeds to adjudicate other issues on merit.

60. This Court in Civil Revision No.154 of 2004, titled as *Yog Raj Sood vs. Anita Kaushal & another,* decided on 01.06.2016, has already discussed the scope of interference in a petition for revision filed under Section 24(5) of the Act, in the following terms:-

> "31. Now what is the scope of such revisional jurisdiction and the extent of the power which the court can exercise is now well settled by a five-Judge Bench of the apex Court reported in *Hindustan Petroleum Corporation Limited vs. Dilbahar Singh,* (2014) 9 SCC 78. The findings 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 *Dattonpant Gopalvarao Devakate vs. Vithalrao Maruthirao Janagawal,* (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.

32.The 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 apex Court in *Rukmini Amma Saradamma vs. Kallyani Sulochana,* (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 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 from procedural illegality or irregularity."

[Emphasis supplied]

61. Having perused the record of the authorities below, it cannot be pointed out as to in what manner and as to how findings returned can be said to be perverse, irrational or wholly erroneous. One need not elaborate on the evidence produced by the parties, but the issues answered by the Rent Controller, are based on cogent, material and admissible evidence.

62. From the ocular evidence that of Raghav Sharma (AW.1) and Ms.Manju Madan (AW.2), it is evidently clear that the premises in question are required by the landlord, who wants to carry out additions and alterations, which cannot be carried out without the tenant being evicted. Premises are bonafidely required for generating income. Also the tenant has constructed a mezzanine floor, thereby causing severe damage to the property, impairing its market value and utility. Such findings of fact by the authorities below are clearly borne out from the material placed on record. In fact, from the testimony of Dr.Kailash Kashyap (RW.1), it cannot be inferred that either their testimonies or veracity stand impeached; confronted or belied. It has not come on record that the evidence led is collusive or in any manner only to help the landlord.

63. No perversity or illegality can be found in the finding of fact returned by the Courts below.

64. Mr. R.L.Sood, learned Senior Counsel, vehemently argues that the petitioner cannot be said to be a person aggrieved and as such has no locus to file the present petition.

65. After careful consideration, I am of the considered view that this issue requires to be left open to be considered in an appropriate case, for the reason that other submissions made by the petitioner do not find favour with the Court.

66. Since much efforts stand put in, the Court only feels to refer to certain decisions on this count.

67. Who can be an aggrieved person stands considered by the Apex Court in the following terms, in *Shobha Suresh Jumani vs. Appellate Tribunal Forfeited Property and another,* (2001) 5 SCC 755:-

> "5. First we would reiterate that the words "any aggrieved person" are found in several statutes. However, the meaning of the expression "aggrieved" may vary according to the context of the enactment in which it appears and all the circumstances. In *Sidebotham, Re. ex p Sidebotham,* (1880) 14 Ch D 458 (Ch D at p. 465) it was observed by James, L.J.:
>
> > "But the words 'person aggrieved' do not really mean a man who is disappointed of a benefit which he might have received if some other order had been made. A 'person aggrieved' must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something, or wrongfully affected his title to something."
>
> 6. The said passage was referred to and relied upon by this Court in *Thammanna v. K. Veera Reddy,* (1980) 4 SCC 62 and *Northern Plastics Ltd. vs. Hindustan Photo Films Mfg. Co. Ltd.,* (1997) 4 SCC 452."
>
> … … …
>
> "9. From the aforesaid scheme of the Act, "any person aggrieved" by an order of the competent authority would mean a person whose property is held to be illegally acquired under the Act and which is to be forfeited or whose legal rights qua the said property are adversely affected. According to *Black's Law Dictionary,* "aggrieved party" refers to "a party whose personal, pecuniary or property rights have been adversely affected by another person's actions or by a Court's decree or judgment. – Also termed party aggrieved; person aggrieved". Therefore, a relative or associate who has not interest or right in such property cannot be held to be a person aggrieved. It is true that the wife may be aggrieved because her husband's properties are forfeited. But that would not confer a right to file an appeal against such order. There is no infringement of her legal right. For the purposes of the Act husband and wife are different entities. .. … …"
>
> (Emphasis supplied)

68. A 'person aggrieved' must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something, or wrongfully affected his title to something". (*Thammanna vs. K. Veera Reddy and others,* (1980) 4 SCC 62).

69. The Apex Court in *Bar Council of Maharasthra vs. M. V. Dabholkar and others,* (1975) 2 SCC 702, has held as under:-

> "28. Where a right of appeal to courts against an administrative or judicial decision is created by statute, the right is invariably confined to a person aggrieved or a person who claims to be aggrieved. The meaning of the words "a person aggrieved" may vary according to the context of the statute. One of the meanings is that a person will be held to be aggrieved by a decision if that decision is materially adverse to him. Normally, one is required to establish that one has been denied or deprived of something to which one is legally entitled in order to make one "a person aggrieved". Again a person is aggrieved if a legal burden is imposed on him. The meaning of the words "a person aggrieved" is sometimes given a restricted meaning in certain statutes which provide remedies for the protection of private legal rights. The restricted meaning requires denial or deprivation of legal rights. A more liberal approach is required in the background of statutes which do not deal with property rights but deal with professional conduct and morality. .. ..".

CMP No.6299 of 2017-Mesne profit

70. The next issue which arises for consideration is as to whether petitioner is liable to pay mesne profits?

71. The demised premises which comprise of 210 sq.ft., fully used for commercial purpose, are situate on the Ridge, the very heart of Shimla Town. It is on the ground floor of a busy commercial building commonly termed as Ritz Cine Complex. It has astoundingly high commercial value and is accessible by vehicular traffic.

72. A Coordinate Bench of this Court vide judgment dated 6.4.2017, passed in Civil Revision No. 212 of 2016, titled as *Sh. Champeshwar Lall Sood & another vs. Sh. Gurpartap Singh & others,* in relation to commercial premises situated on the Mall Road, Shimla, which is not far off from the demised premises, has already determined mesne profits to be @ Rs.250 per sq. ft. Hence this Court, by relying upon the said decision, applying the principle therein, can safely quantify mesne profits of the demised premises to be @ Rs.250/- per sq.ft. The principle for determination of fair compensation as laid down by the Apex Court in *Atma Ram Properties (P) Ltd. vs. Federal Motors (P) Ltd.,* (2005) 1 SCC 705 and *Marshall Sons & Co. (I) Ltd. vs. Sahi Oretrans (P) Ltd. and another,* (1999) 2 SCC 325, stands duly considered while arriving at such figure. Thus, petitioner would be liable to pay a sum of Rs.52,500 (210 sq.ft. X Rs.250 per sq.ft.), per month, w.e.f. 30.06.2011, the date of passing of order of ejectment. He is a mere trespasser in the property. This the petitioner shall deposit within a period of two months from today. Needless to add, the amount already deposited by the petitioner towards mesne profits in terms of interim order dated 22.11.2017 shall be deducted there from.

73. Learned counsel for the petitioner refers to a decision rendered by the Apex Court in *H. Seshadri vs. K.R. Natarajan and another,* (2003) 10 SCC 449. Well the decision is inapplicable as it deals with the case of determination of proprietary rights of the occupant prior to the execution of the decree and this Court is not dealing with such proceedings.

74. Another decision rendered in *Abdul Sattar vs. Khutejabi and others,* (2003) 5 SCC 647, is equally inapplicable, for there the Court is dealing with the order of ejectment passed against the persons, who were not tenants under the special Statute, which did not cover the possessors as tenants.

75. Learned counsel for the petitioner lays emphasis on the fact that post agreement recorded in the proceedings of the mediator, the landlord accepted the rent, binding the parties thereupon. This plea is unacceptable. In *P. John Chandy and Co. (P) Ltd. vs. John P. Thomas,* (2002) 5 SCC 90, the Apex Court clarified that the acceptance of the payment even as rent can be of no consequence. In any event, in the instant case the amount stands immediately returned.

In view of the above, present petition is dismissed with the vacating of interim order passed therein.

Pending application, if any, also stands disposed of.

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

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

Cr. A No. 565 of 2017.
Reserved on: 2.8.2018.
Decided on: 3.8.2018.

Indian Penal Code, 1860- Section 376- Rape- Consent, what is? – Accused was tried on allegation that he developed physical relations with victim on pretext of marrying her – Also executed affidavit of marriage with her before Executive Magistrate though he was already married to one 'K' – Trial Court convicting accused for rape by holding that consent of victim, if any, was vitiated – Appeal against – High Court found that (i) accused and victim were residents of same area and (ii) victim probably knew that accused was already married to 'K', when she consented for sexual relationship with him- On facts, Held, consent of victim was not obtained by accused on false promise to marry her – Sexual act, if any, was with her free consent – Appeal allowed – Accused acquitted. (Paras-16 to 19 & 24)

Cases referred:
Kaini Rajan vs. State of Kerala, JT 2013 (12) SC 538
State of Punjab Vs. Gurmeet Singh and others, AIR 1996 SC 1393
Ranjit Hazarika Vs. State of Assam, (1998) 8 SCC 635
Vimal Suresh Kamble Vs. Chaluverapinake Apal S.P. and another, (2003) 3 SCC 175
Tilak Raj vs. State of Himachal Pradesh (2016) 4 SCC 140

For the appellant: Mr. Kul Bhushan Khajuria, Advocate.
For the respondent: Mr. R.P. Singh & Kunal Thakur, Dy. Advocate Generals.

The following judgment of the Court was delivered:

Justice Dharam Chand Chaudhary, J.

Appellant Rajinder Kumar herein is a convict (hereinafter referred to as the accused). He was booked by the police of Police Station Bharmour, District Chamba for the commission of offence punishable under Sections 376, 420 and 494 IPC vide FIR No. 10/2014 Ext. PW-10/A, with the allegations that he had physical relations with the prosecutrix (name withheld), for the last 3 years. He also belongs to the same area to which the prosecutrix belongs. On 12.1.2014, he brought the prosecutrix to Chamba and booked a room in hotel Ashiana near Sheesh Mahal. He subjected her to sexual intercourse in the said room. On the next day i.e.

13.1.2014, she was brought by him to Dalhousie, where he solemnized Court marriage with her. The prosecutrix had sworn in affidavit Ext. PW-12/A whereas accused Ext. PW-12/B before the Executive Magistrate Dalhousie in this regard. Thereafter, the accused told the prosecutrix to return to her parental house. She went there and later on contacted him to join his company in the matrimonial home, however, he denied there being any relation with her. On this, with a view to get her name entered in the record of the Gram Panchayat as his wife, she went to the office of Gram Panchayat at Sunhara and asked the Secretary to enter her name being the wife of the accused. The Secretary in turn informed her that the accused is already married with one Kiran Kumari and that the entry to this effect stood already made in the record of the Gram Panchayat on 5.1.2014.

2. On finding that the accused ravished her at the pretext of solemnization of marriage with her and having felt humiliated as well as annoyed with him reported the matter to the Superintendent of Police, Chamba vide complaint Ext. PW-3/A. The complaint so lodged by her was marked to Incharge A.H.T.U/Women Cell Chamba. HC Sunita (PW-9), who conducted preliminary enquiry in the matter and on finding an offence having been committed by the accused punishable under Section 376, 420 and 494 IPC, the complaint was forwarded to PS Bharmour for registration of FIR.

3. The investigation in the matter was conducted by ASI Ram Pal (PW-15). He moved an application Ext. PW-15/A and got the prosecutrix medically examined from PW-14 Dr. Richa Gupta, Medical Officer, Regional Hospital Chamba. The accused was arrested vide arrest memo Ext. PW-15/B. An application Ext. PW-15/C was moved for his medical examination and the MLC is Ext. PA. PW-15 ASI Ram Pal during the course of investigation visited Ashiana hotel near old bus stand Chamba and prepared the site plan of room No. 104 vide Ext. PW-15/D and PW-15/E. The identification memos Ext. PW-3/B and PW-15/A were prepared in the presence of witnesses. Bed Sheet Ext. P-3 produced by Bhim Sain (PW-5), was taken into possession vide seizure memo Ext. PW-1/B. The same was sealed in a parcel of cloth Ext. P-2 with seal "R". The sample of seal Ext. PW-15/F was obtained separately. The visitors' register of the hotel Ext. P-1 was also seized and taken into possession. On an application Ext. PW-6/A moved to Secretary Gram Panchayat Sunara, abstract of family register Ext. PW-6/B was obtained from its Secretary Roshan Lal (PW-6). The statements of the witnesses, including that of Bhim Singh Ext. PW-15/G were recorded as per their version. On the receipt of the report Ext. PX from the laboratory and on the completion of the investigation, report under Section 173 (2) Cr.P.C. was filed in the trial Court.

4. On perusal of the police report, learned trial Judge proceeded to frame charge for the commission of offence punishable under Sections 376 and 494 IPC against the accused. He was tried for the commission of the offence he allegedly committed, however, convicted only under Section 376 IPC as no case was found to be made out against him for the commission of the offence punishable under Section 494 IPC.

5. On his conviction, the accused has been sentenced and convicted to undergo rigorous imprisonment for a period of seven years and also to pay a sum of Rs. 25,000/- as fine vide judgment dated 23.9.2017 under challenge in this appeal.

6. Aggrieved by the findings of conviction recorded against him, he has assailed the legality and validity thereof before this Court in the present appeal on the grounds inter alia that he has been convicted without there being on record cogent and reliable evidence suggesting that he has subjected the prosecutrix to sexual intercourse. The impugned judgment rather is stated to be based upon surmises and conjectures. The own statement of the prosecutrix according to him is full of material contradictions, improvements and omissions which goes to the very root of the case. She herself has contradicted the prosecution case qua the place of occurrence and possession of her clothes after the alleged incident. The medical evidence is suggestive of that she was not subjected to sexual intercourse, however, the same is stated to be erroneously ignored. The prosecution, as such, has failed to prove its case against the accused beyond all reasonable doubt. The findings of conviction as recorded against him are, therefore, stated to be

based upon misreading, misconstruction and mis-appreciation of the evidence available on record.

7. The grouse of the accused, therefore, in a nut shell, is that learned trial Court has erroneously relied upon the sole testimony of the prosecutrix which hardly inspires any confidence. The findings of conviction recorded against him are stated to be perverse, hence not legally sustainable.

8. On hearing Mr. Kul Bhushan Khajuria, Advocate, learned defence counsel and Sh. Kunal Thakur, Dy. Advocate General as well as going through the evidence comprising oral as well as documentary, no doubt, the offence the accused allegedly committed is not only heinous but grievous also because if the prosecution story is believed to be true, the accused had developed physical relations with the prosecutrix on the pretext of solemnization of marriage and subjected her to sexual intercourse repeatedly during the period of three years from 12.1.2014, when she was lastly subjected to sexual intercourse by him in room No. 104 in Ashiana Hotel at Chamba. Therefore, though she was subjected to sexual intercourse by him with her consent, however, her consent allegedly was obtained by way of mis-representation. She has been subjected to sexual intercourse in the manner as claimed by the prosecution or not needs adjudication on appreciation of the facts and circumstances of this case and also the evidence available on record.

9. The rival submissions as made takes this Court to the evidence as has come on record of this case, however, before that I deem it appropriate to discuss as to what constitutes the offence punishable under Section 376 IPC in legal parlance. The present in the given facts and circumstances is a case which falls under first and second description to Section 375 IPC. The same reads as follows:

> "**375-Rape.** A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:
>
> First:- Against her will.
> Secondly:- without her consent.
> Thirdly:- xxxx
> Fourthly:- xxxx
> Fifthly:- xxxx
> Sixthly:- xxxx
> Explanation:- Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape".

10. What constitutes consent has been discussed by the Apex Court in ***Kaini Rajan vs. State of Kerala, JT 2013 (12) SC 538,*** as follows:

> "12. Section 375 IPC defines the expression "rape", which indicates that the first clause operates, where the woman is in possession of her senses, and therefore, capable of consenting but the act is done against her will; and second, where it is done without her consent; the third, fourth and fifth, when there is consent, but it is not such a consent as excuses the offender, because it is obtained by putting her on any person in whom she is interested in fear of death or of hurt. The expression "against her will" means that the act must have been done in spite of the opposition of the woman. An inference as to consent can be drawn if only based on evidence or probabilities of the case. "Consent" is also stated to be an act of reason coupled with deliberation. It denotes an active will in the mind of a person to permit the doing of an act complained of. Section 90 IPC refers to the expression "consent". Section 90, though, does not define

> "consent", but describes what is not consent. "Consent", for the purpose of Section 375, requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but after having fully exercised the choice between resistance and assent. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances."

11. The principle settled in the judgment supra, therefore, is that the prosecutrix was a consenting party to the sexual intercourse or not can only be ascertained on careful study of all relevant circumstances. Since the prosecutrix is major i.e. 24 years of age when the accused started assaulting her sexually whereas 26 years the day when lastly subjected to sexual intercourse, therefore, the prosecution is required to plead and prove beyond all reasonable doubt that alleged sexual act with her was committed by the accused against her will and without her consent.

12. Now if coming to the legal principles attracted in a case of this nature, in ***State of Punjab*** Vs. ***Gurmeet Singh and others, AIR 1996 SC 1393***, the Apex Court has held that the own statement of the prosecutrix if inspires confidence is sufficient to bring the guilt home to the accused. The apex Court in order to ensure that an innocent person is not implicated in the commission of an offence of this nature, while taking note of the judgment in ***Gurmeet Singh's*** case supra has however diluted the ratio thereof in ***Ranjit Hazarika*** Vs. ***State of Assam, (1998) 8 SCC 635*** and held that the statement of prosecutrix cannot be universally and mechanically applied to the facts of every case of sexual assault, as in its opinion, in such cases, the possibility of false implication can't also be ruled-out. Similar was the view of the matter taken again by the apex Court in V***imal Suresh Kamble*** Vs. ***Chaluverapinake Apal S.P. and another, (2003) 3 SCC 175***. While placing reliance on this judgment and the law laid down by the Apex Court in the judgment supra, this Court in ***Criminal Appeal No. 481 of 2009*** titled ***State of Himachal Pradesh*** V. ***Negi Ram***, decided on 27th May, 2016 has held as under:

> "15. Therefore, the legal position as discussed supra makes it crystal clear that irrespective of an offence of this nature not only grievous but heinous also, the Court should not got swayed merely by passion and influence only on account of the offence has been committed against a woman and rather keep in mind the cardinal principle of criminal administration of justice, that an offender has to be believed to be innocent unless and until held guilty by the Court after satisfying its judicial conscience on the basis of given facts and circumstances of each case as well as proper appreciation of the evidence available on record."

13. Now if coming to the factual matrix and the evidence available on record, the prosecutrix and accused belong to the same area. As per the own admission of the prosecutrix while in the witness box Kiran Kumari, wife of the accused is resident of a place which is at a distance of 4-5 kms. from her house. Not only this, but Sh. Chandu Ram, the father of Kiran Kumari and father-in-law of the accused is none-else but real maternal Uncle of Kaushalya Devi, the mother of the prosecutrix. The prosecutrix has also admitted that her family and family of said Sh. Chandu Ram are in social relations with each other. Her father PW-4 also admits that his wife (Kaushalya Devi) is real niece of Chandu Ram, the father of Kiran Kumari and that his family is in social relations with Chandu Ram. He also admits that they know the place where their relatives are married and that not only the accused but also the parents of his wife Kiran Kumari are residents of the area which falls under his Gram Panchayat. He admits the distance of the house of the accused from that of his house about 1 km. and also that both families were on visiting terms. While as per the testimony of the prosecutrix in her cross-examination, it is stated that she had not disclosed about her relations with the accused to her relatives or friends, however, her father PW-4 in his cross-examination has admitted that he was aware about the contact of the accused with his daughter (the prosecutrix) for the last one and a half year from the date (20.1.2014), the report was lodged in the Police Station.

14. The evidence having come on record by way of the statements of the prosecutrix and her father leaves no manner of doubt that the prosecutrix and the accused were known to each other and rightly so because they belong to the same place. However, the accused developed physical relations with her and had been subjecting her to sexual intercourse at the pretext that he will solemnize marriage with her is a debatable question. It is not proved whether he had been subjecting her to sexual intercourse for the last two years because she never lodged any report to the police nor raised any hue and cry against such conduct and behaviour of the accused had she been subjected to sexual intercourse without her consent and against her will.

15. Now, if coming to the incident of 12.1.2014 when the accused allegedly subjected her to sexual intercourse in room No. 104 of Hotel Ashiana in Chamba town, this aspect of the prosecution case is not supported by the Manager of the hotel PW-5 Bhim Sain. According to him, neither he booked any room in his name for the stay of the accused and the prosecutrix nor accused contacted him in this regard. The accused, according to him is even not in his relation also. He was allowed to be cross-examined by learned Public Prosecutor and in his statement recorded in his cross-examination, it is admitted that room No. 104 was booked in his name in Hotel Ashiana and that the accused and prosecutrix stayed in the said room on 12.1.2014. This witness, as such, has blown hot and cold in the same breath because in his examination-in-chief he has denied room No. 104 having been booked in his name in hotel Ashiana whereas in his cross-examination stated otherwise. Since, he also belongs to village Guan, PO Sunara and as the Village and Post Office of the accused is also Sunara, therefore, though the possibility of he having helped the accused in getting the room reserved cannot be ruled out, however, the fact remains that the prosecutrix lived in the company of the accused in her free volition having raised no hue and cry and rather as per her own testimony, she accompanied the accused to the hotel and lived with him there on 12.1.2014. Whether she was subjected to sexual intercourse or not is a question again under consideration on the basis of the evidence available on record. No doubt, the own testimony of the prosecutrix if otherwise inspires confidence is sufficient to bring the guilt home to the accused, however, not in each and every case and particularly in a case of this nature where the accused and the prosecutrix were known to each other for the last 3 years from the day the matter was reported to the police. It is, therefore, difficult to rely upon her own testimony that she was subjected to sexual intercourse during the night intervening 12/13.1.2014 in room No. 104 of hotel Ashiana at Chamba.

16. The another material piece of evidence which could have lended support to this aspect of the matter is the statement of Dr. Richa Gupta (PW-14). According to her, the prosecutrix was brought to the hospital on 21.1.2014 around 3:30 PM. She was medically examined and nothing abnormal was found. No injury or wound was found anywhere on her person whereas secondary sexual character including breasts and pubic hair were found fully developed. On her private parts also, no marks of injury could be noticed, however, hymen was absent and in vagina, two fingers could have been inserted easily. Such physical examination of the prosecutrix by PW-14 Dr. Richa gupta reveals that even if the prosecutrix was subjected to sexual intercourse, it was a consensual act and also that she was habitual to sexual intercourse. This witness had preserved pubic hair and vaginal swab as well as the clothes of the prosecutrix worn at the time of her medical examination and the same when chemically analyzed in the laboratory, semen and blood could not be detected thereon except for vaginal swab and her underwear on which the blood though was detected, however, not sufficient for further testing. The report Ext. PX can be relied upon in this regard. No doubt in the opinion of PW-14 Dr. Richa Gupta, there was nothing to suggest that sexual intercourse had not taken place, however, the opinion so given cannot be treated with the so called sexual assault allegedly made during the night intervening 12/13.1.2014.

17. As noticed hereinabove, since the prosecutrix was habitual to sexual intercourse, therefore, the opinion given by the doctor at the most can be seen in that perspective. The present, therefore, is a case where the prosecution has miserably failed to prove that the prosecutrix was subjected to sexual intercourse during the night intervening 12/13.1.2014.

18. Even if it is believed that the accused had physical relations with her for a period over 3 years from the date of registration of the FIR and he had been subjecting her to sexual intercourse, the commission of such an act with her by the accused cannot be said to be against her will and without her consent and rather consensual. When she developed relations with him as per the prosecution case itself, she was 22 years of age. In January, 2014, she was 24 years of age as she disclosed in her affidavit Ext. PW-12/A. At the time of her medical examination also, she has disclosed her age as 24 years. Anyhow, there is no dispute qua her age. She, as such, was major. Not only this, but she is post graduate and as such was well aware of the consequences of her physical relations with the accused.

19. Learned trial Judge while recording the findings of conviction against the accused was swayed only by the prosecution case qua her consent obtained by the accused allegedly on a false pretext i.e. solemnization of marriage with her. The prosecutrix though stated so while in the witness box, however, as already held in the given facts and circumstances, particularly that the prosecutrix being a major girl aged 22/24 years of age and also post graduate could have not fallen prey to such assurance given by the accused and even if any such assurance was given to her would have not allowed the accused to subject her to sexual intercourse well before her marriage with him. Interestingly enough, Kiran Kumari, wife of the accused admittedly none else but is in near relation of the prosecutrix being the daughter of real maternal uncle of her mother. The parents of Kiran Kumari are also residents of the area which falls under Gram Panchayat Sunara. Though, the prosecutrix and her father while in the witness box have denied that they were invited by the father of Kiran Kumari to participate in the marriage, however, at the same time they both have stated that the two families were having social relations with each other. The marriage of accused with Kiran Kumari stood already solemnized and it is thereafter, she was entered as the wife of the accused in the record of Gram Panchayat Sunara on 5.1.2014, i.e well before the alleged incident of sexual assault committed upon the prosecutrix by the accused in room No. 104 of Hotel Ashiana. Otherwise also, nothing is there on record that either of them has deliberated upon marriage with each other. The story of assurances held out to her to solemnize marriage has been disclosed for the first time in the complaint Ext. PW-3/A made to the Superintendent of Police, Chamba. Even if any sexual relations between the accused and the prosecutrix, the same were consensual and in the considered opinion of this Court her consent was not obtained at the pretext of marriage. However, when the accused solemnized marriage with Kiran Kumari, a coloured version has been introduced and an effort also made to solemnize court marriage by the prosecutrix with the accused by way of executing affidavits Ext. PW-12/A and PW-12/B before Tehsildar Dalhousie, District Chamba. The accused, however, was also married and as such could have not solemnized legal and valid marriage with the prosecutrix. When she came to know about the marriage of the accused, the report should have been lodged by her immediately either on the same day i.e. 12/13.1.2014 and not delayed by 7-8 days i.e. up to 20.1.2014. The report, therefore, came to be lodged after due deliberation and the findings to the contrary recorded by learned trial Court are absolutely wrong.

20. In a case titled ***Shivashankar @ Shiva vs. State of Karnataka & anr., Cr. Appeal No. 504 of 2018 decided on 6.4.2018,*** under similar circumstances, when the prosecutrix had been residing with the accused for a period of about 8 years and later on came forward with a complaint that she was subjected to sexual intercourse at the pretext of solemnization of marriage with her by the accused, the Apex Court has held that it was difficult to hold sexual intercourse in the course of relationship which has continued for 8 years as **"rape"**, especially in the face of the prosecutrix's own allegation that they lived together as man and wife. Similar is the situation in the case in hand because here also, as per the version of the prosecutrix they were known to each other for the last 3 years and during this period the accused developed sexual relations with her at the pretext of solemnization of marriage. Therefore, the point in issue is squarely covered by the judgment of the Apex Court in **Shivshankar's case** cited supra.

21. The Apex Court in ***Tilak Raj vs. State of Himachal Pradesh (2016) 4 SCC 140,*** a case having more or less similar facts has also held as follows:

> ".....The evidence as a whole including FIR, testimony of prosecutrix and MLC report prepared by medical practitioner clearly indicate that the story of prosecutrix regarding sexual intercourse on false pretext of marrying her is concocted and not believable. In fact, the said act of the Appellant seems to be consensual in nature. The trial court has rightly held thus: "23. If the story set up by the prosecutrix herself in the court is to be believed, it does come to the fore that the two were in a relationship and she well knew that the accused was duping her throughout. Per the prosecutrix, she had not succumbed to the proposal of the accused. Having allowed access to the accused to her residential quarter, so much so, even having allowed him to stay overnight, she knew the likely outcome of her reaction. Seeing the age of the prosecutrix which is around 40 years, it can be easily inferred that she knew what could be the consequences of allowing a male friend into her bed room at night.
>
> 24. The entire circumstances discussed above and which have come to the fore from the testimony of none else but the prosecutrix, it cannot be said that the sexual intercourse was without her consent. The act seems to be consensual in nature.
>
> 25. It is also not the case that the consent had been given by the prosecutrix believing the accused's promise to marry her. For, her testimony itself shows that the entire story of marriage has unfolded after 05.01.2010 when the accused was stated to have been summoned to the office of the Dy. S.P. Prior to 05.01.2010, there is nothing on record to show that the accused had been pestering the prosecutrix for any alliance. The prosecutrix has said a line in her examination-in-chief, but her cross- examination shows that no doubt the two were in relationship, but the question of marriage apparently had not been deliberated upon by any of the two. After the sexual contact, come talk about marriage had cropped up between the two. Thus, it also cannot be said that the consent for sexual intercourse had been given by the prosecutrix under some misconception of marriage." .....

22. Applying the ratio of the judgments ibid in the given facts and circumstances of this case, the present is not a case where the sole testimony of the prosecutrix that she was subjected to sexual intercourse at the pretext of solemnization of marriage with her could have been relied upon to record the findings of conviction or an opinion that the prosecutrix consented for sexual intercourse with the accused on account of mis-conception of facts could have been formed. Learned trial Court while forming such an opinion has erred legally and also went wrong and rather swayed merely by the fact that the prosecutrix was subjected to sexual intercourse by the accused. The findings of conviction for the commission of offence under Section 376 IPC are, therefore, neither legally nor factually sustainable.

23. Even the medical evidence and the evidence as has come on record by way of scientific investigation as already discussed supra also does not support the case of the prosecution. The evidence having come on record by way of remaining prosecution witnesses, mostly the official, is also of no help to the prosecution for the reason that even if it is believed to be true that the accused has subjected her to sexual intercourse frequently during the period of three years prior to the registration of the FIR against him, such an act was consensual and not against her will and without her consent.

24. The reappraisal of the evidence, as discussed hereinabove and the law laid down by the Apex Court, reveals that the prosecution has failed to prove its case against the accused for the commission of offence punishable under Section 376 IPC beyond all reasonable doubt. Therefore, the findings of conviction and sentence recorded by learned trial Court are neither legally nor factually sustainable. The impugned judgment, as such, deserves to be quashed and set aside whereas the accused acquitted of the charge framed against him under Section 376 IPC also.

25. For all the reasons hereinabove, this appeal succeeds and the same is accordingly allowed. Consequently, the impugned judgment is quashed and set aside and the accused is acquitted of the charge framed against him under Section 376 IPC. Presently, the accused is serving out sentence, therefore, it is ordered that he be set free forthwith, if not required in any other case.

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

Suresh Kumar .....Petitioner.

Versus

University Grants Commission and another .....Respondents

CWP No. 972 of 2016
Reserved on: 26.07.2018
Decided on: 03.08.2018

Constitution of India, 1950- Article 226- National Eligibility Test- Wrong answers in answer key – Consequences – Petitioner submitting that answers of questions No.29 and 60 of Law Paper as given in answer key, were wrong and reflected in wrong assessment of his paper – University Grants Commission (UGC) denying petitioner's case and relying upon report of Expert Committee which examined petitioner's objections and found them baseless – However, High Court found answers of questions No.29 and 60 given in answer key, actually wrong – Report of Expert Committee was without any reasons – Answers of those questions given by petitioner found correct – Petition allowed – UGC directed to award marks of such questions to petitioner and revise his result accordingly. (Paras-12 and 13)

Indian Penal Code, 1860- Section 378- **Indian Electricity Act, 1910 (Act)-** Section 39- Theft – Movable property – Whether electricity running in cables is movable property? – Held, by legal fiction created by Section 39 of Act, running electricity is movable property and its dishonest abstraction amounts to theft. (Para-8)

Case referred:
Avtar Singh v. State of Punjab, AIR 1965 SCC 666

For the petitioner: Mr. Sanjeev Bhushan, Sr. Advocate with Ms. Abhilasha Kaundal, Advocate.

For the respondent: Mr. Rajiv Jiwan, Advocate for respondent No.1.
Mrs. Ritta Goswami, Advocate for respondent No.2.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)

This writ petition has been filed with the following prayers:

"i) That a writ in the nature of mandamus may very kindly be issued directing the respondent No.2 to rectify the answer of questions No. 29 of 60 of paper III (Law) of National Eligibility Test (NET) by further directing them to grant 4 marks to the petitioner.

ii) That further a writ of mandamus may very kindly be issued thereby directing the respondents to declare the petitioner qualified in the National Eligibility Test (NET) (Law) held in the month of December, 2014."

2. The petitioner is a post-graduate having done LLM (Masters in laws) and, as such, qualified for opting teaching as his profession. One of the eligibility conditions, however, is to qualify the National Eligibility Test (NET). Respondent No.2, Central Board of Secondary Education is conducting the test on All India Basis. The eligibility criteria for appearing in the test is that the candidate must have obtained atleast 55% marks in the post graduation. The petitioner having 55% marks in LLM, was eligible for appearing in the test in question and ultimately appeared in the test, which took place in December, 2014. The result was declared by the 2nd respondent in June, 2015. The petitioner secured 210 marks out of 350 i.e. 60% of the total marks. The result is Annexure P-1. According to the petitioner, in order to declare successful in the test, the cut-off marks were 212 out of 350. Since the petitioner secured only 210 marks, therefore, fell short only by two marks. The print-out of cut-off marks/merit is Annexure P-2. The 2nd respondent after declaration of the result had given option to the candidates to raise objections to the result so declared subject to deposit of Rs. 5000/- as fee. The petitioner availed the option so granted and consequently on payment of Rs. 5000/- to the said respondent by way of draft, he raised objections, Annexure P-3. He objected to the answer to the question Nos. 24, 29 and 60 of paper III, which according to him were wrongly given in the answer key. It is only due to this reason, the petitioner failed to qualify the National Eligibility Test. According to the petitioner, had the questions been rightly answered in the answer key, he would have been declared successful in first go itself.

3. The petitioner after making objections kept on waiting for revised result for pretty long time i.e. above five months, but of no avail. It is in the month of December, 2015, the result was uploaded by the 2nd respondent again, which remained as it is. According to the petitioner, the 2nd respondent has not made any effort to find out the correct answers to the above-said questions and declared the result again with wrong answers thereto. As per his further case, though he is not sure about the answer to question No.24, however, as regards answers in the key to question Nos. 29 and 60, according to him are 100% incorrect. In order to substantiate the submissions so made, he has placed on record the abstract from the Standard Book of Indian Penal Code written by Rattan Lal and Dheeraj Lal, Annexure P-5 and with respect to question No. 60, the abstract of Article 1A "Convention Relating to the Status of Refugees" held in 1951, Annexure P-7. He has also annexed to the writ petition, the answer key, Annexure P-6.

4. Respondent No.1 initially was ordered to be proceeded against *ex-parte,* however, later on joined further proceedings in the writ petition. Any how, the said respondent has not opted for filing reply and while granting adjournment for the purpose on 01.04.2017, it was observed that in case reply is not filed within the time granted, it shall be presumed that no response is intended to be filed on behalf of the said respondent.

5. Respondent No.2, in reply to the writ petition has supported the answers to each and every question of paper-III as correct and come forward with the version that correct answers to question No. 29 is option (C), whereas, to question No. 60 option (D). The answers i.e. option (D) to question No. 29 and option (A) to question No. 60 according to the said respondent were wrong. The OMR sheet with respect to examination paper-III-Law stream of petitioner is Annexure R-2/3, whereas, the revised result declared on the basis of report of the Expert Committee is Annexure
R-2/4. In, nut-shell, the response of respondent No.2, is that the answers in the key of each and every question are correct and the same were even found as correct after seeking opinion of the Expert Committee, which allegedly was constituted to consider the objections raised by the candidates including the petitioner to certain questions after declaration of the result.

6. On hearing Mr. Sanjeev Bhushan, learned Senior Advocate assisted by Ms. Abhilasha Kaundal, Advocate on behalf of the petitioner and Mrs. Ritta Goswami, learned counsel on behalf of respondent No.2 as well as taking into consideration the pleadings of the parties, a short question that answers to question Nos. 29 and 60 of paper-III-Law in the answer key are incorrect or not, arise for determination.

7. Now, if coming to question No.29, the same reads as follows:-

"Which of the following properties could not be held to be an offence of theft, when committed/taken by a person?

(A) Durga Idol (B) Cooking Gas

(C) Running Electricity (D) Forgotten Umbrella

8. It is a matter of common sense that Durga Idol (option A) Cooking gas (option B) Running Electricity (option C), if stolen or taken by a person, offence of theft can be said to be committed. The respondents also agree that option (A) and option (B) are not the correct answers, however, as per the answer key and the opinion of the Expert Committee, referred to hereinabove, the correct answer to this question according to them is option (C) viz., taking running electricity by someone is not an offence of theft. This is, however, not the correct answer for the reason that abstract from the Standard Book on Indian Penal Code written by Rattan Lal and Dheeraj Lal, Annexure P-5 to the writ petition, amply demonstrates that irrespective of electricity is not a movable property within the meaning of Section 378 IPC and as such, its dishonest abstraction cannot be regarded as theft under the Section ibid, yet by a legal fiction created by Section 39 of the Indian Electricity Act, 1910, the abstraction of running electricity is deemed to be an offence of theft punishable under Section 379 IPC read with Section 39 of Electricity Act, 1910. The only difference is that the prosecution in the cases of theft of electricity can only be launched at the instance of a person specified in Section 50 of the Electricity Act, as is held in **Avtar Singh** v. **State of Punjab, AIR 1965 SCC 666.** Therefore, dishonest abstraction of running electricity also amounts to an offence of theft. The correct answer, therefore is option (D) "Forgotten Umbrella" for the reason that the person who takes away a 'forgotten umbrella' had no dishonest intention to deceitfully remove the same from the custody of 'its true owner as he/she is not knowing as to who is the owner of such umbrella'. Therefore, the ingredients of offence of theft under Section 378 IPC are not established hence having taken away a 'forgotten umbrella' cannot be said to be an offence of theft. The petitioner, as such, has given the right answer to question No.29 and the answer to this question in the key as well as in the opinion of the Expert Committee is not correct.

9. Now if coming to question No.60, the same reads as follows:-

"60. Read Assertion (A) and reasons (R) and answer using codes given below.

Assertion (A): A refugee means any person who, owing to well-founded fear of being prosecuted for reason of face, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality.

Reasons (R): Because the United Nations Convention on the Refugees 1951 in its Article 1A says so.

Codes:

(A). Both (A) and (R) are right and (R) is right reason of (A).

(B). (A) is wrong and (R) is right.

(C). (A) is right and (R) is wrong.

(D). Both (R) and (A) are wrong.

10. The petitioner has given the answer i.e. option (A) "Both (A) and (R)" are right and (R) is right reason of (A)." Options (B) "(A) is wrong and (R) is right", option (C) "(A) is right and (R) is wrong" and option (D) "Both (R) and (A) are wrong" are according to him wrong answers. As per answer key and the opinion of the Expert Committee, option (D) "Both (R) and (A) are wrong" is the correct answer. However, the answer key and for that matter expert opinion with respect to this question is again wrong for the reason that Article 1A(2) of paper Annexure P-7, an abstract of 'CONVENTION RELATING TO THE STATUS OF REFUGEES (1951)", answer this question correctly. The same reads as follows:-

"(2). As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. In case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-found fear, he has not availed himself of the protection of one of the countries of which he is a national."

11. The recital hereinabove clearly demonstrate that option (A) is the correct answer to question No. 60. In the answer key and in the opinion of the Expert Committee, option (D) is, therefore, wrong answer.

12. In view of what has been said hereinabove, the petitioner has clearly demonstrated that in the key the answers of question Nos.29 and 60 are wrong. The report of the Expert Committee constituted by the 2nd respondent re-affirming the answers to these questions to be correct is, non speaking as no reason therefor has been assigned. As a matter of fact, in order to disagree with the objections qua answers given by the petitioner, the Expert Committee should have recorded reasons. Merely to say that option (C) and option (D) are the correct answers to questions No. 29 to 60 without any supporting reason therefor, is not sufficient nor such report/opinion of the Expert Committee can be taken as legal and valid. Therefore, the answers to questions No.29 to 60 given by the petitioner are correct answers and such he is entitled to award of marks for these questions.

13. For all the reasons discussed hereinabove, this petition succeeds and the same is accordingly allowed. Consequently, the 2nd respondent is directed to revise the result of the petitioner and declare the same.

14. Before parting, while taking note of the fact that the examination was conducted long back in the year 2014 and the result declared in the month of June, 2015, the relief granted in this writ petition is restricted only to the petitioner and this judgment shall not be treated as a precedent so that the matter which stands closed is not re-opened.

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

Sh. Thakur Dass and another .....Petitioners.

Vs.

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

CWP No.: 772 of 2007
Date of Decision: 03.08.2018

Himachal Pradesh Land Revenue Act, 1954- Section 128- Mode of partition – Objection thereto – Rejection by revenue authorities – Petition against – On objections of petitioner, Assistant Collector himself visiting spot in presence of parties and after hearing them confirming mode of partition – Appeal and revision(s) of petitioner against mode of partition dismissed by Revenue Courts right up to Financial Commissioner (Appeals) - Petitioner feeling aggrieved of fact that area of path (18 marlas) was excessive and land in Khasra No.71/1 was not allotted to him – On facts, found that (i) path was actually 18 marlas on spot and kept joint, between all co-sharers including petitioner and (ii) Khasra No.71/1 was in actual possession of respondents since time of

ancestors – Held, orders passed by revenue authorities were just, reasoned and speaking – Findings also borne out from records of case and thus not perverse – Petition dismissed.

(Paras-5 to 9)

Case referred:

Bakshi Security and personal Services Private Limited Vs. Devkishan Computed Private Limited and others, (2016) 8 Supreme Court Cases 446

For the petitioners: Mr. Naveen K. Bhardwaj, Advocate.

For the respondents: M/s Sanjeev Sood and Desh Raj Thakur, Additional Advocates General, with Mr. Kamal Kant, Deputy Advocate General, for respondents No. 1 to 4.

Ms. Megha Kapoor Gautam, Advocate, for respondents No. 5 to 9.

Ms. Ambika Kotwal, Advocate, for respondent No. 10.

None for the remaining respondents.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

By way of this petition, the petitioners have prayed for the following reliefs:

"(i) That the impugned order dated 27.10.1998 (Annexure P-4), order dated 15.7.1999 (Annexue P-6), order dated 28.6.2006 (Annexure P-8) and order dated 16.10.2006 (Annexure P-10) may kindly be quashed.

(ii) That the respondents may be directed to re-partition the land in dispute after taking into consideration the factual possession on the spot.

(iii) That the respondents may be directed to produce the entire record pertaining to the case of the petitioners for the perusal of this Hon'ble Court.

(iv) That the respondents may be burdened with cost of this writ petition throughout.

(v) Any other order which this Hon'ble Court deems just and proper in the facts and circumstances of the case submitted hereinafter in favour of petitioners and against the respondents."

2. Facts necessary for adjudication of the present petition are as under:

Petitioners filed an application on 13.08.1992 before the Assistant Collector, 1st Grade (Settlement) Nadaun for partition of land comprised in Khewat No. 166, Khatauni No. 184 and Khasra Nos. 71, 73 & 169, Kita-3, area measuring 18 Kanals, situated in Village Kot, Tappa Kohla, Tehsil Nadaun, District Hamirpur, H.P. Assistant Collector, 1st Grade (Settlement), Nadaun devised mode of partition as per order dated 07.02.1997. After receipt of partition papers, he invited objections from the parties. Petitioners submitted their objections with regard to the partition carried out by the field agency. Thereafter, on the request of parties, Assistant Collector, 1st Grade visited the spot himself, which was done by him in the presence of the parties. He confirmed the partition as per his order dated 27.10.1998 after considering and rejecting the objections of the petitioners. This order was assailed by the petitioners by way of an appeal before the respondent No. 3. Vide order dated 15.07.1999, respondent No. 3 rejected the appeal on the ground that passage in issue was recorded as per the contents of mode of partition, i.e., Clause-5 thereof. Said order was also assailed by the petitioners by way of a revision petition before respondent No. 2, who rejected the same vide order dated 28.06.2006 by reiterating that the passage in issue was in consonance with the mode of partition. Order passed by the respondent No. 2 was assailed by the petitioners before respondent No. 1, who rejected the revision petition vide order dated 16.10.2006. These orders passed by various revenue authorities stand assailed by way of present petition.

3. Order dated 28.06.2006, passed by the Commissioner, Mandi Division is appended with the petition as Annexure P-8, whereas order dated 16.10.2006, passed by the Financial Commissioner (Appeals), Himachal Pradesh is appended with the petition as Annexure P-10.

4. I have heard the learned counsel for the parties and have also gone through the pleadings.

5. It is a matter of record that an application for partition of the land referred to above was filed by the present petitioners on 13.08.1992. It is also duly borne out from the records that after the field agencies submitted their report to the Assistant Collector, 1st Grade, he on the request of the parties visited the spot and approved the methodology adopted for effecting the devision of the land. This is evident from order dated 27.10.1998, which is appended with the petition as Annexure P-4. During the course of arguments, the factum of said officer having visited the spot in the presence of parties has not been disputed. The order of the Assistant Collector was upheld in appeal by the Land Settlement Collector, Dharamshala vide order dated 15.07.1999. A perusal of the said order, which is appended with the petition as Annexure P-6 demonstrates that the grievance of the petitioners therein was only with regard to the area of the path measuring 0-18 Marla, comprised in Khasra Nos. 71/9, 71/10 and 73/5, which as per the petitioners was excessive. Collector (Settlement) held that the path in issue was alloted to co-sharers, which was shown as joint and thus, there was no need to modify the same, as the path was safe in joint possession of all co-sharers. Against this order, a revision petition was filed before the Divisional Commissioner, Mandi, which was dismissed, as already mentioned above, vide order dated 28.06.2006 (Annexure P-8). Now, a perusal of Annexure P-8 also demonstrates that the said authority agreed with the partition effected by the Assistant Collector 1st Grade by holding that the grounds taken by the petitioners were frivolous and baseless, as one Khasra No., i.e., Khasra No. 71/1, which was being demanded by the petitioners was rightly not alloted to them by the Assistant Collector, as on the basis of his spot visit, he found said land to be under the possession of respondents since the time of their ancestors and thus, the same could not be allotted to the petitioners. This authority also held that the objection raised with regard to path of 18 Marlas by the petitioners was also frivolous, as Assistant Collector himself had held that it stood agreed by the parties at the time of mode of partition that the path on the spot will be kept in the joint possession of the parties. While dealing with the issue of 18 Marlas of land, which was kept in joint possession of the parties, as it was a path on the spot, it was also observed by this authority that the remaining land had been allotted amongst the respondents and that the petitioners were allotted Khasra No. 71/2, measuring 0-9 Kanal, Khasra No. 71/8, measuring 0-8 Kanal and Khasra No. 73/6, measuring 6-15 Kanal, total 7-12 Kanals. Revisional Authority thus held that there was no merit in the petition filed by the petitioners. This order was further assailed by way of a revision petition before the Financial Commissioner (Appeals), who also dismissed the revision petition of the present petitioners vide order dated 16.10.2006 (Annexure P-10). While dismissing the revision petition, it was held by the learned Financial Commissioner that during the course of arguments, petitioners had reiterated their grievance that 17 marlas of land had been allotted to the petitioners in Khasra No. 71, which was less by 25 Marlas as per their share. Learned Financial Commissioner observed that petitioners had contended that against 3 Marlas of land kept as a public path in the said Khasra number as per old record, now 18 Marlas land had been kept as public path and the contention of the petitioners was that the public path should only be of 3 Marlas. Learned Financial Commissioner rejected the revision petition by holding that all these contentions had been taken care of by the orders passed by the Authorities below and in fact the partition had been done by the Assistant Collector, Grade 1 after personally visiting the spot and thus, no irregularity stood committed by him. On these basis, it was held by the learned Financial Commissioner that there was no reason to interfere with the order passed by the learned Divisional Commissioner, Mandi.

6. In my considered view, there is no infirmity with the orders so passed by the authorities below. As I have already held above, the factum of the Assistant Collector, 1st Grade himself visiting the spot alongwith parties and thereafter confirming the mode of partition is not

in dispute. All the authorities below have held that the partition was correctly effected by the Assistant Collector, 1st Grade and there was no infirmity with the same. In my considered view, these findings of fact cannot be unsettled by this Court in exercise of its power of judicial review in the present proceedings.

7. In fact, this Court is not to act as an Appellate Forum over the orders passed by the authorities below, but has to see as to whether the procedure adopted by the authorities below was just and fair and there was no procedural lapse committed by them. Records demonstrate that all the authorities below passed the orders concerned after hearing the present petitioners, as also other parties.

8. In ***Bakshi Security and personal Services Private* Limited** Vs. ***Devkishan Computed Private Limited and others,*** (2016) 8 Supreme Court Cases 446, the Hon'ble Supreme Court has held as under:

> *"19. It is also well to remember the admonition given by this Court in Michigan Rubber (India) Limited v. State of Karnataka and Others, (2012) 8 SCC 216 in cases like the present, as under:- "21. In Jagdish Mandal v. State of Orissa, [(2007) 14 SCC 517], the following conclusion is relevant:*
>
> *"22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made 'lawfully' and not to check whether choice or decision is 'sound'. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions: (i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; OR Whether the process adopted or decision made is so arbitrary and irrational that the court can say: 'the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached'; (ii) Whether public interest is affected. If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/ contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action."*

9. During the course of arguments learned counsel for the petitioners could not point out as to what procedural infirmity was committed by either of the authorities below while passing the impugned orders. Not only this, in my considered view, the orders passed by the Authorities below are just, reasoned and speaking orders. Further, the findings returned by the authorities below are also duly borne out from the records of the case and thus, it cannot be said

that the findings are perverse. In this view of the matter, I see no reason to interfere with the orders passed by the Authorities below and, therefore, as there is no merit in the present petition, the same is accordingly dismissed. No order as to costs. Miscellaneous applications, if any, also stand disposed of.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, ACJ AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Court on its own motion ....Petitioner.
Versus
State of H.P. and others ....Respondents.

CWPIL No.: 110 of 2018.
Decided on: 7.8.2018.

Constitution of India, 1950- Article 226- **Himachal Pradesh Municipal Corporation Act, 1994 (Act)-** Sections 182 and 261- Right to life – Scope –Water pollution – Public interest Litigation – High Court taking cognizance on letter highlighting illegal dumping of muck and garbage in and around Chadwick Fall, Shimla – High Court constituting a Committee and calling remedial steps from it – Also directing Committee to conduct spot inspection – Report suggesting various actions to be taken by departments – Held, hygeinic environment is an integral facet of healthy life – State is bound to protect and improve as also safeguard environment – Chapter 12 of Act emphasizes on proper use of water, its proper treatment and discharge thereafter – Act also prohibits deposit of rubbish, filth or other polluted and obnoxious matter into or banks of water course – Petition disposed of with direction to Deputy commissioner Shimla to take all measures for implementing suggestions pointed out in inspection report – Also directed to associate Himachal Pradesh State Legal Service Authority and students of law colleges in programme. (Paras-12 to 14, 17 and 18)

Cases referred:

M.C. Mehta v. Kamal Nath & others, (1997) 1 SCC 388
Municipal Council, Ratlam v. Shri Vardichan & others, (1980) 4 SCC 162
Narmada Bachao Andolan v. Union of India & others, (2000) 10 SCC 664
Virender Gaur & others v. State of Haryana & others, (1995) 2 SCC 577

For the petitioner Mr. Deven Khanna, Advocate, as Amicus Curiae.
For the respondents Mr. Ashok Sharma, Advocate General with M/s. J.K. Verma, Ranjan Sharma, Ritta Goswami and Nand Lal Thakur, Additional Advocates General for the respondents-State.
Mr. Maan Singh, Advocate for respondent No. 6.
Mr. Naresh K. Gupta, Advocate for respondent No. 9.

The following judgment of the Court was delivered:

Sanjay Karol, Acting Chief Justice

On 26th of June, 2018, this Court had *inter alia* passed the following order:-

"……

The issue highlighted by the letter petitioner Rishabh Jain, a student of second semester pursing his LLB course with the H.P. University, Shimla, is with regard to maintenance of an age old water body falling within the municipal

limits of Shimla town, popularly known as Chadwick Fall. He has also highlighted the insensitive and callous attitude of various functionaries of the State, who otherwise are required to protect and preserve this heritage site. Photographs annexed indicate the garbage/muck, which stands collected all along the source of water and the water body itself.

Undisputedly, Department of Tourism, Government of Himachal Pradesh has earmarked Chadwick Fall to be a place of heritage and a centre of attraction for tourists, visiting Shimla.

Before we pass any further order, at this stage, we deem it appropriate to constitute a committee, headed by the Deputy Commissioner, Shimla, comprising also of Director (Tourism) ; Secretary, H.P. State Pollution Control Board; Divisional Forest Officer, Shimla; Assistant Commissioner, Municipal Corporation, Shimla; one representative of the Engineer-in-Chief, IPH, Shimla, not below the rank of Superintending Engineer; and two public spirited persons, one of whom, we feel, should be Mr. Raja Bhasin (has authored Books on Shimla) and another person, whom we leave it to be nominated by the Deputy Commissioner, Shimla.

Let the said committee visit the area right from the source of water; path of the stream, upto the place of the water fall and submit its report with regard to the existing position, also suggesting remedial measures required to be taken. This, the committee shall positively do so within a period of two weeks from today.

……."

2. Pursuant to our directions, the Deputy Commissioner, Shimla, has filed his affidavit annexing therein the inspection report, relevant portion whereof is reproduced as under:-

"Before embarking on the suggestive measures to be taken by the various departments the committee wishes to apprise the Hon'ble Court the general condition, location, topography of the area. Chadwick is an old tourist spot in Shimla and falls in the general area of Summerhill. The water fall is seasonal and during the monsoon season when the rains take place then the water comes down and in the other months it is generally dry. There are two trails leading to and from Chadwick Falls from the vehicular road from the nearby village Hewn. The first trail goes down for a distance approximately 1.5 Kms. And the other trail comes at the lower vehicular point and is approximately 1 Km. From the Chadwick Falls. The forest is of mixed temperature alpine nature comprising primarily of Baan, Kail, and Chir trees. The under growth is healthy and consists of number of shrubs and other plants. There is also wild life in the area which includes pheasants, pine-marten, jackals and occasionally, leopards.

The committee inspected the site with the focus on the following –

a) Garbage in the catchment area.

b) Debris in the catchment area.

c) Sewage.

d) How the general area can be developed from the tourism point of view

ACTIONS BY THE VARIOUS DEPARTMENTS :

1. **<u>The Municipal Corporation, Shimla</u>**

1.1 It was observed that the water coming down in the fall was not clean and there was a likelihood that upstream of the falls, sewage from the area was getting mixed in the water as there was a foul smell and hence Municipal Corporation will check the leakage, if any, from the septic

tanks and/or the sewage line laid by the MC Shimla in the catchment area of the Chadwick Fall. Remedial measures shall also be taken in a time bound manner within MC limits. Septic tanks upstream would be repaired so that there is no leakage as also all septic tanks will be inspected to check that no leakage is there. If thearea falls under Gram Panchayat Neri, needful be done by the IPH Department.

1.2 To connect all the houses within the Municipal Corporation and also in Gram Panchayat Neri with the sewerage line laid by the MC Shimla which connects with STP Golcha. The representatives of the Gram Panchayat Neri present on the spot told that the Municipal Corporation had given an assurance to the villagers at the time of laying of sewerage line that the houses of the villagers will be connected without charging any fee. However nothing was documented.

1.3 Gram Panchayat Neri will carry out door to door collection of garbage and disposal will be in the MC Garbage Disposal Plant at Bharyal.

1.4 To ensure absolute cleanliness in the area that forms part of the catchment of Chadwick Falls and also to ensure general cleanliness within the Municipal limits on the Road/Path/Trail leading to Chadwick Falls.

2. **Forest Department**

2.1 The catchment area of the Chadwick Falls lies in the Reserve Forest on one side and in the DPP on the other side. The Forest Department shall maintain the path(s) leading to Chadwick Falls that lie within its jurisdiction by carrying out periodical maintenance.

2.2 To constitute Eco-Tourism Development Society for the area or to make the area part of the eco-tourism society constituted for Potter Hill. Till the Society is constituted, the Department will work with various NGO's in concerned GramPanchyats through Youth Ctubs, Eco Clubs, Mahila Mandals & Yuvak Mandals etc. for general cleanlinesses of the area.

2.3 To develop walking trails from Chadwick Falls to the Potter Hill (approximate walking distance two and half hours) on Glen & Annandale on the other side (approximate walking distance two and half hours).

2.4 To maintain walking trail (s) viewpoints in the catchment area. To formulate regulatory mechanism for the tourists in this area depending on carrying capacity. Possibility of making proper entry & exit points with proper ticketing so that maximum number of tourists at a given point of time may be explored.

2.5 It was observed by the Committee that lot of debris has been thrown in the catchment area which essentially is a forest by various contractors and people residing in the area and proper periodical checking will be carried out by Forest Department.

3. **Pollution Control Board**

3.1 To carry out inspection and regulatory checks in the catchment area on periodic basis.

3.2 To carry out periodical cleanliness drives with all holders. First search drive will be carried out on 8th July, 2018.

4. **Tourism Department**

4.1 To provide funds to the Municipal Corporation, Shimla and Forest Department, Shimla to develop the area and also to install proper signage.

4.2. To develop & publish a Map/detail/ folder of walking trail in the catchment area for the benefit of the tourists.

Suggestive Future course of Action

Since, the area where Chadwick Fails is located within the jurisdiction of the Forest Department and the Forest Department has Eco-Tourism wing which is already constituted and functioning, the forest department may be asked to prepare a comprehensive plan for the development the area around Chadwick Fall including Potter Hill, Summer Hill, Sangati, Neri, Glen and Annandale. There is an old Forest path leading from Annandale to Tattapani which may also be included in the future development plan to provide trekking opportunity to the interested persons."

3. Undisputedly, in fact quite evidently, contents of the letter petition are borne out to be correct. The condition of the water body, commonly known as 'Chadwick Falls', so to say the least, is pathetic. In fact, it is worse than a drain. It is in this backdrop, we find the letter petitioner correctly highlighting violation of various provisions of the Constitution of India as also various environmental laws.

4. Right to life, as contemplated under Article 21 of the Constitution of India, includes having hygienic environment as a integral facet of healthy life. Right to life with human dignity, in the absence of humane and healthy environment would only become illusionary. Clean environment, ecology, air and water are all facets of right to healthy life. Part IV of the Constitution of India, containing the directive principles to State Policy, specifically mandates the State to protect and improve as also safeguard the environment (Article 48-A). Similarly, Part IV-A thereof prescribes the fundamental duties to be performed by every citizen of India, which expression, in our considered view, would apply equally to the State, to protect and improve the natural environment, including forests, rivers etc.

5. The Apex Court, after elaborate discussion, has now settled the fundamental principles of Environmental Laws, which, inter alia, include (a) doctrine of public trust, (b) precautionary principle, (c) polluter pays principle, and (d) cooperative social responsibility. In fact, way back in *M.C. Mehta v. Kamal Nath & others,* (1997) 1 SCC 388, while dealing with a case of motel, which was discharging untreated effluents in River Beas, the Apex Court issued several directions, holding that our legal system – based on English common law – includes the public trust doctrine as part of its jurisprudence. The State is the trustee of all natural resources which are by nature meant for public use and enjoyment. Public at large is the beneficiary of the sea-shore, running waters, airs, forests and ecologically fragile lands. The State as a trustee is under a legal duty to protect the natural resources.

6. In *Municipal Council, Ratlam v. Shri Vardichan & others,* (1980) 4 SCC 162, the Apex Court held that:

"15. Public nuisance, because of pollutants being discharged by big factories to the detriment of the poorer sections, is a challenge to the social justice component of the rule of law. Likewise, the grievous failure of local authorities to provide the basic amenity of public conveniences drives the miserable slum-dwellers to ease in the streets, on the sly for a time, and openly thereafter, because under Nature's pressure, bashfulness becomes a luxury and dignity a difficult art. A responsible municipal council constituted for the precise purpose of preserving public health and providing better finances cannot run away from its principal duty by pleading financial inability. Decency and dignity are non-negotiable facets of human rights and are a first charge on local self governing

bodies. Similarly, providing drainage systems - not pompous and attractive, but in working condition and sufficient to meet the needs of the people - cannot be evaded if the municipality is to justify its existence. A bare study of the statutory provisions makes this position clear."

7. The Apex Court in *Narmada Bachao Andolan v. Union of India & others,* (2000) 10 SCC 664, held that:

> "248. Water is the basic need for the survival of human beings and is part of right of life and human rights as enshrined in Art. 21 of the Constitution of India and can be served only by providing source of water where there is none. The Resolution of the U.N.O. in 1977 to which India is a signatory, during the United Nations Water Conference resolved unanimously inter alia as under :-
>
> > "All people, whatever their stage of development and their social and economic conditions, have the right to have access to drinking water in quantum and of a quality equal to their basic needs."

8. In *Virender Gaur & others v. State of Haryana & others,* (1995) 2 SCC 577, the Apex Court held:

> "7. Article 48-A in Part IV (Directive Principles) brought by the Constitution 42 nd Amendment Act, 1976, enjoins that "the State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country". Article 47 further imposes the duty on the State to improve public health as its primary duty. Article 51-A (g) imposes "a fundamental duty" on every citizen of India to "protect and improve the natural environment including forests, lakes, rivers and wild life and to have compassion for living creatures". The word 'environment' is of broad spectrum which brings within its ambit "hygienic atmosphere and ecological balance". It is, therefore, not only the duty of the State but also the duty of every citizen to maintain hygienic environment. The State, in particular has duty in that behalf and to shed its extravagant unbridled sovereign power and to forge in its policy to maintain ecological balance and hygienic environment. Article 21 protects right to life as a fundamental right. Enjoyment of life and its attainment including their right to life with human dignity encompasses within its ambit, the protection and preservation of environment, ecological balance free from pollution of air and water, sanitation without which life cannot be enjoyed. Any contra acts or actions would cause environmental pollution. Environmental, ecological, air, water, pollution, etc. should be regarded as amounting to violation of Article 21. Therefore, hygienic environment is an integral facet of right to healthy life and it would be impossible to live with human dignity without a humane and healthy environment. Environmental protection, therefore, has now become a matter of grave concern for human existence. Promoting environmental protection implies maintenance of the environment as a whole comprising 'the man-made and the natural environment. Therefore, there is a constitutional imperative on the State government and the municipalities, not only to ensure and safeguard proper environment but also an imperative duty to take adequate measures to promote, protect and improve both the man-made and the natural environment."

9. It is not in dispute that the water body, as a whole, falls within the limits of Municipal Corporation, Shimla (Corporation), so constituted under the provisions of the Himachal Pradesh Municipal Corporation Act, 1994 (hereinafter referred to as the Act).

10. Chapter-III (Sections 41 to 44) of the Act deals with General Functions of the Corporation, i.e., public health, sanitation, conservancy and solid waste management, apart from protection of environment and promotion of ecological aspects. Section 42(1)(b) of the Act, inter alia, deals with the functions and obligations of the Corporation.

11. In terms of Chapter-XII (Section 166-207), it is also the duty of the Corporation to take steps for ascertaining the sufficiency and wholesomeness of the water supply within the municipal area (Section 169). In fact, by virtue of Section 182, the Commissioner of the Corporation is empowered to direct that supply from polluted source be not consumed.

12. To our mind, this Chapter lays down much emphasis on proper use of water and its proper treatment and discharge thereafter. In fact, it is one of the most essential functions of the Corporation. Further, much emphasis is also laid on proper sanitation and public health, under Chapter-XV (Section 261 to 301).

13. By virtue of Section 261, there is an obligation to clean, treats and properly dispose of the rubbish, filth and other polluted and obnoxious matter. Correspondingly, there is a duty upon the owners and occupiers to put such filth and rubbish at the earmarked places, with further duty upon the Corporation to dispose of the same, in accordance with law. In fact, Section 266 prohibits accumulation of rubbish, filth or obnoxious matter at any place to avoid nuisance.

14. Sections 207 & 266 of the Act prohibit deposit of any rubbish, filth or polluted and obnoxious matter into or on the banks of water course.

15. It is not in dispute that the beauty and glory of the Chadwick Falls is of international fame. For more than two Centuries, this spot has been attracting not only the local populace but also tourists, both domestic and international. It has got its natural beauty, which undoubtedly needs to be protected and preserved for posterity.

16. The letter petitioner has highlighted various schemes promoted by the Central Government including 'Swachh Bharat Abhiyan (#MycleanIndia)', as one of the favourite programmes of Hon'ble Prime Minister. The said campaign needs to be encouraged and the spirit of the fundamental duties imbibed, through various modes and means, amongst all, and more specifically the students and the local inhabitants/residents. The Committee has identified the stakeholders/agencies, who are required to carry out necessary work in this regard. The Municipal Corporation, Shimla, Department of Forest, Government of Himachal Pradesh, Himachal Pradesh State Pollution Control Board and Department of Tourism, Government of Himachal Pradesh, are the agencies which are required to ensure that the entire length of the water body, commonly known as 'Chadwick Falls' is cleaned up, maintained and developed so as to restore its pristine glory.

17. We are also of the considered view that the civil society should be associated in this exercise. Himachal Pradesh State Legal Services Authority and students of various Law Colleges/faculties in Shimla should be associated in this programme.

18. Under these circumstances, we direct the Deputy Commissioner, Shimla to take all measures, by associating all the stakeholders/agencies, including the civil society, for implementing the suggestions pointed out in the inspection report reproduced supra. Needful shall positively be done within a period of two months from today.

19. Before parting, we wish to place on record appreciation qua the efforts put in by Mr. Deven Khanna, learned Amicus Curiae, who, on the instructions of this Court obtained necessary feedback.

20. Registry is directed to send a copy of this judgment to the Deputy Commissioner, Shimla (respondent No. 8) and the Commissioner, Municipal Corporation, Shimla (respondent No. 9) to take necessary action and the letter petitioner to enable him to take follow up action, if any, with the concerned authorities.

In view of the above, the petition stands disposed of, so also pending application(s), if any.

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

Mukesh Sharma .....Petitioner.
Versus
State of H.P. .....Respondent.

Cr. MP(M) No.970 of 2018.
Decided on: 7th August, 2018.

Code of Criminal Procedure, 1973- Section 439- Bail- Grant of- Accused allegedly entered in chamber of Judicial Officer and threatened her with dire consequences if his case was not dealt with fairly – Accused also allegedly manhandled police officials and destroyed case property, when taken to police station from chamber of judicial officer - On facts, allegations made out against accused prima facie found to be doubtful – His custody not required for further investigation – Petition allowed – Bail granted subject to conditions. (Paras-5 and 6)

For the Petitioner: Mr.Surender Saklani, Advocate.
For the respondent: Mr. Vikas Rathore & Mr. Narinder Guleria, Additional Advocate General.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. (oral).

Heard.

2. Learned Additional Advocate General has placed on record the status report and the I.O. ASI Gurdev Singh, Police Station Dehra has produced the record.

3. Petitioner is an accused in FIR No.115/18, registered against him under Sections 451, 353, 186, 189, 506 of Indian Penal Code and Section 3 of the Prevention of Damage to Public Property Act, 1984, in Police Station, Dehra, District Kangra with the allegations that on 11.7.2018, around 9.55 a.m., complainant HHC Satnam Singh No.833 was on duty outside the chambers of learned Additional Chief Judicial Magistrate, Dehra, District Kangra. The accused-petitioner came there and when tried to enter inside the chambers, the complainant asked the reason therefor and also prevented him from doing so, but of no avail as the accused-petitioner pushed aside the complainant and forcibly entered inside the chambers of learned Magistrate. Inside the chambers, the accused-petitioner allegedly made the utterances that her (Magistrate's) predecessor has roughly dealt with him and that in case she also did something wrong with him in the case under Section 498-A IPC pending against him, he will drag her to the High Court and thereby he allegedly criminally intimidated the Additional Chief Judicial Magistrate, Dehra. The complainant overpowered the accused-petitioner with the assistance of others and he was brought outside the chambers. When taken to Police Station, he intimidated the police officials on duty there and even damaged a computer display, chair, table and case property of another case i.e. two bottles of country liquor. On the statement made under Section 154 Cr.P.C., by HHC Satnam Singh aforesaid, a duty constable, FIR came to be registered against the accused-petitioner.

4. It is seen that offences, the accused-petitioner allegedly committed under Sections 451, 186, 189 and 506 IPC are compoundable. As regards the offence punishable under Section 3 of the Prevention of Damage to Public Property Act, in item No. II of First Schedule to the Code of Criminal Procedure i.e, "**Classification of offences against other laws**", which includes Prevention of Damage to Public Property Act, also, the same as imprisonment, which shall not be less than six months, but may extend to 5 years or with fine, is non-bailable. Therefore, it is the offence punishable under Section 353 IPC and Section 3 of the Prevention of Damage to Public Property Act allegedly committed by the accused petitioner non-bailable.

5. On having gone through the records and analyzing the rival submissions, normally a duty constable performs the duty in the Court premises or in the Court room and not outside the chambers of a Judicial Officer unless or until called upon to do so. Therefore, it is doubtful at this stage that the occurrence has taken place in the manner as claimed by the investigating agency. It is also interesting to note that the accused when taken to Police Station has not only damaged the Public Property like table, chairs, computer display there but also two bottles of country liquor, case property of another case in the presence of police staff on duty that too when brought there after having been overpowered by the complainant and other persons, the genuineness of such allegations at this stage also seem to be doubtful.

6. Anyhow, the investigation, in so far as the accused petitioner is concerned, is almost complete. It is borne out from the record that his custodial interrogation is not required. Being so, to curtail his freedom and liberty any further, would, in the given facts and circumstances, be unwarranted. Therefore, this application is allowed. Consequently, the accused-petitioner, who has been arrested in connection with the case registered against him vide FIR No. 115/18 in Police Station, Dehra, District Kangra, shall be released on bail, subject to his furnishing personal bond in the sum of Rs.25,000/- (twenty five thousand) with one surety in the like amount to the satisfaction of learned Chief Judicial Magistrate, Kangra at Dharamshala, District Kangra, H.P. The accused-petitioner shall further abide by the following conditions:-

That he;

- shall make himself available for interrogation as and when required and shall cooperate with the Investigating Officer to conduct the investigation in a manner so as to take it to its logical end;
- shall 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, which learned trial Court shall decide in accordance with law;
- shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;
- shall not make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Investigating Officer;
- shall not leave the territory of India without the prior permission of the Court.

7. 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 the bail.

8. The observations hereinabove shall remain confined to the disposal of this petition and have no bearing on the merits of the case. The application stands disposed of. Copy Dasti.

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

Ravi Shankar Shandil .....Petitioner.

Versus

State of H.P. & Ors. .....Respondents.

CWP No. 1547 of 2018.
Decided on: 7.8.2018.

Constitution of India, 1950- Articles 14, 15 and 226- MBBS/BDS Course(s) – Admission against State quota seats – Prospectus issued by respondent(s) stipulating admission(s) to MMS/BDS Courses in Colleges situated in State against State quota seats only to wards of Himachalis who had passed at least two required examinations from schools in the State – Petitioner though passed four such examinations from Schools in Himachal Pradesh but being 'non himachali', seeking admission against State quota seats – Rejection of application by University – Petition against – Held, in view of specific provisions laid in prospectus, petitioner not eligible for admission against State quota seats, when he is neither himachali nor bonafide resident of Himachal Pradesh – Such criterion for admission existing since long, has been held to be constitutionally valid in 'Gagan Deep Vs. State of H.P., 1996 (1) Sim. L.C. 242 – Petition dismissed. (Paras-6,11 & 12)

Cases referred:

Gagan Deep vs. State of H.P. and its connected matters 1996(1) Sim. L.C. 242
Vikram Singh Negi vs. State of H.P. & ors., (2009) 2 Shim. LC 362
Gunjan Kapoor vs. State of H.P. & ors, 1999(1) Sim. L. C. 246,

For the petitioner:	Mr. Virbahadur Verma, Advocate.
For the respondents:	Mr. Narinder Guleria, Mr. Vikas Rathore, Addl. AGs & Mr. Kunal Thakur, Dy. AG for respondents No. 1 & 2. Mr. Neel Kamal Sharma, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Justice Dharam Chand Chaudhary, J (Oral).

By means of present writ petition, the petitioner, a non-Himachali, is seeking direction to the respondents to consider him for admission to MBBS/BDS course in Medical/Dental Colleges situated in the State against 85% State quota seats on account of he having passed all the four examinations i.e. 8th, 10th, 10+1 and 10+2 standard from Sainik School, Sujanpur Tihra, District Hamirpur. In the alternative, the petitioner has sought a direction to the respondents to consider the category of the students who have passed two school examinations out of the four prescribed in the Prospectus from the schools situated in the State of Himachal Pradesh and have studied in the educational institutions situated within the State for number of years, irrespective of not being bonafide residents of Himachal Pradesh.

2. The Central Board of Secondary Education (CBSE) has conducted NEET-UG-2018 examination on all India basis for admission in MBBS/BDS courses throughout the country. The result was declared. In the State of Himachal Pradesh admissions on the basis of merit were to be made in the Medical/Dental Colleges against State quota seats i.e. 85% seats. The Prospectus (Annexure P-4), containing terms and conditions and eligibility criteria etc. for seeking admission was prepared and published on behalf of respondents No. 1 & 2 by respondent No. 3 University. A Counseling Committee under the Chairmanship of Director, Medical Education and Research, (H.P.), the second respondent was constituted by first respondent for granting admission strictly on the basis of merit and as per the criteria laid down in the Prospectus (Annexure P-4). The respondent-University had invited ONLINE applications from the candidates having qualified NEET-UG-2018 examination and otherwise fulfilling eligibility criteria mentioned in the Prospectus. The petitioner had applied for counseling ONLINE and as per the previous merit list, he was placed under general combined merit rank 196 for admission under State/Management quota seats, however, subject to fulfillment of the prescribed eligibility criteria. The petitioner appeared before the Counseling Committee during first round of counseling held on 30.6.2018. The Committee, on examination of his form submitted ONLINE and the certificates/other testimonials, found him not eligible to seek admission against 85% State quota seats, being not a bonafide Himachali, irrespective of he having fulfilled the condition

of passing two school examinations out of the four from Sainik School, Sujanpur Tihra, District Hamirpur, Himachal Pradesh. The petitioner, however, has opted for management quota seats in private Medical College(s) situated in the State being eligible for the same.

3. The petitioner, aggrieved by the rejection of his candidature for 85% State quota seats on account of being not a bonafide Himachali, has questioned the legality and validity thereof on the ground that he having studied for number of years i.e. from 6th standard onwards up to 10+ 2 in Sainik School, Sujanpur Tira, an educational institution situated in District Hamirpur, Himachal Pradesh, there should have been a provision in the Prospectus to grant admission to a student like the petitioner irrespective of having not been resident of Himachal Pradesh. The non-inclusion of such criteria in the Prospectus according to him is arbitrary, un-constitutional and violative of Article 14 of the Constitution of India. The respondents, according to the petitioner, have rightly inserted provisions in the prospectus to hold the domicile/bonafide Himachali eligible for seeking admission in MBBS/BDS courses in the State of Himachal Pradesh in relaxation of the conditions of passing two examinations out of four from the educational institutions situated in the State, however, the persons like the petitioner who have spent considerable time of their schooling in such educational institutions and also deserves for admission by way of relaxation in the condition of bonafide Himachali/residents of Himachal Pradesh no provisions qua it finds mention in the prospectus. An example that in IIT Hamirpur, Himachal Pradesh, no such condition is prescribed for granting admission, such criteria prescribed for admission in medical courses is stated to be discriminatory and arbitrary has also been given.

4. The respondent-State, in its response while supporting the eligibility criteria laid down in the Prospectus for granting admission in MBBS/BDS courses against 85% State quota seats has come forward with the version that the petitioner who is not a bonafide Himachali or permanent resident of Himachal Pradesh, is not entitled to seek parity against those who as per the criteria laid down are granted certain exemptions in eligibility criteria. The eligibility criteria so laid down is stated to be legal and valid and not discriminatory, arbitrary or violative of Article 14 of the Constitution of India.

5. On the other hand, the respondent-University coming forward with the version that the petitioner having submitted application form ONLINE for seeking admission against 85% State quota seats in the Medical/Dental Colleges situated in the State and having appeared before the Counseling Committee on 30.6.2018, was not found to have fulfilled the basic condition of being a resident of Himachal Pradesh or a bonafide Himachali. Therefore, irrespective of he having passed all the four examinations i.e. 8th, 10th, 10+1 and 10+2 from Sainik School, Sujanpur Tihra, District Hamirpur, a school situated in the State could have not been considered for admission against State quota seats. He, however, opted for admission against management quota seats in private medical colleges situated in the State and rightly so because as per further version of respondent No. 3, he was eligible for the same. Therefore, both the sets of respondents have sought the dismissal of the writ petition.

6. On hearing learned counsel for the petitioner and learned Addl. Advocate General as well as learned standing Counsel for the respondent-University and going through the record, no doubt as per the version of the petitioner, the condition that one should be either a resident of Himachal Pradesh or at least bonafide Himachali, for seeking admission in the Medical/Dental Colleges situated in the State of Himachal Pradesh against 85% State quota seats is unreasonable, illegal, discriminatory and un-Constitutional also, however, the eligibility criteria so laid down in the Prospectus long back in the year 1994-95 has been upheld by a Division Bench of this Court in ***Gagan Deep vs. State of H.P.*** and its connected matters ***1996(1) Sim. L.C. 242***.

7. The provisions contained in clause IV (A) 1 in the Prospectus Annexure P-4 published for the academic session 2018-19 provides for the following eligibility and qualification for granting admission against 85% State quota seats:

"**IV. ELIGIBILITY AND QUALIFICATIONS**

(A) For State Quota Seats :

1. Children of Bonafide Himachali/Domicile/Himachal Govt. employees and employees of autonomous bodies wholly or partially financed by the Himachal Pradesh Government who qualified the NEET-UG-2018 will only be eligible to apply ONLINE for admission to MBBS/BDS Courses through counselling in Government Medical/Dental Colleges including State Quota seats in Private un-aided Medical/Dental Colleges situated in Himachal Pradesh. They should have passed at least two exams out of the following examinations from the recognized schools or colleges situated in the State of Himachal Pradesh and affiliated to ICSE/CBSE/H.P. Board of School Education or equivalent Boards/Universities established by law in India.

(a) Middle or equivalent

(b) Matric or equivalent

(c) 10+1 or equivalent

(d) 10+2 or equivalent"

8. A Division Bench of this Court in ***Gagandeep's case*** cited supra, while holding that the criteria so laid down is legal and valid and also in accordance with the Constitutional provisions has held as under:

> "18. Looking to the material placed before us and the contentions of the learned Counsel for the parties, it is clear that students studying in the Schools, Institutions, Colleges situated in the State of Himachal Pradesh form a separate class while the students falling to the category of the petitioners, form a distinct class. Contention that there are many good Schools in Shimla and a few other places with good educational facilities, is hardly convincing. Assuming that there are some such schools, they are far behind the schools outside the State. Moreover, they can be counted on finger tips. Except for bare contention, no material has been placed before us to assess the standard of education and the percentage of appearance and selection to the Medical Courses. A few schools cannot be made the basis for assuming that the standard of education in all the School, Institutions and Colleges in the State is as high as in Schools, Institutions and Colleges located outside the State. What is the requirement of the State which maintains the Medical Colleges and what should be the sources of recruitment for admission, is primarily for the State to decide. The eligibility criteria has to be the result of the past experience and the requirement of the State. Of course, the State action should not transgress.
>
> 19. Second facet of this question is whether laying down of this kind of criteria is constitutionally permissible; whether it is arbitrary and unjust causing hardship to the petitioners? We answer all these questions against the petitioners. By now, such kind of reservations have been held constitutionally permissible in series of decisions by the apex Court and this Court. Similarly, question of hardship or that the State could have extended this kind of benefit to the candidates passing these examinations from the Institutions and Colleges situated in Himachal Pradesh in a different and better way, do not make the provision unconstitutional, unjust or harsh.
>
> .....
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> .....
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> .....

27. The third facet for sustaining the eligibility is equally efficacious when it is pointed out by the respondents that although quite a large number of persons have qualified medical degree from the State Medical College, yet people are deprived of medical facilities in rural and far flung areas of the State since the doctors do not want to go to such areas and they flee the State to avoid postings in such areas. Although bond amount has been increased, yet that has not given the desired results. State Government is spending lacs of rupees on a student for doing the medical course but the amount is going into the drawings since they are not prepared to remain in the State and serve the people.

28. The fourth facet is about the arbitrariness, un-justness and hardship being caused to the petitioners by the eligibility criteria. Having up-held the institutional preference and accepting the submission of the learned Advocate General that the candidates studying in Schools, Colleges and Institutions situated in the State of Himachal Pradesh form a separate category and are entitled to protection to enable the them to secure and admissions in the medical institutions as compared to the petitioners and similarly placed candidates falling in different group with better facilities and chances to appear in the institutions located in the States they are studying, nothing much remains for examination of this question, more particularly, in view of the latest decision of the apex Court reported in of Anant Madaan Vs State of Haryana and others,(1995)2 SCC 135 upholding reservation of 85 percent seats to MBBS/BDS courses on the basis of candidate's education for preceding three years in the state and rejecting the contention of the reservation being arbitrary, discriminatory and causing hardship. It is necessary to quote paras 8 and 9 of this judgment:

> "8.In view of the above facts, we have to consider whether the condition requiring a candidate to have studied in 10th and 10+2 classes in a recognized Institute in Haryana, can be considered as arbitrary or unreasonable. It is by now well settled that preference in admissions on the basis of residence, as well as institutional preference, is permissible so long as there is no total reservation on the basis of residential or institutional preference. As far back as in basis 1955, in the case of D.P Joshi Vs. State the of Madhya Bharat, this Court making a distinction between the place of birth and residence, upheld a preference on the basis of residence in educational institutions."
>
> "9. In the case of ***Jagdish Saran (Dr.)*** v. ***Union of India***, this Court reiterated that regional preference or preference on the ground of residence in granting to medical colleges was not arbitrary or unreasonable so long as it was not a wholesale reservation on this basis. This Court referred to various reasons of why such preference may be required. For example, the residents of a particular region may have very limited opportunities for technical education while the region may require such technically qualified persons. Candidates who were residents of that region were more likely to remain in the regions and serve their regions if they were preferred for admission to technical institutions in the State, particularly medical colleges. A State which was short of medical personnel would be justified in giving preference to its own residents in medical colleges as these residents, after qualifying as doctors, were more likely to remain in the State and give their services to their State. The Court also observed that in the case of women students, regional or residential preference may be justified as their parents may not be willing to send them outside the State for medical education. We,

> however, need not examine the various reasons which have impelled this Court to uphold residential or institutional preference for admission to medical colleges. The question is settled by the decision this Court in Pradeep Jain (Dr) Vs. Union of Inida. This Court has observed in that judgment: (SCR p. 981: SCC p. 687, para 19):
>
> We are, therefore, of the view that certain percentage of reservation on the basis of residence requirement may legitimately be made in order to equalize opportunities for medical admissions on a broader basis and to bring about real and not formal, actual and not merely legal, equality. The percentage of reservation made on this count may also include institutional reservation for students passing the PUC or pre-medical examination of the same university or clearing the qualifying examination from the school system of the educational hinterland of the medical college in the State....."
>
> This Court held in that case that reservation to the extent of 70%, on this basis would be permissible. This percentage of reservation was subsequently increased to 85% by this Court in the case of Dinesh Kumar (Dr) Vs. Motilal Nehru Medical College. This Court in that case directed an entrance examination on an all-India basis for the remaining 15% of seats."
>
> Consequently, all the submissions raised by the petitioners on this aspect of the case are rejected."

9. It is thus seen that in this judgment reservation in medical educational institutions on the basis of residential and institutional preferences both has been held legal and valid. Therefore, the point in issue raised in this writ petition is squarely covered by the judgment supra against the petitioner.

10. This Court in ***Vikram Singh Negi vs. State of H.P. & ors., (2009) 2 Shim. LC 362*** has held that it is for the State to decide that reservation should be made and if so, for what category of people. Also that, no person has a right to claim as to which condition should be retained and which condition must be deleted from the Prospectus, meaning thereby that the Courts must be slow in interfering with the criteria prescribed for admission in Medical/Dental Colleges by the State. In a recent judgment rendered on 13.7.2018 in CWP No. 1353 of 2018, titled ***Shivam Sharma vs. State of H.P.*** and its connected matters, this Court while placing reliance on the law laid down in ***Gagandeep's case*** and ***Vivek Singh Negi's case*** (supra) and also in ***Gunjan Kapoor vs. State of H.P. & ors, 1999(1) Sim. L. C. 246***, has held that the provisions contained in the Prospectus have the force of law.

11. Therefore, when in the Prospectus Annexure P-4, there is no provision for considering a person like the petitioner to grant admission against 85% State quota seats, this Court has no reason nor any material to stretch the eligibility criteria to the category of the petitioner who neither is a resident of Himachal Pradesh nor bonafide Himachali, though has passed all the four school examinations from a well reputed school i.e. Sainik School, Sujanpur Tihra, situated in the State of Himachal Pradesh. It is for the policy makers to lay down such criteria and when no case to establish the arbitrariness or violation of Article 14 of the Constitution of India is made out, the Court cannot interfere with the criteria so laid down.

12. Having said so, coupled with the factum of the petitioner is neither a resident of Himachal Pradesh nor bonafide Himachali, is not entitled for admission against 85% State quota seats in the Medical/Dental Colleges situated in the State of Himachal Pradesh.

13. This petition, being devoid of any merits, is dismissed so also the pending application(s), if any.

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

Anil Kumar and another .....Petitioners.

Versus

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

Cr.MMO No. 232 of 2018
Decided on: 08.08.2018

Himachal Pradesh Panchayati Raj Act, 1994- Section 37 – Return of complaint – Circumstances – After investigation police filing case against accused for offences under Sections 323 and 341 I.P.C. before Panchayat as incident happened in panchayat area – Panchayat referred case to court of Judicial Magistrate on ground that accused 'do not listen' to Panchayat – Held, only in circumstances mentioned in Section 37, Panchayat can transfer case to Judicial Magistrate – None of eventuality existed which warranted transfer of case to Magistrate – Order set aside – Magistrate directed to forward record to Gram Panchayat for trial – Petition allowed.

(Paras-4,5 and 7)

For the petitioners: Mr. Bhuvnesh Sharma, Advocate.

For the respondents: Mr. R.P. Singh, Dy. A.G with Mr. Kunal Thakur, Dy. A.G for respondent No.1.
Mr. Susheel Gautam, Advocate for respondents No. 2 and 3.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)

Heard.

2. Order dated 20.09.2017, Annexure P-1 passed by a Bench of Gram Panchayat, Dhanot, Development Block Dehra, Tehsil Jawalamukhi, District Kangra in a case registered vide FIR No. 80/2017 against the accused-petitioners at the instance of Vijay Singh, respondent No. 3-complainant is under challenge in this petition on the grounds is *inter-alia* that the jurisdiction to try an offence under Section 341 and 323 IPC though vests with the Gram Panchayat and the challan also filed against the accused-petitioners before Gram Panchayat, however, vide impugned order, the case has been wrongly referred to the Judicial Courts at Dehra.

3. The record reveals that on the basis of the report lodged by respondent No.3-complainant against the accused-petitioners, a case has been registered against them for the commission of an offence punishable under Section 341 and 323 IPC on the completion of the investigation, report against them was initially filed before Gram Panchayat, Dhanot Tehsil Jawlamukhi, District Kangra H.P. The Gram Panchayat instead of taking cognizance has referred the matter to the Judicial Courts at Dehra on the ground that the accused-petitioners do not listen to the Gram Panchayat. The case is now pending in the Court of learned Judicial Magistrate Dehra, District Kangra H.P. The record reveals that notice of accusation was put to the accused-petitioners.

4. It is seen that offence punishable under Sections 341 and 323 IPC is triable by Gram Panchayat. The Gram Panchayat can only forwarded the case to the Court of nearest Judicial Magistrate only under any of the eventuality mentioned below. Section 37 of the Himachal Pradesh, Panchyati Raj Act, 1994. The same reads as follows.

"37 **Return of complaints**:- If at any time, it appears to Gram Panchayat,-

(a) that it has no jurisdiction to try any case before it; or

(b) that the offence is one of which it cannot award acquitted punishment; or

(c) that the case as is of such a nature or complexity that it should be tried by a regular court,

it shall return the complaint to the complainant directing him to file it before the Magistrate having jurisdiction to try such case."

5. It is seen that none of the eventuality exists, warranting transfer of the case by the Gram Panchayat to the nearest Magistrate. The provisions contained under Section 64 of the Act further reveal that in the event of the accused fails to appear or could not be located, the Gram Panchayat may forward case to the nearest Magistrate. The Magistrate shall ensure the attendance of the accused by way of issuing bailable warrants and on execution of the warrants and furnishing personal/surety bond, direct the accused to appear before the Gram Panchayat. Such was not the position in the case in hand, because the accused-petitioners do not listen to the Gram Panchyat is not a ground to refer the case to the Court of nearest Judicial Magistrate. Learned Judicial Magistrate, as such, should have returned the case to the Gram Panchayat for trial in accordance with law, instead of entertaining the same and proceeding further with the trial.

6. Therefore, the impugned order dated 22.03.2018, Annexure P-2 Colly.) is quashed and set aside. There shall be a direction to learned Judicial Magistrate to forward the record to the Gram Panchayat for trial in accordance with law.

7. The petition, as such, is allowed. There shall be a direction to the accused-petitioners and respondent No. 3-complainant through learned counsel representing them to appear before Gram Panchayat, Dhanot on **06.09.2018**. Learned Judicial Magistrate, Dehra, District Kangra HP to remit the record to the Gram Panchayat so as to reach there well before the date fixed.

An authenticated copy of this judgment be supplied for learned Judicial Magistrate Dehra, District Kangra for compliance.

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

Om Prakash and others .....Petitioners/Defendants.
Versus
Smt. Saroj & anr. ....Respondents/Plaintiff(s).

CMPMO No. 263 of 2015.
Reserved on : 31st July, 2018.
Date of Decision: 8th August, 2018.

Code of Civil Procedure, 1908- Order VII Rule 11- Rejection of plaint – Partial partition – Trial Court dismissing defendant's application for rejection of plaint filed on ground that suit was for partition of only part of joint property – Petition against – High Court found that suit, infact was for partial partition yet upheld order of trial court on plaintiff's request of moving appropriate application before Trial Court for incorporating left out property in suit – Petition dismissed. (Para-1)

Cases referred:
R.Sudha vs. Shanmugam, 2017(3) Madras Law Journal 208,
Saichanakya versus Priti Tandon & Anr., 2014 (19) R.C.R (Civil) 630 (Delhi)

For the Petitioners: Mr. Janesh Gupta, Advocate.
For the Respondents: Mr. Y. P. Sood, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The aforesaid petition, is directed, against the disaffirmative orders pronounced by the learned trial Court, upon, an application cast before it, by the defendants, under the provisions of Order 7, Rule 11, CPC, wherethrough, the, defendants espoused for rejection, of the plaint, (a) on the ground qua the plaintiff failing to embody in the suit for partition, certain properties, as, disclosed, in the apt application. The plaintiff had instituted a suit for partition, of, the joint properties, and, had impleaded all apt co-owners thereof, as, defendants. A perusal of the plaint, does, bear out the factum, of the plaintiff's suit, for partition of the undivided properties, jointly held by her, with, the defendants, not, obviously including, the, properties reflected by the defendants, in their application, as, subsequently cast before the learned trial Court, under, the provisions, of, Order 7, Rule 11 of the CPC.

2. Before proceeding to determine, the predominant fact, whether, any suit for partial partition, of, property(ies) held joinlty amongst the plaintiff, and, the defendants, is maintainable, it, is deemed imperative, to allude, to the provisions borne in Order 7, Rule 11 of the CPC, provisions whereof stand extracted hereinafter:-

> **11. Rejection of plaint**— The plaint shall be rejected in the following cases:—
>
> (a) where it does not disclose a cause of action;
>
> (b) where the relief claimed is undervalued and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;
>
> (c) where the relief claimed is properly valued but the plaint is returned upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;
>
> (d) where the suit appears from the statement in the plaint to be barred by any law::
>
> [(e) Where it is not filed in duplicate;]
>
> [(f) Where the plaintiff fails to comply with the provisions of rule 9;]"

(a) significantly when only upon satiation qua the mandate thereof, the apt mandate thereof, rather would beget, attraction, vis-a-vis, the plaintiff's suit. However, prior thereto, it is also imperative to determine, the, tenacity of the reasons assigned, by the learned trial Court. The learned trial Court, without, meteing any interpretation, vis-a-vis, the aforesaid factum, has rather hence declined, the, espoused relief to the defendants, merely, on the ground, of, the documents hence appended with the apt application, being photo copies, of, the apt revenue record, whereto presumption of truth, is not attachable rather, presumption of truth, being attachable, vis-a-vis, the original(s) thereof. However, the aforesaid reason(s) assigned by the learned trial Court, are, per se, flimsy, as the mere appending, of, the photo copies, of, the relevant revenue records, with the apt application, per se, not, eroding the probative vigour thereof, (i) unless, the plaintiff while meteing reply, to, the aforesaid apt application, had contested the authenticity, of, the photo copies of the apt revenue record. However, when a perusal of the reply filed by the plaintiff, vis-a-vis, the apt application, fails to unfold, qua the plaintiff/non-applicant, hence, contesting the authenticity, of, the photo copies, of, the apt revenue record, appended with the apposite application, (ii) thereupon, it was insagacious, for, the learned trial Court, on the aforesaid anvil, hence decline relief, vis-a-vis, the defendants, upon their apposite application.

3. Be that as it may, it is also enjoined to be determined, whether the plaintiff, was, enjoined to cast, a suit for partition, only with respect, to, some of the properties jointly held by her, with, the defendants or whether the suit for partial partition, of, all the joint suit properties, was or was not hence maintainable. The learned counsel appearing for the plaintiff/respondent, has, contended with vigour, that, it being insagacious, to make any insistence, upon, the

plaintiff/respondent herein, to cast a suit, for, partition qua all undivided suit properties, jointly held by her hence with the defendants. He contends that merely, the, apt pleadings as cast by the respective litigants in their respective plaint, and, their respective written statements, alone comprising, the relevant material, for, hence attracting the mandate of Order 7, Rule 11 of the CPC, and, when the suit for partial partition, does discloses espousable causes of action, and, when the suit for partition, is, properly valued for the purpose of jurisdiction, and, when advolerm court fees stand affixed upon the plaint, especially vis-a-vis the apt shares, of the plaintiff/non-applicant, in, the undivided suit property, thereupon, the plaint not warranting rejection. The aforesaid submission addressed before this Court, by the learned counsel appearing for the plaintiff/respondent, is in part conflict, with, the pronouncement, made by the Hon'ble Madras High Court in a case titled as ***R.Sudha vs. Shanmugam***, reported in ***2017(3) Madras Law Journal 208***, the relevant paragraph No.9 whereof stand extracted hereinafter:-

> "9. The next argument put forth by the plaintiff's counsel is that the courts below have erred in holding that the suit is bad for partial partition. However, as seen from the judgment and decree of the courts below, they have rightly found that the plaintiff has deliberately omitted to include the lands belonging to the Joint Hindu Family Properties, particularly, obtained by the first defendant by way of oral partition and the document viz. Ex. B3. It is also found by the courts below that it is only the first defendant, who is maintaining the joint family and also put up house construction in respect of the properties and also not acted against the interest of his children. Therefore, the courts below have also disbelieved the evidence of Pws 1 and 2 and found that the Joint Hindu family had owned 3.66 acres lands and on the other hand, the plaintiff has deliberately excluded certain items and only had laid the suit in respect of the suit properties covered under Exs. B1 & 2. Therefore, as rightly contended by the contesting defendants, the suit laid by the plaintiff for partition is bad for partial partition. The findings of the courts below, as regards the above issue is found to be based on the correct appreciation of the evidence on record, and, also upon acceptable findings and conclusions. No infirmity is found with reference to the above findings of the courts below."

and also, partially conflicts with the verdict, of, the Hon'ble Delhi High Court, rendered in a case titled as ***Saichanakya versus Priti Tandon & Anr.,*** reported in ***2014 (19) R.C.R (Civil) 630 (Delhi)***, relevant paragraph No.15 whereof stand extracted hereinafter:-

> "15. Pertaining to the first contention advanced, it may not doubt be true that a suit for partial partition of joint property is not maintainable. But this would be when either joint title to the property has not to be established by any litigating party and flows from the document of title, or where the plea is that the family constituted a joint family with further claim that the properties in the names of individual members were purchased from out of the joint funds. In a case of the instant kind, where there are no allegations by either side that a particular property is a joint property, the claim being that a particular property is held benami, would not attract the principle of law that a suit for partial partition would not lie. The reason being that the suit filed would not be one seeking partial partition. Th defence that some other property is also liable to be partitioned because the registered owner thereof is a benamidar would require first a title to be proved and thereafter the if the title is proved a partition to be effected."

wherein, rather concurrent view(s) stand recorded qua a suit for partial partition, of, the joint properties, rather being not maintainable. However, accepting to the fullest, the aforesaid trite expostulation of law, would beget immense hardship, and, would disempower the plaintiff, to seek partition, of the suit properties, and, of all undivided suit properties, held jointly by her with the defendants, though, not included in the plaint, (a) emphatically when, in, contradiction therewith, rather hereat the suit has not progressed, upto the stage, of, issues being framed nor evidence upon the apt framed issues, stands adduced, rather when the suit, is, at a nascent stage, (ii) thereupon the inclusion therein, of, only some of the joint properties, and, its excluding

the apt joint properties, as, mentioned in the application, rather cannot coax any conclusion qua the plaint not disclosing any enforceable causes of action, vis-a-vis, the plaintiff, contrarily, with, it , for reasons aforestated, standing also properly valued for the purpose of court fee, and, jurisdiction, and, besides when hence, infirmity, if any, in the plaint, is yet curable by the plaintiff/non-applicant/respondent herein, comprised in the latter, in consonance, with the joint properties, disclosed in the apt application, recoursing the provisions, borne in Order 6, Rule 17, CPC, (I) thereupon, in the larger interest, of, justice, and, for not precluding the rights of the plaintiff/non-applicant, and, of the defendants, to, rear a claim for dismemberment, of all, undivided suit properties, jointly held by her, with, the defendants, (ii) besides, especially when hence the bar of Order 2, Rule 2 of the CPC, would also stand attracted against the plaintiff, and, against the defendants, (iii) thereupon, alone this Court deems it fit, to uphold, the impugned order, with, a condition that the plaintiff, shall, by motioning the trial Court, by casting an application, borne under the provisions of Order 6, Rule 17 CPC, seeks its leave to incorporate in the plaint, all suit properties jointly held by her with the defendants, and, as disclosed in the apt application. Consequently, the instant petition is dismissed. The parties are directed to appear before the learned trial Court on 29th August, 2018. Records be sent back forthwith.

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

Rajesh Singh. .....Petitioner.

Versus

State of Himachal Pradesh & anr. .....Respondents.

Cr.MMO No. 256 of 2018.
Date of decision: August 08, 2018.

Code of Criminal Procedure, 1973- Section 482- Inherent power – Exercise of - Quashing of FIR – Held, proceedings involving heinous offences cannot be quashed, simply on ground of compromise with victim of crime – High Court dismissed petition seeking quashing of FIR and consequent proceedings involving offence of rape. (Paras-4 & 5)

Case referred:
Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur and others Vs. State of Gujarat and another (2017) 9 SCC 641

For the petitioner Mr. Sanjay Jaswal, Advocate.
For the respondents Mr. R.P. Singh and Mr. Kunal Thakur, Dy. AGs, for respondent No. 1-State.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. *(Oral)*

Respondent No. 2-complainant in person with her mother Smt. Lalita Devi.

2. In this petition FIR No. 73 of 2017 registered under Section 376 IPC against the accused-petitioner at the instance of respondent No. 2 complainant has been sought to be quashed and set aside on the ground that respondent No. 2-complainant (prosecutrix) consequent upon the compromise Annexure P/3 to this petition has now decided not to prosecute the case any further.

3. The status report placed on record reveal that the investigation in the case is complete and challan also stand filed. The order Annexure P/4 reveal that Sessions Case No. 49-D/VII/2018 arising out of the FIR Annexure P/1 is pending disposal in the court of learned Additional District Judge (III), Kangra at Dharamshala.

4. The offence, the accused-petitioner allegedly committed, is not only grievous in nature but heinous also. The Apex Court in a recent judgment titled ***Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur and others*** V. ***State of Gujarat and another (2017) 9 SCC 641*** while reiterating the broad principles need to be followed while considering the prayer for quashing the FIR and consequential criminal proceedings on the basis of compromise has held that in a case involving commission of heinous offence like murder, rape and dacoity, the proceedings can not be quashed even if accused-petitioner and victim of the occurrence have compromised the dispute. This judgment reads as follow:-

> **16.6.** 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; and
>
> **16.10.** There is yet an exception to the principle set out in propositions 16.8 and 16.9 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.

5. The point in issue raised in this petition is, therefore, covered against the accused-petitioner by the judgment ibid. This petition, as such, is dismissed, so also the pending application(s), if any.

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

RFA No. 106 of 2006 along with
Cross Objections No.332 of 2006.
Reserved on : 2nd August, 2018.
Date of Decision: 8th August, 2018.

1. RFA No. 106 of 2006.

State of H.P. & another .....Appellants.

Versus

Smt. Santosh Sood .....Respondents.

2. Cross-Objection No. 332 of 2006.

Santosh Sood .....Cross-objector

versus

State of H.P. & Anr. ....Respondents.

Land Acquisition Act, 1894- Sections 18 & 23- Market Value – Determination – Acquisition of part of building only – Reference Court assessing rental value of acquired part at Rs.34,580/- and granting 40% increase keeping in view location of property – Appeal by State and cross-objections

by landowner – Cross-objector did not lead any evidence qua claim of Rs.500/- per square yard nor evidence regarding spending of Rs. 5 lakh for restoring affected part of building – Assessment of Reference Court found proper – Appeal and cross-objections dismissed. (Paras-2 to 4)

For the Appellant:	Mr. Hemant Vaid, Addl. A.G. with Mr. Y.S. Thakur, Dy. A.G.
For the respondent(s)/ Cross-objector	Mr. Bhupender Gupta, Senior Advocate with Ms. Rinki Kashmiri, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal, is, instituted before this Court by the State of H.P., its, standing aggrieved, by the learned Reference Court, hence meteing a 40% increase, vis-a-vis, the rental value, of, the building put to acquisition. Contrarily, the cross-objector, is, aggrieved, by, the meteing of, a, mere 40% increase, by the learned Reference Court, vis-a-vis, the building brought to acquisition. Since, both, RFA, and, the cross-objections are directed against a common award, hence, both enjoin meteing, of, a common adjudication thereon.

2. Uncontrovertedly, the entire apt building, was not subjected to acquisition, rather only a part thereof, stands, subjected to acquisition. Corollary whereof being qua hence only a part of the building, being affected by its acquisition, (a) ensuing effect thereof, is, qua, given evidence existing on record qua the unacquired portion of the building being larger in size, vis-a-vis, the acquired portion thereof, thereupon, also there apparently occurred, no total loss of derivable rentals, therefrom, vis-a-vis, the apt landowner. Contrarily, there was only a partial loss of rental income, from, the apt building. The learned Reference Court had concluded that a sum of Rs.34,580/- per annum, is the apt amount, hence, comprising the rental income accruing, to the landlord concerned. Since, as aforestated, only a part of the building stood acquired, also, since the unacquired part thereof, rather comprised a substantial portion, of the building, thereupon, the learned Reference Court, had concluded, that an apt 40% increase, (b) given the location of the building, being meteable vis-a-vis, the aforesaid sum, of Rs.34,580/- per annum, derived therefrom as rental(s). The aforesaid meteing, of, a 40% increase, vis-a-vis, the annual rental income derived by the landlord, is both just and fair, and, does not merit interference.

3. Even though, the cross-objector contested the meteing, of, the aforesaid 40% increase, vis-a-vis, the rental income, accruing from the acquired portion of apt building, yet the aforesaid contest, (a) is neither based upon any sound tangible evidence, nor hence is amenable for acceptance, (b) besides the claim reared by the cross-objector qua hers being entitled, to compensation of Rs.5,00,000/-, towards costs, for restoring the affected part of the building, is, also not acceptable, as no best evidence, stands adduced, comprised in hers, hence, expending the aforesaid sum of Rs. Five lacs, for, restoring the affected part, of the apt building, thereupon, the assessment, of, the amount of compensation appertaining therewith, is, both just and fair.

4. The further ground as meted in the cross-objections, reared, by the cross-objector qua hers being entitled, to quantification of compensation, borne, in, a sum of Rs.500/- per square yard, (i) given the aforesaid sum of money standing reckoned, vis-a-vis, the property of one Aridaman Nath, wherewhose property also stood acquired, under, a notification common, with the notification hereat, yet the aforesaid plea is discountenanced, given an apparent contradistinctivity, in, the location of the properties of Shri Aridaman Nath, vis-a-vis, the location of the property, of, the cross-objector hereat.

5. Consequently, the instant appeal, as also, the cross-objections are dismissed, and, the impugned award is maintained and affirmed. All pending applications also stand disposed of. No order as to costs. Records be sent back forthwith.

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

State of H.P. and others .....Appellants.
Versus
Roop Lal & others. .....Respondents.

RFA No. 324 of 2007.
Reserved on : 1st August, 2018.
Date of Decision: 8th August, 2018.

Land Acquisition Act, 1894- Section 34- Interest, payment of- Relevant date, what is?- Reference Court directing payment of interest on compensation amount from date of taking of possession (1.5.1982), much prior to issuance of notification under Section 4 of Act – Held, expression "taking possession" occurring in Section 34 of Act means valid possession of acquired land as assumed subsequent to commencement of acquisition proceedings – Holding of possession and utilization of land prior thereto does not foist any jurisdiction upon Collector or Reference Court to levy statutory interest thereon – Appeals allowed – Direction to pay interest since 1982 set aside – Awards modified. (Paras-2 & 3)

Case referred:
R.L. Jain (D) by LRS. vs. DDA and others, (2004)4 SCC 79

For the Appellant(s): Mr. Hemant Vaid, Addl. A.G.. with Mr. Y.s. Thakur and Mr. Vikrant Chandel, Dy. A.Gs.
For the respondent(s): Nemo.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The landowners' land was acquired for construction, of, Patrighat-Gobharta Road, in, Muhal Patrighat. The learned Reference Court, upon, receiving the apt reference, from, the Collector concerned, had proceeded, to assess, vis-a-vis, the acquired land of the landowners, compensation amount(s) borne in the sums enumerated thereunder, (a) besides had also in the operative part of the verdict, made a conclusion, qua the compensation amount assessed by the Collector concerned, vis-a-vis, the landowners qua their lands, brought to acquisition, not, meriting any interference. The effect of the learned Reference Court hence affirming the award pronounced by the Collector, has sparked the institution of the instant RFA before this Court, (b) with espousal(s) therein qua the Collector concerned, inaptly levying interest, upon, the compensation amount assessed by him, w.e.f. 1.05.1982, upto the date, of, the department concerned, after issuance, of, an apt notification, under, Section 4 of the Land Acquisition Act, hence, taking possession thereof.

2. The learned Additional Advocate General has contended with vigour before this Court, that, in the learned Collector concerned, levying, the, apt statutory interest, upon, the compensation amount assessed, vis-a-vis, the landowners, and, also his directing qua its accrual commencing, from, the date whereat, the, public works department, rather utilized the land, palpably failing beyond the domain and ambit of Section 34 of the Land Acquisition Act, provisions whereof stand extracted hereinafter:-

> "**34. Payment of interest.** When the amount of such compensation is not paid or deposited on or before taking possession of the land, the Collector shall pay the amount awarded with interest thereon at the rate of [nine per centum] per annum from the time of so taking possession until it shall have been so paid or deposited:"

(a) rather the connotation acquired by the underlined statutory coinage existing therein "taking possession" appertains, only to a valid possession,as, assumed, of, by the acquired land, by the department concerned, (b) preeminently subsequent, to, the commencement, of, the statutory proceedings, and, any utilization, of the lands, of, the landowners, and, concomitantly any holding of possession thereof, prior thereto, rather not foisting any jurisdiction, upon, the Collector or upon the reference Court, to since then or to therefrom levy statutory interest, upon, the compensation amount, assessed by both. The aforesaid submission addressed before this Court, by the learned Additional Advocate General, has immense vigour, as it is squarely, bears concurrence, with, the verdict pronounced by the Hon'ble Apex Court in a case titled as ***R.L. Jain (D) by LRS. vs. DDA and others***, reported in ***(2004)4 SCC 79***. Therein, the Hon'ble Apex Court has made, a, trite expostulation of law, that the mandate of Section 34 of the Land Acquisition Act being applicable only, vis-a-vis, possession assumed or taken under the Act, and, mandate thereof being inapplicable, vis-a-vis, possession of acquired lands, as, taken prior to the issuance, of, the primary notification.

3. Consequently, the instant appeal is allowed, and, the award of the Collector, as also, the award of the Reference Court, rather concurrently, hence, levying the apt interest, upon, the compensation amount, as, assessed qua the acquired land(s) of the landowners, and, commencement thereof standing mandated therein, to arise from 1982, is, to the above extent interfered with, (b) and awards of the collector concerned, and, of the reference Court, is modified to the extent, that, the compensation amount concurrently adjudged, qua the acquired land, being amenable to carry interest, under Section 34 of the Act, and, commencement thereof, rather occurring, from, the date of assumption, of, valid possession thereof, in pursuance, to, an apt notification issued, under Section 4 of the Land Acquisition Act. All pending applications also stand disposed of. No order as to the costs. Records be sent back forthwith.

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

Sh. Anshul Kalia. .....Petitioner.

Versus

State of Himachal Pradesh & ors. .....Respondents.

CWP No. 1818 of 2018
Date of decision: August 13, 2018.

Constitution of India, 1950- Article 226- Admission in MBBS/BDS courses – Counselling - Directions, when can be issued – Petitioner appeared in first round of counseling on 1st July, 2018 and was allotted seat in Govt. Medical College, Ner Chowk vide letter dated "17.7.2018" – He was required to deposit fees upto 21.7.2018 – Meanwhile petitioner appeared for counseling at Govt. Medical College, Chandigarh on 13.7.2018 and was allotted seat, but lateron it was cancelled by Punjab and Haryana, High Court vide judgment dated 24.7.2018 – By then, time to deposit fee (21.7.2018) against State Quota seat allotted to him in Govt. Medical College at Ner Chowk, had expired – Petitioner seeking appearance in second round of counseling at Govt. Medical College, Ner Chowk against State Quota seat – Plea objected by University on ground that he was granted provisional seat in first round of counseling and as he did not deposit fees, petitioner not entitled to participate in second round – Held, petitioner is in merit and was allotted seat in first round of counseling – He is entitled to appear in second round conselling qua which even date has not yet been fixed by University – Petition allowed. (Paras-4 to 9)

For the petitioner Mr. Ankush Dass Sood, Senior Advocate with Mr. Sumeet Raj Sharma and Ms. Shweta Joolka, Advocates.

For the respondents — Mr. Vikas Rathore and Mr. Narinder Guleria, Addl. Advocate Generals for respondents No. 1 and 2.
Mr. Neel Kamal Sharma, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. ***(Oral)***

The petitioner appeared in National Eligibility-cum-Entrance Test (UG)-2018 [NEET (UG)-2018] for admission in MBBS/BDS courses during the academic session 2018-2019. On declaration of the result, he made an application for seeking admission against 85% state quota seats in the Medical/Dental colleges situated in the state of Himachal Pradesh. He appeared in the first round of counselling on 1st July, 2018. He was allotted a seat reserved for Scheduled Caste community in Shree Lal Bahadur Shastri Government Medical College, Ner Chowk, District Mandi (HP), vide letter Annexure P-4.

2. Simultaneously, he on the basis of merit got admission against a seat reserved for Scheduled Caste Community in Government Medical College, Chandigarh on 3rd July, 2018 as is apparent from Annexure P-5. His admission to the course at Chandigarh was, however, challenged in the High Court of Punjab and Haryana at Chandigarh by way of filing civil writ petition No. 15586 of 2018 (O&M), titled *Sabhya Kamal* versus *Union Territory Chandigarh & others* on the ground, inter alia, that being a reserved category candidate of State of Himachal Pradesh, he could have not been granted admission in Government College, Chandigarh. The writ petition was allowed vide judgment Annexure P-6 and as a result whereof the admission of the petitioner in Govt. Medical College, Chandigarh has been cancelled.

3. Consequently, the petitioner has made the representation Annexure P-7 to the Director, Medical Education and Research, Himachal Pradesh- respondent No. 2, the incharge, Counselling Committee to allow him to appear in second round of counselling which had yet to be held for admission against state quota seats. The representation so made by him is stated to be under consideration of the said respondent.

4. Though the reply has been filed by 3rd respondent and the prayer qua appearance in second round of counseling made by the petitioner is agitated on the ground that as per the provisions under the prospectus for academic session 2018-2019 provisional admission was granted vide Annexure P-4 to the petitioner during the first round of counseling, however, he had not deposited the admission fee. Hence, not entitled to appear in the second round of counseling.

5. We fee that if the stand so taken by the respondent-University is accepted, it will not be harsh but oppressive also to the petitioner for the reasons that he is in merit and was allotted seat in first round of counseling itself on merit. Since he simultaneously got admitted in Government Medical College, Chandigarh, therefore, opted for pursuing his course in that college at Chandigarh and sought admission there. However, it is his ill luck that his admission to the course was quashed by the High Court of Punjab and Haryana vide judgment Annexure P-6. He, therefore, is entitled to appear in second round of counseling qua which date has not yet been fixed as stated by learned standing counsel representing the respondent No. 3-University.

6. Otherwise also, the petitioner not sought the direction to admit him in the course and rather to allow him to appear in the second round of counseling. Being so and in view of he is in merit, there is no reasons as to why he should not be allowed to appear in the second round of counseling.

7. We further note from the record that the petitioner is not at any fault for the reason that on the basis of the counseling having taken place on 1st July, 2018 at Shimla the letter qua his provisional admission in Shree Lal Bahadur Shastri Government Medical College, Ner Chowk, District Mandi (HP) Annexure P-4 was issued by respondent No. 3 on 17.7.2018.

The date for deposit of fee etc. was up to 21st July, 2018. Interestingly enough, well before the date of issuance of Annexure P-4 and the deposit of fee, he appeared in the counseling at Chandigarh on 13.7.2018 and got admission there. There is another aspect i.e. the judgment Annexure P-6 of Punjab and Haryana High Court came on 24.7.2018 by which time the period to deposit the fee against state quota seat allotted to him in Shree Lal Bahadur Shastri Government Medical College, Ner Chowk, District Mandi (HP) had already expired. Such peculiar circumstances also substantiate the relief claimed in the writ petition because the petitioner is not at any fault, hence, in the given facts and circumstances should not be made to suffer.

8. In view of what has been said hereinabove, we allow this writ petition and direct the respondents to allow the petitioner to appear in second round of counseling as and when held and in case found to be in merit be allotted the seat against 85% State quota seat in Medical/Dental Colleges situated in the State.

9. The writ petition is accordingly disposed of, so also the pending application(s), if any.

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

Gurjot Kaur & anr. .....Petitioners.

Versus

Director General Employee State Insurance Corporation & ors. .....Respondents.

CWP No. 1500 of 2018

Date of decision: August 13, 2018.

Constitution of India, 1950- Articles 15 & 226- Admission to MBBS/BDS in ESIC Medical College against Insured Persons (IPs) quota seats – Criterion - Petitioner seeking admission against (IPs) quota seat –Claiming that her mother was an insured person under Employees State Insurance Act, 1948 - However, her mother (P2) not being granted IPs of Group-I Category certificate on ground that she does not satisfy requisite conditions – And record qua deposit of contribution by her from April, 2014 to May, 2017 was prepared only to avail admission against Quota seat – Since, contribution of said period was realized on only 19/20 June, 2017 through supplementary challan – However, on finding that similar provision in admission notice debarring a candidate from obtaining award of IP Certificate for default or delayed deposit of contribution was set aside by Kerla High Court, High Court set aside such condition in admission notice – Respondents directed to issue Grade I Certificate to petitioner as ward of insured person – Also permitted her to participate in dust up round of counseling – Petition disposed of.

(Paras- 3, 4 and 8 to 10)

For the petitioners Mr. Ankush Dass Sood, Senior Advocate with Ms. Shweta Joolka, Advocates.

For the respondents Mr. Sumeet Raj Sharma, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. ***(Oral)***

Heard.

2. In this writ petition, the petitioner No. 1 who is ward of petitioner No. 2 and insured under Employee State Insurance Act, 1948 is a candidate for admission in MBBS/BDS

course in the State of Himachal Pradesh against 15% ESIC special quota termed as "Insured Person (IPs) quota" in the colleges situated in the State of Himachal Pradesh. In the State of Himachal Pradesh 30 seats are reserved for this category in Shree Lal Bahadur Shastri Government Medical College, Ner Chowk, District Mandi.

3. The petitioner No. 2 was not issued the IPs of Group-I category certificate on the ground that she does not satisfy the requisite conditions. Also that, the records qua deposit of the contribution for the period April 2014 to May 2017 has been prepared only to avail the benefits of seeking admission in ESIC Medical College in the capacity of ward of IP (Insured Person). In the interim, following order was passed on 3.7.2018 in CMP No. 6106 of 2018:

> "In the interim on having considered the given facts and circumstances and also that petitioner No. 2, mother of petitioner No. 1, is an insured person under the provisions of Employees State Insurance Corporation Act, 1948 and is making subscription under the scheme, therefore, subject to final order to be passed in the writ petition, petitioner No. 1, Gurjot Kaur shall be permitted to join second round of counselling, scheduled to be held on 9th/10th July, 2018, after her registration for the course on the scheduled date i.e. 6.7.2018. She however shall not be admitted to the course, without seeking permission from this Court. The application stands disposed of. Authenticated copy of this order be supplied to the parties."

4. On filing of response by the respondents, the matter came to be heard further on 31.7.2018 when following order came to be passed:

> "Heard for some time. The impugned order Annexure P-3 reveals that request for issuance of requisite certificate has been rejected by the Employees' State Insurance Corporation, the 3rd respondent on the ground that petitioner No. 2 does not satisfy the requisite condition and also that the records seems to have been prepared only to avail the benefit for getting admission in ESIC Medical College under this category for her ward, petitioner No. 1. The impugned order further reveals that contribution of insured person for the period from April, 2014 to May, 2017 was submitted after three years by creating supplementary challan and the amount was realized on 19.6.2017 and 20.6.2017, respectively. The contribution from the salary of petitioner No. 2 was being submitted on deduction from her salary during every month during this period or not is a question which needs consideration during further course of hearing in this writ petition. There is however nothing on record to show that the contribution of her share were being deducted from her salary regularly or not. In case it was being deducted and it is her employer Adarsh Management & Consultants, where, as per her own case she started working perhaps on and w.e.f. 1.4.2014, who has not deposited the same. She may have been registered with Employees' State Insurance Corporation on 24.12.2011 while on the establishment of M/s Preet Enterprises, Nalagarh, District Solan. However, the impugned order Annexure P-3 reveals that she was re-registered/re-entered by her employer Adarsh Management & Consultants on 19.6.2017, but what was status of her registration w.e.f. April, 2014 till 19.6.2017 also needs clarification.
>
> Let supplementary affidavit clarifying all these aspects be filed by the petitioners within a week. Learned counsel for the respondents also to seek instructions in this regard.
>
> List on **7th August, 2018**."

5. Consequently, petitioner No. 2 has filed supplementary affidavit dated 7.8.2018 which reads as follow:

> "That in compliance to the direction issued by this Hon'ble Court dated 31.7.2018 it is submitted that the petitioner No. 2 has been continuance

employment with Adarsh Management Consultants since April 2014 till 30.4.2018. that the salary was remitted to petitioner No. 2 by the employer Adarsh Management Consultants in cash. However only after deducting the contribution towards employee state insurance. The above fact is certified by the employer to the certificate annexed herewith as Annexure P-12. The employer Adarsh Management Consultants have also supplied the copy of the e-challans as well as the salary register for the relevant period which are Annexed as P-13 and P-14 respectively. Thus the petitioner No. 2 was under continuance employment with Adarsh Management Consultants from April 2014 up to 30.4.2018 and the contribution towards employee state insurance was being deducted from the salary of petitioner No. 2 every month. Thus the delay if any has been on the part of the employer as the ESI Act obligates the employer to deposit the employee state insurance contribution deducted from the salary of employee and that to be remitted by employer with ESIC and employee has no role to play in same."

6. In response thereto the respondents have also filed the counter affidavit reiterating that deposit of contribution late violates the provisions contained under Section 44 of the ESI Act and as such, the certificate was rightly denied to the petitioners in terms of clause 8 of the admission notice (Annexure P-1) issued by the ESIC.

7. What we could gather from the supplementary affidavit filed by the petitioners is that the employer of petitioner No. 2 had been regularly making deduction towards ESIC contribution. It is, however, the employer i.e. Adarsh Management and Consultants failed to deposit the same further along with its share of contribution for pretty long time i.e. up to three years. Now the employer has deposited the due and admissible amount towards the ESIC contribution which is not disputed by the respondent also.

8. In view of a recent judgment rendered by the High Court of Kerala at Ernaklam in WP (c) No. 17305 of 2018, Clause 8 (a)(d) of admission notice which debar a candidate from obtaining Ward of IP certificate and resultantly admission in ESIC Medical College for default or delayed on deposits of contribution has been quashed and set aside. Therefore, the point in issue brought to this Court in the present petition is squarely covered by this judgment. Since nothing to the contrary has been brought to our notice, therefore, we are also in agreement with the decision so rendered by the High Court of Kerala.

9. We, therefore, quash and set aside the impugned orders Annexures P-3, P-9 and P-10 and allow the writ petition. Consequently, there shall be a direction to the respondents to issue Grade-I ward of Insured Person (I.P.) Certificate so that the same can be produced by the petitioner No. 1 before the Counseling Committee.

10. Though the petitioner No. 1 was considered in second round of counseling being holder of Grade-II IP Ward certificate, however, being found to be not in merit in this category could not be selected as stated by learned Counsel for the respondents at Bar. Learned Counsel further submits that Mop-up round of Counseling as per amended schedule will now take place on 19th and 20th August, 2018 qua which registration will start on 16.8.2018 and will continue up to 18th August, 2018 till 5.00 P.M. Therefore, in modification of the interim order passed in this writ petition, we now direct the respondents to allow petitioner No. 1 to appear in Mop-up round of counseling and consider her the ward of IP under Group-I category.

11. The writ petition is accordingly disposed of, so also the pending application(s), if any.

12. Authenticated copy of this judgment be supplied to learned Counsel on both sides for compliance.

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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.114 of 2017
Reserved on: August 13, 2018
Decided on : August 14, 2018.

Constitution of India, 1950- Articles 14, 15, 16 & 226 – **Public Interest Litigation –** Gender discrimination – Reservation in government jobs for wards of freedom fighters – Government policy providing reservation to unmarried daughters/grand-daughter(s) - Married daughters/grant-daughters not eligible for reservation – However, son(s) and grandson(s) irrespective of marital status eligible as descendant(s) of freedom fighters for benefit of reservation- State justifying policy on ground that married daughter(s), grand-daughter(s) after their marriage don't fall in definition of 'family' as is normally understood – Held, primary object and purpose of policy is not to confer benefits on descendants but to acknowledge sacrifices done by freedom fighter by giving employment to his wards – Law cannot make an assumption that married sons alone continue to be members of family of their parents, and that married daughter ceases to be so- It is constitutionally impermissible because it is an invidious basis to discriminate against married daughters- Identity of woman as a woman continues to subsist even after and notwithstanding her marital relationship – Policy being discriminatory set aside – Petition disposed of. (Paras- 27 to 33)

Cases referred:

Miss C.B. Muthamma, I.F.S. v. Union of India & others, (1979) 4 SCC 260
Dr. Mrs. Vijaya Manohar Arbat v. Kashirao Rajaram Sawai & another, (1987) 2 SCC 278
Savita Samvedi (Ms) & another v. Union of India & others, (1996) 2 SCC 380
Madhu Kishwar v. State of Bihar, (1996) 5 SCC 125
Air India v. Nergesh Meerza, (1981) 4 SCC 335
Randhir Singh v. Union of Inida, (1982) 1 SCC 618
Vishaka v. State of Rajasthan, (1997) 6 SCC 241
MCD v. Female Workers (Muster Roll), (2000) 3 SCC 224
Liverpool & London S.P. & I. Assn. Ltd. v. M.V. Sea Success I, (2004) 9 SCC 512
Anuj Garg & others v. Hotel Association of India & others, (2008) 3 SCC 1
National Legal Services Authority v. Union of India & others, (2014) 5 SCC 438
Charu Khurana & others v. Union of India & others, (2015) 1 SCC 192
Ishan Pandit v. State of H.P. & others, AIR 1999 HP 1
Kinjlak M. Kalia v. Himachal Pradesh Krishi Vishvavidyala, 2000 (3) Shim. LC 413
State of Jammu and Kashmir v. Dr. Susheela Sawhney, AIR 2003 Jammu and Kashmir 83
Santosh Kumar Upadhayay v. State of U.P. and others, (2016) 1 ILR (All) 153

For the Petitioner : Mr. Deven Khanna, Amicus Curiae.

For the Respondents : Mr. Ashok Sharma, Advocate General, with Mr. Ranjan Sharma and Ms Ritta Goswami, Additional Advocates General.

The following judgment of the Court was delivered:

Sanjay Karol, Acting Chief Justice

Letter petitioners Ms Rekha Sharma and Ms Geeta Sharma, daughters of late Shri Het Ram Sharma (a Freedom Fighter), resident of Dadyal (Sundernagar), District Mandi, Himachal Pradesh, have highlighted a vital issue of public importance, i.e. of gender discrimination, in the State Policy, providing reservation in Government jobs to the wards of Freedom Fighters.

2. The questions, which arise for consideration in the present petition are:

> 1. Whether Policy of the State, providing reservation for recruitment, confined only to the unmarried daughters, unlike sons, who are married, is discriminatory or not?
>
> 2. If the marital status of a son does not make any difference in law, qua his entitlement or eligibility as a descendent, then why should marital status of a daughter, in terms of constitutional values, make any difference?
>
> 3. Whether there is a nexus with the objects sought to be achieved by the said action of the State?

3. Quite apparently, as per Policy of the State, married daughters and granddaughters of a Freedom Fighter, unlike sons and grandsons, are excluded from the benefit of reservation in jobs.

4. From the response, so filed by the State, averments made by the letter petitioners are found to be correct. However, State justifies such action, by stating that "the issue of providing reservation in services for the children/grandchildren of Freedom Fighters was engaging attention of the Government since long. However, after thoughtful consideration of whole matter it has decided in the year 1984 that 2% reservation in services be provided to the children/grandchildren belonging to the State of H.P. in direct recruitment to all services/posts i.e. Class-I to IV including all Public Sector Undertakings/ Board/Corporation. Since 1984, 2% reservation is being provided to the Children/grandchildren of Freedom Fighters. As per Scheme, the benefit of reservation is applicable in respect of sons/grandsons, daughters/ granddaughters of Freedom Fighters. The employed children/grandchildren and married daughters/ granddaughters of Freedom Fighters have been excluded from the scheme. So far as the question regarding giving reservation quota to the married Daughters/ grand-daughters of Freedom Fighters is concerned, it is submitted that status of a married woman has to be construed in consonance with the general understanding of the word family as well as a status of married woman in the society. After marriage a married woman loses the status of being a member of parent's family though married daughter/granddaughters after marriage do not lose status of member of undivided family of her father for the purpose of property. Keeping this background in view it is not legally sustainable to include the married daughters/grand-daughters in reservation scheme. However, the divorced daughters/grand-daughters and widow daughters/ granddaughters who have not remarried have been legitimately and legally brought within the ambit and scope of definition of dependent of Freedom Fighters provided they are residing with and/or fully dependent on the family of Freedom Fighters". (Emphasis supplied)

5. In crux, it is the State's stand that with the solemnization of marriage, daughter severs her relationship with her parental family, for she gets "transplanted" into the family of her husband, and as such, cannot claim herself to be part of family of a Freedom Fighter.

6. Also, earlier decision rendered by this Court in CWP No.4386 of 2015, titled as *Neelam Kumari v. State of H.P. & others,* for complying with the decision rendered in another writ petition, being CWP No.2958 of 2009, titled as *Jyoti Kumari & others v. Secretary Education & another,* is now subject matter of challenge before the Supreme Court of India.

7. On 8.11.2017, this Court passed the following order:

> "Whether granting benefit of reservation of 2%, in employment under the State, only to children and particularly unmarried daughters of freedom fighters, is voilative of Articles 14-16 of the Constitution of India, is the issue which arises for consideration in the petition. Also, whether issue of discrimination on the basis of gender with the ward solemnizing marriage arises at all or not, needs to be examined.
>
> On a letter petition addressed to the Chief Justice of this Court, *suo motu* cognizance was taken and present petition was registered as CWPIL. The issue raised is of prime importance and significance.
>
> Let the Chief Secretary to the Government of Himachal Pradesh, file his personal affidavit placing on record policy of the State and the reasons in support thereof.
>
> State shall also examine issue more so in light of law laid down by Apex Court in C.B. Muthamma v. Union of India and others, 1979(4) SCC 260 and other subsequent judgments. Needful be done within two weeks.
>
> List on 29.11.2017.
>
> ....."

8. Pursuant thereto, the Chief Secretary, Government of Himachal Pradesh, has filed his personal affidavit dated 5.12.2017, stating that definition of a "Freedom Fighter" stands explained vide Circulars dated 17.12.1985 and 21.12.1985, so as to mean:

> "i) the person who has been sanctioned or will be sanctioned freedom fighters pension under the Freedom fighters pension scheme, 1972 and 1980 by the Government of India, Ministry of Home Affairs, New Delhi.
>
> or
>
> ii) The person who is receiving or will be granted financial assistance under the H.P. Freedom Fighters Financial Assistance Scheme, 1985.
>
> iii) Only the children of the son of the freedom fighter will be taken under the definition of grand children of freedom fighters."

9. Stand taken by the Government, as reflected in the earlier reply-affidavit dated 10.10.2017, filed by the Deputy Secretary (GAD) to the Government of Himachal Pradesh, stands reiterated, further averring that "According to common knowledge and general understanding the married daughter does not constitute to be a part of the family in its real sense. A daughter of a freedom fighter after her marriage, gets herself transplanted into the family of her husband and cannot, therefore, be claimed to be a part of the family in its real sense of the freedom fighter her father at least for anything relating to her children".

10. In effect, the Government of the day reiterated that a married daughter gets "transplanted" into the family of her husband, severing her relationship with that of her paternal family, and as such is not entitled to the benefits of the Policy of reservation in the Government jobs.

11. We find the stand adopted by the State to be absolutely archaic and disappointing. It is certainly not in tune with the changing times. In fact, it is out of sync with the constitutional values and principles. Predominant mindset of male chauvinism is all pervading.

12. However, subsequently to *Ishaan Pandit & Kinjlak M. Kalia (supra)*, even this Court in CWP No.2958 of 2009, titled as *Jyoti Kumari & others v. The Secretary Education & another,* decided on 18.5.2015, has taken a contrary view, the one view which we are following.

13. We follow the subsequent decisions of the same Coordinate Benches on this issue. We are persuaded to so for two reasons – (i) decision of 1999 has lost is efficacy, (ii) much water has flown from since then and the law in sync with constitutional values stands crystalised by different courts of the country.

14. Long ago, the Apex Court in *Miss C.B. Muthamma, I.F.S. v. Union of India & others,* (1979) 4 SCC 260 (Two Judges), had an occasion to deal with Rule 8(2) of the Indian Foreign Service (Conduct and Discipline) Rules, 1961, providing that no married woman shall be entitled, as of right, to be appointed to the service. Though during the pendency of the petition, the said Rule stood deleted, but, while disposing of the petition, the Court observed that:

> "6. At the first blush this rule is in defiance of Article 16. If a married man has a right, a married woman, other thing being equal, stands on no worse footing. This misogynous posture is a hangover of the masculine culture of manacling the weaker sex forgetting how our struggle for national freedom was also a battle against woman's thraldom. Freedom is indivisible, so is Justice. That our founding faith enshrined in Articles 14 and 16 should have been tragically ignored vis-à-vis half of India's humanity, viz., our women, is a sad reflection on the distance between Constitution in the book and Law in action. And if the Executive as the surrogate of Parliament, makes rules in the teeth of Part III, especially when high political office, even diplomatic assignment has been filled by women, the inference of die-hard allergy to gender parity is inevitable."
>
> "9. Subject to what we have said above, we do not think it necessary to examine the averments of mala fides made in the petition. What we do wish to impress upon Government is the need to overhaul all Service Rules to remove the stain of sex discrimination, without waiting for ad hoc inspiration from writ petitions or gender charity."(Emphasis supplied)

15. In *Dr. Mrs. Vijaya Manohar Arbat v. Kashirao Rajaram Sawai & another,* (1987) 2 SCC 278 (Two Judges), the Apex Court, while construing the provisions of Section 125 of the Code of Criminal Procedure, entitling a parent to claim maintenance, by interpreting expression 'his', held both the siblings, i.e. son and the daughter, liable for the same.

16. Lateron, in *Savita Samvedi (Ms) & another v. Union of India & others,* (1996) 2 SCC 380 (Two Judges), while dealing with a Railway Circular, entitling unmarried daughter alone for allotment of Railway accommodation, on out of turn basis, the Apex Court held the same to be unconstitutional, in violation of Article 14 of the Constitution of India, holding the married daughter to be at par with an unmarried one.

17. The Apex Court in *Madhu Kishwar v. State of Bihar,* (1996) 5 SCC 125 (Three Judges), has held that Article 21 of the Constitution of India reinforces "rights to life". Equality, dignity of person and right to development are inherent rights in every human being. Life in its expanded horizon includes all that give meaning to a person's life including culture, heritage and tradition with dignity of person. The fulfilment of that heritage in full measure would encompass the right to life. For its meaningfulness and purpose every woman is entitled to elimination of obstacles and discrimination based on gender for human development. Women are entitled to enjoy economic, social, cultural and political rights without discrimination and on footing of equality. Equally, in order to effectuate fundamental duty to develop scientific temper, humanism and the spirit of enquiry and to strive towards excellence in all spheres of individual and collective activities as enjoined in Article 51A (h) and (j) of the Constitution of India, not only facilities and opportunities are to be provided for, but also all forms of gender based discrimination should be eliminated. It is a mandate to the State to do these acts. Therefore, the State should create conditions and facilities conducive for women to realise the right to economic development including social and cultural rights. Also that:

> **"**37. The public policy and constitutional philosophy envisaged under Articles 38, 39, 46, and 15(1) and (3) and 14 is to accord social and economic democracy to women as assured in the preamble of the economic empowerment and social justice to women for stability of political democracy. In other words, they frown upon gender discrimination and aim at elimination of obstacles to enjoy social, economic, political and cultural rights on equal footing. Law is a living organism and its utility depends on its vitality and ability to serve as sustaining pillar of society . Contours of law in an evolving society must constantly keep changing as civilisation and culture advances. The customs and mores undergo change with march of time. Justice to the individual is one of the highest interest of the democratic State. Judiciary cannot protect the interests of the common man unless it would redefine the protections of the Constitution and the common law. If law is to adapt itself to the needs of the changing society, it must be flexible and adaptable.**"**
>
> **"**39. Law is the manifestation of principles of justice, equity and good conscience. Rule of law should establish a uniform pattern for harmonious existence in a society where every individual would exercise his rights to his best advantage to achieve excellence, subject to protective discrimination. The best advantage of one person could be the worst disadvantage to another. Law steps into iron out such creases and ensures equality of protection to individuals as well as group liberties. Man's status is a creature of substantive as well as procedural law to which legal incidents would attach. Justice, equality and fraternity are trinity for social and economic equality. Therefore, law is the foundation on which the potential of the society stands……**"**

18. In a case where an Act prohibited employment of women in any part of the premises where liquor was consumed by the public, the apex Court, relying upon the Convention on the Elimination of All Forms of Discrimination against Women, 1979 and the Beijing Declaration, as also the earlier judgments rendered in *Air India v. Nergesh Meerza,* (1981) 4 SCC 335; *Randhir Singh v. Union of Inida,* (1982) 1 SCC 618; *Madhu Kishwar v. State of Bihar,* (1996) 5 SCC 125; *Vishaka v. State of Rajasthan,* (1997) 6 SCC 241; *MCD v. Female Workers (Muster Roll),* (2000) 3 SCC 224; and *Liverpool & London S.P. & I. Assn. Ltd. v. M.V. Sea Success I,* (2004) 9 SCC 512, the Apex Court in *Anuj Garg & others v. Hotel Association of India & others,* (2008) 3 SCC 1 (Two Judges), observed that:

> "21. When the original Act was enacted, the concept of equality between two sexes was unknown. The makers of the Constitution intended to apply equality amongst men and women in all spheres of life. In framing Articles 14 and 15 of the Constitution, the constitutional goal in that behalf was sought to be achieved. Although the same would not mean that under no circumstance, classification, inter alia, on the ground of sex would be wholly impermissible but it is trite that when the validity of a legislation is tested on the anvil of equality clauses contained in Articles 14 and 15, the burden therefor would be on the State. While considering validity of a legislation of this nature, the court was to take notice of the other provisions of the Constitution including those contained in Part IV-A of the Constitution." (Emphasis supplied)

In the very same Report, the Court further took note of the changing global scenario and the factum of the hotel management having opened up vista for young women for employment. It re-affirmed that right of employment itself may not be a fundamental right but in terms of Articles 14 & 16, each person, similarly situate, has a fundamental right to be considered therefor.

19. In *National Legal Services Authority v. Union of India & others,* (2014) 5 SCC 438 (Two Judges), the Apex Court observed that:

> **"**The rule of law is not merely public order. The rule of law is social justice based on public order. The law exists to ensure proper social life. Social

life, however, is not a goal in itself but a means to allow the individual to live in dignity and development himself. The human being and human rights underlie this substantive perception of the rule of law, with a proper balance among the different rights and between human rights and the proper needs of society. The substantive rule of law "is the rule of proper law, which balances the needs of society and the individual". This is the rule of law that strikes a balance between society's need for political independence, social equality, economic development, and internal order, on the one hand, and the needs of the individual, his personal liberty, and his human dignity on the other. It is the duty of the Court to protect this rich concept of the rule of law.**"** (Emphasis supplied)

20. In *Charu Khurana & others v. Union of India & others,* (2015) 1 SCC 192 (Two Judges), noticing that only women makeup artists were declined membership of an association, holding such action to be unconstitutional, the Apex court observed that:

"3. Giving emphasis on the role of women, Ralf Waldo Emerson, the famous American Man of Letters, stated "A sufficient measure of civilization is the influence of the good women". Speaking about the democracy in America, Alexa De Tocqueville wrote thus: "If I were asked.... to what singular prosperity and growing strength of that people (Americans) ought mainly to be attributed. I should reply; to the superiority of their women". One of the greatest Germans has said: "The Eternal Feminine draws us upwards".

4. Lord Denning in his book *Due Process of Law* has observed that a woman feels as keenly thinks as clearly, as a man. She in her sphere does work as useful as man does in his. She has as much right to her freedom-develop her personality to the full-as a man. When she marries, she does not become the husband's servant but his equal partner. If his work is more important in life of the community, her's is more important in the life of the family. Neither can do without the other. Neither is above the other or under the other. They are equals.**"**

"8. The equality principles were reaffirmed in the Second World Conference on Human Rights at Vienna in June 1993 and in the Fourth World Conference on Women held in Beijing in 1995. India was a party to this Convention and other Declarations and is committed to actualize them. In 1993 Conference, gender-based violence and all categories of sexual harassment and exploitation were condemned. A part of the Resolution reads thus:

> "The human rights of women and of the girl child are an inalienable, integral and indivisible part of universal human rights. The World Conference on Human Rights urges governments, institutions, intergovernmental and non-governmental organizations to intensify their efforts for the protection of human rights of women and the girl child."**"**

"32. The purpose of referring to the same is to understand and appreciate how the Directive Principles of State Policy and the Fundamental Duties enshrined Under Article 51A have been elevated by the interpretative process of this Court. The Directive Principles have been regarded as soul of the Constitution as India is a welfare State. At this juncture, it is apt to notice the view expressed by a two-Judge Bench of this Court in *Ashoka Smokeless Coal India (P) Ltd. v. Union of India*, (2007) 2 SCC 640 wherein it has been laid down that:

> "106. .... the Directive Principles of State Policy provide for a guidance to interpretation of fundamental rights of a citizen as also the statutory rights."**"**

21. In *Ishan Pandit v. State of H.P. & others,* AIR 1999 HP 1, this Court, in dealing with a case of reservation provided for admission to MBBS/BDS Courses, restricted only to the male members of the Freedom Fighter, did uphold the view propagated by the State in its response. This decision stands subsequently followed by another Division Bench of this Court in *Kinjlak M. Kalia v. Himachal Pradesh Krishi Vishvavidyala,* 2000 (3) Shim. LC 413.

22. A Full Bench of the Jammu and Kashmir High Court in *State of Jammu and Kashmir v. Dr. Susheela Sawhney,* AIR 2003 Jammu and Kashmir 83, had an occasion to deal with a question, whether marriage of daughter of a permanent resident of the State of Jammu and Kashmir to a non-resident, would disentitle her from acquisition of immoveable property in the State, and lose right for employment in the State or not. After appreciating various principles, the Court eventually held that daughter of a permanent resident, on marrying a non-resident, would not lose her status of permanent resident of the State of Jammu and Kashmir.

23. We notice that, under the instant Policy, the object and purpose of providing reservation is to confer benefit upon the wards of the Freedom Fighters. Stand taken by the State that daughter gets transplanted into the family of her husband, in view of what the Hon'ble Supreme Court has observed, noticed by us supra, is not in tune with the changing times. The primary object and purpose of the Policy is not to confer benefits only on the male members of the Freedom Fighters. It is to acknowledge the sacrifices made by the Freedom Fighters, by giving employment to their wards.

24. It is a settled principle of law that classification must not be arbitrary, but must be rational. It must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics, must have a reasonable relation to the object of the legislation. In order to pass the test, two conditions must be fulfilled, namely, (1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and (2) that that differentia must have a rational relation to the object sought to be achieved by the Act/Policy. The differentia which is the basis of classification, and the object of the Act are distinct things and what is necessary is that there must be a nexus between them.

25. We notice that there is 2% reservation for the Wards of Freedom Fighters in Civil appointment of the State and in various corporations and boards of the State. However, the same has been limited only to the sons, grandsons, unmarried daughters and un-married granddaughters. Whereas married sons and grandsons are entitled to enjoy the said benefit of reservation, married daughters and granddaughters have not been considered as Wards of Freedom Fighters and are, thus, not eligible to be considered against the quota of reservation meant for wards of Freedom Fighters.

26. This has to be tested on the provisions of the Constitution, specifically Articles 14 and 15(1), and 16 of the Constitution, relating to *"discrimination on the basis of sex".* Sons and grandsons of freedom fighters are eligible to be considered for the quota under the category *"Wards of Freedom Fighters"* even though married, but not the married daughters and granddaughters.

27. The primary object to provide employment to wards of freedom fighters is to recognize the outstanding services rendered by them to the Nation during struggle for Independence and thus their wards are given benefit towards employment by making reservation to them under the category of "Wards of Freedom Fighters". In our considered view, Daughters and Granddaughters, even if married, would be eligible for public employment.

28. A Full Bench of the High Court of Calcutta in WPST No.447 of 2013, titled as *The State of West Bengal & others v. Purnima Das & others,* has also taken a similar view, wherein it has been held that exclusion of any member of a family on the ground that he/she is not so dependent would be justified, but certainly not on the grounds of gender or marital status.

29. Dealing with an identical issue, in *Santosh Kumar Upadhayay v. State of U.P. and others,* (2016) 1 ILR (All) 153, the High Court of Allahabad held that it would be anachronistic to discriminate against married daughters by confining the benefit of the horizontal reservation in this case only to sons (and their sons) and not to unmarried daughters. If the marital status of a son does not make any difference in law to his entitlement or to his eligibility as a descendant, equally, the marital status of a daughter should in terms of constitutional values make no difference. The notion that a married daughter ceases to be part of the family of her parents upon her marriage must undergo a rethink in contemporary times. The law cannot make an assumption that married sons alone continue to be members of the family of their parents, and that a married daughter ceases to be a member of the family of her parents. Such an assumption is constitutionally impermissible because it is an invidious basis to discriminate against married daughters and their children. A benefit which a social welfare measure grants to a son of a freedom fighter, irrespective of marital status, cannot be denied to a married daughter of a freedom fighter.

30. We find that another Division Bench of the Allahabad High Court in Writ Petition No.41279 of 2014, titled as *Isha Tyagi v. State of U.P. & others,* while taking a similar view, has observed that the "State Government has taken a policy decision to grant a horizontal reservation of 2% to the descendants of freedom fighters. While doing so, the State Government has qualified the condition of eligibility by stipulating that a son or a daughter would be entitled to the benefit of the reservation. However, it has been stated in the relevant condition that the law department had opined that this benefit can be extended only to an unmarried daughter of a freedom fighter. Consequently, whereas the son's son would be eligible to apply for admission, the children of a daughter stand excluded. Exclusion of a granddaughter is plainly an act of hostile discrimination which is violative of the fundamental right guaranteed under Articles 14 and 15 of the Constitution. The condition which has been imposed by the State does not prescribe financial dependence. In fact, the clarification is to the effect that it is not necessary that the son of a freedom fighter should be financially dependant upon him. The basis and object of the horizontal reservation of 2% is to recognise the seminal role in the freedom struggle played by freedom fighters. It is in recognition of their contribution to the freedom struggle that a benefit of reservation is extended to descendants of freedom fighters. This being the rationale, there is no reason or justification to exclude a married daughter and consequently the children of a married daughter. Once a decision has been taken to extend the benefit of horizontal reservation to descendants of freedom fighters, whether the descendant is a son or a daughter should make no difference whatsoever. In fact, any discrimination against a daughter would be plainly discrimination on grounds of gender. The guarantee under Article 15 of the Constitution is broad enough to encompass gender discrimination and any discrimination on grounds of gender fundamentally disregards the right to equality, which the Constitution guarantees".

31. The action of the respondents by not giving reservation to married women and not allotting them Wards of Freedom Fighter Certificate, is illegal and arbitrary and an example of colorable exercise of power, for marriage does not have and should not have a proximate nexus with identify. The identity of a woman, as a woman continues to subsist even after and notwithstanding her marital relationship. The time has, therefore, come for the Court to affirmatively emphasise that it is not open to the State, if it has to act in conformity with the fundamental principles of equality which are embodied in Articles 14 and 15 of the Constitution, to discriminate against married daughters by depriving them of the benefit of the reservation, which is made available to a son irrespective of his marital status.

32. This Court in *Jyoti Kumari (supra)* and *Neelam Kumari (supra)* has taken a similar view. Noticeably, the State having preferred, SLP No.31435 of 2016, titled as *H.P. Secretariat Chief Secretary & others v. Neelam Kumari*, but, as on date, the efficacy of these decisions remains in place.

33. Thus, we hold that the Policy of the State, confining benefits to the unmarried daughter alone, unlike married son, is not in line with the object, which is sought to be achieved

by conferring benefit of reservation, horizontal in nature, to the wards of Freedom Fighters. The object is to acknowledge the sacrifices made by the Freedom Fighters, by providing benefit to their wards. It is not to perpetuate the lineage of legacy only through a male descendent. The object also cannot be to perpetuate discrimination on the basis of sex.

34. We are of the considered view that, of late, consistently, this Court has taken a view that the State cannot discriminate on the ground of gender, while giving benefit of reservation only to the married sons and not the married daughters, being wards of the Freedom Fighter. The Policy to this extent is absolutely arbitrary and illegal and thus needs to be quashed and set aside. Ordered accordingly.

35. The questions are, thus, answered as under, by holding that {(1) & (2)} the Policy of the State is discriminatory, and (3) in confining benefits of reservation to married sons unlike married daughters, there is no nexus with the object sought to be achieved in providing reservation for wards of Freedom Fighters.

36. Hence, present petition stands disposed of, in the aforesaid terms, so also pending application(s), if any.

We place on record our appreciation for the assistance rendered by Mr. Deven Khanna, learned Amicus Curiae. He undertakes to inform the letter petitioners about the outcome of the present petition. Learned Advocate General undertakes to communicate the order to the Chief Secretary, Government of Himachal Pradesh, for taking consequential action.

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

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

Versus

Iqbal Singh .....Respondent.

LPA No. 151 of 2013.
Decided on: 14.8.2018.

Constitution of India, 1950- Article 226- Service Matter – Absorption – Policy Guidelines – Court Interference - Taking over of Private College alongwith staff by Government on 20.04.2007- College was previously getting grant from government – Taking over happened after guidelines dated 25.08.1994 – Guidelines specifically providing that person with 25 years experience is to be absorbed as Superintendent Grade-II, and he is to be placed at bottom of seniority list – Petitioner appointed as 'clerk' in private college in 1994 and promoted as Superintendent Grade-II in 1997 – Hon'ble Single Bench directing government to absorb petitioner as Superintendent Grade-II on and w.e.f. 20.04.2007 (date of taking over) and previous services rendered by him be also counted for seniority, further promotion and pensionary benefits – Letters Patent Appeal – Hon'ble Division Bench found that (i) petitioner could not have been promoted as Superintendent Grade-II in 1997 by College in contravention of Grand in Aid Rules – Therefore, any wrong committed by College was not binding on Govt. – (ii) As per R & P Rules, no clerk could have been directly promoted as Superintendent Grade-II rather there should have been placements as Sr. Clerk and Junior Assistant first – (iii) As per guidelines framed by Government, person with 25 years of experience could only be absorbed as Superintendent Grade-II – (iv) These guidelines had come into force before College was taken over by Government in 2007 – Held, Hon'ble Single Judge could not have directed absorption of petitioner as Superintendent Grade-II from date of taking over of College- Judgement of Hon'ble Single Judge set aside – However, petitioner directed to be absorbed as Jr. Assistant on regular basis with all consequential benefits from date of taking over of college – LPA disposed of accordingly. (Paras-5 to 9)

For the appellant(s): Mr. Ashok Sharma, AG with Mr. Narender Guleria, Vikas Rathore Addl. AG and Mr. Kunal Thakur, Dy. AG.
For the respondent: Mr. D.K.Khanna, Advocate.

The following judgment of the Court was delivered:

Justice Dharam Chand Chaudhary, J (Oral).

In this appeal, judgment dated 10th May, 2012 passed by learned Single Judge in CWP No. 598 of 2010-A is under challenge. The appellant-State is aggrieved by the direction of learned Single Judge to absorb the respondent-petitioner as Superintendent (Grade-II) from 20.4.2007, the day when Chander Dhar Guleri Degree College, Haripur (Guler), District Kangra was taken over. Also that, services he rendered in the erstwhile degree College be counted for the purpose of seniority, further promotion and grant of pensionary benefits etc.

2. It is seen that learned Single Judge while allowing the writ petition has placed reliance on the judgment of this Court in ***Surjit Singh Spehia vs. State of H.P. & anr., CWP(T) No. 2168 of 2008, Ved Parkash vs. State of H.P. & ors., CWP(T) No. 469 of 2008*** and ***Rajni Sharma vs. State of H.P. & anr, CWP(T) No. 5200 of 2008.*** The instructions, today placed on record by learned Advocate General reveal that in Ved Prakash's case supra, Letters Patent Appeal was preferred by the appellant-State which is pending disposal in this Court. As regards Surjit Singh Spehia's case, his services were taken over as Superintendent (Grade-II) from the date of taking over the College i.e. 15.8.1984 and not from 18.3.1973 i.e. from his initial appointment in privately aided College. It is significant to note that the services of Sephia were taken over as Superintendent (Grade-II) well before the guidelines dated 25.8.1994 came into being. On the other hand, services of the petitioner in this case have been taken over from the date when he initially was appointed in Chander Dhar Guleri Degree College, Haripur (Guler), District Kangra. As regards Rajni Sharma's case, it has been pointed out that the same pertains to regularization of adhoc/tenure services of government sector employees which has nothing to do with the cases of aided sector ministerial staff. The same as such, is also not applicable in this case.

3. The challenge to the impugned judgment is also on the grounds inter alia that the writ petitioner was appointed on 14.7.1994 as Clerk by the Management of the College and thereafter promoted as Superintendent (Grade-II) on completion of 3 years and 9 month's service i.e. on 1.4.1997. As per the R & P Rules, there is no provision of promotion from the post of Clerk to Superintendent (Grade-II) and rather a Clerk firstly is to be placed in the cadre of Sr. Clerk and in that of Jr. Assistant on completion of 5 years regular service as Sr. Clerk and Sr. Assistant on completion of 10 years service as Jr. Assistant in the cadre. A Sr. Assistant on completion of 6 years service becomes entitled to promotion as Superintendent (Grade-II), that too subject to availability of posts under the grant-in-aid Rules. The management had no power to promote an incumbent from Clerk to Superintendent (Grade-II). Therefore, any wrong action of management cannot bind the State to legalize the wrong committed by it. The guidelines dated 25.8.1994 have also been pressed into service to substantiate its case.

4. We have heard Sh. Ashok Sharma, Advocate General assisted by S/Sh. Narender Guleria, Vikas Rathore, Addl. Advocate Generals and Sh. Kunal Thakur, Dy. Advocate General for the State and also Sh. D.K. Khanna, Advocate learned counsel for the respondent-writ petitioner.

5. The controversy in the present appeal lies in a narrow compass as the short question which needs adjudication is as to whether learned Single Judge has rightly applied the ratio of the judgment(s) rendered in ***Surjit Singh Spehia vs. State of H.P. & anr.,*** in case ***Ved Parkash vs. State of H.P. & ors.,*** and in that of ***Rajni Sharma vs. State of H.P. & anr,*** and legally held the writ petitioner entitled to his absorption as Superintendent (Grade-II) from 20.4.2007, the day when Chander Dhar Guleri Degree College, Haripur (Guler), District Kangra was taken over. The answer to this poser, in all fairness, and in the ends of justice would be in

negative for the reason that Chander Dhar Guleri Degree College, Haripur (Guler), District Kangra was taken over by the appellant-State vide Notification No. EDN-A-Ka(1)-18/2007 dated 20.4.2007. By that time, the appellant-State had framed the guidelines dated 25.8.1994 and made applicable the same in the matters pertaining to taking over the services of staff working in privately managed educational institutions. The conditions No. 7 & 9 thereof read as follows:

> "(9) All the members (including principal) of the staff will treated as fresh entrant and they will be placed at the bottom of the seniority list, maintained in respect of Government employees in their respective cadre from the date of taking over, provided, in the case of Ministerial staff.
>
> (i) A person with 25 years experience may be absorbed Superintendent Grade-II;
>
> (ii) A person with 17 years of service as clerk may be absorbed as Senior Assistant.
>
> (iii) A person with 10 years experience as clerk may be absorbed as junior assistant.
>
> (iv) and having 5 years experience may be absorbed as senior clerk and less than 5 years, as clerk."

6. It is seen that on taking over the services of the staff at the time of taking over the educational institution, he/she has to be placed down below in the seniority and as regards ministerial staff, their services have to be placed in the cadre on fulfillment of the requisite terms and conditions i.e. a Superintendent (Grade-II) with 25 years experience can be absorbed as such, with 17 years of service a Sr. Assistant, with 10 years experience a Sr. Clerk as Jr. Assistant and a Clerk with 5 years experience as Sr. Clerk.

7. In the case in hand, the petitioner, admittedly, was appointed as Clerk by the management of Chander Dhar Guleri Degree College, Haripur (Guler), District Kangra on 14.7.1994. He was appointed straightway as Superintendent (Grade-II) on 1.4.1997 on rendering 3 years and 9 months service. The management could have not promoted him as Superintendent (Grade-II) in a manner not permissible under the Rules. Otherwise also, in terms of the guidelines dated 25.8.1994, noticed supra, only an incumbent with 25 years experience in a privately managed educational institution can be absorbed as Superintendent (Grade-II). The services of the petitioner, therefore, were not liable to be taken over as Superintendent (Grade-II) because his case is not covered under the guidelines. He, as such, has rightly been absorbed as Jr. Assistant because on the day of taking over the College, he had rendered almost 13 years of service in the College. **He, however, should have been absorbed as Jr. Assistant on regular basis and not on contract basis because the post of Jr. Assistant though is in Clerical cadre, however, filled in by way of placement of an eligible clerk.** It is the initial appointment in a cadre in Government departments which under the Rules has to be made on contract basis and not against the post to be filled in by way of promotion/placement. Therefore, the petitioner having rendered 13 years of services on the day when the College was taken over, his services should have been taken over as Jr. Assistant on regular basis. Nothing to the contrary has been brought to our notice during the course of arguments in this regard.

8. As regards the case of Surjit Singh Spehia, the same is not applicable in the given facts and circumstances of this case being distinguishable on facts as noticed supra. Otherwise also, the judgment in his case had attained finality being not assailed further by way of filing appeal etc. The judgment in Ved Prakash's case relied upon by learned Single Judge has not yet attained the finality and is rather under challenge in Letters Patent Appeal before this Court. We have also noticed the judgment of this Court in Rajni Sharma's case, which also is distinguishable on facts.

9. In view of the discussion hereinabove, the judgment passed by learned Single Judge, as such, is not legally sustainable and the same is accordingly quashed and set aside. The appellant-State, however, is directed to treat the writ petitioner having been absorbed as Jr.

Assistant on regular basis w.e.f. the date of taking over the privately managed Chander Dhar Guleri Degree College, Haripur (Guler), District Kangra i.e. on 20.4.2007. He is also held entitled to all consequential benefits. The due and admissible arrears be released in favour of the writ petitioner within a period of two months from today.

The appeal is accordingly allowed and stands disposed of, so also the pending application(s), if any.

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

FAO No. 544 of 2017 a/w
FAO No. 285 of 2016
Decided on : 16.8.2018.

1. **FAO No. 544 of 2017**
Prithvi Singh .....Appellant
Versus
Mahinder Pal ....Respondent

2. **FAO No. 285 of 2016**
Mahiner Pal .....Appellant
versus
Prithvi Singh ....Respondent.

Motor Vehicles Act, 1988- Section 166- Claim application – Permanent disability – Effect of – Claims Tribunal granting compensation under head 'loss of earning capacity', on finding that claimant had suffered permanent disability in motor accident – Appeal against – Claimant was a tailor – As per his own evidence, he was still working as tailor – Loss of earning capacity on account of permanent disability not proved – Held, Claims Tribunal went wrong in granting compensation towards loss of earning capacity – Appeal partly allowed – Award modified. (Para-4)

Case referred:
Sarla Verma & others vs. Delhi Transport Corporation & another, (2009) 9 SCC 126

For the appellant: Mr. Lovneesh Thakur, Advocate for the appellant in FAO No. 544 of 2017 and for respondent No. in FAO No. 285 of 2016.

For the respondent: Mr. Anil Kumar, Advocate, for the appellant in FAO No. 285 of 2016 and for respondent in FAO No. 544 of 2017

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

Since both the appeals, hence, arise from a common award, hence, both stand disposed, of, under a common order.

2. The learned counsel for the claimant in FAO No. 544 of 2017 has maintained a vigor submission before this Court, qua, the computation, made, by the learned Tribunal, vis-a-vis, the income of the disabled claimant, income whereof, is comprised in a sum of Rs. 10,000/- per mensem, rather being grossly inappropriate, nor any computation of compensation, as made, on anvil thereof being valid, given (i) there occurring ample evidence on record, (ii) especially qua in sequel, to the claimant hence incurring the apt disability, disability whereof stands displayed

in Ext. PW1/A, (iii) thereupon, there, being a gross reduction in his income, as hitherto, reared from his avocation, as a tailor.

3. On the other hand, the learned counsel appearing for the owner of the offending vehicle, has, also made a submission before this Court, qua, the computation made by the learned Tribunal, under the head, loss of earnings, and earning capacity, in sequel to the disability entailed, upon, the claimant, consequent to the accident, rather being also amenable for disaffirmation, given (i) the learned Tribunal not bearing in mind, the, testification, rendered in his cross-examination, by the claimant, wherein he acquiesces, qua, even after his incurring the apt disability, his, yet continuing to maintain, his avocation as a tailor.

4. After considering the respective submissions addressed before this Court, by the learned counsel concerned, this Court, for the reasons, ascribed hereinafter, disaffirms the computation of compensation, made by the learned Tribunal, vis-a-vis, the disabled claimant, under the head, loss of earnings capacity, given (i) it being grossly away, from, the apt evidence, adduced in respect thereof, besides it misapplying the mandate of the verdict, rendered by the Hon'ble Apex Court, reported in ***(2009) 9 SCC 126, titled Sarla Verma & others*** vs. ***Delhi Transport Corporation & another,*** (ii) given the disabled claimant rather acquiescing, qua, his continuing to retain his avocation, as a tailor, (iii) whereupon an inference is errectable qua the apt disability, not precluding him nor incapacitating him, to perform, his avocation as as tailor, (iv) in aftermath, with no concomitant loss of earnings, from, his hitherto avocation, as a tailor, hence standing encumbered upon him, nor, also thereupon any computation, under the head, loss of earnings capacity, was tenably assessable qua him, in sequel to his sustaining, the, apt disability, in a roadside accident, involving the offending vehicle, (v) thereupon, it, being un-beffiting, for, the learned Tribunal, to make any computation of any compensation, vis-a-vis, the disabled claimant, under the aforesaid head, loss of earnings of income, in sequel to the disability, entailed upon him, (vi) the learned Tribunal could tenably proceed to make the aforesaid computation, upon, the disabled claimant, upon the latter placing on record, the apt statements of accounts, with a clear display, therein, that prior to the apt disability standing entailed upon him, his, rearing from his avocation, as a tailor, sums of money higher, than the one as stand reared, subsequent to the entailment of the apt disability, upon him (vii) yet, with the aforesaid best evidence remaining unadduced, this Court, is, of the firm opinion, qua, the compensation under the head, loss of earnings, being amenable to be quashed, and, set aside.

Appeal bearing FAO No. 285 of 2016, is, partly allowed, and, appeal bearing FAO No. 544 of 2017 is dismissed, and, the award of 25.8.2015, rendered by the learned Motor Accident Claims Tribunal-II, Sirmour District at Nahan, H.P., is, modified to the above extent. Both the appeals stand disposed of. Pending applications, if any also stand disposed of. Records be sent back forthwith.

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

Suresh Kumar ....Petitioner.

Versus

Harbans Lal & ors. ....Respondents.

CMPMO No.218 of 2018.
Reserved on : 25.7.2018.
Date of Decision : 20.8.2018.

Indian Evidence Act, 1872- Section 65- Secondary evidence – Loss of original – Proof of – Plaintiff wanting to prove copies of tatima and field book of land by way of secondary evidence on ground that original thereof were destroyed in connivance with defendant No.3, who was

draftsman in office of Town and Country Planning Dharamshala – In proof of plea of destruction of records, plaintiff relying upon order of State Information Commissioner, Shimla finding defendant No.3 guilty for misplacement/loss of original record and imposing fine on him – Trial Court however framing issue and asking plaintiff to adduce evidence qua loss of original documents – Petition against – Plaintiff submitting that witnesses already examined have deposed qua non-availability of original documents and Trial Court should not have framed issued – Held, question whether documents in question existed or not, destroyed or not is pending adjudication before Trial Court – It was justified in framing issues in this regard – Petition dismissed. (Para- 7)

For the petitioner Mr. R.L. Chaudhary, Advocate.
For the respondents Mr. Bhupender Gupta, Sr. Advocate with Ms.Rinki Kashmiri, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present petition is maintained by the petitioner, under Article 227 of the Constitution of India, for quashing and setting aside the impugned order, dated 11.1.2018, passed by the learned Senior Civil Judge, Dharamshala, H.P, in Civil Suit No.302 of 2013 *titled Suresh Kumar vs. Harbans Lal and others*, whereby the learned Court below, has framed the issues in an application, under Section 65 of the Indian Evidence Act, for leading secondary evidence of the alleged document i.e. *tatima* and field book dated 6.7.2003.

2. Brief facts giving rise to the present petition are that the petitioner-plaintiff (*hereinafter referred to as 'the plaintiff')* maintained a suit through his wife Smt. Manju Devi-General Power of Attorney alleging therein that there exists only one approach to access Plot No.3 i.e. Khasra No.380/22/6/3, Khata No.34, Khatauni No.60, area measuring 0-00-78 hectares, situated at Mohal Chailiyan Mauza Mant Tehsil Dharamshala, District Kangra, H.P. Earlier, the suit land was owned and possessed by defendant No.1 and made an offer in the year 2003, to sell the same to the plaintiff and defendant No.3, which was accepted by the plaintiff. Prior to the offer and sale deed, the land comes, under the Town and Country Planning, Dharamshala and as such, defendant No.1, intends to sell out the land and after prior permission for sub division of land, under Section 16 (c) of H.P. Town and Country Planning Act, 1977, vide its approval order dated 2.7.2003, the said land was sub divided into three plots. The plaintiff is bonafide purchaser of the suit land i.e. plot No.2 and 3 from defendant No.1, moreover, plot No.3 has specifically purchased by the plaintiff to sale out the same in near future. Defendant No.3-Rajesh Chander Sharma, who is serving in the office of Town and Country Planning, Dharamshala, as a draftsmen, has prepared site plan, as well he is also purchaser of plot No.1 from defendant No.1, as such, defendants have sufficient knowledge qua the plotting of land and path that is 03 meters i.e. access to khasra No.3 is only the path for plot No.3. The plaintiff visited so many times in the office of Town and Country Planning, Dharamshala, as well D.R.O. Kangra at Dharamshala, for transferring the said path, as a path in the revenue record, but in vain. The plaintiff had applied for obtaining the copy of affidavit dated 1.7.2003, sworn by defendant No.1, under the Right to Information Act, while plotting of said land, but in response to the said application, under the Right to Information Act, the plaintiff intimating that the original case file is not traceable and advised him, if desired, then contact with the office of Tehsildar, Dharmashala, for incorporating the same in revenue record. Aggrieved by the response so given by the Public Information Officer, complaint under Section 18 of the Right to Information Act, has been maintained by the plaintiff before State Information Commissioner, Shimla, and after going through the record, defendant No.3 found guilty for misplacement/loss of file, and imposed Rs.25,000/- as maximum penalty, under Section 20 of the RTI Act, 2005 and directed to get the relevant file reconstructed. Accordingly, sale deed dated 9.5.2013, registered vide document No.772/2013, is fraud played by all the defendants in connivance with revenue officials, reason being that all the defendants having knowledge that the land cannot be sale out in any capacity and the revenue officials have

also fully aware of the facts that the land in suit has already been surrendered by defendant No.1. As a path and *tatima* in this regard has got prepared and lying with the revenue record and further sale deed was got prepared on 29.4.2013 and the same has been attested by the Sub Registrar, Dharamshala, on 9.5.2013. Defendant No.1 without any right, title and interest by exercise of fraud and with intention to deceive the plaintiff further sold the land to defendant No.2. Hence, the present petition.

3. Learned counsel appearing on behalf of the petitioner has argued that though the learned Court below has framed issues with regard to the documents, which have been destroyed and not available with the office, as claimed, but since PW-3 has already deposed before the learned Court below that the documents were not available, so the learned Court below should allow the application, under Section 65 of the Indian Evidence Act

4. On the other hand, learned Senior counsel appearing on behalf of the respondents has strenuously argued that the documents were stated to be not available, but there is nothing to conclude that those were destroyed and could not be procured and prays for dismissal of the petition.

5. In rebuttal, learned counsel appearing on behalf of the petitioner has argued that there was already enough material on record that the original documents were destroyed and so, these issues were not required to be framed.

6. To appreciate the arguments of learned counsel appearing on behalf of the parties, I have gone through the record in detail.

7. At this moment, this Court finds that the documents whether exists or not; destroyed or not; or are in the possession of same person or not; or can be produced before the learned Court below or whether the secondary evidence is to be allowed or not, in view of the non-production of the document is not available, which is pending adjudication. So, the learned Court below is within its right to frame issues in this regard. This Court finds that there is no illegality in the impugned order dated 11.1.2018, passed by the learned Court below, which cannot be said to be without any basis. So, the impugned order is just, proper and in accordance with law and needs no interference. As the case is pending since long and issues are only framed with regard to the application, under Section 65 of the Indian Evidence Act, it is ordered that the learned Court below will dispose of the said application within a period of ***two months*** positively. No other order is required for.

8. In view of what has been discussed hereinabove, the present petition, which sans merits, deserves dismissal and is accordingly dismissed. Parties, through their learned counsel, are directed to appear before the learned Court below on ***29th* August, 2018**. However, the parties are left to bear their own costs. Ordered accordingly. Pending applications, if any, shall also stands disposed of.

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

Arpita Singh .....Petitioner.

Versus

Union of India & ors. .....Respondents.

CWP No. 1654 of 2018.
Decided on: 21.8.2018.

Constitution of India, 1950- Articles 14, 15 and 226- Admission to professional courses – Eligibility criteria of "domicile" – Interference by Courts – Not permissible – Petitioner though a

Bonafide Himachali seeking admission in B. Des.(Fashion Communication or Accessories Designing) at NIFT, Kangra against State quota seats – Prospectus however defining 'domicile' of candidate as State from which he/she had completed his/her – Class 12th examination/graduation/qualifying degree – Petitioner however had qualified 12th examination from Meerut – Held, in view of provisions of prospectus, petitioner not 'domicile' of Himachal Pradesh as she qualified 12th examination from Meerut (UP) – Provision cannot be assailed as arbitrary and irrational not being based on any intelligible differentia - It is constitutionally permissible to lay down essential educational requirements and domicile criteria – Petition dismissed leaving it open to respondents to consider petitioner for admission in course in any Institute against seat of category to which petitioner belongs, if lying vacant and she is otherwise qualified for same. (Paras-6, 7 and 9)

For the petitioner: Mr. Vinay Sharma, Advocate.
For the respondents: Mr. Lokinder Thakur, Sr. Panel Central Govt. Counsel for UOI.

The following judgment of the Court was delivered:

Justice Dharam Chand Chaudhary, J (Oral).

Complaint herein is that the petitioner irrespective of being permanent resident of Himachal Pradesh and as such bonafide Himachali has been denied admission in B. Des.(Fashion Communication or Accessories Designing) at National Institute of Fashion Technology, Chheb, Kangra (H.P), the 3rd respondent, at the pretext that for the purpose of admission against State Domicile preferential seats six in number, called as supernumerary seats, having not passed 10+2 examination from the schools situated in the State of Himachal Pradesh, she is not eligible in terms of the prospectus issued by NIFT, the second respondent.

2. Admittedly, the petitioner is a permanent resident of Ward No. 4, PO Arla, Tehsil Palampur, District Kangra, hence a bonafide Himachali. The bonafide Himachali certificate is Annexure P-6. She has passed 10th class examination from Mount Carmel School, Thakurdwara, Kangra, the certificate is Annexure P-1. Even 8th class examination has also been passed by her from this very school. However, on 4.12.2015, her father Sh. Sanjit Kumar on his promotion as SMG, Scale IV was transferred to FGMO Meerut (U.P.) On joining duty by him there, the petitioner also got admission in 10+ 2 class at Meerut Public School for Girls, Meerut Cantt UP. She has passed Sr. Secondary School Certificate Examination (10+2) in the month of May, 2018 as is apparent from the certificate annexure P-2. She qualified the All India Entrance Examination conducted by NIFT, the second respondent and applied for admission in B. Des.(Fashion Communication or Accessories Designing) course against State Domicile Quota (SC) reserved seat. She was called for counseling on 28.5.2018 vide Annexure P-3, however, denied the admission on the ground that being not State domicile, she is not entitled to seek admission against State Domicile preferential seats. Her father Sh. Sanjit Kumar made the representation Annexure P-8 to the second respondent highlighting therein the circumstances under which the petitioner had to seek admission in Meerut Public School for Girls, Meerut Cantt U.P., but of no avail.

3. It is in this backdrop, the present writ petition came to be filed with a prayer to quash the eligibility criteria in the prospectus for the academic session 2018-19 prescribed for seeking admission against State Domicile preferential seats, with further direction to the respondents to allow the applicant to continue B. Des.(Fashion Communication or Accessories Designing) course from respondent No. 3 Institute by treating her eligible for admission against State Domicile preferential seats reserved for the candidate of S.C. community. Respondent No. 3 Institute is situated at Chheb in District Kangra (H.P). Amongst other disciplines, the B. Des.(Fashion Communication or Accessories Designing) course is also available in the said Institute. The petitioner has appeared in All India Entrance Examination conducted by the second respondent. She opted for admission in B. Des.(Fashion Communication or Accessories

Designing) course against State Domicile preferential seats reserved for the candidates of S.C. community. She belongs to S.C. category of Himachal Pradesh. On declaration of the result of All India Entrance Examination conducted by NIFT and having declared qualified, she made online application for seeking admission in the course in question from respondent No. 3 Institute. She even was called for counseling also, however, admittedly declined the admission for the sole reason that she is not eligible being not State domicile for seeking admission in respondent No. 3 Institute against supernumerary seats allocated under State Domicile preference.

4. As per admitted case of the parties, for the current session 20% of the total seats in the discipline of B. Des.(Fashion Communication or Accessories Designing) in respondent No. 3 College, 20% i.e. 6 supernumerary seats have been allocated to respondent No. 3 Institute as per the abstract of the prospectus Annexure P-4. Supernumerary seats in addition to 30 seats will be offered for admission as State Domicile preferential seats to a candidate who belongs to the State where the NIFT campus is situated. Also that the State in which the candidate has completed his/her Class 12th Examination, graduation, qualifying degree is the domicile of the candidate. Such provision in the prospectus reads as follows:

> "**State Domicile Preferential Seats.**
>
> Twenty percent (20%) i.e. 06 supernumerary seats in addition to 30 seats will be offered for admission as State Domicile Preferential Seats to candidates who belong to the States where the following NIFT campuses are located:

S. No.	NIFT Campus	State
1.	----------	----------
2.	Kangra	Himachal Pradesh
3.	----------	----------
4.	----------	----------
5.	----------	----------
6.	----------	----------
7.	----------	----------
8.	----------	----------

> Thirty Five percent (35%), seats within 30 seats will be offered for admission as State Domicile Preferential Seats to the domicile candidates of Jammu and Kashmir (J&K).
>
> **The State in which the candidate has completed his/her class 12th examination/graduation/qualifying degree is the domicile of the candidate**. A certificate from the School/College may be obtained. In case the candidate obtained the qualifying certificate/degree through Distance Learning mode, the address of the school attended by the candidate regularly will determine his/her domicile status.
>
> **Candidates who are domicile of the states where the NIFT Campuses exist will be allowed to opt for these preferential seats while filing online application form. However, they will have a choice to take admission under General/ST/SC/OBC category (as applicable) as per merit to any course/campus of their choice.**
>
> Reservation of SCs/STs/OBCs (non creamy layer) candidates, shall be applicable for the domicile seats also."

5. The petitioner, admittedly, is not a domicile candidate of Himachal Pradesh for the purpose of the provisions ibid in the prospectus having not completed her class 12th

examination from the State of Himachal Pradesh and rather from Meerut U.P. Therefore, irrespective of she had submitted her application online, the admission in the course to her has been declined by the respondents.

6. Although the provision in the prospectus that State domicile shall only be the one who had passed the qualifying examination from the State where the Institute in which the State Domicile preferential seats are available has been assailed not only as un-Constitutional and arbitrary but illogical and irrational also being allegedly not based upon any intelligible differentia, however, the challenge so laid is not legally permissible because in a similar case pertaining to the admission in MBBS/BDS course in the medical/dental colleges situated in the State of Assam, the Apex Court recently in ***Writ Petition (C) No. 766 of 2018, Rajdeep Ghosh vs. State of Assam & ors., decided on 17.8.2018,*** while upholding the Constitutional validity of educational/domicile criteria has observed that it is permissible to lay down the essential educational requirements, residential/domicile criteria in a particular State in respect of State quota seats. It has also been observed by the Apex Court that the object sought to be achieved is that the incumbent must serve the State concerned and for the emancipation of the educational standards of the people who are residing in a particular State, such reservation is legal and valid. (Emphasis supplied)

7. Therefore, in view of the ratio of the judgment ibid, no contrary view of the matter as sought in this writ petition can be taken. Be it stated that it is ill-luck of the petitioner that she could not pursue her studies in 10+2 class in a school situated in Himachal Pradesh, may be on account of transfer of her father to Meerut in the month of December 2015 and as such for the purpose of the criteria laid down in the prospectus for seeking admission against State Domicile preferential seats, she is State domicile of U.P., having qualified 10+2 examination from Meerut Public School for Girls, Meerut Cantt U.P. In her domicile State i.e. U.P., there is no NIFT campus where she could have sought admission in the course in question. However, in view of the provisions in the prospectus, she is not eligible to seek admission against SC category reserved seat in respondent No. 3 Institute, being not domicile of State of Himachal Pradesh for the purpose of admission against State Domicile preferential seats. The criteria, so laid down, may be harsh and oppressive to her, however, has to be applied with all rigors for the reason that the same is based upon a policy decision taken by the respondents applicable to all the institutes situated in the country. Admittedly, the State Domicile preferential seats, including the seat reserved for SC category are lying vacant for want of eligible candidate(s). In order to find justification in the submission made on behalf of the petitioner that in the recent past the vacant seats under State Domicile preference, allocated to respondent No. 3 Institute, have been filled in without insisting for such eligibility criteria, the following order was passed on 7.8.2018 and the relevant record requisitioned:

> "Heard for sometime.
>
> Though prima-facie on merits, no case in favour of the petitioner is made out as she does not fall under the category of State domicile in terms of the prospectus having passed her 10+2 examination from Meerut Public School for Girls, Meerut Cantt (U.P). The supernumerary seats i.e. one meant for S.C category to which the petitioner belongs is lying vacant. Learned counsel representing the petitioner is very specific in submitting that in the recent past also, the State domicile preferential seats lying vacant for want of eligible candidates were released and the candidates belonging to other categories admitted against the same. Being so, it has become imperative to go through the record pertaining to the last academic session i.e. 2017-18. The respondent-Institute to produce the same on the next date. List on 21.08.2018."

8. Sh. Dinesh Kumar, Joint Director, NIFT, Kangra (H.P) is present and has produced the record. Learned Sr. Panel Counsel on instructions from Mr. Dinesh Kumar has submitted that against 130 seats only 125 students could be admitted during the last year and the seats in State domicile preference category remained vacant for want of eligible candidates. Mr. Vinay Sharma, learned counsel representing the petitioner was given time to go through the

record so produced by respondent No. 3 Institute. The case when recalled, he failed to satisfy us that State domicile preferential vacant seats as per the record so produced were filled in from the students belonging to other categories without insisting for the eligibility criteria prescribed in the prospectus. He, however, pointed out from the record that the seats reserved for S.C. category were allowed to be filled in from amongst the general category candidates. In order to substantiate such submissions, the students having surnames "Rathore" and "Bhardwaj" etc. have been pointed out from the record. The submissions so made are without any substance for the reason that the reserved category people also have surnames like "Rathore" and "Bhardwaj" etc., therefore, it cannot be believed that the candidates having "Rathore" and "Bhardwaj" as surnames were not reserved category candidates and rather belonging to general category. Such, even is not the case of the petitioner also pleaded in the Writ Petition hence of no help to her case.

9. This being the legal and factual position, there is no merit in this petition and the same is accordingly dismissed. Pending application(s), if any shall also stand dismissed.

Before parting, though the writ petition has been dismissed, however, in the peculiar circumstances, we leave it open to the respondents to consider the petitioner for admission in the course in any Institute, including respondent No. 3-Institute, against the seat reserved for S.C. category, if lying vacant and she otherwise being qualified is in merit.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, ACJ AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

State of H.P. and others .....Petitioners.

Vs.

Shri Arjun Singh .....Respondent.

CWP No.: 2005 of 2017
Reserved on: 07.08.2018
Decided on: 21.08.2018

Constitution of India, 1950- Article 226- Service matter - Regularization - Whether automatic ? – No- On finding that daily wager engaged in 1995 by department, had rendered services of 240 days in each year, Administrative Tribunal directed State to regularize him from date when he completed eight years of engagement – State challenging order – Held, as per terms and conditions of Regularization Policy, entitlement of regularization after completion of eight years is not automatic – He has right to be considered for regularization as per his seniority and subject to availability of vacancy – Continuous service of eight years is only on eligibility criteria – Petition allowed – Order of Administrative Tribunal set aside. (Paras-5 to 8)

For the petitioners: Mr. Ashok Sharma, Advocate General, with M/s Ranjan Sharma, Adarsh K. Sharma, Ms. Ritta Goswami and Nand Lal Thakur, Additional Advocates General.

For the respondent: Mr. Ramakant Sharma, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge :

By way of this writ petition, State has challenged order, dated 05.10.2015, passed by the learned Administrative Tribunal in O.A. No. 584 of 2015, titled as *Arjun Singh* Vs. *State of H.P. and others*, which reads as under:

"The applicant had been daily wage beldar with the respondents. The respondents in their response admit that the applicant had completed 240 days of presence in each calendar year from 1995 to 2002. The daily wage workers, who have completed 8 years service are to be regularized. The respondents further admit that the applicant was regularized with effect from 21.9.2007. Such status ought to have been conferred after completion of 8 years, that is, with effect from 1.1.2003. As such, the original application is disposed of with a direction to the respondents to issue appropriate orders of regularization of the applicant with effect from 1.1.2003.

2. The pending misc. application, if any, also stands disposed of."

2. Learned Advocate General has argued that the impugned order is not sustainable in the eyes of law, as while passing the impugned directions, learned Administrative Tribunal has erred in not appreciating that upon completion of 8 years, the only right which stood conferred upon the applicant was of being considered for the purpose of regularization as per his seniority and no direction could have been passed by the learned Administrative Tribunal of regularizing the applicant w.e.f. 01.01.2003, i.e., the date when he completed 8 years of service.

3. On the other hand, learned counsel for the respondent has argued that there is no perversity with the order passed by the learned Administrative Tribunal, because the order of regularization after 8 years of service has been passed by the learned Administrative Tribunal strictly in consonance with the regularization Policy of the State, which was in vogue at the relevant time.

4. We have heard the learned counsel for the parties and have also gone through the impugned order as well as the records of the case.

5. In our considered view, there is merit in the contention of learned Advocate General. Policy of regularization after 8 years of service of the State Government cannot be so construed that on completion of 8 years of service as a daily wager, a workman is automatically entitled for regularization of service. The right which stands conferred upon a workman under such a Policy is that now he has a right to be regularized as per his seniority, subject to availability of vacancy. This important aspect of the matter has not been taken into consideration by the learned Administrative Tribunal while passing the impugned order.

6. There is on record a regularization Policy issued by the Department of Personnel, Government of Himachal Pradesh, dated 9th June, 2006, which provides that daily waged/contingent paid workers, who have completed 8 years of continuous service (with a minimum of 240 days in a calendar year except where specified otherwise for the tribal areas) as on 31.03.2004, may be considered for regularization against the available vacancies in various Departments. It is further mentioned in the said Policy that where the vacancies did not exist in the Departments, the question of creation of posts for regularization of such eligible daily wagers may be considered on merit on a case to case basis by the Government. The regularization under the said Policy is subject to the terms and conditions mentioned therein, which we are quoting hereinbelow:

"(i) Daily waged/contingent paid workers who are completed 8 years of continuous service (with a minimum of 240 days in a calendar year except where specified otherwise for the tribal areas) as on 31.3.2004 may be considered for regularization against the available vacancies in various departments and the terms & conditions for such regularization shall be governed as per Annexure 'A'.

(ii) 8 years of continuous service is only an eligibility criteria and regularization shall be only from prospective effect i.e., after the date the orders of regularization is issued after completion of codal formalities.

(iii) The daily waged/contingent paid workers being considered for such regularization shall possess minimum educational qualification as prescribed in the Recruitment & Promotion Rules of such post.

(iv) In case of a Daily Waged/Contingent Paid worker, who has worked for less than 8 years on higher wages, on a higher pay scale post, he will be considered for regularization by combining the service both in the lower scale post and higher scale post but he shall be regularized on a lower post because for regularization on a higher post, 8 years complete daily wage service on the higher pay scale post shall be essential.

(v) The daily waged/contingent paid workers may be regularized against the posts/vacancies of relevant categories purely on seniority basis subject to rejection being unfit and by doing so in case any roster point for reserved/feeder category remains under utilized, these shall be made good in future recruitment by filling up the backlog first.

(vi) Such daily waged/contingent paid workers, who were within the age limit prescribed for direct recruitment at the time of engagement on daily wages basis, may be given relaxation in age limit while regularizing their services, if they have crossed the maximum age limit as prescribed in the Recruitment and Promotion Rules.

(vii) Such daily waged/contingent paid workers, who havae been engaged without being sponsored by the Employment Exchange, may be given relaxation while regularizing their services.

(viii) The Department(s) are not required to make prior consultation with the H.P. Public Service Commission for regularisation of services in case of those posts which fall within the purview of the H.P. Public Service Commission.

(ix) The seniority of the "Daily Waged/Contingent Paid Workers" as are required under this policy vis-a-vis employee appointed on regular basis shall be determined on the date of issue of these policy instructions. The inter-se-seniority of such "Daily Waged/Contingent Paid Workers" shall be determined in accordance with order of regularization of such daily wager based on seniority as daily wager.

(x) There shall be no resultant vacancy by way of such regularization because such vacancies shall be abolished."

7. A perusal of these instructions clearly demonstrates that post completion of 8 years of service, regularization is not automatic and it is subject to availability of vacancy and that 8 years of continuous service is only an eligibility criteria and regularization shall be only from prospective effect, i.e., from the date of order of regularization is issued. In this view of the matter also, the order passed by the learned Administrative Tribunal is not sustainable.

8. Accordingly, we allow this writ petition by setting aside the impugned order, dated 05.10.2015, passed by the learned Administrative Tribunal in O.A. No. 584 of 2015 titled as *Arjun Singh Vs. State of H.P. and others*.

Petition stands disposed of, so also miscellaneous applications, if any. No order as to costs.

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

Ashok Kumar alias Harbans Lal ...Petitioner/Objector

Versus

Santosh Kumar Sood and another ....Respondents/Decree-holder.

CMPMO No. 16 of 2018.
Judgment reserved on: 16.8.2018
Date of decision: 23.08.2018

Code of Civil Procedure, 1908- Sections 151 to 153- Order XXI Rule 66- Correction of sale certificate – On finding that sale certificate issued in favour of Decree Holder did not contain entire particulars of immovable property which was attached and auctioned, Executing Court ordering correction – Petition against – Petitioner, a third party not disputing attachment and subsequent auction of said land in favour of Decree Holder – Disputing correction of Sale Certificate on ground that land was ancestral – Held, it was not open to petitioner to raise objection as to validity of attachment of land, after confirmations of sale – On proclamation of sale issued by Court, land now sought to be incorporated in sale certificate by way of correction, was attached and then sold in auction to Decree Holder – Since, it was not included in Sale Certificate, Executing Court was justified in ordering its correction – Petition dismissed – Order of Executing Court upheld. (Paras- 9 and 10)

For the Petitioner	Mr. K.D. Sood, Senior Advocate, with Mr. Mukul Sood, Advocate.
For the Respondents	Mr. Ajay Sharma, Advocate, for respondent No.1.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

It was way back in 1872 that the Privy Council while dealing with a case relating to the difficulties faced by a decree-holder in execution of the decree observed that:

> *"…. the difficulties of a litigant in India began many years when he has obtained a decree." (*Refer: ***General Manager of the Raj Durbhunga vs. Coomar Ramaput Singh (1871-72) 14 MIA 605: 20 ER 912).***

2. The decree holder/respondent in this case is still to enjoy the fruit of the decree that was passed in his favour way back in the year i.e. 16.5.1997 in a suit that was instituted by him more than 28 years back i.e. on 01.03.1990.

3. Brief facts of the case are that a suit for recovery of money was filed by the Decree-holder Santosh Kumar Sood against one Sh. Amar Nath Sood, which was decreed for a sum of Rs.3,27,000/- alongwith interest at the rate of 12% per annum from June 1987 by the learned District Judge, Kangra in Civil Suit No.3-P/1/95/90. In execution of the decree, the decree-holder moved an application for attachment of the property of the judgment-debtor Amar Nath. In pursuant thereto, warrants of attachment of the properties were issued and thereafter the properties were put to sale. In the interregnum, the decree holder was permitted to participate in the public auction and in the auction so conducted, he happened to be the highest bidder having purchased the attached properties for Rs.14,79,445.35. However, in the sale certificate that came to be issued in favour of the decree-holder, he noticed that some of the properties which had been attached and had in fact been put to auction, were not mentioned therein and, therefore, he accordingly filed an application under Sections 151, 152 and 153 of CPC for amendment/correction of the sale certificate dated 11.11.2009. It was averred in the application that the sale certificate issued in favour of the decree-holder was not issued strictly in terms of Order 21 Rule 66 as the same did not contain the necessary details in respect of the property auctioned/sold and there appeared some clerical error, which ought to be rectified.

4. The petitioner herein, who admittedly is not Judgment debtor, contested this application claiming certain interest in the property as would be evident from para 8 of the preliminary objections and paras 2 to 5 of reply on merits, which read thus:

> *"8. That the land and property in khata No.20 which is in upper Khaira is not constructed by Amar Nath which were built up by Krodhu Devi who had executed a registered will dated 20.5.1993 of shops and house and building of State Bank of Patiala in khasra No. 107 under tenancy of State Bank of India was given away to Harbans Lal alias Ashok Kumar was given to him, since it was*

constructed by respondent No.2 only after spending huge amount. Amar Nath deceased has nothing to do with the above building and shops. The said matter is subjudice in Civil Suit No. 325/09 titled as Harish Chand etc. vs. Ashok Kumar etc. pending in the court of Civil Judge (Sr. Divn.), Palampur. As such the application liable to be dismissed. The shops were built up by Ashok Kumar only whereas old shops had fallen down in 1997-98. The new structure of 3 shops was raised by respondent No.2. There is no old construction of shops and house in existence during life time of Krodhu Devi, the mother of the respondent No.2. As such, the application is liable to be dismissed.

2 to 5. The allegations are wrong and denied. The petitioner has not come to the Court with clean hands. In fact, earlier auction of disputed land owned by Amar Nath JD was issued and the entry was made in revenue record vide rapat No.41 on 07.10.98. Thereafter, the petitioner/D.H moved the application for its cancellation of and new warrant of publication was issued vide rapat No.317 on 07.5.2007 of the land in suit owned and possessed by Amar Nath in Khata No.76 in Kanyalkar of Khasra Nos. 325, 326, 329, 369, 371 area 0-26-50 to extent of 1/5th share, area 0-05-30 khata No.77, Khatauni No.160, Kita 31 area 0-59-22 hects to extent of 21/780 shares area 0-01-59 hects khata No.78 area 0-02-95 to extent of 21/3120 shares i.e. 0-00-02 hects, khata No.80 kita 20 area 0-15-05 hects to extent of 21/3120 shares i.e. 0-00-10 hects and khata No.80/1 kita 4 area 0-04-71 to extent of 21/3120 hects area 0-00-03 hects of Kanyalkar was attached and auction was to be held on 24.5.2007, thereafter the sale certificate was issued to the petitioner/DH. As only the share of Amar Nath was attached by attachment, in the suit land alongwith house and shops if any. In fact the D.H. has received an amount of Rs.1.50 lacs for which bond was filed by late Amar Nath, which was the tentative value of the alleged truck and house as given in the bond vide dated 05.6.2007 passed by Hon'ble Court in CMA/574/2004. The D.H. has not attached any detail and maps of houses and shops alongwith execution/petition. The petitioner/DH has himself appeared in the auction proceedings on 24.5.2007 through his Advocate Raksh Sharma and gave bid for 13,21,445.35 Rs. which was accepted by the Tehsildar A.C. 1st Grade, Palampur. In fact, the suit land alongwith residential house in Khata No.80/1 is ancestral house and shops are built by Jyoti Parkash and after his death his legal heirs Pardeep Kumar, Jagshri Devi, daughters Manjoo Lata, Kalpana, Vandana and Anjana are in possession of above structures, who are residing in the above house.

That the land and property in khasra No.20 which is in upper khaira is not constructed by Amar Nath, which was property of Krodhu Devi, the mother of the respondents and Amar Nath etc. who had executed a Registered Will on 20.5.1993 of the land in Upper Khaira and building of State Bank of India was given away to the respondent Ashok Kumar No.2 since the above building under tenancy of S.B.I. was constructed by respondent No.2 only after spending huge amount. Amar Nath deceased was not entitled to any share of building of SBI and other structures. The said will has been challenged in Civil Suit No.325/09 by Harish Chand etc. vs. Ashok Kumar etc. in the court of ld. Civil Judge, Palampur (Sr. Divn.) who has directed the parties to maintain status quo qua nature possession and alienation on 23.12.2009 of land and property in khata No.20 in upper Khaira as in which the petitioner/DH is party to the suit at Palampur as such the matter is subjudice between the parties and the same is going to be decided by the court of Sub Judge (Sr. Division), Palampur. In fact, there were old two shops which were fallen down in 1997-98 and the respondent No.2 has built up 3 lanteled shops alongwith residence of respondent No.2 there upon. Amar Nath had only share in land and not in the structures thereupon. No correction in

the sale certificate can be ordered as it will amount fresh new sale certificate which was never ordered by the Hon'ble Court on basis of sale conducted on 24.5.2007, there was no detail and map of shops, houses annexed with the execution application of DH/petitioner. As such no detail of houses and shops could be added to the sale certificate already issued to the DH. No Kothi double storey latenled one was subject matter of attachment on 7.5.2007 and sale on 24.5.2007 nor Amar Nath had 1/4th share in shops /building which are constructed by respondent No.2 only. All other allegations are wrong and denied."

5. The learned Executing Court allowed the application after concluding that the sale certificate was required to be issued as per the sale warrant Ex.AW-1/T wherein the description of the attached properties of the J.D. had been mentioned vide paras (i) to (xiii), whereas in the sale certificate, the shops/ residential area stated in para Nos. (vi), (vii), (xi), (xii) and (xiii) had been excluded, therefore, correct sale certificate be issued after including these properties.

6. It is this order, which has been assailed by the petitioner (for short 'impugned order'). The petitioner has laid challenge to the impugned order mainly on the ground that there was no mistake in the sale certificate which had been issued in pursuance to the sale effected of the properties which had earlier been attached and, therefore, no sale certificate in respect of the properties which was not the subject matter of the attachment, could have been issued in favour of the decree-holder.

7. On the other hand, learned counsel for the decree-holder/respondent would argue that the instant petition is nothing, but an abuse of the process of the Court as the petitioner herein has no interest whatsoever in the properties that have been put to sale and as a matter of fact the instant petition is proxy litigation instituted at the behest of the judgment debtors, who themselves have not either filed the objections or contested the impugned order and have set up the petitioner as a stooge.

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

8. Every litigation must come to an end at some stage.

9. As observed earlier, the main thrust of the objection of the petitioner is that the property now included in the sale certificate was never attached and, therefore, could not have been put to sale. However, the record clearly belies the submissions so put-forth by the petitioner. The record reveals that Ex.AW1/U is the order with regard to the issuance of sale warrant. Ex.AW1/T is the certified copy of sale warrant/notice under Order 21 Rule 66 CPC, wherein the description of the attached properties of JD has been clearly mentioned in paragraphs No. (i) to (xiii). The decree-holder being the highest bidder in the public auction in whose favour the sale had been confirmed, was to be issued a sale certificate strictly in consonance with the property/share of JD mentioned in Ex.AW-1/T. However, the sale certificate that was issued in favour of the decree-holder did not contain the entire description of the property of the JD Amar Nath that was attached and subsequently sold in favour of the decree holder. However, the sale certificate did not include the complete properties as were mentioned in paras (vi), (vii), (xi), (xii) and (xiii) of the sale warrant Ex.AW-1/T. Once that be so, then obviously no fault can be found with the order passed by the learned Executing court, whereby it allowed the application filed by the decree-holder for amendment of the sale certificate by ordering its correction and bring it in conformity with the sale warrant Ex.AW-1/T.

10. Apart from the above, in case the reply of the petitioner to the application for amendment of the sale certificate is perused, then it would be noticed that nowhere the petitioner has ever contended or even disputed that the properties not included in the sale certificate sought to be amended, had never been attached or put to sale, rather the entire thrust in the objections is with regard to either the property being ancestral or that there was a

registered sale and so on and so forth (as quoted supra), which objections obviously were not available to the petitioner.

11. Thus, what can be conclusively held by this Court is that the entire endeavour of the petitioner is nothing else but to ensure that the decree holder does not enjoy the fruits of the decree despite the same having been passed in his favour in a suit instituted nearly three decades back.

12. It is really agonising to see that the decree holder is unable to enjoy the fruits of his success even today, therefore, while dismissing this petition, it is directed that the Executing Court shall ensure that the properties as mentioned in the corrected sale certificate and all other consequential action, if not already taken, be taken within 15 days from the receipt of the copy of this order.

13. The parties through their counsel(s) are directed to appear before the learned Executing Court on **27.8.2018.**

14. In view of the above discussion, the petition is accordingly dismissed, so also the pending application(s) if any, leaving the parties to bear their own costs.

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

Ashwani Kumar .....Petitioner

Versus

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

Cr.MMO No. 73 of 2018
with Cr.MMO No. 201 of 2018
Decided on: 23.08.2018

Code of Criminal Procedure, 1973- Section 482- Inherent Powers – Exercise of - Quashing of FIR(s) – Parties filing two separate petitions for quashing FIRs registered by them against each other, and regarding which chargsheet(s) stood filed in Court of Judicial Magistrate – Held, Filing of cross cases prima facie, reveals that occurrence did take place – Which party was at fault, will surface at an appropriate stage during trial – Both cases at very initial stage before trial court – On facts, quashing of proceedings would not be in interest of justice – Petitions dismissed.

(Paras-3 & 4)

For the petitioner(s): Mr. Ashok Chaudhary, Advocate for the petitioner in Cr.MMO No. 73 of 2018 and for respondent No.2 in Cr.MMO No. 201 of 2018.

For the respondent(s): Mr. Vikram Thakur, Advocate for respondent No.2 in Cr.MMO No. 73 of 2018 and for petitioners in Cr.MMO No. 201 of 2018.

Mr. R.P. Singh, Dy. A.G with Mr. Kunal Thakur, Dy. A.G for the respondent-State.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)

Heard.

2. This judgment shall dispose of both petitions having arisen out of the cross cases registered at the instance of the accused-petitioners therein against each other. While in

this petition (Cr.MMO No. 73 of 2018) accused-petitioner Ashwani Kumar has sought quashing of FIR No. 157 of 2017, Annexure P-1 registered against him at the instance of Kavi Kumar, accused-petitioner No.1 in connected petition, accused-petitioner Kavi Kumar and others in connected petition (Cr.MMO No. 201 of 2018), have approached this Court with a prayer to quash FIR No. 156/17 registered against them at the instance of Ashwani Kumar aforesaid.

3. The status report filed by learned Deputy Advocate General and placed on record of this petition reveals that case under Section 341, 323, 147, 148, 149, 504 and 506 IPC has been registered against accused-petitioner Ashwani Kumar vide FIR No. 157 of 2017 and under Section 452, 147, 148, 149, 504 and 506 IPC has been registered vide FIR No. 156 of 2017 against Kavi Kumar etc. Both the cases came to be registered on account of the occurrence taken place on the same day, of course, at different time. As a matter of fact, these are cross cases for all intents and purposes and have to be tried simultaneously in the same Court. The status report further reveals that on the completion of investigation challan in both the cases stand filed in the Court of JMIC, Jawali, District Kangra, H.P. and the same presently are at the stage of service of the accused-petitioners. The registration of cross cases *prima-facie* reveal that occurrence had taken place, however, which party was at fault, will surface at an appropriate stage during the course of trial. However, so far as these petitions are concerned, it cannot be believed by any stretch of imagination that there is false implication of the accused-petitioners. Being so, quashing the proceedings against both sets of accused-petitioners, at this stage, would not be in the interest of justice and rather to throttle the prosecution of the accused well before holding the trial against them.

4. Therefore, there is no merit in these petitions nor any case is made out for quashing the FIR. The same, as such, are dismissed, so also the pending application(s), if any.

In the peculiar circumstances, learned trial Court is directed to expedite the hearing in these cases at the earlier, preferably within a year, of course, subject to rendering all assistance not only by the accused but also the prosecution.

An authenticated copy of this judgment be sent to learned trial Court for compliance.

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

Ramesh Malik (deceased) represented through LRs and others ....Petitioners.

Versus

J.S. Sharma and others ....Respondents.

Civil Revision No.154 of 2006
Reserved on : 16.8.2018
Date of Decision: August 23, 2018

Himachal Pradesh Urban Rent Control Act, 1987- Section 14(2)(ii)(a)- Eviction suit – Subletting - Date relevant for determination- As on date of notice and not passing of an order, if it stands established that there was unlawful subletting, tenant is liable to be evicted. (Para-24)

Himachal Pradesh Urban Rent Control Act, 1987- Section 14(2)(ii)(a)- Subletting – What is? – Held, subletting comes into existence when tenant gives up possession of tenanted accommodation wholly or in part and puts another person totally stranger, in exclusive possession thereof – On facts, original tenants were found living permanently at Delhi and had no connection with Shimla – Exclusive possession of demised premises found with R-6 from 1990 to 1995 – Thereafter, R-6 redelivered possession to tenants in 1995- Eviction petition was filed in

1991 – Held, subletting without consent of landlord stands proved on record – Findings of Rent Controller and Appellate Authority upheld – Revision dismissed. (Paras- 28 and 34 to 39)

Himachal Pradesh Urban Rent Control Act, 1987- Section 14(3)(c)- Eviction suit – Reconstruction and unsafe condition of building – Proof of – On facts, building found crumbled and thus unsafe and unfit for human habitation – Landlord having applied for reconstruction of building – Also having sufficient means to carry out reconstruction - Building plan sanctioned by Municipal Corporation – Held, findings of fact recorded by Rent controller and Appellate Authority and ordering eviction of tenant on these grounds based on proper appreciation of evidence – Revision dismissed. (Paras-17 to 22)

Himachal Pradesh Urban Rent Control Act, 1987- Section 14(3)(c)- Rebuilding and Reconstruction – Prior Sanction to build – Necessity of – Held, Absence of prior sanctioned building plan is not ground for non-suiting landlord who otherwise satisfies ingredients of provisions of statute – Hari Dass Sharma v. Vikas Sood & others, (2013) 5 SCC 243 referred and relied upon. (Para-21)

Himachal Pradesh Urban Rent Control Act, 1987- Section 24(5)- Revision – Scope – Explained – Held – Revisional power under Act may not be as narrow as revision power under Section 115 of Code of Civil Procedure but certainly it is not wide enough to make High Court a second Court of first appeal – However, revisional power of High Court includes power to examine whether finding of fact is based on some legal evidence or it suffers from any illegality like misreading of evidence, overlooking or ignoring material evidence altogether etc. (Para-9)

Jurisprudence- Tenancy- Determination – Destruction of super structure - Whether automatically amounts to determination of tenancy also– Held, tenancy cannot be said to have been determined by attracting applicability of doctrine of frustration consequent upon demolition of premises – Doctrine of frustration belongs to realm of law of contracts; it does not apply to transaction where not only a privity of contract but a privity of estate stands created by way of lease. (Para-14)

Cases referred:

Hindustan Petroleum Corporation Limited vs. Dilbahar Singh, (2014) 9 SCC 78
Rukmini Amma Saradamma vs. Kallyani Sulochana, (1993) 1 SCC 499
T. Lakshmipathi & others v. P. Nithyananda Reddy & others, (2003) 5 SCC 150
D. G. Gouse and Co. (Agents) (P) Ltd. v. State of Kerala, (1980) 2 SCC 410
Shaha Ratansi Khimji & sons v. Kumbhar Sons Hotel Private Limited & others, (2014) 14 SCC 1
Vannattankandy Ibrayi v. Kunhabdulla Hajee, (2001) 1 SCC 564
Rajbir Kaur v. S. Chokesiri and Co., (1989) 1 SCC 19
S. Venugopal v. A. Karruppusami & another, (2006) 4 SCC 507
Hari Dass Sharma v. Vikas Sood & others, (2013) 5 SCC 243
Gajanan Dattatraya v. Sherbanu Hosang Patel & others, (1975) 2 SCC 668
Dev Kumar (Died) through LRs v. Swaran Lata (Smt.), 1996 (1) SCC 25
Mohan Lal Sood & others v. Vinod Dogra & others, 2009 (2) Shim.LC 42
Sohan Singh v. Bachan Singh, 2005(2) RCR 695
Virendra Kashinath Ravat & another v. Vinayak N. Joshi & others, (1999) 1 SCC 47
Bharat Sales Ltd. v. Life Insurance Corporation of India, (1998) 3 SCC 1
Rajbir Kaur v. S. Chokesiri and Co., (1989) 1 SCC 19
Nihal Chand Rameshwar Dass & another v. Vinod Rastogi & others, (1994) 4 SCC 325
Celina Coelho Pereira (Ms) and others v. Ulhas Mahabaleshwar Kholkar & others, (2010) 1 SCC 217

For the Petitioners	Mr. G.C. Gupta, Senior Advocate, with Ms Meera Devi, Advocate.
For the Respondents	Mr. Ashok Sood, Advocate.

The following judgment of the Court was delivered:

Sanjay Karol, Acting Chief Justice

Concurrent findings of fact in favour of respondents-landlords (hereinafter referred to as landlord) are subject matter of present petition filed by the petitioners-tenants (their successors-in-interest) (hereinafter referred to as the tenant).

2. The Rent Controller (3), Shimla, vide order dated 27.12.2001, passed in Case No.137/II of 96/91, titled as *J.S. Sharma & others v. Ramesh Malik & others,* allowed the petition for ejectment filed, under Section 14 of the H.P. Urban Rent Control Act, 1987 (hereinafter referred to as the Act), holding (a) the tenanted premises to be unsafe and unfit for human habitation, (b) whole of the said premises required by the landlords for reconstruction/rebuilding, (c) during subsistence of the tenancy, the tenants (petitioners No.1 to 5 in the Rent Petition) had sublet the premises in favour of respondent No.6 Subhash Chand Sharma, without any consent, approval or authority of the landlord.

3. In appeal, preferred by the tenants, findings returned by the Rent Controller stand affirmed by the Appellate Authority(II), Shimla, vide judgment dated 30.6.2006, passed in Rent Appeal No.15-S/13(b) of 05/04, titled as *Ramesh Malik & others v. J.S. Sharma & others.*

4. The demised premises constitute ground floor of the building, commonly known as 'Jallu House, Eastern Portion, Tutikandi, Shimla-171004'. As per the landlord, tenancy was with Ramesh Malik (deceased, now represented by LRs), Naresh Chand, Shakuntla Verma, Sarla Sehgal and S. Suneja, on a monthly rental of Rs.10/-, including taxes for residential purpose, but however respondent No.6, being in exclusive possession thereof, illegally and unauthorizedly, as a sub tenant, put it to use for commercial purpose, by running a *Karyana* shop.

5. The building in question, originally owned by Smt. Savitri Devi, was sold to the landlord, vide sale deed dated 24.3.1986. The existing structure outlived its life and as such, the Municipal Authorities have declared it to be unsafe and unfit for human habitation.

6. On the other hand, the tenant pleaded rental to be Rs.125/- per month and the building fit for human habitation, with the factum of creation of sub-tenancy refuted.

7. Based on the pleadings of the parties, the Rent Controller framed the following issues:

1. Whether the premises in question has become unsafe and unfit for human habitation as prayed? OPP

2. Whether the premises and building as a whole is required by the petitioner for its reconstruction as prayed? OPP

3. Whether the premises in question has been subleted to Sh. Subhash Chand Sharma by the respondent No.1 to 5 as prayed? OPP

4. Whether the respondents No.1 to 5 are in arrear of rent as prayed? OPR

5. Whether the petitioner have no locus standi to file the present petition as alleged? OPR

6. Whether there does not exists any relationship of landlord and tenant between the parties as alleged? OPR

7. Whether the petition is bad for misjoinder of the parties, as alleged? OPR

8. Relief.

8. Heard learned counsel for the parties.

9. Now what is the scope of such revisional jurisdiction and the extent of the power which the court can exercise is now well settled by a five-Judge Bench of the apex Court

reported in *Hindustan Petroleum Corporation Limited vs. Dilbahar Singh,* (2014) 9 SCC 78. The findings 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 *Dattonpant Gopalvarao Devakate vs. Vithalrao Maruthirao Janagawal,* (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.

10. The 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 apex Court in *Rukmini Amma Saradamma vs. Kallyani Sulochana,* (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 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 from procedural illegality or irregularity."
>
> [Emphasis supplied]

11. In view of the aforesaid discussion the correctness, legality and propriety of the orders passed both by the Rent Controller and the Appellate Authority are required to be examined.

12. It is not in dispute that today the superstructure of the tenanted premises stands completely demolished.

13. However, it is a settled principle of law that even after demolition of the superstructure, tenancy would continue, for it has not come on record that land underneath the superstructure was not to be part thereof.

14. In *T. Lakshmipathi & others v. P. Nithyananda Reddy & others,* (2003) 5 SCC 150, the Apex Court observed that tenancy cannot be said to have been determined by attracting applicability of the doctrine of frustration, consequent upon demolition of the tenanted premises. Further, doctrine of frustration belongs to the realm of law of contracts; it does not apply to a transaction where not only a privity of contract but a privity of estate stands created, inasmuch as lease is the transfer of an interest in immovable property within the meaning of S. 5 of the Transfer of Property Act, and that:

> "24. We are, therefore, of the opinion that in the event of the tenancy having been created in respect of a building standing on the land, it is the building and the land which are both components of subject matter of demise and the destruction of the building alone does not determine the tenancy when the land which was site of the building continues to exist; more so when the building has been destroyed or demolished neither by the landlord nor by an act of nature but solely by the act of the tenant or the person framing under him……."

15. In *D. G. Gouse and Co. (Agents) (P) Ltd. v. State of Kerala*, (1980) 2 SCC 410, while dealing with Entry 49 of List II of the Seventh Schedule of the Constitution, making a reference to Oxford English Dictionary, the Apex Court held that the site of the building is a component part

of the building and therefore inheres in the concept of ordinary meaning of the expression 'building'. Referring to *Corpn. of the City of Victoria v. Bishop of Vancouve Island,* AIR 1921 PC 240, it held that the word 'building' must receive its natural and ordinary meaning as "Including the fabric of which it is composed, the ground upon which its walls stand and the ground embraced within those walls".

16. Further, the Apex Court in *Shaha Ratansi Khimji & sons v. Kumbhar Sons Hotel Private Limited & others,* (2014) 14 SCC 1 and *T. Lakshmipathi v. R. Nithyananda Reddy,* (2003) 5 SCC 150, observed that when there is a lease of a house or a shop it cannot be treated as a lease of structure but also a lease of site. In fact, view taken in Vannattankandy Ibrayi v. Kunhabdulla Hajee, (2001) 1 SCC 564, stood overruled.

17. A perusal of testimony of landlord Shri J.S. Sharma (PW-3) as also other witnesses, clearly establishes the factum of the demised premises being (a) old, unsafe and unfit for human habitation, (b) the landlord having applied for reconstruction of the building, and (c) the landlord having sufficient means to reconstruct the same. Significantly, notice dated 23.9.1991 (Ex.P-1), issued by the Municipal Corporation, Shimla, stands proved, so also sanction of the building plan (Ex.P-4) and letter of extension (Ex.P-5).

18. Shri R.P. Saxena (PW-2), an expert witness, has testified with regard to the building being unsafe and unfit for human habitation.

19. Well, on this issue, there cannot be much dispute, for the superstructure already stands crumbled.

20. It is a settled principle of law that if the landlord were to prove the factum of the building being old, requiring the same to be reconstructed, the Courts would pass necessary orders in that regard. {*Rajbir Kaur v. S. Chokesiri and Co.*, (1989) 1 SCC 19; and *S. Venugopal v. A. Karruppusami & another,* (2006) 4 SCC 507}.

21. It is also a settled principle of law that prior sanction of building plan is not a ground for non-suiting the landlord, who otherwise satisfies the ingredients of provisions of the statute, entitling the landlord for ejectment of the tenant on the ground of building requiring reconstruction. {*Hari Dass Sharma v. Vikas Sood & others, (2013) 5 SCC 243}.*

22. Thus, findings returned by the Courts below, on the question of the landlord bonafidely requiring the premises for reconstruction and rebuilding, stand duly established and do not require any interference.

23. What further needs to be examined is as to whether findings returned by the Courts below, on the question of subletting, warrant interference or not.

24. It is a settled principle of law that the tenant's liability for being evicted, arises, once the factum of unlawful subletting is proved. What is important is that as on the date of notice, not the passing of an order, if it stands established that there was unlawful subletting, the tenant is liable to be evicted. {*Gajanan Dattatraya v. Sherbanu Hosang Patel & others,* (1975) 2 SCC 668}.

25. Also, that in order to succeed on the ground of subletting, landlord must prove that the tenant has parted with the exclusive possession of the premises and that the same is exclusive with the sub-tenant, to the ouster of the landlord. {*Dev Kumar (Died) through LRs v. Swaran Lata (Smt.),* 1996 (1) SCC 25; and *Mohan Lal Sood & others v. Vinod Dogra & others,* 2009 (2) Shim.LC 42}.

26. Further, whether the tenant has parted with the possession of the premises or not is a question of fact to be arrived at on reasonable appreciation of the evidence led by the parties. {*Sohan Singh v. Bachan Singh,* 2005(2) RCR 695}.

27. It is also a settled principle of law that absence of a specific pleading, *ipso facto* cannot be a ground for setting aside findings, concurrent in nature, more so in a petition under

Article 227 of the Constitution of India, where the material otherwise justifies the findings to be reasonable. {*Virendra Kashinath Ravat & another v. Vinayak N. Joshi & others,* (1999) 1 SCC 47}. Hence, objection of absence of pleadings, on this issue, at this stage, only merits rejection.

28. In *Bharat Sales Ltd. v. Life Insurance Corporation of India,* (1998) 3 SCC 1, the Apex Court, has observed that **"**Sub-tenancy or sub-letting comes into existence when the tenant gives up possession of the tenanted accommodation, wholly or in part, and puts another person in exclusive possession thereof. This arrangement comes about obviously under a mutual agreement or understanding between the tenant and the person to whom the possession is so delivered. In this process, the landlord is kept out of the scene. Rather, the scene is enacted behind the back of the landlord, concealing the overt acts and transferring possession clandestinely to a person who is an utter stranger to the landlord, in the sense that the landlord had not let out the premises to that person nor had he allowed or consented to his entering into possession over the demised property. It is the actual, physical and exclusive possession of that person, instead of the tenant, which ultimately reveals to the landlord that the tenant to whom the property was let out has put some other person into possession of that property. In such a situation, it would be difficult for the landlord to prove, by direct evidence, the contract or agreement or understanding between the tenant and the sub-tenant. It would also be difficult for the landlord to prove, by direct evidence, that the person to whom the property had been sub-let had paid monetary consideration to the tenant. Payment of rent, undoubtedly, is an essential element of lease or sub-lease. It may be paid in cash or in kind or may have been paid or promised to be paid. It may have been paid in lump-sum in advance covering the period for which the premises is let out or sub-let or it may have been paid or promised to be paid periodically. Since payment of rent or monetary consideration may have been made secretly, the law does not require such payment to be proved by affirmative evidence and the Court is permitted to draw its own inference upon the facts of the case proved at the trial, including the delivery of exclusive possession to infer that the premises were sub-let.**"**

29. The Apex Court in *Rajbir Kaur v. S. Chokesiri and Co.*, (1989) 1 SCC 19, has observed that:

> "59. ..... If exclusive possession is established, and the version of the respondent as to the particulars and the incidents of the transaction is found acceptable in the particular facts and circumstances of the case, it may not be impermissible for the court to draw an inference that the transaction was entered into with monetary consideration in mind. It is open to the respondent to rebut this. Such transactions of subletting in the guise of licences are in their very nature, clandestine arrangements between the tenant and the subtenant and there cannot be direct evidence got. It is not, unoften, a matter for legitimate inference. The burden of making good a case of subletting is, of course, on the appellants. The burden of establishing facts and contentions which support the party's case is on the party who takes the risk of non-persuasion. If at the conclusion of the trial, a party has failed to establish these to the appropriate standard, he will lose. Though the burden of proof as a matter of law remains constant throughout a trial, the evidential burden which rests initially upon a party bearing the legal burden, shifts according as the weight of the evidence adduced by the party during the trial. In the circumstances of the case, we think, that, appellants have been forced by the courts below to have established exclusive possession of the ice-cream vendor of a part of the demised premises and the explanation of the transaction offered by the respondent having been found by the courts below to be unsatisfactory and unacceptable, it was not impermissible for the courts to draw an inference, having regard to the ordinary course of human conduct, that the transaction must have been entered into for monetary considerations. There is no explanation forthcoming from the respondent appropriate to the situation as found.**"**

30. The aforesaid observations stand reiterated by the Apex Court in *Nihal Chand Rameshwar Dass & another v. Vinod Rastogi & others,* (1994) 4 SCC 325.

31. Thus, the principles culled out by the Apex Court on the issue of subletting, as laid down in *Celina Coelho Pereira (Ms) and others v. Ulhas Mahabaleshwar Kholkar & others,* (2010) 1 SCC 217, are as under:

> (i) In order to prove mischief of subletting as a ground for eviction under rent control laws, two ingredients have to be established, (one) parting with possession of tenancy or part of it by tenant in favour of a third party with exclusive right of possession and (two) that such parting with possession has been done without the consent of the landlord and in lieu of compensation or rent.
>
> (ii) Inducting a partner or partners in the business or profession by a tenant by itself does not amount to subletting. However, if the purpose of such partnership is ostensible and a deed of partnership is drawn to conceal the real transaction of sub-letting, the court may tear the veil of partnership to find out the real nature of transaction entered into by the tenant.
>
> (iii) The existence of deed of partnership between tenant and alleged sub-tenant or ostensible transaction in any other form would not preclude the landlord from bringing on record material and circumstances, by adducing evidence or by means of cross-examination, making out a case of sub-letting or parting with possession in tenancy premises by the tenant in favour of a third person.
>
> (iv) If tenant is actively associated with the partnership business and retains the control over the tenancy premises with him, may be along with partners, the tenant may not be said to have parted with possession.
>
> (v) Initial burden of proving subletting is on landlord but once he is able to establish that a third party is in exclusive possession of the premises and that tenant has no legal possession of the tenanted premises, the onus shifts to tenant to prove the nature of occupation of such third party and that he (tenant) continues to hold legal possession in tenancy premises.
>
> (vi) In other words, initial burden lying on landlord would stand discharged by adducing prima facie proof of the fact that a party other than tenant was in exclusive possession of the premises. A presumption of sub-letting may then be raised and would amount to proof unless rebutted.

32. Having perused the evidence, this Court is of the considered view that even though the Rent Controller cursorily dealt this issue, by returning its findings in Para-7 of the order, but however, the lower Appellate Court fully examined the evidence and after detailed discussion, concurred with the conclusion arrived by the Rent Controller.

33. From the ocular version of landlord (PW-3), it is clear that tenancy was not created by instant landlords, but by the erstwhile owners, from whom they bought the property in the year 1986. At that time, there were several tenants. The landlord filed ejectment petitions against all the tenants, and during pendency thereof, all, except the instant tenants, handed over possession of their respective portion of the premises.

34. Also this witness states that tenants (petitioners No.1 to 5) are permanently residing in Delhi and have nothing to do with Shimla town. This significantly stands unrebutted. Further, the demised premises were sub-let to Subhash Chand Sharma (respondent No.6), without any permission of the landlord. This was so done in the year 1990 for a consideration of

Rs.12,000/-. The sub-tenant exclusively occupied the premises from the year 1990 till 1995, when the possession delivered back to the tenants.

35. Perusal of cross-examination part of testimony of this witness reveals him to have admitted not only to have remembered the month in which the premises were handed over to the sub-tenant or when an amount of Rs.12,000/- was paid. But then, this alone would not impeach the credit of his testimony.

36. From perusal of testimony of the tenants, on whose behalf Shri Ramesh Malik (RW-1) deposed, it is clear that sub-tenant Subhash was, for whatever reason, occupying the premises. Close scrutiny of his testimony further reveals that the tenants have not come out with the truth and revealed/disclosed relevant facts and material in their possession and to their knowledge.

37. In the examination-in-chief part of his testimony, this witness (RW-1) states that they are running the shop and Subhash has no connection with it. In the cross-examination part, he clarifies that it was his brother Naresh Malik who had employed Subhash as a servant for 5-6 months and that the latter had left as he was complaining of the stones falling from the upper storey. But then, this witness contradicts by stating that Subhash had actually worked for him for 3-4 months. Significantly he does not state that it was for his brother. However, what is crucial is that the witness admits to have maintained accounts of the shop. But then, they did not produce the same in the Court, for establishing the exact status of Subhash. The easiest way of proving true relationship of Subhash was production of salary receipt or books of accounts establishing the factum of his employment. This was not so done. On this count, adverse inference can be drawn against the tenants (Section 114 of Indian Evidence Act, 1872).

38. Testimony of the landlord is corroborated by Deep Ram Sharma (PW-4), from whose testimony also it is apparent that the *Karyana* shop was being run by Subhash.

39. In this backdrop, this Court is of the considered view that testimony of landlord (PW-3) cannot be said to have been shattered, in any manner, or its veracity beseeched, rendering his statement to be false, incorrect or not worthy of credence. Factum of Subhash being in exclusive possession, without consent of the landlords, for a period of five years, thus, stands established on record, more so, keeping in view the law laid down in *Rajbir Kaur* (supra) and other decisions noticed hereinbefore.

40. Under these circumstances, findings returned by the Courts below cannot be said to be perverse, in view of law laid down by the Apex Court in *Dilbahar Singh* (supra), warranting any interference.

In view of the above discussion, present petition, being without merit, is dismissed. Pending application(s), if any, also stands disposed of.

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

Rattani .....Appellant.

Versus

Amrit Lal .....Respondent.

RSA No. 201 of 2007
Reserved on : 8.8.2018
Decided on : 23.8.2018.

Specific Relief Act, 1963- Sections 37 and 39- Permanent prohibitory and mandatory injunctions – Entitlement of – Dispute interse co-sharers – Plaintiff seeking decree of permanent prohibitory injunction for restraining defendant from raising construction over joint land – Also praying for mandatory injunction for demolition of 'dhara' raised by defendant over suit land –

Trial Court decreeing suit in toto – Appellate Court partly allowing appeal and declining mandatory injunction – RSA – High Court found that (i) 'Dhara' was constructed over land which was in exclusive possession of defendant (ii) it was well within share of defendant (iii) it was not as valuable portion of joint land and (iv) Partition proceedings were pending before revenue officer – On facts, High Court refused to interfere with decree of first appellate Court. (Paras- 8 & 9)

Transfer of Property Act, 1882- Section 44- Joint land – Rights of co-sharers – Held, no co-sharer is empowered to make exclusive use of any part of undivided land. (Para- 8)

For the appellant: Mr. Adarsh Vashisht, Advocate.
For the respondent: Mr. Bhender Kumar, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal stands directed, against, the verdict pronounced, by, the learned First Appellate Court, whereunder, it, after partly allowing the defendant's appeal, as reared therebefore, rather hence affirmed, the decree, rendered, by the learned Civil Judge (Junior Division), Sarkaghat, District Mandi, vis-a-vis, the decree of permanent prohibitory injunction, whereas it reversed, the relief of mandatory injunction, recorded, vis-a-vis, the suit property, by the learned trial Judge. The aggrieved therefrom, has, hence preferred the instant appeal, before this Court.

2. Briefly stated the facts of the case are that the parties to the suit along with other co-sharers were joint owners in possession of land comprising khewat No. 145, khatauni No. 241, khasra No. 2188, 2194 and measuring 0-06-89 hectares, situated in village Jamsai/226, Tehsil Sarkaghat, District Mandi. The defendant had purchased 9/135 share of Smt. Satya Devi of the suit land and thus he had become joint owner of the same along with the plaintiff and other co-sharers. On 12.6.1999, the defendant constructed a Dhara towards front side of khasra No. 2195/1 with a motive to occupy the best and valuable portion of the suit land. Despite fact that partition case was pending before the Assistant Collector 1st Grade, Sarkaghat. The plaintiff prayed for a decree of permanent prohibitory injunction for restraining the defendant from raising construction over the suit land till partition and for mandatory injunction directing the defendant to demolish the Dhara constructed by him.

3. The defendant contested the suit. He filed written statement, wherein he alleged that the joint land was partitioned among the co-sharers in a private partition, all the co-sharers had been coming in separate possession of their respective share since the time of private partition. The defendant had purchased share of Smt. Satya Devi and thus he become joint owner in possession of the suit land. The defendant had raised construction on a portion, which was in possession of Smt. Satya Devi. Thus, the construction was within his own share. The defendant also contested the suit on preliminary objection such as cause of action, non-joinder of necessary parties and estoppel. In nut shell the defendant refuted the case of the plaintiff and he prayed for dismissal of the suit.

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

1. Whether the suit land is joint interse the parties? OPP.
2. Whether the defendant has raised construction over the part of suit land i.e. of plaintiff and other co-sharers to the prejudice of plaintiff? OPP.
3. Whether the construction in the form of Dhara raised in khasra No. 1995/1 and 2195/1 is liable to be demolished? OPP.
4. Whether there is no cause of action for the plaintiff to file the present suit? OPD.

5. Whether the plaintiff is estopped by his act and conduct to file the present suit? OPD.
6. Whether the suit is bad for non-joinder of necessary party? OPD.
7. If issue No.1 is not proved whether suit has already been privately partitioned? OPD.
8. Relief.

5. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court, hence decreed the plaintiff"s suit. In an appeal, preferred therefrom, by the defendant, before the learned First Appellate Court, the latter Court partly allowed the appeal, and, partly affirmed the findings recorded by the learned trial Court.

6. Now the plaintiff has instituted the instant Regular Second Appeal before this Court, wherein, she, assails the findings recorded, in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission, on 7.9.2007, this Court, admitted the appeal, on, the hereinafter extracted substantial questions, of, law:-

i) Whether the learned lower appellate Court being last court of facts is right in not discussing the entire oral as well as documentary evidence as required of it in view of the law laid down by the Hon'ble Apex Court reported in 2000 (5) SCC page 652?
ii) Whether the impugned judgment and decree is result of complete misreading, mis-interpretation as well as mis-appreciation of statements of PW-1, PW-3 and of document exhibit PW-3/A?
iii) Whether the impugned judgment and decree is the result of non-consideration of law laid down with respect to raising of construction by co-sharers over a best portion of land until it is legally partitioned?.

Substantial questions of law No. 1 to 3.

7. Uncontrovertedly, the apt proceedings, for subjecting, the, undivided suit property, for dismemberment by metes and bounds, are, yet pending before the revenue officer concerned. However, prior thereto, the defendant, one Amrit Lal, purchased an area measuring 46 square meters, from, one of the co-sharers, in, the undivided suit property, namely one Smt. Satya Devi. The aforesaid purchase, of, land hence, holding an area measuring 46 square meters, and, as borne in the undivided suit property, rather occurred in the year 1997. Consequently, the defendant Amrit Lal became a co-sharer, in, the suit property. However, subsequent thereto, and, prior to the institution of the suit, he raised a Dhara, upon, the apt area in respect whereof, his alienor, had exclusive possession, (a) and, as a sequel thereof, the exclusive possession, of a part, of the undivided suit property, appears to stand capitalized, by one Amrit Lal, for, his hence proceeding to raise a Dhara thereon. It is a trite canon of law, (b) qua, till dismemberment(s), of, the undivided suit khasra number hence occurs, (c) no co-owner being empowered to make any exclusive use of any part, of, the undivided suit property, except with the consent, of, other recorded co-sharers. Moreover, till dismemberment, of, the undivided suit property hence occurs, thereupon any exclusivity of possession, qua any part of the undivided property, as held by any co-owner, is, rather unamenable, for, rearing any interpretation, (d) qua, it hence rather enabling the apt co-owner to subject, it, to his exclusive use, (e) imperatively, when the trite canon, rather underlying, the jurisprudential concept of joint property, is, qua community of possession and unity of title, hence, inhereing in all the recorded co-owners, vis-a-vis, the apt undivided suit property, (i) thereupon any holding, of, any exclusivity of possession, of, any part of the undivided suit property, by any co-sharer(s) being rather construable, qua his holding constructive possession thereof, even, for other co-owners. However, the aforesaid principle may suffer some dilution, upon, existence of direct evidence, and, its hence displaying qua, under a valid private partition, the apt possession of the contested parcel of land, rather being delivered, to the co-owner concerned. However, the aforesaid evidence, does not, exist on record, thereupon the aforesaid jurisprudential principle rather inhereing, the, concept of co-ownership, hence, continues to hold its sway.

8. Be that as it may, the defendant could well proceed to raise a Dhara, on, a portion of the undivided suit property, (i) upon, his establishing, qua the area thereunderneath hence falling to his share, in, the undivided suit property, (ii) besides his also establishing, qua the Dhara as raised, also falling within his share in the undivided suit property, (iii) it not occupying the best valuable portion, of, the undivided suit land. However, for determining whether apparently, the raising of a Dhara, on the undivided suit khasra number, hence standing borne in an area, falling beyond his apt share, and, also for further determining, qua the Dhara, as raised by him, upon, a part of the undivided suit property, hence comprising, the best valuable portion, of the undivided suit property, (iv) it is imperative to bear in mind, the, statement of PW-3, wherein he has echoed, qua the portion, of the undivided suit property, whereon the defendant, has raised the apt Dhara, rather not comprising, the, best valuable portion of the undivided suit khasra number, (v) besides with firm evidence existing on record, qua, the Dhara occupying an area of 12 square meters, of, the undivided suit property, (vi) whereas with defendant Amrit Lal being apparently, a, share holder, to, the extent of 46 square meters, (vii) thereupon the Dhara as raised, may hence be concluded, to, rather occur, not, upon the best valuable portion, of, the undivided suit property, besides also a conclusion is reared qua the Dhara rather occupying an area, hence falling within the share of Amrit Lal, in, the undivided suit property.

9. In aftermath, with partition proceedings, still pending, before the revenue officer concerned, and, merely a Dhara standing raised, on, the undivided suit property, thereupon the revenue officer concerned, is, directed, to, within three months, conclude the partition proceedings. Furthermore the above discussion also brings to the fore qua hence it being not appropriate, to invalidate the declining, by the learned first appellate Court, of, a decree, of, mandatory injunction, (a) yet, given, the pendency of the partition proceedings, before the revenue officer concerned, (b) thereupon for his ensuring qua the equities, inter-se, the, co-sharers concerned, vis-a-vis, the joint suit property being not disturbed, it is also deemed fit qua, hence, the decree of permanent prohibitory injunction, as rendered, against, the defendant, rather warranting validation. The substantial questions of law are answered accordingly.

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

11. 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. No order as to costs.

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

Court on its own motion ....Petitioner.

Versus

Vikas Sanoria ....Respondent.

Cr. OPC No.5 of 2018.
Reserved on : 23.08.2018.
Date of decision: 24th August, 2018.

Contempt of Courts Act, 1971- Apology – Stage and manner of tendering – Held, Apology is an act of contrition – Therefore, must be offered clearly and at the earliest opportunity – Belated apology hardly shows contrition, which is essence of purging of contempt – On facts, contemnor,

even after issuance of contempt notices by High Court found to have relentlessly continued in posting adverse comments against Judicial Magistrate, District Judge and even High Court on his Facebook account – Apology tendered by contemnor was conditional – Not offering to purge himself by deleting objectionable comments posted by him – Apology as tendered by contemnor cannot be accepted. (Paras-26, 30 and 31)

Contempt of Courts Act, 1971- Section 12- Criminal Contempt – Duty of advocate – Held, lawyer is an officer of Court and is expected to conduct himself in manner that behoves his privileged position in Court – Advocates are required to conduct themselves at all times as gentlemen – It is expected that they would stand to augment process of justice instead of acting in manner which tends to obstruct functioning of Court and administration of justice. (Para-14)

Contempt of Courts Act, 1971- Section 12- Criminal Contempt – Fair comment, What is? – Held, Fair comments even if outspoken but made without any malice or attempting to impair administration of justice and made in good faith in proper language do not attract any punishment for contempt of court - However, when from criticism deliberate, motivated and calculated attempt is discernible to bring down image of judiciary in estimation of public or to impair administration of justice, Courts must bestir themselves to uphold dignity and majesty of law. (Para-16)

Contempt of Courts Act, 1971- Section 12- Criminal contempt – What is? – Contemnor, an advocate on failing to get orders to his liking posted scurrilous and indecent comments against Judicial Magistrate on his Facebook account – He continued to do so even after initiation of contempt proceedings against him and despite his undertaking given before High Court that he would not post such comments in future – He even started posting comments against High Court and its Hon'ble Judges – Contemnor not denying having posted such comments on his Facebook account but trying to justify them on ground that act of judicial Magistrate put him under mental stress – In his reply also contemnor trying to portray that judicial officer lacked sensitivity – Held, Facebook posts of contemnor-Advocate were deliberate attempt(s) on his part to interfere with due course of judicial proceedings –Contemnor found guilty of criminal contempt and sentenced to simple imprisonment for one month and fine of Rs.10,000/- - Also directed to purge himself by deleting his Facebook account. (Paras1, 2, 4, 5 & 35)

Cases referred:

Vinay Chandra Mishra (the alleged contemnor) (1995) 2 SCC 584
Mr. 'G', A Senior Advocate of the Supreme Court [1955] 1 SCR 490
Lalit Mohan Dass vs. Advocate General, Orissa [1957] SCR 167
D.C.Saxena vs. Hon'ble the Chief Justice of India (1996) 5 SCC 216
Ajay Kumar Pandey (1996) 6 SCC 510, Ajay Kumar Pandey, Advocate, in RE: (1998) 7 SCC 248,
S.K.Sundaram: IN RE (2001) 2 SCC 171
Arundhati Roy, IN RE (2002) 3 SCC 343)
M.B. Sanghi Vs. High Court of Punjab & Haryana (91) 3 SCC 600,
Asharam M.Jain vs. A.T. Gupta, (1983) 4 SCC 125
Jennison vs. Baker [1972] 1 All E.R. 997, 1006
Vishram Singh Raghubanshi Vs. State of Uttar Pradesh (2011) 7 SCC 776
Pravin C. Shah vs. K. A. Mohd. Ali and another, 2001 (8) SCC 650
R.K.Garg versus State of H.P., ILR 1981 (HP) 94

For the Petitioner : Mr. Ashok Sharma, Advocate General, as Amicus Curiae.
For the Respondent : In person.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

This Court after noticing that the respondent had made certain scurrilous and indecent attacks against the Judicial Magistrate 1st Class-7, Shimla, initiated *suo motu* criminal contempt proceedings in Cr.OPC No.4 of 2018 titled 'Court on its own motion versus Vikas Sanoria'. The respondent, who happens to be an Advocate, after putting in appearance in those proceedings thereafter had posted the following comments on his face book account:

> *"Court on its motion___(Loose motion___,),,, since daughter of sitting JUSTICE saheb. To dekhte jnaabjee.....haha."*

2. On the basis of the aforesaid comments, the instant contempt proceedings against the respondent were initiated, who vide his statement dated 02.08.2018, undertook not to post such scurrilous and offensive posts on his face book account. It is after such an undertaking that the case was adjourned to 16.08.2018 so as to observe his conduct. However, the indulgence and sympathy shown by this Court appeared to be totally misplaced as it thereafter emboldened the respondent-contemnor to cast uncalled for and unwarranted aspersions and makes scurrilous and indecent attacks against this Court and its Judges in wild, intemperate and even in abusive language, constraining the Court to pre-pone the matter to 09.08.2018 when the matter was adjourned for 10.08.2018 for appearance of the respondent. On 10.08.2018, the respondent was charge-sheeted and the charge reads thus:-

> *"**Charge***
>
> *We (Justice Tarlok Singh Chauhan and Justice Chander Bhusan Barowalia), do hereby charge you (Vikas Sanoria) as under:*
>
> *That you on or about July 29, 2018 published various posts on your facebook account mentioning thereby, "Court on its own motion_(Loose Motion_,),,,since daughter of sitting JUSTICE saheb. To dekhte jnaabjee....haha", "Sunday, 29 July 2018, 6:26 PM....13 min. 23 seconds duration of call...Just abuses. From the XUV 500.. Jai ho Judicial system Ji.. Koyeenaa....wait n watch ji..", "Jabb Jabb phone se resentment/krodh/gaali millegi..FB post dallegi prevailing discrepancies vaaste..Judicial System ji haha @ XUV 500.. Koyeenaa Wait n Watch ji," "Presently favourite Justice he he.. Feeling BLESSED ji..WAQT.." Annexures 1 to 5 of the present charge, which posts tend to scandalize the High Court of Himachal Pradesh and thereby committed an offence punishable under Section 12 of Contempt of Courts Act, 1971 and within the cognizance of this Court.*
>
> *And we hereby direct that you be tried by this Court on the above said charge.*
>
> sd/-
>
> **(Tarlok Singh Chauhan)**
>
> **Judge**
>
> sd/-
>
> **(Chander Bhusan Barowalia)**
>
> **Judge**
>
> *The contents of the aforesaid charge together with Annexures-1 to 5 were read over and explained to the respondent, in vernacular, to which he pleaded not guilty and claimed trial as per his statement recorded separately."*

3. Today, the case was fixed for evidence and the respondent stated that he does not want to lead any oral evidence and his reply by way of affidavit itself be read as evidence. His statement was taken on record.

4. The so-called justification and explanation as contained in the reply-affidavit is reproduced in verbatim and reads thus:-

> *"1.That the facebook posts annexed alongwith CROPC No.05/2018 have been posted from my facebook I.d. during the month of July/Aug., 2018.*
>
> *2. That the posts were made inadvertently by me in a fit of rage/anger as it took seven days to get the vehicle release application decided by the concerned JMIC at Distt. Court, Shimla,H.P. pertinent to mention here that over all it took around 29 days to get the vehicle released.*
>
> *3.That due to undue delay in obtaining release orders of the vehicle in question, I was deprived of my professional fee in entirety. Not only this the surety required at that time of getting the vehicle released had to be arranged by me.*
>
> *4.That during this entire course I lived under continuous threat of damage to my office, car, threat of life/hurt etc. etc.to me alongwith my wife and minor daughter as the vehicle owner's younger brother had delivered multiple telephonic threats/abuses and to that effect a complaint was made in writing to the SHO, P.O. West, Shimla, H.P. i.e. GD No.072, GD date and time 01/08/2018, 23:23 Hours.*
>
> *5.That during this compelling adverse circumstances, I lost my cautious/temper/balance of mind oftenly for a period of more than 40 days commencing w.e.f. 13/07/2018.*
>
> *6. That my acts/posts on social media are/were a result of mental torture/telephonic abuses on the part of younger brother of the vehicle owner, besides financial losses incurred, liability towards the lawyer engaged by me to prefer criminal revision in the Court of Ld. Distt. Judge, Shimla, H.P. and also financial liability towards the surety of the vehicle in question.*
>
> *7.That in case any Judicial Officer (Hon'ble Justices of H.P. High Court, Ld. Distt. Judge,Shimla, H.P. or any of the subordinate Judicial Officers) must have felt offended due to my social media posts, I regret for the same and tender my apologies by the means of this affidavit with a further undertaking not to repeat the same in the future.*
>
> *8. That a direction be also passed to all Subordinate Judicial Officers, to deal with matters sensitively after proper application of mind/law as at times it's the Lawyer community which is to be blamed for being not able to obtain desired results due to insensitive handling of the matter by the concerned Subordinate Judicial Officers."*

5. However, upon cross examination by the learned Advocate General, who was specially appointed to assist this Court as Amicus Curiae, the respondent acknowledged that all the comments in his face book in Ext. RW-1/B (7 leafs) were posted by him and referred to the Judges of this Court as also to JMIC-7 of the District Court, Shimla. However, he feigned ignorance as to whether these postings were contemptuous and in fact amount to interference with the due process of law and administration of justice and further stated that he was not in a position to state as to whether these postings scandalize the Court.

6. Evidently, the language used by the respondent is intemperate and contemptuous and above all, this petition is loaded with sarcasm and innuendos and, therefore, this court has no hesitation to conclude that the respondent has made deliberate attempt to interfere with the due course of judicial proceedings and such action could be construed to be obstructive or attending to obstruct the administration of justice.

7. The genesis of this case evidently appears to be an application moved by the respondent for the release of his client's vehicle. However, since the orders passed by the Court

were not to the liking of the respondent, therefore, he took to proxy war not only against the said Magistrate, but made disparaging and contemptuous remarks against this Court when it initiated proceedings of contempt against him.

8. Judiciary cannot be reduced to the position of flies in the hands of wanton boys. Judge bashing is not and cannot be a substitute for constructive criticism. The Hon'ble Supreme Court in ***Haridas Das*** *versus* ***Usha Rani Banik (Smt) and others APU Banik, (2007) 14 SCC 1*** observed as under:-

> *"1. "Judge bashing" and using derogatory and contemptuous language against Judges has become a favourite pastime of some people. These statements tend to scandalize and lower the authority of the Courts and can not be permitted because, for functioning of democracy, an independent judiciary to dispense justice without fear and favour is paramount. Its strength is the faith and confidence of the people in that institution. That cannot be permitted to be undermined because that will be against the public interest.*
>
> *2. Judiciary should not be reduced to the position of flies in the hands of wanton boys. Judge bashing is not and cannot be a substitute for constructive criticism.*
>
> *Xxx xxxx xxxx*
>
> *12. There is guarantee of the Constitution of India that there will be freedom of speech and writing, but reasonable restriction can be imposed. It will be of relevance to compare the various suggestions as prevalent in America and India. It is worthwhile to note that all utterances against a Judge or concerning a pending case do not in America amount to contempt of Court. In Article 19 the expression "reasonable restrictions" is used which is almost at par with the American phraseology "inherent tendency" or "reasonable tendency". The Supreme Court of America in Bridges v California (1911) 86 Law Ed. 192 said:*
>
> > *"What finally emerges from the clear and present danger cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely serious and the degree of imminence extremely high before utterances can be punished."*
>
> *13. The vehemence of the language used is not alone the measure of the power to punish for contempt of Court. The fires which it kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The stream of administration of justice has to remain unpolluted so that purity of Court's atmosphere may give vitality to all the organs of the State. Polluters of judicial firmament are, therefore required to be well taken care of to maintain the sublimity of Court's environment; so also to enable it to administer justice fairly and to the satisfaction of all concerned. To similar effect were the observations of Lord Morris in Attorney General v. Times Newspapers 1974 AC 273 at page 302. It was observed that when*
>
> > *"unjustifiable interference is suppressed it is not because those charged with the responsibilities of administration of justice are concerned for their own dignity, it is because the very structure of ordered life is at risk if the recognised Courts of the Land are so flouted and their authority wanes and is supplanted. "*
>
> *14. To similar effect were the observations of Hidayatullah , C.J. (as the learned Judge was then) in Rustom Cowasijee Cooper vs. Union of India (1970) 2 SCC 298) (SCC p.301, para 6)*
>
> > *"6. There is no doubt that the Court like any other institution does not enjoy immunity from fair criticism. No Court can claim to be always right although it does not spare any effort to be right according to the best of the ability, knowledge and judgment of the Judges. They do not think*

themselves to be in possession of all truth to hold that wherever others differ from them are in error. No one is more conscious of his limitations and fallibility than a Judge. But because of his training and the assistance he gets from learned counsel he is apt to avoid mistakes more than others. While fair and temperate criticism of the Court even if strong, may not be actionable, but attributing improper motives or tending to bring Judges or Courts into hatred and contempt or obstructing directly or indirectly with the functioning of Courts is serious contempt of which notice must be and will be taken. Respect is expected not only from those to whom the judgment of the Court is acceptable but also from those to whom it is repugnant. Those who err in their criticism by indulging in vilification of the institution of Court, administration of justice and the instruments through which the administration acts, should take heed for they will act at their own peril."

15. There is an abundance of empirical decisions upon particular instances of conduct which has been held to constitute contempt of Court. We shall now refer to a few. Lord Russel of Killowen, L.C. J, has laid down in Reg v. Gray 1900(2) QB 36 at 40 as follows: (All ER p.62 C)

"Any act done or writing published calculated to bring a Court or a Judge of the Court into contempt, or to lower his authority, is a contempt of Court."

16. It cannot be denied that judgments are open to criticisms and in the said case it was observed : (Gray case, ALL ER p.62 D-E)

"Judges and Courts are alike open to criticism and if reasonable argument or expostulation is offered against any judicial act as contrary to law or public good, no Court could or would treat that as contempt of Court".

Indeed, Section 5 of the Act now provides that a person shall not be guilty of contempt of Court for publishing any fair comment on the merits of any case which has been heard and finally decided. But, if such a defence is taken, it is always open to test whether the publication alleged to be offending was by way of fair comment on the merits of the case or was personal scurrilous abuse of a Judge as a Judge, for abuse of a Judge or a Court or attacks on the personal character of a Judge are clearly punishable contempt. As stated in para 27 at page 21 of Volume-9 of Halsbury's Laws of England; Fourth Edition,:

"The punishment is inflicted, not for the purpose of protecting either the Court as a whole or the individual Judges of the Court from a repetition of the attack, but of protecting the public, and specially those who either voluntarily or by compulsion are subject to the jurisdiction of the Court, from the mischief they will incur if the authority of the tribunal is undermined or impaired."

17. The view was echoed by this Court in Re. D.C. Saxena v. Chief Justice of India (AIR 1996 SC 2481) In the same volume of Halsbury's Laws of England at para 27 it is stated thus:

"Any act done or writing published which is calculated to bring a Court or a Judge into contempt or to lower its authority or to interfere with the due course of justice or the lawful process of the Court, is a contempt of Court."

18. The above proposition has been approved and followed by Lord Atkin in Andrew Paul Terence Ambrad v. The Attorney General of Trinidad and Tobago, (AIR 1936 PC 141). It was observed as follows: (AIR pp 145-46)

"No wrong is committed by any member of the public who exercised the ordinary right of criticism in good faith in private or public the public act done in the seat of justice. The path of criticism is public way, the wrong headed are permitted to err therein, provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice and are genuinely exercising a right of criticism and not acting in malice or attempting to impart the administration of Justice, they are immune. Justice is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men."

19. Lord Justice Donovan in Attorney General v. Butterworth: 1963(1) QB 696 after making reference to Req. V. Odham's Press Ltd ex parte A.G.: 1957(1) QB 73 said:

"whether or not there was an intention to interfere with the administration of justice is relevant to penalty not to quit".

This makes it clear that an intention to interfere with the proper administration of justice is an essential ingredient of the offence of contempt of court and it is enough if the action complained of is inherently likely so to interfere. In Morris v. Crown Office: 1970(1) All E.R. 1079 page 1081, Lord Denning M.R. said that:

The course of justice must not be deflected or interfered with. Those who do it strike at the very foundations of our society.

In the same case, Lord Justice Solmon spoke: (All ER p.1087 b-c)

"The sole purpose of proceedings for contempt is to give our courts the power effectively to protect the rights of the public by ensuring that the administration of justice shall not be obstructed or prevented."

20. Frank Further, J. in Offutt v. U.S. 1954(348) U.S. 11 expressed his view as follows: (L.Edp.16)

"It is a mode of vindicating the majesty of law, in its active manifestation against obstruction and outrage."

21. In Jennison v. Baker : 1972(1) All E.R. 997 at page 1006 it is stated:

"The law should not be seen to sit by limply, while those who defy it go free, and those who seek its protection lose hope."

22. Chinappa Reddy, J. speaking for the Bench in Advocate General, State of Bihar v. Madhya Pradesh Khair Industries: (1980 (3) SCC 311) citing those two decisions in the cases of Offutt and Jennison (supra) stated thus:

"It may be necessary to punish as a contempt a cause of conduct which abuses and makes a mockery of the judicial process and which thus extends its pernicious influence beyond the parties to the action and affects the interest of the public in the administration of justice. The public have an interest, an abiding and a real interest, and vital stake in the effective and orderly administration of justice, because unless justice is so administered, there is the peril of all rights and liberties perishing. The Court has the duty of protecting the interest of the public in the due administration of justice and, so, it is entrusted with the power to commit for contempt of Court not in order to protect the dignity of the Court against insult or injury as the expression "Contempt of Court" may seem to suggest but to protect and to vindicate the right of the public and the administration of justice shall not be prevented, prejudiced, obstructed or interfered with."

23. Krishna Iyer, J. in his separate judgment In Re. S. Mulgaokar: (1978 (3) SCC 339) while giving broad guidelines in taking punitive action in the matter of contempt of Court has stated: (SCC p 353, para 33)

> *".....if the Court considers the attack on the judge or judges scurrilous, offensive, intimidatory or malicious beyond condonable limits, the strong arm of the law must, in the name of public interest and public justice, strike a blow on him who challenges the supremacy of the rule of law by fouling its source and stream."*

24. In Brahma Prakash Sharma and others v. The State of Uttar Pradesh: (AIR 1954 SC 10) this Court after referring to various decisions of the foreign countries as well as of the Privy Council stated thus: (AIR p.14, para 12)

> *"It will be an injury to the public if it tends to create an apprehension in the minds of the people regarding the integrity, ability or fairness of the Judge or to deter actual and prospective litigants from placing complete reliance upon the Court's administration of justice, or if it is likely to cause embarrassment in the mind of the Judge himself in the discharge of his judicial duties. It is well established that it is not necessary to prove affirmative that there has been an actual interference with the administration of justice by reason of such defamatory statement; it is enough if it is likely or tends in any way to interfere with the proper administration of law...."*

25. It may be noted here that in the illustrated case S. Mulgaokar's case (supra) it was held that :(SCC p.347, para 16)

> *"16.The judiciary cannot be immune from criticism. But, when such criticism is based on obvious distortion or gross mis-statement and make in a manner which seems designed to lower respect of the judiciary and destroy public confidence in it, it cannot be ignored."*

26. Though certain imputations against the Judge may be only libelous against that particular individual, it may at times amount to contempt also depending upon the gravity of the allegations. In Brahma Prakash Sharma's case (supra) this Court held that: (AIR p.14, para 12)

> *"[A] defamatory attack on a Judge may be a libel so far as the judge is concerned and it would be open to him to proceed against the libell or in a proper action if he so chooses. If, however, the publication of the disparaging statement is calculated to interfere with the due course of justice or proper administration of law by such Court, it can be punished separately as contempt."*

The same view has been taken in Perspective Publications (P) Ltd v. The State of Maharashtra (AIR 1971 SC 221) and C.K. Daphtary and others v O.P. Gupta and others (AIR 1971 SC 1132). Therefore, apart from the fact that a particular statement is libelous, it can constitute criminal contempt if the imputation is such that the same is capable of lowering the authority of the Court. The gravity of the aforesaid statement is that the same would scandalize the court.

27. The right to criticize an opinion of a court, to take issue with it upon its conclusions as to a legal proposition, or question its conception of the facts, so long as such criticisms are made in good faith and are in ordinarily decent and respectful language and are not designed to willfully or maliciously misrepresent the position of the Court, or tend to bring it into disrespect, or lessen the respect due to the authority to which a Court.....is entitled, cannot be questioned.... The right of free speech is one of the greatest guarantee to liberty

in a free country like ours, even though that right is frequently and in many instances outrageously abused.....

If any considerable portion of a community is led to believe that either because of gross ignorance of the law or because of a wrong reason, it cannot rely upon the courts to administer justice that portion of the community, upon some occasion, is very likely to come to the conclusion that it is better not to take any chances on the courts failing to do their duty.

28. Judiciary is the bed rock and handmaid of democracy. If people lose faith in justice parted by a Court of law, the entire democratic set up would crumble down. In this background, observations of Lord Denning M.R. in Metropolitan Properties Ltd. v. Lennon (1968) 3 All E.R. 304 are relevant:

> *"Justice must be rooted in confidence, and confidence is destroyed when right minded people go away thinking - the Judge is based."*

29. Considered in the light of the aforesaid position in law, a bare reading of the statements makes it clear that those amount to a scurrilous attack on the integrity, honesty and judicial competence and impartiality of judges. It is offensive and intimidating. The contemnor by making such scandalising statements and invective remarks has interfered and seriously shaken the system of administration of justice by bringing it down to disrespect and disrepute. It impairs confidence of the people in the Court. Once door is opened to this kind of allegations, aspersions and imputations, it may provide a handle to the disgruntled litigants to malign the Judges, leading to character assassination. A good name is better than good riches. Immediately comes to one's mind Shakespeare's Othello, Act II, Scene iii, 167:-

> *"Good name in man and woman, dear my Lord is the immediate jewel of their souls; who steals my purse, steals trash; its something, nothing; 'T was mine, its his, and has been slate to thousands; But he that filches from me my good name,*
>
> *Robs me of that which not enriches him*
>
> *And makes me poor indeed."*

30. Majesty of law continues to hold its head high notwithstanding such scurrilous attacks made by persons who feel the law Courts will absorb anything and every thing, including attacks on their honesty, integrity and impartiality. But it has to be borne in mind that such divinity and magnanimity is not its weakness but its strength. It generally ignores irresponsible statements which are anything but legitimate criticism. It is to be noted that what is permissible is legitimate criticism and not illegitimate insinuation. No Court can brook with equanimity something which may have tendency to interfere with the administration of justice. Some people find judiciary a soft target because it has neither the power of the purse nor the sword, which other wings of democracy possess. It needs no reiteration that on judiciary millions pin their hopes, for protecting their life, liberty, property and the like. Judges do not have an easy job. They repeatedly do what rest of us (the people) seek to avoid, make decisions, said David Pannick in his book "Judges". Judges are mere mortals, but they are asked to perform a function which is truly divine.

31. What is contempt of Court has been stated in lucid terms by Oswald in Classic "Book on Contempt of Court". It is said:

> *"To speak generally, contempt of court may be said to be constituted by any conduct that tends to bring the authority and demonstration of law into disrespect and disregard or to interfere with or prejudice parties, litigant or their witnesses during the litigation."*

> *"Contempt in the legal acceptance of the term, primarily signifies disrespect to that which is entitled to legal regard, but as a wrong purely moral or affecting an object not possessing a legal status, it has in the eye of the law no existence. In its origin all legal contempt will be found to consist in an offence more or less direct against the sovereign himself as the fountainhead of law and justice or against his palace where justice was administered. This clearly appears from old cases."*

32. Lord Diplock, speaking for the Judicial Committee in Chokolingo v. Attorney General of Trinidad and Tobago (1981) 1 All E.R. 244, summarized the position thus:

> *"Scandalising the Court is a convenient way of describing a publication which, although it does not relate to any specific case either part of pending or any specific Judge, is a scurrilous attack on the judiciary as a whole which is calculated to undermine the authority of the Courts and public confidence in the administration of justice. Thus, before coming to the conclusion as to whether or not the publication amounts to a contempt, what will have to be seen is, whether the criticism is fair, temperate and made in good faith or whether it is something directed to the personal character of a Judge or to the impartiality of a Judge or court. A finding, one way of the other, will determine whether or nor the act complained of amounted to contempt."*

33. Mahajan, J in Aswini Kumar Ghose v. Arabinda Bose, (AIR 1953 SC 75), observed as follows: (AIR p.76, paras 2-3)

> *"2. No objection could have been taken to the article had it merely preached to the Courts of law the sermon of divine detachment. But when it proceeded to attribute improper motives to the Judges, it not only transgressed the limits of fair and bona fide criticism but had a clear tendency to affect the dignity and prestige of this Court..... It is obvious that if an impression is created in the minds of the public that the Judges in the highest Court of the land act on extraneous considerations in deciding cases, the confidence of the whole community in the administration of justice is bound to be undermined and no greater mischief than that can possibly be imagined.....*
>
> *3.....We would like to observe that it is not the practice of this Court to issue such rules except in very grave and serious cases and it is never over-sensitive to public criticism; but when there is danger of grave mischief being done in the matter of administration of justice, the animadversion cannot be ignored and viewed with placid equanimity....."*

34. There can be no quarrel with the proposition that anyone who intends to tarnish the image of judiciary should not be allowed to go unpunished. By attacking the reputation of Judges, the ultimate victim is the institution. The day the consumers of justice loose faith in the institution that would be the darkest day for mankind. The importance of judiciary needs no reiteration."

9. We are of the opinion that until and unless immediate action is not taken, Judge bashing will become the norm and it will become difficult to preserve and protect the institution of Judiciary.

10. The Court will be failing in its duty to protect the administration of justice from attempts to denigrate and lower the authority of the judicial officers entrusted with the sacred

task of delivering justice. Therefore, even if the respondent found that the Court was not exceeding to his request, even then he was not expected to be discourteous to the Court or to fling hot words or epithets or use disrespectful, derogatory or threatening language in the comments posted on his face book which has the effect of overbearing the Court. The cases are won and lost in the Court daily. One or the other side is bound to lose. The remedy of the losing lawyer or the litigant is to prefer an appeal against the decision and not to indulge in a running battle of words with the court. That is the least expected from the lawyer as was held by the Hon'ble three Judges Bench of the Hon'ble Supreme Court in ***IN RE: Vinay Chandra Mishra (the alleged contemnor) (1995) 2 SCC 584*** wherein it was observed as under:

> "33. *Normally, no Judge takes action for in facie curiae contempt against the lawyer unless he is impelled to do so. It is not the heat generated in the arguments but the language used, the tone and the manner in which it is expressed and the intention behind using it which determine whether it was calculated to insult, show disrespect, to overbear and overawe the court and to threaten and obstruct the course of justice. After going through the report of the learned Judge and the affidavits and the additional affidavits filed by the contemner and after hearing the learned Counsel appearing for the contemner, we have come to the conclusion that there is every reason to believe that notwithstanding his denials, and disclaimers, the contemner had undoubtedly tried to browbeat, threaten, insult and show disrespect personally to the learned Judge. This is evident from the manner in which even in the affidavits filed in this Court, the contemner has tried to justify his conduct. He has started narration of his version of the incident by taking exception the learned Judge's taking charge of the court proceedings. We are unable to understand what exactly he means thereby. Every member of the Bench is on par with the other member or members of the Bench and has a right to ask whatever questions he want to, to appreciate the merits or demerits of the case. It is obvious that the contemner was incensed by the fact that the learned Judge was asking the questions to him. This is clear from his contention that the learned Judge being a junior member of the Bench, was not supposed to ask him any question and if any questions were to be asked, he had to ask them through the senior member of the Bench because that was the convention of the Court. We are not aware of any such convention in any court at least in this country. Assuming that there is such a convention, it is for the learned Judges forming the Bench to observe it inter se. No lawyer or a third party can have any right or say in the matter and can make either an issue of it or refuse to answer the questions on that ground. The lawyer or the litigant concerned has to answer the questions put to him by any member of the Bench. The contemner has sought to rely on the so-called convention and to spell out his right from it not to have been questioned by the learned Judge This contention coupled with his grievance that the learned Judge had taken charge of the proceedings, shows that th contemner was in all probability perturbed by the fact that the learned Judge was asking him questions. The leaned Judge's version, therefore, appear to be correct when he states that the contemner lost his temper when he started asking him questions. The contemner has further admitted that he got "emotionally perturbed" and his "professional and institutional sensitivity got deeply wounded" because the learned Judge, according to him, apparently lost his temper and told him in no unconcealed terms that he would set aside the order in toto disregarding what he had said. The learned Judge's statement that the contemner threatened him with transfer and impeachment proceedings also gets corroboration from the contemner's own statement in the additional affidavit that he did tell the learned Judge that a Judge got himself transferred earlier on account of his inability to command the goodwill of the Bar due to lack of mutual reverence. No one expects a lawyer to be subservient to the Court while presenting his case and not to put forward his arguments merely because the Court is against him. In fact, that is the moment when he is expected to put forth his best effort to persuade the*

Court. However, if, in spite of it, the lawyer finds that the court is against him, he is not expected to be discourteous to the court or to fling hot words or epithets or use disrespectful, derogatory or threatening language or exhibit temper which has the effect of overbearing the court. Cases are won and lost in the court daily. One or the other side is bound to lose. The remedy of the losing lawyer or the litigant is to prefer an appeal against the decision and not to indulge in a running battle of words with the court. That is the least that is expected of a lawyer. Silence on some occasions is also an argument. The lawyer is not entitled to indulge in unbecoming conduct either by showing his temper or using unbecoming language."

11. It is held by the Hon'ble Supreme Court in the matter of ***Mr. 'G', A Senior Advocate*** of the Supreme Court ***[1955] 1 SCR 490,*** the Court, in dealing with cases of professional misconduct is not concerned.

"with ordinary legal rights, but with the special and rigid rules of professional conduct expected of and applied to a specially privileged class of persons who, because of their privileged status, are subject to certain disabilities which do not attach to other men and which do not attach even to them in a non-professional character....He (a legal practitioner) is bound to conduct himself in a manner befitting the high and honourable profession to whose privileges he has so long been admitted; and if he departs from the high standards which that profession has set for itself and demands of him in professional matters, he is liable to disciplinary action."

12. In ***Lalit Mohan Dass vs. Advocate General, Orissa [1957] SCR 167,*** the Hon'ble Supreme Court observed :-

A member of the Bar undoubtedly owes a duty to his client and must place before the Court all that can fairly and reasonably be submitted on behalf of his client. He may even submit that a particular order is not correct and may ask for a review of that order. At the same time, a member of the Bar is an officer of the Court and owes a duty to the court in which he is appearing. He must uphold the dignity and decorum of the Court and must not do anything to bring the Court itself into disrepute. The appellant before us grossly overstepped the limits of propriety when he made imputations of partiality and unfairness against the Munsif in open Court. In suggesting that the Munsif followed no principle in his orders, the appellant was adding insult to injury, because the Munsif had merely upheld an order of his predecessor on the preliminary point of jurisdiction and Court fees, which order had been upheld by the High Court in revision. Scandalising the Court in such manner is really polluting the very fount of justice; such conduct as the appellant indulged in was not a matter between an individual member of the Bar and a member of the judicial service; it brought into disrepute the whole administration of justice. From that point of view, the conduct of the appellant was highly reprehensible."

13. The Bar Council of India under Section 49(1) (c) of the Advocates Act, 1961 has prescribed Standards of Professional Conduct and Etiquette to be observed by Advocates – the relevant part of which is reproduced below:

"An Advocate shall, at all times, comport himself in a manner befitting his status as an officer of the Court, a privileged member of the community, and a gentleman, bearing in mind that what may be lawful and normal for a person who is not a member of the Bar, or for a member of the Bar in his nonprofessional capacity may still be improper for an advocate. Without prejudice to the generality of the foregoing obligation, an advocate shall fearlessly uphold the interests of his client, and in his conduct conform to the rules hereinafter mentioned both in letter and in spirit. The rules hereinafter mentioned contain cannons of conduct and etiquette adopted as general guides; yet specific mention thereof shall not be construed as a

denial of the existence of others equally imperative though not specifically mentioned.

Section I – Duty to the Court.

1. An advocate shall, during the presentation of his case and while otherwise acting before a Court, conduct himself with dignity and self-respect. He shall not be servile and whenever there is proper ground for serious complaint against a judicial office, it shall be his right and duty to submit his grievance to proper authorities.

2. An advocate shall maintain towards the Courts a respectful attitude, bearing in mind that the dignity of the judicial office is essential for the survival of a free community.

3....

4. An advocate shall use his best efforts to restrain and prevent his client from restoring to sharp or unfair practices or from doing anything in relation to the Court, opposing counsel or parties which the advocate himself ought not to do. An advocate shall refuse to represent the client who persists in such improper conduct. He shall not consider himself a mere mouthpiece of the client, and shall exercise his own judgment in the use of restrained language in correspondence, avoiding scurrilous attacks in pleadings and using intemperate language during arguments in Court....."

14. As observed above, a lawyer is an officer of the Court and is expected to conduct himself in a manner that behoves his privileged position in the Court. Advocates are required to conduct themselves at all time as gentlemen; this conduct assumes greater significance in a court of law when he/she stands to assist the Court. It is expected that they would stand to augment the process of justice instead of acting in a manner which tends to obstruct the functioning of the Court and the administration of justice.

15. Unlike the contemnor in ***Haridas Das*** case (supra), who sought shelter from the contempt proceedings under the nebulous umbrella of illiteracy, the present respondent is an advocate, who has been practicing in the Courts of the State. The objectionable language used is rather contemptuous language used by him, thus cannot be ignored.

16. As observed above, no affront to the majesty of law can be permitted. The fountain of justice cannot be allowed to be polluted by disgruntled litigants or lawyers. The protection is necessary for the Courts to enable them to discharge their judicial functions without fear. A litigant for that matter or even a lawyer cannot be permitted to browbeat the Court or terrorize or intimidate the Judges or malign the Presiding Officer(s) with a view to get a favourable order. Judges shall not be able to perform their duties freely and fairly if such activities are permitted and in the result administration of justice would become a casualty and the rule of law would receive a setback. It is most unbefitting for a litigant or a lawyer to make imputations against the Judges only. They cannot be permitted to use language which is intemperate and unparliamentary. A litigant or the lawyer cannot cast uncalled for, scurrilous and indecent attacks against the Courts and its Judges in wild, intemperate and even in abusive language. The safeguards provided by the law are not for the protection of any Judge individually but are essential for maintaining the dignity and decorum of the courts. No doubt, fair comments, even if, outspoken, but made without any malice or attempting to impair the administration of justice and made in good faith, in proper language, do not attract any punishment for contempt of court. However, when from the criticism deliberate, motivated and calculated attempt is discernible to bring down the image of judiciary in the estimation of the public or to impair the administration of justice or tend to bring down the administration of justice into disrepute, the courts must bestir themselves to uphold the dignity and the majesty of law. No system of justice can tolerate such unbridled licence on the part of a person to permit himself the liberty or scandalizing a court by casting unwarranted, uncalled for an unjustified aspersions on the

integrity, ability, impartiality or fairness of a Judge in the discharge of his judicial functions as it amounts to an interference with the due course of administration of justice.

17. Indeed, no lawyer can be permitted to browbeat the court or malign the Presiding Officer with a view to get a favourable order. Judges shall not be able to perform their duties freely and fairly if such activities are permitted or tolerated and justice would become a casualty and Rule of Law would receive a set back. The Judges are obliged to decide cases impartially and without any fear or favour. Litigants cannot, be allowed to 'terrorize' or 'intimidate' judges 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. Not only are the aspersions cast by the respondent derogatory, scandalous and uncalled for, but also tend to bring the authority and administration of justice into disrespect.

18. This all has been done calculatedly by the respondent in order to undermine the authority of the Courts and public confidence in the administration of justice. Contempt of Court is to keep a blaze the glory around the judiciary and to deter the people from attempting to render justice contemptible in the eyes of public. A libel upon the Court is a reflection upon the sovereign people themselves. The respondent has tried to convey to the people that the administration of justice is weak or in incompetent hands and that the fountain of justice is tainted. Therefore, it is necessary to regulate the judicial process free from fouling the fountain of justice to ward off the people from undermining the confidence of the public in the purity of fountain of justice and due administration. Justice thereby remains pure, untainted and unimpeded. If the people's allegiance to the law is so fundamentally shaken, it is the most vital and most dangerous obstruction of justice calling for urgent action.

19. The respondent has indulged in scandalizing the Court, which means hostile criticism of Judges as Judges or judiciary. The gravamen of the offence is lowering the dignity or authority or an affront to majesty of justice. The respondent has challenged the authority of the Court and has, therefore, interfered with the performance of duties of Judge's office or judicial process or administration of justice that has the tendency of bringing the Judges or judiciary into contempt. If the attempts of the respondent are encouraged the judicial independence would vanish eroding the very edifice on which the institution of justice stands. Any action on the part of a litigant which has the tendency to interfere with or obstruct the due course of justice has to be dealt with sternly and firmly to uphold the majesty of law. None can be permitted to intimidate or terrorize Judges by making scandalous unwarranted and baseless imputations against them in the discharge of their judicial functions so as to secure orders which the litigant "wants".

20. The rule of law is the foundation of a democratic society and the judiciary is the guardian of the rule of law. If the judiciary is to perform its duties and functions effectively and remain true to the spirit with which they are sacredly entrusted, the dignity and authority of the Courts has to be respected and protected at all costs. It is for this reason that the Courts are entrusted with the extraordinary power of punishing those for contempt of court who indulge in acts whether inside or outside the Courts, which tend to undermine the authority of the Courts and bring them in disrepute and disrespect thereby obstructing them to discharge their official duties without fear or favour. This power is exercised by the Courts not to vindicate the dignity and honour of any individual Judge who is personally attacked or scandalized but with a view to uphold the majesty of law and the administration of justice. The foundation of the judiciary is the trust and the confidence of the people in its ability to deliver fearless and impartial justice and as such no action can be permitted to shake the very foundation itself. Thus, it is now settled that abuses, attribution of motives, vituperative terrorism and scurrilous and indecent attacks on the impartiality of the Judges in the pleadings, applications or other documents filed in the Court or otherwise published which have the tendency to scandalize and undermine the dignity of the Court and the majesty of law amounts to criminal contempt of court.

21. No doubt, the lawyer has the freedom of expression and liberty to project his case forcefully, but it has to be remembered that while exercising this liberty he is required to maintain dignity, decorum and order in the Court proceedings. Liberty of free expression cannot

be permitted to be treated as a licence to make reckless imputations against the impartiality of the Judges deciding the cases. Even criticism of the judgment has to be in a dignified and temperate language and without any malice. (See: ***D.C.Saxena vs. Hon'ble the Chief Justice of India (1996) 5 SCC 216, In Re: Ajay Kumar Pandey (1996) 6 SCC 510, Ajay Kumar Pandey, Advocate, in RE: (1998) 7 SCC 248, S.K.Sundaram: IN RE (2001) 2 SCC 171 and Arundhati Roy, IN RE (2002) 3 SCC 343).***

22. The Hon'ble Supreme Court in ***M.B. Sanghi Vs. High Court of Punjab & Haryana (91) 3 SCC 600,*** while examining the similar case has observed as under (SCC p.602, para 2).

> *"2.....The foundation of judicial system which is based on the independence and impartiality of those who man it will be shaken if disparaging and derogatory remarks are made against the presiding judicial officers with impunity. It is high time that we realise that the much cherished judicial independence has to be protected not only from the executive or the legislature but also from those who are an integral part of the system. An independent judiciary is of vital importance to any free society".*

23. In ***Asharam M.Jain vs. A.T. Gupta, (1983) 4 SCC 125,*** while dealing with the issue, this Court observed as under: (SCC p.127, para 3)

> *"3.....The strains and mortification of litigation cannot be allowed to lead litigants to tarnish, terrorise and destroy the system of administration of justice by vilification of judges. It is not that judges need be protected; judges may well take care of themselves. It is the right and interest of the public in the due administration of justice that has to be protected."*

24. In ***Jennison vs. Baker [1972] 1 All E.R. 997, 1006*, it was observed (QB p.66 H)**

> *".....'The law should not be seen to sit by limply, while those who defy it go free, and those who seek its protection lose hope.' "*

25. *In* ***Vishram Singh Raghubanshi Vs. State of Uttar Pradesh (2011) 7 SCC 776,*** the Hon'ble Supreme Court noted the dangerous trend of making false allegations against judicial officers and observed as under:

> "18. *The dangerous trend of making false allegations against judicial officers and humiliating them requires to be curbed with heavy hands, otherwise the judicial system itself would collapse. The Bench and the Bar have to avoid unwarranted situations on trivial issues that hamper the cause of justice and are in the interest of none. "Liberty of free expression is not to be confounded or confused with license to make unfounded allegations against any institution, much less the Judiciary". A lawyer cannot be a mere mouthpiece of his client and cannot associate himself with his client maligning the reputation of judicial officers merely because his client failed to secure the desired order from the said officer. A deliberate attempt to scandalise the court which would shake the confidence of the litigating public in the system, would cause a very serious damage to the Institution of judiciary. An Advocate in a profession should be diligent and his conduct should also be diligent and conform to the requirements of the law by which an Advocate plays a vital role in the preservation of society and justice system. Any violation of the principles of professional ethics by an Advocate is unfortunate and unacceptable. (Vide: O.P. Sharma & Ors. v. High Court of Punjab & Haryana, (2011) 5 SCALE 518)."*

26. As regards the apology tendered by the respondent, the same apparently is conditional. We really do not find any remorse on the part of the respondent as even today, he has not even offered to purge himself of the contempt by deleting the comments posted on his facebook. How the respondent/contemnor would purge himself of the contempt has been clearly

laid down by the Hon'ble Supreme Court in ***Pravin C. Shah vs. K. A. Mohd. Ali and another, 2001 (8) SCC 650***, wherein, it has been observed as under:

> *"23. Now we have to consider the crucial question - How can a contemnor purge himself of the contempt? According to the Disciplinary Committee of the Bar Council of India, purging oneself of contempt can be done by apologising to the court. The said opinion of the Bar Council of India can be seen from the following portion of the impugned order:*
>
> *Purging oneself of contempt can be only by regretting or apologising in the case of a completed action of criminal contempt. If it is a case of civil contempt, by subsequent compliance with the orders or directions the contempt can be purged off. There is no procedural provision in law to get purged of contempt by an order of an appropriate court.*
>
> *24. Purging is a process by which an undesirable element is expelled either from ones own self or from a society. It is a cleansing process. Purge is a word which acquired implications first in theological connotations. In the case of a sin, purging of such sin is made through the expression of sincere remorse coupled with doing the penance required. In the case of a guilt, purging means to get himself cleared of the guilt. The concept of purgatory was evolved from the word purge, which is a state of suffering after this life in which those souls, who depart this life with their deadly sins, are purified and render fit to enter into heaven where nothing defiled enters. (vide Words and Phrases, Permanent Edn., Vol.35A, page 307). In Blacks Law Dictionary the word purge is given the following meaning: To cleanse; to clear or exonerate from some charge or imputation of guilt, or from a contempt. It is preposterous to suggest that if the convicted person undergoes punishment or if he tenders the fine amount imposed on him the purge would be completed.*
>
> *25. We are told that a learned single Judge of the Allahabad High Court has expressed a view that purging process would be completed when the contemnor undergoes the penalty (vide Dr. Madan Gopal Gupta vs. The Agra University and ors., AIR 1974 Allahabad 39). This is what the learned single Judge said about it:*
>
> *In my opinion a party in contempt purged its contempt by obeying the orders of the court or by undergoing the penalty imposed by the court.*
>
> *26. Obeying the orders of the court would be a mode by which one can make the purging process in a substantial manner when it is a civil contempt. Even for such a civil contempt the purging process would not be treated as completed merely by the contemnor undergoing the penalty imposed on him unless he has obeyed the order of the court or he has undone the wrong. If that is the position in regard to civil contempt the position regarding criminal contempt must be stronger. Section 2 of the Contempt of Courts Act categorises contempt of court into two categories. The first category is civil contempt which is the willful disobedience of the order of the court including breach of an undertaking given to the court. But criminal contempt includes doing any act whatsoever which tends to scandalise or lowers the authority of any court, or tends to interfere with the due course of a judicial proceeding or interferes with, or obstructs the administration of justice in any other manner.*
>
> *27. We cannot therefore approve the view that merely undergoing the penalty imposed on a contemnor is sufficient to complete the process of purging himself of the contempt, particularly in a case where the contemnor is convicted of criminal contempt. The danger in giving accord to the said view of the learned single Judge in the afore-cited decision is that if a contemnor is sentenced to a fine he can immediately pay it and continue to commit contempt in the same court, and then again pay the fine and persist with his contemptuous conduct. There must be*

something more to be done to get oneself purged of the contempt when it is a case of criminal contempt."

27. Therefore, the apology at this stage cannot be accepted. Apology is an act of contrition. Unless apology is offered in good grace, the apology is shorn of penitence and hence it is liable to be rejected. If the apology is offered at the time when the contemnor finds that the court is going to an act of a cringing coward.

28. Apology is not a weapon of defence to purge the guilty of their offence nor is it intended to operate as universal panacea, but it is intended to be evidence of real contriteness.

29. As was noted by the Hon'ble Supreme Court in L.D. Jaikwal Vs. State of U.P. (1984) 3 SCC 405:

"We are sorry to say we cannot subscribe to the "slap-say sorry-and forget" school of thought in administration of contempt jurisprudence. Saying "sorry" does not make the slapper, poorer, nor does the cheek which has taken the slap smart less upon the said hypocritical word being uttered through those very slaps.

Apology shall not be paper apology and expression of sorrow should come from the heart and not from the pen. For it is one thing to "say" sorry-it is another to "feel" sorry ."

In (T.N. Godavarman Thirumulpad Vs. Ashok Khot &b Another, AIR 2006 SC 2007)."

30. Even otherwise, it is more than settled that an apology for criminal contempt of court must be offered at the earliest since a belated apology hardly shows the "contrition which is the essence of the purging of contempt". Of course, an apology must be offered and that too clearly and at the earliest opportunity. However, even if the apology is not belated but the court finds it to be without real contrition and remorse, and finds that it was merely tendered as a weapon of defence, the Court may refuse to accept it. Even otherwise, the apology is to be accepted as a matter of course and the court is not bound to accept the same.

31. Evidently, in this case, the respondent even after this Court had issued notice, as observed above, relentlessly continued to post the adverse comments not only against the Judicial Magistrate, District Judge, Shimla but even also this Court or rather contemptuous comments on its facebook account. Being a member of the bar it was the duty of the respondent not to demean and disgrace the majesty of justice. There was no occasion for the respondent to have attributed insinuation and cast bald and unsubstantiated allegations against the judges that too right across the board i.e. Judicial Magistrate, District and Sessions Judge,Shimla and this Court. He has remained clearly oblivious to the fact that the judicial process is based on probity, fairness and impartiality which is unimpeachable. Such an act especially by member of Bar who is another cog in the wheel of justice is highly reprehensible and deeply regretted.

32. The trend of targetting and making wild allegations against the Judges would lead to a catastrophe and, therefore, has to be stopped and dealt with an iron fist to curb and control the growing trend of "Judges bashing". This message has to go out and must be loud and clear.

33. In view of the aforesaid discussion, it is clearly evident that the respondent has indulged himself in scandalizing the Court and his act amounts to interference with the due course of judicial proceedings, apart from scandalizing and lowering the dignity of this Court. The charges framed against the respondent stand duly proved. Accordingly, the respondent is convicted under Section 12 of the Contempt of Courts Act.

34. We, now come to the question of sentence. The Hon'ble Supreme Court in a case where a lawyer had hurled a shoe against the Presiding Judge had been sentenced to simple imprisonment of six months and fine of Rs.200/- by this Court, modified the said judgment by awarding one month imprisonment. However, the fine was raised from Rs.200/- to Rs. 1,000/- (Refer: ***R.K.Garg*** *versus* ***State of H.P., ILR 1981 (HP) 94)***.

35. Taking cue from the aforesaid judgment, we sentence the respondent to simple imprisonment for one month and to pay a fine of Rs.10,000/-. In addition thereto, the respondent is directed to purge the contempt by deleting his face book account and at the same time the Registrar General of this Registry is directed to take up the matter with regard to deletion of the face book account of the respondent with the concerned Agency and ensure that the same is deleted by the concerned Agency.

36. Before parting with the case, we must record our appreciation for the valuable assistance rendered by the learned Advocate General, who was asked to assist the Court in this matter.

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

Shri Sandeep Singh & ors. .....Appellants.

Versus

Vandana & another. .....Respondents.

RFA No. 397 of 2006.
Reserved on: 21.8.2018.
Decided on: 24.8.2018.

Limitation Act, 1963- Articles 24, 68, 70 and 71- Misappropriation of Istridhan by in-laws – Suit for compensation – Limitation – Plaintiff alleging misappropriation of Istridhan and other gift items by in-laws – Plaintiff filing suit for compensation and claiming money equivalent of misappropriated articles – Trial Court decreeing suit – Appeal against – High Court found entrustment of articles/gifts with in-laws having been made on 8.5.1994, 12.10.1994 and 13.10.1994 – Suit for compensation was filed on 13.11.2001 – Held, suit for compensation could have been filed within three years of receipt of Istridhan by defendants – Suit barred by limitation – Appeal allowed – Judgment and decree of Addl. District Judge set aside – Suit dismissed.

(Paras- 16 and 21)

For the appellants	Mr. Kapil Dev Sood, Senior Advocate with Mr. Dhananjay Sharma, Advocate.
For the respondents	Mr. G.D. Verma,Senior Advocate, with Mr. B.C. Verma, Advocate, for respondent No. 1.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J.

This appeal is directed against the judgment and decree dated 27.6.2006 passed by learned Additional District Judge, Solan in Civil Suit No. 4-NL/1 of 2001, whereby the suit has been decreed for the recovery of a sum of Rs.5,87,915/- together with cost and future interest @ 6% per annum against the appellants, hereinafter referred to as the defendants.

2. Ms. Vandana, respondent herein, was plaintiff in the trial Court. She filed the suit for recovery of compensation/damages to the tune of Rs.5,87,915/- against the defendants none else but her in-laws on the grounds that all articles/gifts given by her parents and relations at the time of betrothal ceremony followed by marriage including jewelery were with them in the matrimonial home at Ludhiana when after being tortured and turned out therefrom she came to the house of her parents at Nalagarh. She lodged FIR No. 218 of 1997 in Police Station, Division No. 5, Civil Lines, Ludhiana against them under Sections 498-A, 386, 506 and 120-B IPC.

Ultimately, her marriage with appellant-defendant No. 1 was dissolved by a decree of divorce. The gifts/articles given in dowry to her allegedly remained in the matrimonial home at Ludhiana with the defendants.

3. The respondent/plaintiff was married to defendant No. 1 Sandeep Singh on 12.10.1994. Prior to that the ring ceremony (betrothal) had taken place on 8.5.1994. The items as per the list Ext.P1 were given to defendant No. 1 and his parents/relations defendants No. 2 to 5 on that occasion. At the time of her marriage the articles as per list Ext.P2 were given by her parents by way of gift to her. The defendants had taken the same to the matrimonial home at Ludhiana. At the time of her marriage the articles as per the detail in the list Ext.P3 were given in gift by her relatives and friends. The same contained golden jewelery also. All these articles were also taken by defendants to Ludhiana and available with them. On the occasion of Lohri festival, fallen immediately after marriage, the gifts and eatables as per the detail in the list Ext.P4 were given by the parents of the plaintiff to the defendants. Besides, the items as per the details in the list Ext.P5 such as emergency lights, Samsung TV and clothes etc. were also given by the parents of the plaintiff to her and also her minor daughter Tina. All these items in the form of Istri Dhan are stated to be valuing Rs.4,05,739/- as per the detail in Ext.P6.

4. The defendants allegedly hatched the conspiracy to dishonestly retain and misappropriate the articles including jewelery her Istri Dhan and as such started using the same instead of returning to her. They even failed to return these articles on issuance of legal notice Ext.P7 also. According to her these articles were given by her parents and relatives for her own use and as such the defendants had no legal right to use the same. These articles were entrusted to them. Since the same have not been returned to her and rather used by the defendants, therefore, they have breached the trust she and her parents had imposed upon them. She had also filed a complaint under Sections 406, 403 and 120-B of the Indian penal Code. It is in this backdrop, she has claimed the decree for recovery of Rs.4,05,739/- plus the amount of interest i.e. Rs.1,82,176/- total Rs.5,87,915/- together with future interest @15% against the defendants.

5. The defendants when put to notice had contested the suit. In preliminary, they raised the objections that the suit is barred by limitation, bad for misjoinder of parties and multifariousness of causes of action. Also that the articles in the lists Ext.P1 to Ext.P5 do not fall within the ambit of Istri Dhan and as such,the suit is not maintainable.

6. On merits, though marriage of the plaintiff with defendant No. 1 has been admitted and also that the same now stand dissolved by a decree of divorce passed by learned District Judge, Solan. It is, however, denied that at the time of ring ceremony the articles in Ext.P1 were given in gift to the defendants by the parents of the plaintiff. It is also denied that the furniture articles mentioned in list Ext.P2 were given to defendant No. 2 and that the same were taken by her to Ludhiana. Only 30-40 persons joined the barat to Nalagarh. It is, however, denied that the gifts were given to the defendants at the time of marriage as per the list Ext.P3. The ornaments and clothes given to the plaintiff were retained by her and remained through out with her. The ornaments, jewelery and other gifts given to the defendants were also kept by the plaintiff with her and ultimately taken to her parental house at Nalagarh. A statement that she had taken the ornaments with her and that the car and television etc. were also taken by her to Nalagarh was made by the plaintiff during the course of proceedings in the High court. She allegedly concealed such facts from the Court. It is denied that the plaintiff entrusted the ornaments and other articles, her Istri Dhan to the defendants in the presence of Prem Parkash Chadha, Kanta Chadha and Ram Karan her relatives. Her relatives were not known to them and rather introduced by her to them. It is also denied that the articles in Ext.P4 were given by the plaintiff to the defendants. Even if it is believed that the same were given to them by her, she and her parents had committed a cognizable offence as well as liable to be tried under the provisions of Indian penal Code. It is also submitted that under the Dowry Act a list is required to be prepared by the relatives of the bride and bridegroom. However, no such list has been prepared nor signed by the defendants. The lists Ext.P1 to Ext.P5 as such are stated to be

fabricated and forged documents. It is also denied that there was demand for dowry on their behalf and that they had harassed her at that pretext.

7. A daughter is born to the plaintiff and defendant No. 1 out of the wedlock has been admitted and it is submitted that as per the order passed by learned District Judge, Solan defendant No. 1 has been paying Rs.2000/- to her towards maintenance. It has, therefore, been denied that dowry articles worth Rs.4,05,739/- are with the defendants and that they have put the same for their own use and rendered thereby the plaintiff entitled to recover the same together with interest. The suit, as such, has been sought to be dismissed.

8. In replication, the contents of preliminary objections have been denied being wrong and on merits, the claim as set out in the plaint has been reiterated.

9. On the pleadings of the parties, learned trial Court has framed the following issues:

1. Whether the plaintiff is entitled to recover the suit amount by way of compensation alongwith interest and damages on account of illegal retention of Istri Dhan of the plaintiff? OPP
2. Whether the suit is barred by time? OPD
3. Whether the suit is bad for multifariousness? OPD
4. Whether the suit is bad for misjoinder of parties? OPD
5. Whether the suit is not maintainable? OPD
6. Relief.

10. The plaintiff in order to prove her case has herself appeared in the witness box as PW1 and examined her cousin Smt. Kanta Chadha PW2 and Punjab Singh PW3, the proprietor of "Punjab Enterprises" in Palika Bazar, Nalagarh. The reliance has also been placed on the lists of the articles allegedly given to the plaintiff in dowry by her parents and relatives Ext.P1 to Ext.P5 and the market value of such articles worked out in the list Ext.P6.

11. The defendants, however, failed to produce the evidence despite opportunity granted and, as such, vide order dated 7.6.2006 their evidence was ordered to be closed.

12. On the completion of record and hearing learned Counsel representing the parties, learned trial Court while holding that the plaintiff is entitled to recover the suit amount by way of compensation along with interest has decided Issue No. 1 in affirmative. Issues No. 2 to 5 have, however, been answered in negative i.e. against the defendants. Therefore, in view of the findings on issue No. 1 the suit has been decreed, as pointed out at the very outset.

13. The defendants feeling aggrieved and dis-satisfied with the impugned judgment and decree have questioned the legality and validity thereof on the grounds, inter alia, that there was no proof of the articles as per Ext.P1 to Ext.P5 given at the time of ring ceremony and marriage of the plaintiff with defendant No. 1 and that the same brought by the defendants to their house at Ludhiana and that they misappropriated and used the same for themselves. Also that the prices of such articles as indicated by the plaintiff in the list Ext.P6 at her own are hypothetical and without any basis, hence cannot be termed as legal and acceptable evidence. Learned trial Judge allegedly misappropriated and misconstrued such evidence available on record by decreeing the suit. The suit in view of Articles 24, 68, 70 and 71 of the Limitation Act was hopelessly time barred being not filed within three years from the entrustment of the articles of gifts allegedly on 8.5.1994, 12.10.1994 and 13.10.1994. Therefore, the question of limitation raised by the defendants has also not been considered in accordance with law. The evidence of defendants was wrongly closed on 7.6.2006 irrespective of learned trial Court informed that the learned counsel representing the defendants was busy in connection with some family function. Learned Counsel did not inform them to appear in person on that day. Defendant No. 1 was also away to Ujain to appear in some examination, hence was not present at Nalagarh on 7.6.2006, therefore, in the absence of learned counsel and the defendants the evidence has been wrongly

closed. The plaintiff who herself is an Advocate has instituted the suit falsely against the defendants at the behest of her father late Shri Kashmiri Lal, who was also a senior Advocate. The orders passed at the stage of conciliation proceedings heavily weighed with learned trial Court while decreeing the suit. As a matter of fact, the defendants never admitted their liability to pay the suit amount and rather in order to avoid the lengthy legal process they were ready to pay some amount to the plaintiff had she agreed for amicable settlement. Since the negotiation failed, therefore, the zimni orders passed during the course of conciliation tried should have not been relied upon. The submissions made in writing by the defendants have also stated to be not considered. The judgment and decree under challenge has been sought to be quashed.

14. Mr. Kapil Dev Sood, learned Senior Advocate assisted by Mr. Dhananjay Sharma, Advocate has strenuously contended that the present is a case of misreading and misconstruction of the evidence available on record as well as the findings on all the issues recorded by learned trial Court on assumptions and presumptions. On the other hand, Mr. G.D. Verma, learned Senior Advocate assisted by Mr. B.C. Verma, Advocate while supporting the judgment and decree has urged that un-rebutted and un-controverted evidence produced by the plaintiff fully substantiate her claim for the recovery of the suit amount and that learned trial Judge has rightly decreed the suit.

15. At the first instance it is desirable to set at rest the controversy qua the defendants' evidence closed by learned trial Court vide its order dated 7.6.2006. It is seen from the record that the plaintiff had closed her evidence on 12.1.2005. Thereafter the suit was adjourned for recording defendants' evidence to 12.4.2005. They, however, not produced any evidence on that day and to the contrary filed an application under Section 10 CPC with a prayer to stay proceedings in the suit. The said application remained listed on 18.5.2005, 16.8.2005 and 4.10.2005. On 4.10.2005 the suit and application both were adjourned to 9.11.2005 for recording evidence on behalf of the defendants. The evidence was not produced on that day nor on the next dates i.e. 11.1.2006, 5.4.2006 and 12.5.2006. On 12.5.2006 the suit was adjourned by way of last opportunity for recording defendants' evidence to 7.6.2006. However, on that day also the defendants failed to produce the evidence. No prayer for adjournment on the ground that the original counsel was absent on account of some family function and that defendant No. 1 was also away to Ujain to appear in some examination there was made by Shri H.C. Thakur, Advocate, appeared as vice counsel. Learned trial Court, as such, has rightly closed the evidence of the defendants as more than sufficient opportunities were already granted to them for the purpose and on this score they cannot be heard to have any grievance.

16. The decree sought by the plaintiff is for the recovery of Rs.5,87,915/- by way of compensation/damages on account of retention, misappropriation and conversion of her Istri Dhan by the defendants for their own use allegedly in an illegal manner. In view of such relief sought in the plaint for the purpose of limitation, the suit is covered by the provisions contained under articles 24, 68 or at the most Article 70 of the Limitation Act. In a situation where the defendants had received the money from the plaintiff the limitation to recover the same is three years from the date the same was received. In the case in hand as per own case of the plaintiff the money i.e. her Istri Dhan in cash was allegedly received by the defendants on 8.5.1994, 12.10.1994 and 13.10.1994. therefore, the suit should have been filed within three years i,e, on or before 7.5.1997, 11.10.1997 and 12.10.1997. The same, however, has been filed on 13.11.2001. In order to bring the suit within limitation it has been submitted that she asked the defendants many a times to return her Istri Dhan but of no avail and ultimately served them with legal notice Ext.P7 dated 1.10.2001. There is, however, no evidence suggesting that they were served with the notice issued to them. She has neither examined some one from the post office in this regard nor proved that the notices were received undelivered due to the fault attributed to the defendants. Therefore, the date of issuance of the notices cannot be taken as a date for the purpose of limitation nor her solitary statement that she approached the defendants time and again to return her Istri Dhan can be believed as gospel truth. Similarly, the movable property i.e. the articles as per the lists Ext.P1 to Ext.P5 gifted by her parents and relations and entrusted to the defendants could have been recovered by her from the defendants within three

years from such entrustment in terms of articles 68, 69 and 70 of the Limitation Act. However, as noticed hereinabove, since the suit has been filed beyond the period of three years, therefore, barred by limitation. The possibility of the suit having been filed after her divorce with defendant No. 1 to harass the defendants cannot be ruled out. The findings to the contrary recorded by learned trial court without there being any justification and reasons therefor, are not legally sustainable. Therefore, the suit being time barred deserves to be dismissed on this score alone.

17. On merits also, as per own case of the plaintiff the lists Ext.P1 to Ext.P5 allegedly containing the detail of her Istri Dhan have been prepared by her and her cousin PW2 Kanta Chadha at their own. There is no basis of preparation thereof. How and in what manner these lists were prepared by them is not explained. The lists do not contain the signatures of either of the defendants. It is, therefore, one sided affair and the element of entrustment of the so called Istri Dhan (gifts and dowry articles) to the defendants is not at all proved. Otherwise also, under the provisions of Dowry Act the document containing the detail of Istri Dhan is required to be signed not only by the parents of the bride but also that of the bridegroom. In the plaint nothing is there that the Istri Dhan as detailed in Ext.P1 to Ext.P5 was given by the parents of the plaintiff and her relations for her use and benefit. The allegations qua demand of dowry and Rs.5,00,000/- to establish an Industrial unit for defendant No. 1 are also not at all proved on record. Admittedly, the plaintiff qua such demand never lodged any report with any authority. Although as per the case of the defendants she made a statement in the High Court that the car, television and jewelery articles were taken by her when left the matrimonial home, yet they failed to substantiate this aspect of their case because there evidence was closed by an order of the Court. Anyhow, the plaintiff in replication to para-5 of the written statement has herself admitted that the car was not entrusted to the defendants and that the jewelery given by them to her was also with her. Therefore, in view of such admission she having taken away the television also cannot be ruled out. Above all, the clothes, mattresses, bed sheets etc. gifted in marriage may have been used by her when lived in the matrimonial home. The clothes given to her were of no use of the defendants. Even if anything in gift was given by her parents to the defendants at the occasion of ring ceremony or at the time of marriage, they did it at their own as it is not the case of the plaintiff that there was any demand qua the same. It is also unheard of that if anything including sweets given at the occasions like “Lohri” festival in gift to the daughter or the her in laws that too during the subsistence of relations without demand, the same is sought to be recovered by way of filing a suit. Therefore, there being no evidence qua entrustment of the articles as per the detail in Ext.P1 to Ext.P5 to the defendants, the plaintiff is not entitled to the decree sought.

18. If coming to the valuation of the articles allegedly given to her as per the list Ext.P6, the same again is the result of own imagination of the plaintiff being not based on any record such as rate list and bills/cash memos. She has only produced in evidence Ex.P8 the cash memo of Samsung Television and no other evidence is forthcoming to justify the costs of various articles including jewelery she indicated in the list Ext.P6. Therefore, it is also not proved that the valuation of the articles which were given to her as Istri Dhan was Rs.4,05,739/-. The findings to the contrary recorded by learned trial Judge on Issue No. 1 are not legally sustainable.

19. Now if coming to issue No. 3, learned trial Judge has wrongly decided the same against the defendants for the reasons that in the suit the plaintiff has joined several cause of action i.e. dated 5.8.1994 when certain articles were given in gifts to the defendants on the occasion of ring ceremony, 12/13.10.1994 when the marriage was solemnized and ensuing Lohri festive which every year falls on 13th January. Therefore, the suit was bad for multifariousness of causes of action and as such, not maintainable. Issue No. 2, as such, has been wrongly decided against the defendants.

20. However, no fault can be found with the findings recorded on issues No. 4 and 5 nor anything is brought to the notice of this Court as to how the suit was bad for misjoinder of parties and not maintainable. The findings recorded on these issues, therefore, call for no interference.

21. For all the reasons hereinabove, this appeal succeeds and the same is accordingly allowed. Consequently, the impugned judgment and decree is quashed and set aside and the suit dismissed.

22. The application, CMP No. 349 of 2018 is also disposed of.

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

State of Himachal Pradesh .....Appellant.

Versus

Sunil Kumar & another .....Respondents.

Cr. Appeal No. 352 of 2012
Reserved on : 09.08.2018
Decided on: 24.08.2018

Indian Evidence Act, 1872- Section 32- Dying declaration - Proof of – Held, Dying declaration if true and voluntary can be basis of conviction and Court should not look for corroborative material – However, there should be evidence that maker was in fit state of mind at time of making of statement – A declaration made while its maker was unconscious and never in position to make the same, must be outrightly rejected – Prosecution relying upon statement of deceased 'R' that her mother-in-law sprinkled kerosene on her and set her ablaze – Statement said to have been given to District Revenue Officer (DRO) in hospital – However, DRO admitting that deceased was sleeping at that time and was in severe pain – He did not obtain medical opinion whether deceased was in position to make statement nor see such opinion allegedly given by Medical Officer to Police – Oral as well as medical evidence clearly showing that deceased was not in a fit condition to make statement – Further held, such statement cannot be relied upon as dying declaration. (Paras- 9, 10, 19 and 20)

Indian Penal Code, 1860- Sections 302 & 498-A- Murder and dowry harassment – Trial Court tried husband 'S' and mother-in-law 'B' on allegations that 'S' used to harass his wife for dowry, whereas 'B' on date of incident, sprinkled kerosene on 'R' and set her ablaze – Trial Court acquitting both accused – Appeal by State – State arguing wrong appreciation of evidence on part of Trial Court, particularly dying declaration of deceased – On facts, High Court finding dying declaration of deceased as well as alleged harassment on account of dowry demand doubtful – Presence of 'B' in house at time of incident, itself was doubtful – Extensive burns on body of deceased were inconsonance with suicide by burning – Held, evidence was wholly insufficient to prove charges against accused – Appeal dismissed – Judgment of Trial Court upheld.
(Paras-13 to 18)

For the appellant: Mr. Sudhir Bhatnagar and Mr. Vinod Thakur, Additional Advocates General, with Mr. J.S. Guleria and Mr. Bhupinder Thakur, Deputy Advocates General.

For the respondents: Mr. Rajesh Mandhotra, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present appeal is maintained by the State, laying challenge to judgment dated 30.11.2011, passed by learned Additional Sessions Judge (I), Kangra at Dharamshala, District Kangra, H.P., in Sessions Trial No. 3-P/2008, whereby the accused/respondents

(hereinafter referred to as "the accused persons") were acquitted for the commission of the offences punishable under Sections 498A and 302 Indian Penal Code, 1960 (hereinafter referred to as "IPC").

2. The prosecution case, in brief, is that in the year 2005 Rashma Devi (the deceased) was married to accused Sunil Kumar. On usual visits to her parental house, Rashma Devi used to divulge to her parents that accused persons Sunil Kumar, Batlo Devi (mother of accused Sunil Kumar) and Jaishi Ram (father of accused Sunil Kumar) used to maltreat her for bringing insufficient dowry. However, the father of Rashma Devi, Madho Ram (complainant) used to pacify her and sent her back to the house of her in-laws. Two months prior to the incident, Rashma Devi again divulged to her parents qua the maltreatment meted out by the accused persons, so the complainant went to the house of her in-laws and the matter was pacified. On 27.09.2007, at about 05:30 p.m., Rashma Devi set herself ablaze. Thus, the complainant, alongwith other villages went to the house of in-laws of Rashma Devi and saw that she sustained burn injuries. She was immediately shifted to Zonal Hospital, Dharamshala. As per the allegations of the complainant, the accused persons used to maltreat Rashma Devi, thus she was compelled to commit suicide. On the anvil of the allegations made by the complainant, a case was registered and the investigation ensued. During the course of investigation, police took into possession a five liter container, containing some kerosene oil. Police also took into possession burnt pieces of clothes, mud etc. Medico legal certificate of the deceased was obtained and on 27.09.2007 police moved an application before District Revenue Officer, Dharamshala, for recording the statement of Rashma Devi, so Shri K.L. Bhatia, the then District Revenue Officer, recorded her statement. Rashma Devi specifically stated that her mother-in-law (accused Batlu Devi) used to maltreat her, qua which she complained to her parents, so an oral complaint was made to Gram Panchayat, Bagora. She has further stated in her statement that on 26.09.2007, when her husband and father-in-law were not in the house, accused Batlu Devi sprinkled kerosene oil on her and set her ablaze. On 01.10.2007 Rashma Devi succumbed to her burn injuries. Postmortem of the body of the deceased was conducted and it was opined that the deceased died due to ante mortem injuries leading to hypovolemic septic shock. Forensic analysis report qua the samples collected from the spot of incident suggested that there were contents of kerosene oil. After the conclusion of investigation, accused Sunil Kumar found to have committed the offence punishable under Section 498-A IPC and accused Batlo Devi committed the offences under Sections 498-A and 302 IPC. Accordingly, *challan* was presented in the Court.

3. The prosecution, in order to prove its case, examined as many as twenty witnesses. Statements of the accused persons were recorded under Section 313 Cr.P.C. wherein they pleaded not guilty. The accused persons did not lead any evidence in defence.

4. The learned Trial Court, vide impugned judgment dated 30.11.2011, acquitted the accused persons for the commission of the offences punishable under Sections 498-A and 302 IPC, hence the present appeal preferred by the State.

5. The learned Additional Advocate General has argued that the learned Trial Court has wrongly appreciated the facts and law and the judgment is based on surmises and conjectures, thus the same is liable to be set aside. He has further argued that the learned Trial Court did not appreciate the evidence in its right and true perspective and the accused persons were wrongly acquitted. He has argued that the appeal be allowed and the accused persons be convicted. Conversely, the learned counsel, has argued that there is no evidence against the accused persons qua the offences to which they are charged with. He has argued that the learned Trial Court has correctly appreciated the material, which has come on record, and the judgment, as rendered by the learned Trail Court, is after appreciating the facts and law to their right and true perspective. The judgment of acquittal needs no interference and the appeal be dismissed.

6. In rebuttal, the learned Additional Advocate General has argued that after re-appreciating the evidence, the accused persons be convicted by setting aside the judgment of the

learned Trial Court, as the prosecution has proved the guilt of the accused persons.

7. In order to appreciate the rival contentions of the parties we have gone through the record carefully.

8. Admittedly, on the anvil of dying declaration, Ex. PW-5/A, made by the deceased in Dharamshala Hospital, on 27.09.2007, in presence of Shri Kishoori Lal Bhatia (PW-5) Officiating District Revenue Officer, the police proceeded against the accused persons. In fact, the edifice of the prosecution case solely depends upon the dying declaration made by the deceased. Thus we deem it necessary to deal with it at the very outset. In the dying declaration the deceased stated that after her marriage the accused persons started harassing her mentally as well as physically. She reported the matter to the panchayat, however, nothing happened. On 26.09.2007, at about 02:30 p.m., when her husband and father-in-law were not in the home, her mother-in-law picked up quarrel with her and sprinkled kerosene oil on her and set her ablaze.

9. In umpteen cases the Courts have settled guiding principles qua dealing with dying declarations and we also deem it apt to enumerate the same hereunder:

(i) Dying declaration, if in the opinion of the Court, is true and voluntary, then conviction solely can be based on the same and not necessarily Courts should look for surrounding corroborative material, however, if the dying declaration seems to be suspicious, then Court must look for the corroborative material;

(ii) In dealing with dying declaration, the Court must ensure that the same is not an outcome of tutoring, prompting or imagination. The maker should be in fit state of mind, so as to clearly identify the assailants;

(iii) A declaration made while its maker was unconscious and never in a position to make the same, must be outrightly rejected;

(iv) Courts should not insist upon the minor and trivial details, as the same cannot be expected from a person who is lying on death bed. Brevity of the statement in itself is guarantee of its being true and lack of minor and trivial details should not be made basis for its rejection;

(v) Variance in dying declaration and prosecution story would entail fatal consequences to the prosecution case; &

(vi) The Court must also look for the medical evidence to ascertain whether the maker of the statement was in fit state of mind, however, where the eye witness to the statement testifies the fact that maker of the statement was in fit state of mind when the statement was recorded, then medical evidence can be given a go by.

10. Now, it is apt to examine the medical evidence, which has come on record. PW-10, Dr. Atul Gupta, the then Registrar, R.P.G.M.C. Tanda, deposed that on 26.09.2007 application, Ex. PW-9/A, was moved by the police for medical examination of the deceased, who was admitted in the Hospital and sustained burn injuries. He has categorically deposed that he opined that the deceased was not fit to make any statement. This witness had observed as under:

> *"The history was given that she has been burnt by sprinkling kerosene oil on her and the patient was conscious. But in pain. No clothes were present on her body. Black coloured slot present on the body. The skin was burnt. First and second degree burn was present on all over the body. Singing of hairs present on the head and eyebrows. About 90% burns were present on the body. Patient was in pains but was responding to command. The patient was administered treatment and was admitted in burn unit for further management and treatment."*

He has further deposed that final opinion was to be given after surgical consultation, however, the same could not be given as the patient died later on. This witness signed medico legal

certificate qua the deceased, which is Ex. PW-11/A. He, in his cross-examination, has admitted that the deceased was not fit to make the statement. He has further admitted that due to 90% burns, the mental faculty of the patient also gets affected.

11. PW-19, Dr. Jagdeep Singh, Medical Officer, the then Senior Resident Registrar, Department of Surgery in R.P.G.M.C., Dharamshala, deposed that on 01.10.2007, vide intimation, Ex. PW-19/A, he informed the police qua the death of the deceased. He has also issued death certificate, Ex. PW-19/B.

12. PW-20, Dr. Sharad Gupta, the then Senior Resident Registrar, Government Medical College and Hospital, Dharamshala, deposed that on 27.09.2007 police moved application, Ex. PW-10/A, for obtaining his opinion whether the deceased was fit to make a statement or not. His opinion in this regard is Ex. PW-18/A. This witness, in his cross-examination, deposed that the deceased had suffered 90% burn injuries. As per the deposition of this witness, condition of the deceased at 12 noon may not be same as on 10 a.m. He admitted that in case the lips are burnt, the patient will face difficulty in speaking. Brain gets affected in case someone suffers injury on vital part of the body. In case of 90% burn injuries, brain can be affected slowly and plasma and blood gets effected too. He has denied that he without examining the patient declared her fit to help the police.

13. Statement of PW-17, Dr. Vivek Sood, the then Medical Officer, C.H.C. Jawalamukhi, is very important. On 02.10.2007, this witness conducted the post mortem examination of the deceased and observed as under:

> "History of the patient was given that she had sustained burn injury on 26.09.2007 due to kerosene oil which was allegedly sprinkled by her mother-in-law, Batlo Devi. First the patient was taken to Palampur Hospital, thereafter Dharamshala and she expired on 01.10.2007.
>
> There were anti mortem wounds:
>
> A well developed female 5 feet 3 inches was lying on postmortem table rigor-mortis was developed all over the body. The body was cooled to room temperature externally. No ligature mark was seen over the body, whole of face, neck, chest, abdomen, both fore arms and arms, excluding both hands both legs, lower legs and feet were burnt, excluding right foot on anterior surface. On posterior surface whole of the body was burnt, except posterior surface of both hands and both feet. Very section had been performed on medical side of ankle joint on both right and left side. The injury was superficial to deep with Derma epidermal burns.
>
> Cranium and spinal cord:
>
> Burns, as already described, pleurae congested. Larynx and trachea contains soot and also congested. Both lungs congested and contain soot.
>
> Abdomen:
>
> Burn, as already described, periponeum NAD. Mouth larynx and esophagus contain soot, rest NAD stomach was empty nucosa injected. There was curling ulcer on anterior and post wall of stomach. Small intestine and their contents NAD. Liver, spleen kidney and bladder were congested. Organs of gestation NAD.

PW-17, in his final opinion, opined that the deceased had died due to ante mortem burns leading to hypovolmic and septic shock. There was no need to preserve the viscera, as the cause of death was clear and there was no symptom and history of poison. Probable time elapsed between injury and death was 6 days, as per her history, and between death and postmortem was more than 12 to less than 24 hours. PW-17, after conducting postmortem, issued PMR, Ex. PW-17/A. He then handed over the record to the police. This witness, in his cross-examination, has

admitted that the injuries sustained by the deceased are possible in case of attempt to suicide. He has further admitted that in case of homicidal attempt, the effected person tries to save himself by making struggle and in case of attempt to suicide by burning, the effected person does not make any attempt to save himself or herself.

14. After discussing medical evidence in depth, it is important to scrutinize other evidence as well. In the case in hand the testimony of PW-1, Madho Ram (father of the deceased) is very important. This witness deposed that after the marriage, the deceased was maltreated by the accused persons for bringing insufficient dowry. He has further deposed that the deceased used to tell him qua the maltreatment meted out by the accused persons, but he did not report the matter to any authority. As per this witness, prior to the occurrence, the deceased visited his house and told that the accused persons gave beatings to her, however, he made her understand and sent her back to the in-laws' house. He received a telephonic message that the deceased has been burnt. When he, alongwith others, went to the house of the accused persons, saw his daughter (the deceased) in the lower storey in a room in burnt and naked condition. He shifted the deceased to the hospital and his statement, Ex. PW-1/A, was recorded by the police. As per the deposition of this witness, on the subsequent day the deceased gained senses and made a statement, wherein she stated that accused Batlo Devi poured kerosene oil on her and set her ablaze. On 01.10.2007 his daughter died in the hospital. This witness, in his cross-examination, has deposed at the time of marriage the accused persons did not demand anything from them. He could not specifically depose that on which date, month and year the accused persons demanded dowry from him. This witness was confronted with his statement, Ex. PW-1/A, where he did not state qua the demand of dowry raised by the accused persons. He denied the suggestion that when he brought the deceased to the hospital, she did not tell him anything about the incident, but he has not deposed as to what was disclosed by her to him and why the same had not been got reduced to writing by him in the FIR. He denied that the deceased neither told anything to the police on the first day of her admission in the hospital, nor she gave any statement to the officer on the next day.

15. Another important witness is PW-2, Jamna Devi (mother of the deceased). This witness supported the version of PW-1. She deposed that on her asking the deceased told her that accused Batlo Devi sprinkled kerosene oil on her and set her ablaze. Thereafter, accused Batlo Devi fled away from the spot. This witness, in her cross-examination, deposed that condition of her daughter remained as such till her death. She has specifically deposed that after the marriage of the deceased, the accused persons did not raise any demand from her. However, they used to demand from the deceased. She has further deposed that the deceased had not demanded anything from her by saying that the same was being demanded by the accused.

16. PW-3, Bramu Ram, was associated in the investigation by the police. However, his version, given in his cross-examination, is very material. He has deposed that on the day of occurrence he alongwith accused Batlo Devi went to forest to graze goats and sheep and they were called by the children in the evening time. As per this witness, when they were called by the children, only then they came to know about the incident. He has further deposed that by the time accused Batlo Devi reached the house, many persons, including father of the deceased, had already reached there.

17. PW-4, Indira Devi (aunt of the deceased), deposed that after the marriage of the deceased, accused persons used to harass and beat the deceased. The deceased used to divulge these facts to her during her visits to her parents' house. However, she did not report to the police qua the maltreatment being given to the deceased. This witness, in her cross-examination, deposed that she did not disclose earlier to the police that the deceased had burnt herself and that she was burnt by her mother-in-law by sprinkling kerosene oil on her and she made such statement for the first time in the Court.

18. PW-6, Dakho Devi (another aunt of the deceased), in her testimony tried to support the prosecution case. She deposed that she had been told by the deceased that she was set ablaze by her mother-in-law (accused Batlo Devi). She has also deposed like PW-4 that she is

narrating the facts first time in the Court.

19. The prosecution case, as already held, mainly rests upon the dying declaration allegedly made by the deceased. The dying declaration of the deceased was allegedly recorded by PW-5, Kishori Lal Bhatia, the then District Revenue Officer, Dharamshala. As per the version of this witness, on 27.09.2007 he was requested to record the statement of the deceased. He deposed that on reaching hospital he had enquired from the police whether the patient was able to give statement and the police told that as per the declaration obtained from the doctor, the patient was fit to make the statement. Subsequently, he recorded the statement of the deceased and whatever she told to him, he dictated to his official. The statement is Ex. PW-5/A and after recording the statement the same was read over to the patient and she admitted it to be correct. The patient affixed her thumb impression on the statement and he appended his certificate, Ex. PW-5/B. This witness, in his cross-examination, has deposed that during his stay in the hospital, he did not call any doctor. When he visited the hospital the patient was sleeping and she was suffering from severe pain. The condition of the patient was very bad due to burning. As the condition of the patient was not good, so it took considerable time to record her statement. As per this witness, opinion obtained by the police was not shown to him by the police.

20. The other prosecution witnesses are official witnesses and their version is not so material. However, we deem it fit to throw light on one important aspect. PW-9, HC Vinod Kumar, categorically deposed that the doctor had given his opinion that the patient (the deceased) was not fit to give statement. This opinion is within circle 'A' in application, Ex. PW-9/A, moved for obtaining opinion of the doctor whether the patient is fit to give her statement or not. In contrast to what has been deposed by PW-9, HC Vinod Kumar, PW-10, ASI Narotam Chand, deposed that the doctor declared the patient to be fit to give statement and opinion in this regard is encircled in circle 'A'.

21. After exhaustively discussing the prosecution evidence, which mainly revolves around dying declaration, Ex. PW-5/A, so made by the deceased and also the settled principles qua dealing with the dying declaration, in a nut shell, as per the prosecution, accused Batlo Devi was present in the room and she sprinkled kerosene oil on the deceased, whereas, defence of accused Batlo Devi is that she, at the time of the incident, was not in the house and was in jungle in order graze her goats and sheep. Admittedly, there is no direct evidence qua the fact that accused Batlo Devi was present in the room at the time of occurrence and she sprinkled kerosene oil on the deceased. It has come in the prosecution evidence that one Urmila Devi came to the house of the deceased, but strangely she was not examined by the prosecution. PW-3, Brahmu Ram, categorically deposed in his cross-examination that accused Batlo Devi alongwith him was grazing goats and sheep and they were called by children only then they came to know about the incident. Certainly, this prosecution witness created a fatal dent to the prosecution case, however, she was not re-examined by the prosecution. PW-3 by stating new facts created a doubt qua the veracity of the prosecution case. During the course of investigation, Investigating Officer did not question PW-3 about these facts. Thus, the presence of the accused Batlo Devi in the house at the time of occurrence is doubtful.

22. PW-1, Madho Ram (father of the deceased) has also deviated from his version made in statement recorded under Section 154 Cr.P.C. This witness stated in his statement recorded under Section 154 Cr.P.C. that the deceased was maltreated for bringing insufficient dowry, so she was killed by accused Batlo Devi. However, when he deposed in the Court, in his cross-examination, he deposed that no demand of dowry had been made by the accused at the time of the marriage. He has further deposed that the deceased used to visit their house and narrate about the maltreatment being given to her by the accused persons. However, he did not report the matter to the police or to the panchayat. PW-2, Jamuna Devi (mother of the deceased), specifically denied the suggestion that her daughter was not maltreated on account of insufficient dowry. However, she admitted the suggestion that the accused after the marriage did not demand anything from her. Dowry was demanded from her daughter and she never told about the demand of dowry from the accused persons. Now, it is surprising that how the parents of the

deceased came to know about the demand of dowry by the accused persons, when they specifically say that the accused did not make any demand of dowry. PW-4, Indira and PW-6, Dakho Devi, aunts of the deceased, in their cross-examinations, deposed that they did not tell to the police that the deceased had told them that the accused used to demand dowry. These witnesses, depose that they are making such statement that the accused persons used to demand dowry for the first time in the Court. Thus, the testimonies of these witnesses also shakes the basis of the prosecution case. Certainly, if there had been relentless demand of dowry by the accused persons, the deceased or her parents could have easily reported the matter to the police or to the panchayat. However, there is nothing on record which could remotely establish the same. The prosecution has not examined any person from the village so as to prove that there had been demands of dowry by the accused persons.

23. In view of what has been discussed hereinabove and on the basis of material, which has come on record, it is more than safe to hold that the prosecution has miserably failed to prove the guilt of accused persons beyond reasonable doubt and the findings of acquittal, as recorded by the learned Trial Court, need no interference, as the same are the result of appreciating the facts and law correctly and to their true perspective. Accordingly, the appeal, which sans merits, deserves dismissal and is dismissed.

24. In view of the above, the appeal, so also pending application(s), if any, stand(s) disposed of.

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

Vijay Kumar Sood & another ...Petitioners.
Versus
Amrik Ahuja & others ...Respondents.

CMPMO No.125 of 2018
Reserved on: 10.8.2018
Date of Decision : August 24, 2018

Constitution of India, 1950- Article 227- Supervisory Jurisdiction of High Court – Extent - Directions for expeditious disposal of case - Whether can be given? – Petitioners who were senior citizens seeking directions of High Court to Rent Controller for expeditious disposal of Rent Suit filed by them – Petitioners claiming that tenants were intentionally delaying matter – Respondents objecting to petition on ground of maintainability - Held, while exercising supervisory jurisdiction, High Court not only acts as a Court of law but also as a Court of equity – It is therefore the power and also the duty of the Court to ensure that Cases of Senior Citizens are to be taken up on priority basis and dealt with promptitude - Power of Superintendence must advance ends of justice and uproot injustice – On finding that Rent Controller had conducted proceedings in very casual manner resulting into gross failure of justice and trial had not commenced for four years, High Court directed Rent Controller to dispose of eviction suit within one year.

(Paras- 6 to 11 & 17, 20 and 21)

Cases referred:

Radhey Shyam & another v. Chhabi Nath & others, (2015) 5 SCC 423
Khimji Vidhu v. Premier High School, (1999) 9 SCC 264
Sharma Sweet House Charna & others v. State Bank of India, 2017(3) Shim.LC 1299;
Krishan Lal @ Krishnu Ram v. Sukh Ram & others, Latest HLJ 2005 (HP) 331
Ramesh Chandra Sankla & others v. Vikram Cement & others, (2008) 14 SCC 58
Krishankant Tamrakar v. The State of Madhya Pradesh, 2018 (5) Scale 248
Hari Vishnu Kamath v. Ahmad Ishaque, AIR 1955 SC 233

For the Petitioners	:	Mr. Ajay Kumar, Senior Advocate, with Mr. Dheeraj K. Vashisht, Advocate.
For the Respondents	:	Mr. G.C. Gupta, Senior Advocate, with Ms Meera Devi, Advocate, for respondent No.1. Respondents No.2 & 3 ex-parte.

The following judgment of the Court was delivered:

Sanjay Karol, Acting Chief Justice

In this petition, filed under Article 227 of the Constitution of India, landlords (petitioners herein) seek a direction to the Rent Controller to expeditiously decide Rent Petition No.42-2 of 2012, titled as *Vijay Kumar v. Sant Singh & others*, filed in the year 2012.

2. The grounds are twofold – (a) landlords Shri Vijay Kumar and Shri Rajinder Kumar, aged 79 and 76 years, respectively, are senior citizens, and (b) there is deliberate attempt on the part of the tenants (respondents herein) to delay the proceedings.

3. Having perused the record, so made available, this Court is of the considered view that there is yet third ground, which this Court finds to be shocking and that being, the casual manner with which the Court below conducted the proceedings, further contributing to delay of trial.

4. Certain facts are not in dispute.

5. The landlords have filed a petition for ejectment of the tenants. The same was filed on 12.9.2012 and summons issued the very same day. After service, pleadings were completed and issues struck on 28.3.2013. Whereafter, from 7.6.2013 till 30.11.2017, the tenants have filed several applications, under the provisions of Order 22 Rule 4 of CPC (three) and under Order 6 Rule 17 CPC (two).

6. Record reveals that the first application for amendment was filed on 7.6.2013, which though was disposed of on 16.8.2013, yet the Court did not take notice of such fact and continued to adjourn the matter for deciding the said application, which fault the Court itself noticed on 15.1.2015, as is so evident from the record of proceedings of trial Court.

7. The second application for amendment was filed on 28.8.2017, which is yet pending consideration.

8. Third application, under order 22 Rule 4 CPC, was filed on 16.7.2013 and allowed on 30.8.2014. Shockingly, as is evident form order sheets dated 21.7.2014, 5.8.2014, 7.8.2014, 11.8.2014, 14.8.2014, 16.8.2014, 20.8.2014, 28.8.2014 and 29.8.2014, even though arguments on the application were heard on 21.7.2014, yet the order was not prepared and matter adjourned repeatedly. In crux, it took one year to decide the said application.

9. Fourth application, under the provisions of Order 22 Rule 4(2) CPC was filed on 27.7.2015 and disposed of on 2.12.2016, and the fifth application, under the provisions of Order 22 Rule 4(3) CPC, which stands filed recently, is pending consideration.

10. This Court, at the outset, does not want to go into the issue as to whether delay caused can be attributed to the tenants or not, but the point to be considered is that the Court below allowed the trial to be delayed by not promptly passing orders and dealing with the tenants firmly. Of course, landlord also is to prove its case.

11. This Court, need not be misunderstood to have commented on the orders passed by the Court below, in allowing the applications, but then it ought to have noticed that for four years, trial had not proceeded, in fact was stopped, and the reason for delay, cannot be attributed to the landlords. Cases of Senior Citizens are to be taken up on priority basis and dealt with promptitude.

12. A dishonest litigant, be it a landlord or a tenant may have interest in delaying the proceedings or dragging the opposite party in a frivolous litigation, which may be false or motivated, but then, it is the duty of the court to ensure expeditious disposal of cases, more so that of dispute between the landlord and tenant, which, in any event, has to be decided expeditiously.

13. With vehemence, Mr. G.C. Gupta, learned Senior Counsel, opposes the petition, on the ground of maintainability, contending that no such petition under Article 227 can be filed, praying for expeditious disposal. In support, he refers to and relies upon the decisions rendered in *Radhey Shyam & another v. Chhabi Nath & others,* (2015) 5 SCC 423; *Khimji Vidhu v. Premier High School,* (1999) 9 SCC 264; *Sharma Sweet House Charna & others v. State Bank of India,* 2017(3) Shim.LC 1299; and *Krishan Lal @ Krishnu Ram v. Sukh Ram & others,* Latest HLJ 2005 (HP) 331.

14. The Apex Court in *Radhey Shyam (supra)* clarified the scope and object of distinction between Articles 226, 227 of the Constitution of India, and Section 115 CPC. It laid down challenge to judicial orders would lie by way of a statutory appeal or revision and not by way of a Writ under Article 32 or 226 of the Constitution of India.

15. In *Sharma Sweet House Charna (supra)*, the Court observed as under:

> "22. From the aforesaid conspectuous of law, it can conveniently be held that the supervisory jurisdiction under Article 227 of the Constitution of India is exercised for keeping the Subordinate Courts within the bound of the jurisdiction. When a Subordinate Court has assumed a jurisdiction which it does not have or has failed to exercise jurisdiction which it does have or jurisdiction though available is exercised by the Court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby the High Court may step into exercise its supervisory jurisdiction. The supervisory jurisdiction is not available to correct mere errors of fact or law unless the following requirement is satisfied:-
>
> (i) The error is manifest and apparent on the face of the proceedings such as when it is based on ignorance or utter disregard to the provisions of law, and to grave injustice or gross failure of justice has occasioned thereby.
>
> (ii) The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscious of the High Court dictates which too act lest gross failure of justice or grave injustice has occasioned."

16. Decision in *Krishan Lal (supra)* does not help the tenant in any manner, in view of observations made by the Court to the effect that:

> "12. This Court is alive to the situation that every error, illegality or otherwise, is not to be corrected while exercising powers under Article 227 of the Constitution of India. At the same time, Court will be failing in its duty when in a given situation it does not exercise its authority under this Article, with a view to keep the Courts subordinate to the High Court within the bounds of its limits. This is a fit case for exercise of such powers on the facts which are peculiar to this case."

17. The Apex Court in *Ramesh Chandra Sankla & others v. Vikram Cement & others,* (2008) 14 SCC 58, held that power of superintendence under Article 227 of the Constitution, conferred on every High Court, covers all courts and tribunals throughout the territories in relation to which it exercises jurisdiction and is very wide and discretionary in nature. It can be exercised *ex debito justitiae* i.e. to meet the ends of justice. It is equitable in nature. While

exercising supervisory jurisdiction, a High Court not only acts as a court of law but also as a court of equity. It is, therefore, the power and also the duty of the Court to ensure that power of superintendence must advance the ends of justice and uproot injustice. The Court further held that:

> "92. In *Roshan Deen v. Preeti Lal*, (2002) 1 SCC 100, dealing with an order passed by the High Court setting aside an order of Commissioner for Workmen's Compensation, this Court stated:
>
> > "12. ....Time and again this Court has reminded that the power conferred on the High Court under Article 226 and 227 of the Constitution is to advance justice and not to thwart it. (vide *State of U>P> v. District Judge, Unnao,* (1984) 2 SCC 673). The very purpose of such constitutional powers being conferred on the High Courts is that no man should be subjected to injustice by violating the law. The look out of the High Court is, therefore, not merely to pick out any error of law through an academic angle but to see whether injustice has resulted on account of any erroneous interpretation of law. *If justice became the byproduct of an erroneous view of law the High Court is not expected to erase such justice in the name of correcting the error of law."*(emphasis supplied)"
>
> "98. From the above cases, it clearly transpires that powers under Articles 226 and 227 are discretionary and equitable and are required to be exercised in the larger interest of justice. While granting relief in favour of the applicant, the Court must take into account balancing interests and equities. It can mould relief considering the facts of the case. It can pass an appropriate order which justice may demand and equities may project. As observed by this Court in *Shiv Shankar Dal Mills v. State of Haryana*, (1980) 2 SCC 437, Courts of equity should go much further both to give and refuse relief in furtherance of public interest. Granting or withholding of relief may properly be dependent upon considerations of justice, equity and good conscience."

18. Though in a different context, the Apex Court in *Krishankant Tamrakar v. The State of Madhya Pradesh,* 2018 (5) Scale 248, highlighted the significance, importance and need for expeditious disposal of cases, holding access to speedy justice, as a part of fundamental right under Articles 14 & 21 of the Constitution of India.

19. A Constitution Bench (7-Judges) of the Apex Court in *Hari Vishnu Kamath v. Ahmad Ishaque,* AIR 1955 SC 233, drew the distinction and relative scope of Articles 226 and 227 of the Constitution of India, holding that in a Writ of Certiorari, under Article 226, the High Court can only annul the decision, but however, under Article 227, not only it was entitled to do the same but also issue further directions.

20. In the instant case, as already noticed, error committed is manifest on the face of record, resulting into gross failure of justice and it is one of such cases where this court must intervene and issue directions.

21. Under these circumstances, the petition is allowed, in the following terms:

(a) Trial of Rent Petition No.42-2 of 2012, titled as *Vijay Kumar v. Sant Singh & others,* is expedited. The Rent Controller must decide the petition, filed in the year 2012, positively, within a period of one year from today.

(b) The Rent Controller shall deal with the case on priority basis.

(c) The parties shall not seek unnecessary adjournment(s). In fact, they shall fully cooperate.

(d) Save and except for official witnesses or such of those witnesses, who are beyond their power, parties shall produce their evidence at their own responsibility.

(e) Any application filed by either of the parties shall be decided at the earliest, considering the age of the parties and the petition.

Petition stand disposed of, so also pending application(s), if any.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, ACJ AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Dr. Amar Singh Sankhyan ..Petitioner

Versus

State of Himachal Pradesh and others ..Respondents

CWP No. 10772 of 2012

Date of decision: 27th August, 2018

Constitution of India, 1950- Article 226- Public Interest Litigation – Petitioner alleging unauthorized construction over land shown as 'Green Area' in Development Plan by HIMUDA in New Shimla – Also seeking directions regarding plantation of trees on road side, which were removed by HIMUDA, while raising unauthorized construction as well as removal of other encroachments – Petitioner also praying for removal of dumper-stand and public toilet constructed unauthorizidely – In view of allegations High Court constituted a High Level Committee headed by Principal Secretary (Town & Country Planning), H.P. for examining issues involved and to make recommendations for appropriate action – Petition disposed of. (Para-12)

For the Petitioner : In person with Mr. T.S. Chauhan, Advocate.

For Respondents Mr. Ashok Sharma, Advocate General, with Mr. Adarsh K. Sharma, Additional Advocate General, for the State.
Mr. Rajesh Sharma, ASGI, for respondent No.1.
Mr. Bhupender Gupta, Senior Advocate, with
Ms. Poonam Gehlot, counsel for respondent No. 4.
Mr. Naresh Gupta, counsel for respondents No. 5 and 7.
Mr. Sanjeev Bhushan, Senior Advocate, with Mr. Rakesh Chauhan, counsel for respondent No. 9.

The following judgment of the Court was delivered:

Sanjay Karol, Acting Chief Justice *(oral)*

Petitioner has prayed for the following reliefs :-

"1. That respondent No. 1, respondent No. 3, respondent No. 4, respondent No.5, respondent No. 6 and respondent No. 7 may be restrained from raising any construction over the Green Land in front of House No. B-4, Lane-1, Sector-2,New Shimla.

2. That the respondents may be further restrained from allowing any type of construction over the Green Land in violation of the Development Plan and the Sector Plan in New Shimla, including Green Land shown in Annexure P-6 which has been approved by respondent No.1 and respondent No.3 under Section 88(2) (b) read with Section 60 of the Act.

3. That respondent No. 5 may be directed to remove the illegal structures of public toilet and rain shelter and restore the iron fencing between the road and the green area.

4. That respondent No. 5 may be directed to plant the three trees on the road side which it removed to construct rain shelter, dumper stand and the public toilet. It may further be directed to restore the plants, vegetation and eco system which the respondent No. 5 destroyed while laying down the foundation of the public toilet on the green area in front of the house of petitioner No.1.

5. That respondent No. 5 be restrained from dumping garbage in front of petitioner's house on the public road and may be directed to take necessary legal action against the unauthorized shopkeeper for dumping the garbage on the road in front of the house.

6. That respondent No. 4 may be directed to report to the Hon'ble Court the names of all the persons/departments that have made encroachments on the park, parking and green area and to remove the encroachment on the same. The Hon'ble Court may consider appropriate action against the encroachers.

7. That respondent No. 5 mayh be directed to vacate its encroachment on the park adjacent to B-5, Lane-I, Sector-2 and respondent No. 4 may be directed to complete the development of the park in accordance with the Development Plan and the Sector Plan for which the allottees have been charged.

8. That respondents may be restrained from changing the land use of the green area, park parking, community centre and guest house and restore the land use of the same as approved in the original Development Plan of respondent No. 4.

9. That respondent No. 4 may be directed to disclose to the Hon'ble Court the specific area, lane and sector-wise information depicting the specific location of the park, parking and the green area in the original Developent Plan and the Sector Plan approved by respondent No. 3 and respondent No. 4.

10. That respondent No. 4 may be directed to disclose to the Hon'ble Court as to why land use was changed illegally and the land earmarked for the park, parking and the green area used for other purposes. Also, the same may be asked to reveal the identities of the beneficiaries thereof.

11. That respondent No. 1, respondent No.3, respondent No.4, respondent No.5, respondent No. 6 may be directed to restore the guest house and community centre as approved by respondent No. 4 in the original Development Plan for the use of allottees.

12. Hon'ble Court may quash the fraudulent illegal transactions of reselling the parking, green area, open areas and parts of community centre and enquiry may be ordered against the erring public servants responsible for the same.

13. That an inquiry be ordered against the erring officials so as to hold responsible those who have engaged in the diversion of the funds allocated by respondent No. 2 to respondent No.5 and respondent No. 6 for the construction of public conveniences at four places under the integrated development of "Shimla-Theog-Narkanda Tourist Circuit" on NH-22."

2. Annexure P-6 is the information obtained by the writ petitioner under the Right to Information Act.

3. It is a matter of record that on 24th December, 2012, when notice was issued in the petition, petitioner's prayer for interim relief was rejected, clarifying that construction raised, if any, shall be subject to the outcome of the writ petition.

4. On 15th January, 2013, respondents were restrained from raising any construction over the green area in New Shimla. Thereafter, matter came up for consideration on several dates and on 6th March, 2018, this Court issued certain directions, which are reproduced as under:-

> "(a) The Chief Secretary, Government of Himachal Pradesh is directed to forthwith convene meeting of all the stake-holders engaged in the development of the area and ensure that before the next date of hearing, the interim/final development plan is made available in the Court for inspection by the parties.
>
> (b) No construction activity shall be allowed to be carried out in the New Shimla area, save and except, in accordance with law. The Commissioner, M.C. Shimla and the Deputy Commissioner, Shimla shall ensure compliance of the same.
>
> (c) We clarify that ongoing constructions shall be strictly in accordance with the plans duly sanctioned by the authorities concerned.
>
> (d) No construction of any nature shall be carried out by the Municipal Corporation, Shimla over the vacant/green/common area, without leave of the Court. The Commissioner, Municipal Corporation, Shimla shall file his personal affidavit disclosing the construction carried out by the Corporation and the status and stage thereof.
>
> (e) The Commissioner, Municipal Corporation, Shimla and the Deputy Commissioner, Shimla shall carry out an inspection drive and have all the premises of New Shimla colony inspected for ascertaining as to whether any illegal or un-authorized activity of construction or user is being carried out or not. If it is found that any of the premises allotted and meant to be used for residential purposes is used for any other purposes, such illegal activity shall be ordered to be closed forthwith.
>
> (f) The inspection shall also be carried out for ascertaining as to whether construction raised is as per the sanctioned plan and within the permissible deviations allowed as per the Municipal Regulations/Law/Byelaws. Construction, raised in excess of the permissible limit, shall be ordered to be demolished forthwith, in accordance with law. In any event, water and electricity supply to such unauthorized premises shall be disconnected."

5. We notice that as a consequence of such directions, respondents did take certain, but limited, action, compelling certain residents seek clarification of order passed by this Court, which was so done.

6. On 1st May, 2018, we had also directed the Residents Welfare Society (Registered), New Shimla-respondent No. 7 to install CCTV Camera. Same day, deliberations also took place with the Director, Town and Country Planning, ensuring implementation of provisions of law as also finding solutions for the problems faced by the residents.

7. We notice that the learned Advocate General had also assured that appropriate police protection would be provided to the writ petitioner at all times.

8. Today, when the matter was taken up for hearing, learned Advocate General clarifies that police protection shall continue to be provided to the writ petitioner, subject to, of course, assessment of threat perception and cost born by the applicant.

9. At this stage, petitioner clarifies that only when he had invited attention of this Court to the threat perception, based on documents so submitted, which are on record, necessary orders were passed.

10. Be that as it may, at this stage, we clarify that the writ petitioner has to independently approach the authorities, seeking police protection based on the threat perception. Accounting for the statement made by the learned Advocate General, we are sure that decision thereupon, shall be taken, in accordance with law, with utmost speed. In fact, we direct the Superintendent of Police, Shimla for taking prompt action on such request, in accordance with law.

11. Further, the learned Advocate General states that the issue, subject matter of present writ petition, can best be resolved by the State, for which purpose a three member Committee, headed by not less than the Principal Secretary (Town & Country Planning) shall be constituted for examining all the issues and taking action, in accordance with law. He states that under all circumstances Rule of Law must prevail. But then, this court may be precluded from passing orders, more so in the absence of cogent and reliable material.

12. Having heard learned counsel for the parties, we are inclined to agree with the suggestions made by the learned Advocate General. As such, we dispose of the present petition in the following terms:-

a) The State shall constitute a Committee of at least five persons, headed by the Principal Secretary (Town & Country Planning) to the Government of Himachal Pradesh for examining the issue and make recommendations for taking appropriate action for strict enforcement of provisions of law.

b) Two of the members of such Committee shall be from (i) the Residents Welfare Society, duly registered in accordance with law, and (ii) the civil society. The Chief Secretary, Government of Himachal Pradesh, shall nominate such persons within one week.

c) The said Committee shall examine all the issues, subject matter of the present lis, and positively take a decision within a period of three months from today. It shall also be filed in the Registry of this Court.

d) The recommendation shall be made after affording opportunity of hearing to all, more so the residents of the area and also taking note of issues raised by them.

e) The recommendations made shall be implemented with promptitude and in accordance with law by the State and the Municipal Authorities.

f) The Committee shall also prepare an action taken report of implementation of its recommendation and place the same before the State for necessary action, if any.

g) It shall be open for anyone of the residents/ members of the civil society to take recourse to such remedies, as are otherwise available in accordance with law, assailing anyone of the decisions taken by the Committee or implementation thereof.

h) Learned Advocate General and Mr. Naresh K. Gupta, Advocate, state that all developmental activities in the area (commonly termed as New Shimla, so developed by HIMUDA or its predecessor-in-interest) shall be carried/allowed to be carried out strictly in accordance with law. Taking such statement on record, we dispose of all the applications.

The writ petition stands disposed of, so also the pending applications, if any.

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

Gulab Singh and others .....Appellants/Defendants.
Versus
Balbir Singh and others ....Respondents/Plaintiff.

RSA No.286 of 2018.
Reserved on: 20.08.2018.
Date of decision: 27th August, 2018.

Code of Civil Procedure, 1908- Section 100- Order XLI Rule 4- Second appeal- Whether maintainable at instance of persons who were not parties in First appeal – Appellants did not file any appeal against decree of Trial Court before District Judge – First Appellate Court upholding decree of Trial Court – Appellants filing Regular Second Appeal before High Court against decree of District Judge though they were not parties before him in First appeal – Held, where there are more than one defendants who are equally aggrieved by decree on ground common to all of them and despite that one of defendants challenged decree in his own right by filing first appeal and other defendants do not challenge decree by first appeal, even then such defendants can maintain Second Appeal – After all, object of Order XLI Rule 4 of Code is to enable one of parties to suit to obtain relief in appeal when decree appealed from proceeds on any ground common to appearing party and other similarly situated parties – Second appeal held maintainable. (Para-21)

Cases referred:
Karam Singh Sobti versus Pratap Chand, (1964) 4 SCR 647
Ratan Lal Shah versus Firm Lalmandas Chhadammalal and Anr., (1969) 2 SCC 70
Mahabir Prasad versus Jage Ram and Ors.,(1971) 1 SCC 265
Rameshwar Prasad versus Shambehari Lal Jagannath, 1964 3 SCR 549
Govindan versus Subramaniam, (2000) 9 SCC 510
Harihar Prasad Singh versus Balmiki Prasad Singh (1975) 1 SCC 212
State of Punjab versus Nathu Ram(1962) 2 SCR 636
Banarsi and others versus Ram Phal, (2003) 9 SCC 606
Panna Lal versus State of Bombay, (1964) 1 SCR 980,
Nirmala Bala Ghose versus Balai Chand Ghose (1965) 3 SCR 550,
Chandramohan Ramchandra Patil and others versus Bapu Koyappa Patil (dead) through LRS and Ors., (2003) 3 SCC 552
K. Muthuswami Gounder versus N. Palaniappa Gounder, (1998) 7 SCC 327,
Panna Lal versus State of Bombay and Ors., (1964) 1 SCR 980
Bajranglal Shivchandrai Ruia versus Shashikant N. Ruia and others, (2004) 5 SCC 272

For the Appellants : Mr. Mukesh Thakur, Advocate.
For the Respondents : Mr. Ajay Kumar, Senior Advocate with Mr.Dheeraj K. Vashisht, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

Where in a case there are more than one defendants, who are equally aggrieved by a decree on a ground common to all of them and only one of them challenges the decree by filing first appeal in his own right and the other defendants do not choose to challenge the decree by filing first appeal, then whether such defendants can maintain the second appeal or their right to challenge the decree is lost, is the question which arises for consideration in this appeal?

2. However, before answering the question, certain minimal facts need to be noticed. The plaintiff/respondent filed a suit for declaration and injunction against the defendants/appellants which was decreed by the learned trial Court. Only, the co-defendant Rameshwar Singh assailed the decree by filing first appeal, however, the same too met with the same fate vide judgment and decree passed by the learned first appellate Court on 31.03.2018.

3. Aggrieved by the judgment and decree passed by the learned first appellate Court, the defendant Rameshwar Singh has filed a separate appeal being RSA No.215 of 2018, whereas, the defendants/appellants, who had not preferred any appeal against the judgment and decree passed by the learned trial Court, have now preferred RSA No. 286 of 2018.

4. This Court on 08.08.2018 passed the following order:-

> *"Admittedly, the appellants herein, had not preferred any appeal against the judgment and decree passed by the learned trial Court, even though, a part thererof was against the appellants.*
>
> *It is only the appellant in RSA No.215 of 2018, who aggrieved by the judgment and decree of the learned trial Court had alone preferred an appeal before the learned first appellate Court. Therefore, the learned counsel for the appellants to justify the maintainability of this appeal.*
>
> *List on* ***20.08.2018.****"*

5. Before proceeding any further, certain provisions of the Code of Civil Procedure need to be noticed:-

6. Order 41 Rule 4 CPC reads thus:-

> "***4. One of several plaintiffs or defendants may obtain reversal of whole decree where it proceeds on ground common to all***
>
> *Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the Appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be."*

7. Likewise Order 41 Rule 4, Rule 33 needs to be noticed and is reproduced as under:-

> ***"33. Power of Court of Appeal***
>
> *The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection, [1][and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees]:*
>
> *PROVIDED that the appellate court shall not make any order under section 35A, in pursuance of any objection on which the court from whose decree the appeal is preferred has omitted or refused to make such order."*

8. The Hon'ble Supreme Court in ***Karam Singh Sobti versus Pratap Chand, (1964) 4 SCR 647***, was dealing with a proceeding under the Delhi Rent Control Act for eviction that had been filed against the tenant and sub-tenant on the ground that the tenant had, without the consent of the landlord, sublet, assigned or otherwise parted with the rented premises. One decree of eviction was passed by the trial judge against both tenant and sub-tenant who were defendants. Both the defendants were aggrieved by the decree of eviction and each had his own

right to appeal from that decree. While the tenant failed to move an appeal, the sub-tenant filed an appeal against the decree. It was held that there was one decree and therefore the appellant was entitled to have it set aside "although thereby the tenant who had not appealed would also be freed from the decree". It was open to the sub-tenant to contend that the decree was wrong as it was passed on an erroneous finding and the sub- tenant could challenge the decree on any available ground. Thus, it was held that the appeal of one of the defendants was competent, even though the other defendant who was equally situated had filed no appeal.

9. In *Ratan Lal Shah versus Firm Lalmandas Chhadammalal and Anr., (1969) 2 SCC 70*, the Hon'ble Supreme Court had occasion to examine the scope of application of Order 41 Rule 4 of the CPC. In that case there was a joint decree against two defendants R & M. R alone appealed to the High Court by impleading M as second respondent in the appeal. M was not served with notice as a result of which the appeal came to an end as far as M was concerned. The High Court dismissed the appeal on the ground that the decree was joint against both R & M, in a suit on a joint cause of action, the decree against M having become final, R could not be heard alone in the appeal. The Hon'ble Supreme Court reversed the judgment of the High Court by taking the view that the appeal could not be dismissed on the ground that M was not served, nor could the appeal be dismissed on the ground that there was a possibility of two conflicting decrees. Delineating the provisions of Order 41 Rule 4 of the CPC, the Hon'ble Supreme Court said : (SCC p.72, para 3):

> *"The object of the rule is to enable one of the parties to a suit to obtain relief in appeal when the decree appealed from proceeds on a ground common to him and others. The court in such an appeal may reverse or vary the decree in favour of all the parties who are in the same interest as the appellant."*

10. The Hon'ble Supreme Court reiterated its view in *Karam Singh Sobti* (supra) and held that even if it be assumed that R was negligent, on that ground he could not be deprived of his legal right to prosecute the appeal and to claim relief under Order 41 Rule 4 of the Code of Civil Procedure, if the circumstances of the case warrant it. The decree of the Trial Court proceeded on a ground common to M and R. In the appeal filed by R, he was denying liability for the claim of the plaintiffs in its entirety. Thus, it was held that this was essentially a case in which the Court's jurisdiction under Order 41, Rule 4, Code of Civil Procedure could be exercised.

11. This view was reiterated by the Hon'ble Supreme Court in *Mahabir Prasad versus Jage Ram and Ors.,(1971) 1 SCC 265*. It was a case in which the plaintiff Mahabir Prasad, his mother and his wife obtained a decree against the defendant Jage Ram and two others for a certain amount. Their application for execution was dismissed by executing court. Mahabir Prasad alone preferred an appeal to the High Court and impleaded his mother Gunwanti Devi, and his wife Saroj Devi as party-respondents. Saroj Devi died and the legal representatives were not brought on record within the period of limitation and her name was struck off from the array of respondents. The High Court dismissed the appeal on the ground that it abated in its entirety. Mahabir Prasad appealed to the Hon'ble Supreme Court. Allowing the appeal it was held by the Hon'ble Supreme Court : (vide SCC p. 267, para 4):

> *"Order 41 Rule 4, Code of Civil Procedure, invests the Appellate Court with power to reverse or vary the decree in favour of all the plaintiffs or defendants even though they had not joined in the appeal if the decree proceeds upon a ground common to all the plaintiffs or defendants."*

12. The Hon'ble Supreme Court in *Mahabir Prasad* (supra) distinguished the judgment in *Rameshwar Prasad versus Shambehari Lal Jagannath,* 1964 3 SCR 549 as a case in which all the plaintiffs whose suits had been dismissed had filed an appeal and thereafter one of them being dead and his heirs were not brought on record. While in the case before the Hon'ble Supreme Court, there was an order against all the decree holders but all of them had not appealed. The previous judgment in Ratanlal Shah (supra) was followed approvingly. Commenting on the judgment in Ratanlal Shah (supra) in the light of Order 41 Rule 4 of the CPC, the Hon'ble Supreme Court observed: (vide SCC pp. 268-69, para 6):

"Competence of the Appellate Court to pass a decree appropriate to the nature of the dispute in an appeal filed by one of several persons against whom a decree is made on a ground which is common to him and others is not lost merely because of the person who was jointly interested in the claim has been made a party-respondent and on his death his heirs have not been brought on the record. Power of the Appellate Court under Order 41 Rule 4, to vary or modify the decree of a Subordinate Court arises when one of the persons out of many against whom a decree or an order had been made on a ground which was common to him and others has appealed. That power may be exercised when other persons who were parties to the proceeding before the Subordinate Court and against whom a decree proceeded on a ground which was common to the appellant and to those other persons are either not impleaded as parties to the appeal or are impleaded as respondents."

13. The same principle was reiterated in *Govindan versus Subramaniam, (2000) 9 SCC 510,* where it was held that Order 41 Rule 4 of the CPC would apply in such a case.

14. In *Harihar Prasad Singh versus Balmiki Prasad Singh (1975) 1 SCC 212*, a similar contention was urged. After analysing Ratan Lal, Karam Singh and Mahabir Prasad (supra) and distinguishing the judgments in *State of Punjab versus Nathu Ram(1962) 2 SCR 636* and *Rameshwar Prasad (supra)*, it was held that normally Order 41 Rule 4 would apply to a situation like the one before us.

15. This principle has also been reiterated in the Judgment in *Banarsi and others versus Ram Phal, (2003) 9 SCC 606,* which holds that Order 41 Rule 4 and Rule 33 are to be read together. The Hon'ble Supreme Court observed (vide SCC p. 619, para 15):

"15. Rule 4 seeks to achieve one of the several objects sought to be achieved by Rule 33, that is, avoiding a situation of conflicting decrees coming into existence in the same suit. The abovesaid provisions confer power of the widest amplitude on the appellate court so as to do complete justice between the parties and such power is unfettered by consideration of facts like what is the subject-matter of the appeal, who has filed the appeal and whether the appeal is being dismissed, allowed or disposed of by modifying the judgment appealed against. While dismissing an appeal and though confirming the impugned decree, the appellate court may still direct passing of such decree or making of such order which ought to have been passed or made by the court below in accordance with the findings of fact and law arrived at by the court below and which it would have done had it been conscious of the error committed by it and noticed by the appellate court. While allowing the appeal or otherwise interfering with the decree or order appealed against, the appellate court may pass or make such further or other, decree or order, as the case would require being done, consistently with the findings arrived at by the appellate court. The object sought to be achieved by conferment of such power on the appellate court is to avoid inconsistency, inequity, inequality in reliefs granted to similarly placed parties and unworkable decree or order coming into existence. The overriding consideration is achieving the ends of justice. Wider the power, higher the need for caution and care while exercising the power. Usually the power under Rule 33 is exercised when the portion of the decree appealed against or the portion of the decree held liable to be set aside or interfered by the appellate court is so inseparably connected with the portion not appealed against or left untouched that for the reason of the latter portion being left untouched either injustice would result or inconsistent decrees would follow. The power is subject to at lest three limitations: firstly, the power cannot be exercised to the prejudice or disadvantage of a person not a party before the court; secondly, a claim given up or lost cannot be revived; and thirdly, such part of the decree which essentially ought to have been appealed against or objected to by a party and which that party has permitted to

achieve a finality cannot be reversed to the advantage of such party. A case where there are two reliefs prayed for and one is refused while the other one is granted and the former is not inseparably connected with or necessarily depending on the other, in an appeal against the latter, the former cannot be granted in favour of the respondent by the appellate court exercising power under Rule 33 of Order 41."

16. This judgment considers the observations made in *Panna Lal versus State of Bombay, (1964) 1 SCR 980,* Harihar Prasad Singh (supra) and *Nirmala Bala Ghose versus Balai Chand Ghose (1965) 3 SCR 550*, and holds that Order 41 Rule 4 of the CPC would take care of a situation as the one before us.

17. In *Chandramohan Ramchandra Patil and others versus Bapu Koyappa Patil (dead) through LRS and Ors., (2003) 3 SCC 552*, a suit for partition was filed in which the right of partition was recognised and upheld by the Court. In the opinion of the Court, the fact that one of the plaintiffs had appealed, and not all, did not render the appellate court powerless for it could invoke the provisions of Order 41 Rule 4 read with Order 41 Rule 33 of the CPC. It was held that the object of Order 41 Rule 4 is to enable one of the parties to a suit to obtain relief in appeal when the decree appealed from proceeds on a ground common to him and others. The Court in such an appeal may vary the decree in favour of all the parties who are in the same interest as the appellant. The Hon'ble Supreme Court observed (vide SCC pp. 558-59,paras 14-15):

"14. Order 41 Rule 4 of the Code enables reversal of the decree by the court in appeal at the instance of one or some of the plaintiffs appealing and it can do so in favour of even non-appealing plaintiffs. As a necessary consequence such reversal of the decree can be against the interest of the defendants vis-a-vis non-appealing plaintiffs. Order 41 Rule 4 has to be read with Order 41 Rule 33. Order 41 Rule 33 empowers the appellate court to do complete justice between the parties by passing such order or decree which ought to have been passed or made although not all the parties affected by the decree had appealed.

15. In our opinion, therefore, the appellate court by invoking Order 41 Rule 4 read with Order 41 Rule 33 of the Code could grant relief even to the non- appealing plaintiffs and make an adverse order against all the defendants and in favour of all the plaintiffs. In such a situation, it is not open to urge on behalf of the defendants that the decree of dismissal of suit passed by the trial court had become final inter se between the non- appealing plaintiffs and the defendants."

18. In *K. Muthuswami Gounder versus N. Palaniappa Gounder, (1998) 7 SCC 327*, dealing with the powers of the appellate court under Order 41 Rule 33 of the CPC, the Hon'ble Supreme Court observed (vide SCC p. 333, para 12):

"12. Order 41 Rule 33 enables the appellate court to pass any decree or order which ought to have been made and to make such further order or decree as the case may be in favour of all or any of the parties even though (i) the appeal is as to part only of the decree; and (ii) such party or parties may not have filed an appeal. The necessary condition for exercising the power under the Rule is that the parties to the proceeding are before the court and the question raised properly arises (sic out of) one of the judgments of the lower court and in that event, the appellate court could consider any objection to any part of the order or decree of the court and set it right. We are fortified in this view by the decision of this Court in Mahant Dhangir versus Madan Mohan, [1987] Supp. SCC 528. No hard and fast rule can be laid down as to the circumstances under which the power can be exercised under Order 41 Rule 33 CPC and each case must depend upon its own facts. The Rule enables the appellate court to pass any order/ decree which ought to have been passed. The general principle is that a decree is binding on the parties to it until it is set aside in appropriate proceedings. Ordinarily the appellate court must not vary or reverse a decree/order in favour of a party who has not preferred any appeal and this Rule holds good notwithstanding Order 41 Rule 33 CPC. However,

in exceptional cases, the Rule enables the appellate court to pass such decree or order as ought to have been passed even if such decree would be in favour of parties who have not filed any appeal."

19. In *Panna Lal versus State of Bombay and Ors., (1964) 1 SCR 980*, the Hon'ble Supreme Court said (vide SCR page 987: AIR p. 1519, para 12):

"12. Even a bare reading of Order 41 rule 33 is sufficient to convince any one that the wide wording was intended to empower the appellate court to make whatever order it thinks fit, not only as between the appellant and the respondent but also as between a respondent and a respondent. It empowers the appellate court not only to give or refuse relief to the appellant by allowing or dismissing the appeal but also to give such other relief to any of the respondent as 'the case may require'."

20. Similar reiteration of law can be found in three Hon'ble Judges' Bench decision of the Hon'ble Supreme Court in *Bajranglal Shivchandrai Ruia versus Shashikant N. Ruia and others, (2004) 5 SCC 272.*

21. Thus, what can be deduced from the aforesaid exposition of law is that the question as posed before this Court is in fact no longer *res integra* as it has been conclusively held that in a case where there are more one defendants, who are equally aggrieved by a decree on a ground common to all of them and despite that one of the defendants challenged the decree in his own right by filing first appeal against the judgment and decree of the learned trial Court and the other defendants do not challenge the decree by filing first appeal, even then such defendants can maintain the second appeal. The mere fact that such defendants were negligent would not be a ground to deprive him or them, as the case may be, of his/their legal right to prosecute the appeal and to claim relief under Order 41 Rule 4 CPC coupled with the provisions of Rule 33 of Order 41 CPC. After all, the object of Order 41 Rule 4 CPC is to enable one of the parties to a suit to obtain relief in appeal when the decree appealed from proceeds on a ground common to appearing party and other similarly situated parties.

22. Obviously, in view of the aforesaid discussion, the right to challenge the decree by such of the defendants,who have not filed the first appeal against the judgment and decree passed against them by the learned trial Court, is not lost and consequently the regular second appeal filed at their instance is maintainable.

23. The question is accordingly answered by holding the appeal to be maintainable.

24. List this appeal along with RSA No.215 of 2018 on 10-09-2018.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, ACJ AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Akshay Sharma and others .....Petitioners.

Vs.

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

CWP No.: 1964 of 2018
Date of Decision: 28.08.2018

Constitution of India, 1950- Articles 16 and 226- Service matter - Junior Office Assistants, recruitment of – Challenge thereto – Original petitioner challenging recruitment process of Junior Office Assistants – Administrative Tribunal, as interim relief, directing Commission to keep fifteen posts for petitioners vacant till final outcome of litigation – However, Commission was granted liberty to declare result of process of recruitment for remaining posts – Writ Petitioners assailing

this order in High Court – Petitioners contending that Commission was considering ineligible candidates for appointment against such posts on basis of communication dated 19th March, 2018, by ignoring essential qualifications/conditions laid down in R&P Rules – State opposing writ on ground that interest of original petitioners stood protected by interim order of Administrative Tribunal – Held – Field governing appointments to posts of Junior Office Assistant is duly covered by R&P Rules framed under Article 309 of Constitution of India – There was no justification for Government to issue communication dated 19th March, 2018 – Respondents directed to make appointments to such posts strictly in accordance with R&P Rules and not in terms of communication dated 19th March, 2018 – Petition disposed of. (Paras-4 to 7) Title: A

For the petitioners:	Ms. Ranjana Parmar, Senior Advocate, with Ms. Amita Chandel, Advocate.
For the respondents:	Mr. Ashok Sharma, Advocate General, with M/s J.K. Verma, Ritta Goswami and Nand Lal Thakur, Additional Advocates General, for respondents No. 1 and 2. Ms. Anjula Khajuria, Advocate, for respondent No. 3. Mr. Sanjeev Bhushan, Advocate, for the caveators.

The following judgment of the Court was delivered:

Sanjay Karol, Acting Chief Justice *(Oral):*

Petitioners have prayed for the following relief:

> *"That it is in the interest of justice and fair play that the impugned order dated 16.08.2018 may kindly be quashed and set aside and this Hon'ble Court may decide the OA on merits after summoning the record of the same from the Ld. Tribunal, or the Ld. Tribunal may further be directed to decide the O.A. expeditiously or this Hon'ble Court may after summoning the record of the Ld. Tribunal, decide the O.A. in the interest of justice."*

2. Order impugned, dated 16.08.2018, passed by the learned Himachal Pradesh Administrative Tribunal in O.A. No. 2644 of 2018, titled as *Akshay Sharma and others* Vs. *State of Himachal Pradesh and others* reads as under:

> *"Replies stand filed. Rejoinders, if any, be filed within two weeks.*
>
> *List on* ***12.09.2018****.*
>
> **M.A. No. 1547 of 2018**
>
> *Reply on behalf of the original applicants stand filed. No other reply is intended to be filed.*
>
> *Heard.*
>
> *In the facts and circumstances, materials on record and interest of justice, subject to keeping fifteen posts of Junior Office Assistant vacant for the applicants and final outcome of the original application, respondent No. 3-Commission shall be free to declare the result of the process for recruitment to the post of Junior Office Assistants.*
>
> *The application stands disposed of."*

3. The contention of learned Senior Counsel for the petitioners is that while passing the impugned order, on the prayer of the original applicants/petitioners for grant of interim relief, learned Tribunal has erred in not appreciating that the respondents were considering ineligible candidates for appointment against the posts of Junior Office Assistant on the basis of a communication dated 19th March, 2018, addressed by the Deputy Secretary (Personnel), Government of Himachal Pradesh, by ignoring the essential qualification condition laid down in the Recruitment and Promotion Rules to the post of Junior Office Assistant, as also the

advertisement issued by the respondents for filling up the said posts vide Advertisement No. 32-3/2016.

4. On the other hand, learned Advocate General has submitted that there is no infirmity with the order passed by the learned Administrative Tribunal, as the interest of original applicants stands protected and in case the original applicant(s) ultimately succeeds, persons whose appointments are held to be bad, shall obviously face the consequences.

5. Heard learned counsel for the parties, as also perused the records so made available.

6. There appears to be merit in the contention of learned Senior Counsel for the petitioners. It is not understood as to what is the justification for issuing communication dated 19th March, 2018, when the field governing appointment to the post of Junior Office Assistant is duly covered by the Recruitment and Promotion Rules so framed under Article 309 of the Constitution of India.

7. In this background, we clarify that the appointments to the posts of Junior Office Assistant (Code 556) shall be strictly in accordance with the Common Recruitment & Promotion Rules for the posts of Junior Office Assistant (Information Technology), Class-III (Non-gazetted) in various Departments of Himachal Pradesh Government, as also Advertisement No. 32-3/2016 and not in terms of communication, dated 19th March, 2018.

With the aforesaid observations, present petition stands disposed of, so also pending application(s), if any.

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

Kam Raj and others .....Petitioners.

Versus

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

CMPMO No. 355 of 2015.
Judgment reserved on: 21.08.2018.
Date of decision: 28th August, 2018.

Jurisprudence- Judgment declaring law- Whether prospective or retrospective? – Held, Prospective declaration of law is just a device innovated to avoid reopening of settled issues – However, there has to be no prospective overruling unless it is so indicated in a particular judgment – A declaration by Court is; "This was the law, this is the law" – This is how provisions have to be construed – The Court merely declares law and earlier decision by Court is "simply no law". (Paras-12 and 13)

Jurisprudence- Merger of decrees- Held – Appeal is continuation of original proceedings and when decision passed in original proceedings is under consideration of appellate authority, whole matter is writ large – Even while affirming in appeal, Court would be passing its own judgment, decree or award which would then merge with award, judgment or decree passed by court/authority of first instance with that of appellate authority – Said doctrine postulates that there cannot be more than one decree governing the same subject matter at a given point of time. (Paras-14 and 19)

Land Acquisition Act, 1894 (Act) – Section 28-A- Statutory interest – Grant of – Petitioners filing application under Section 28-A of Act before Land Acquisition Collector for compensation in terms of award of District Judge, in respect of their own acquired land(s) – Land Acquisition Collector on analogy of award of District Judge passing similar award(s) in favour of petitioners – However, State challenging award of Land Acquisition Collector passed under Section 28-A of Act,

by way of writ – State also challenging award of District Judge, which was basis of proceedings under Section 28-A of Act by filing First appeal – Appeal of State dismissed by High Court on 23.4.2007 and award of District Judge upheld – Also directed State to pay/deposit compensation in favour of petitioners within two months – State deposited some amount which according to petitioners was not in consonance with award of District Judge – Writ Petition – Land Acquisition Collector declined statutory interests on ground that judgment of High Court was silent on the point – Held, once award of Land Acquisition Collector or District Judge is under challenge in appeal before High Court, then judgment rendered by High Court either affirming and dismissing the appeal, award originally passed becomes inoperative since the lacuna of merger will come into play – When High Court directed that compensation in "accordance with law" to be paid to petitioner that would essentially mean the law as determined in Sunder's case – Finding of Land Acquisition Collector held perverse and set aside – Petition allowed – Respondents directed to deposit balance amount of consideration within two months from receipt of copy of judgment.

(Paras-20 to 23)

Cases referred:

Sunder versus Union of India, (2001) 7 SCC 211.

Commissioner of Income Tax versus Smt.Aruna Luthra (2001) 252 ITR 76

Dilip versus Mohd. Azizul Haq and another, (2000) 3 SCC 607

Union of India and others versus West Coast Paper Mills Ltd. and another, (2004) 2 SCC 747,

Chandi Prasad and others versus Jagdish Prasad and others (2004) 8 SCC 724

For the Petitioners :	Mr. Rupinder Singh, Advocate.
For the Respondents:	Mr. Sudhir Bhatnagar, Additional Advocate General with Mr. Bhupinder Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

The moot question to be decided in this petition filed by the petitioners/claimants under Article 227 of the Constitution of India is as to whether the petitioners/claimants are entitled to the compensation in accordance with the ratio of the judgment laid down by a Constitution Bench of the Hon'ble Supreme Court in ***Sunder*** *versus* ***Union of India, (2001) 7 SCC 211***.

2. However, before answering the said question, certain minimal facts need to be noticed.

3. The Government of Himachal Pradesh on 04.06.1990 issued single notification under Section 4(1) of the Land Acquisition Act (for short 'the Act') for acquiring lands in three villages i.e. Kot, Nataila, District Solan and village Kaflaid, District Shimla, for the construction of the Airport at Jubberhatti, District Solan,H.P. After completion of other formalities, the Land Acquisition Collector on 07.08.1993, passed an award. However, dis-satisfied and aggrieved by the award so passed, the claimants filed reference petition under Section 18 of the Act before the learned District Judge, Solan and Shimla, respectively. The reference petitions filed before the learned District Judge, Solan of village Kot and Nataila were consolidated and vide common award dated 05.01.1998, the market value was assessed at Rs.2,08,620/- per bigha for all kinds of lands and the statutory benefits under Sections 23(1-A), 23(2) and 28 of the Act were also awarded in favour of the claimants.

4. On coming to know about the award passed in Land Reference Petition No.17-S/4 of 1996, the petitioners/land owners, who could not file the reference petitions under Section 18 of the Act, filed petition under Section 28-A of the Act, the Land Acquisition Collector, South Zone, Winter field, Shimla. The Land Acquisition Collector on the analogy of

the award passed by the learned District Judge, Solan, passed the similar award in favour of the petitioners on 28.11.2000.

5. It appears that the respondents did not deposit the award amount thus constraining the petitioners to file CWP No.352/2004 before this Court. At the same time, the State also assailed the award passed in favour of the claimants by filing CWP No.346/2004. Not only this, even the award passed by the learned District Judge, Solan, on 05.01.1998 was also assailed by the State by filing RFA No.280/1998 which came to be finally decided by this Court on 23.04.2007, whereby the appeal preferred by the State was ordered to be dismissed and the award passed by the learned District Judge, Solan, was ordered to be upheld.

6. As regards the writ petition filed by the petitioners, the same was allowed and the respondents were directed to pay the award amount to the petitioners and proforma respondents or deposit the same with the Collector within a period of two months.

7. It is not in dispute that in compliance to the aforesaid orders, the State deposited some amount before the Collector and the same was also disbursed to the petitioners including the legal representatives of deceased petitioners No.3, 4 and 9. But, according to the petitioners, the deposit was not in accordance with the award passed by the learned District Judge in the reference petition and, therefore, they accordingly filed execution petition. However, the execution petition came be to be dismissed by the Land Acquisition Collector on the ground that this Court in its judgment had "*remained silent on the question of adopting 1+2+3 formula and never directed to award extra bank interest. Also the appellant had not approached the Forum within the statutory and prescribed time period (limitation). Hence, their entire claim is hereby rejected.*"

8. Aggrieved by the award passed by the Land Acquisition Collector on 31.10.2003, the petitioners have filed the instant petition.

9. It is vehemently argued by learned counsel for the petitioners that they are entitled to the compensation in terms of the judgment in ***Sunder's case*** (supra). Whereas, on the other hand, the learned Additional Advocate General, would contend that the ratio of the judgment in ***Sunder's case*** (supra) cannot be applied in the instant case as the same would only apply prospectively.

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

11. In view of the rival contentions as raised by the learned counsel for the parties, it becomes imperative for this Court to firstly determine the ratio laid down in ***Sunder's case*** (supra) and then to consider whether the the same is to apply prospectively, as is vehemently contended by learned Additional Advocate General.

12. It is more than settled that prospective declaration of law is a device innovated to avoid reopening of settled issues. However, there has to be no prospective over ruling unless it is so indicated in a particular judgment.

13. A Full Bench of the Punjab and Haryana High Court in ***Commissioner of Income Tax*** *versus* ***Smt.Aruna Luthra (2001) 252 ITR 76*** opined that a declaration by the Court is –This was the law, this is the law. This is how the provisions have to be construed. The Court merely declares the law and earlier decision by the Court is "simply no law". It shall be apposite to extract the relevant observations which read thus:-

> *"A Court decides a dispute between the parties. The cause can involve decision on facts. It can also involve a decision on a point of law. Both may have bearing on the ultimate result of the case. When a court interprets a provision, it decides as to what is the meaning and effect of the words used by the Legislature. It is a declaration regarding the statute. In other words, the judgment declares as to*

what the Legislature had said at the time of the promulgation of the law. The declaration is-This was the law. This is the law. This is how the provision shall be construed.

Julius Stone in Social Dimensions of Law and Justice (First Indian Reprint 1999) (Chapter XIV), while dealing with the subject of Judge and Administrator in Legal Ordering, observes as under:

"If, then, a main impulse underlying the stare decisis doctrine is that justice should respect reasonable reliance of affected parties based on the law as it seemed when they acted, this impulse still has force when reliance is frustrated by an overruling. Despite this, it has long been assumed that a newly emergent rule is to be applied not only to future facts, and to the necessarily past facts of the very case in which it emerges, but to all cases thereafter litigated, even if these involved conduct, which occurred before the establishment of the new rule. This has proceeded ostensibly on the conceptual basis, clearly formulated since Blackstone, that the new holding does not create, but merely declares, law. So that any prior putative law under which the parties acted is to be regarded as simply not law". (emphasis supplied)

The above observations clearly support the principle that the court merely declares law. An earlier decision as declared by the court is "simply no law".

14. The Hon'ble Supreme Court could have directed the implementation of the judgment in ***Sunder's case*** (supra) prospectively and not retrospectively. However, I do not find any such direction contained in the said judgment. This proposition otherwise cannot be invoked in the present case as admittedly the award passed by the learned District Judge had also been assailed by none other than the respondents herein, therefore, the doctrine of merger applies, as it cannot be disputed that an appeal is in continuation of the original proceedings and when the decision passed in the original proceedings is under consideration of the appellate authority the whole matter is writ large. Even while affirming the appeal, the Court would be passing its own judgment, decree or award which would then merge with the award, judgment or decree passed by the court/authority of the first instance with that of the appellate authority.

15. At this stage, certain precedents on the subject need to be noticed.

16. In ***Dilip*** *versus* ***Mohd. Azizul Haq and another, (2000) 3 SCC 607***, it was held as follows:-

"Once a decree passed by a court has been appealed against the matter becomes sub-judice again and thereafter the appellate court acquires seisin of the whole case. A court of appeal shall have the same powers and shall perform as nearly as many be the same duties as conferred and imposed on courts of original jurisdiction. The hearing of an appeal under the processual law of the country being in the nature of a rehearing and it is on the theory of an appeal being in the nature of a rehearing that the Courts in this country have, in numerous cases, recognized that in moulding the relief to be granted in a case on appeal, the court of appeal is entitled to take into account even facts and events which have come into existence after the decree appealed against. As an appeal is a rehearing, it must follow that if an appellate court dismisses an appeal it would be passing a decree affirming eviction and thereby passes a decree of its own, and in the event it upsets the decree of the trial court, it would be again passing a decree of its own resulting in merger of decree of the trial court with that of the appellate court. The legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and one to be regarded as one legal proceeding."

17. Similarly, in ***Union of India and others*** *versus* ***West Coast Paper Mills Ltd. and another, (2004) 2 SCC 747****,* the Hon'ble Supreme Court held as follows:-

> *"It may be true that by reason of Section 46-A of the Indian Railways Act the judgment of the Tribunal was final but by reason thereof the jurisdiction of this Court to exercise its power under Article 136 of the Constitution of India was not and could not have been excluded.*
>
> *Article 136 of the Constitution of India confers a special power upon this Court in terms whereof an appeal shall lie against any order passed by a court or tribunal. Once a special leave is granted and the appeal is admitted, the correctness or otherwise of the judgment of the Tribunal becomes wide open. In such an appeal, the court is entitled to go into both questions of fact as well as law. In such an event the correctness of the judgment is in jeopardy.*
>
> *Even in relation to a civil dispute, an appeal is considered to be a continuation of the suit and a decree becomes executable only when the same is finally disposed of by the court of appeal.*
>
> *The starting point of limitation for filing a suit for the purpose of recovery of the excess amount of freight illegally realized would, thus, begin from the date of the order passed by this Court. It is also not in dispute that the respondent herein filed a writ petition which was not entertained on the ground stated hereinbefore. The respondents were, thus, also entitled to get the period during which the writ petition was pending, excluded for computing the period of limitation. In that view of the matter, the civil suit was filed within the prescribed period of limitation.*
>
> *The trial Judge as also the High Court have recorded a concurrent opinion that the respondents were entitled to the benefits of Sections 14 and 15 of the Limitation Act, 1963. We have no reason to take a different view."*

18. However, more pertinent and important observations have been made in a decision by Hon'ble three Judges of the Hon'ble Supreme Court in ***Chandi Prasad and others*** *versus* ***Jagdish Prasad and others (2004) 8 SCC 724*** wherein while dealing with the doctrine of merger, it was observed as under:-

> *"Merger*
>
> *23. The doctrine of merger is based on the principles of propriety in the hierarchy of justice delivery system. The doctrine of merger does not make a distinction between an order of reversal, modification or an order of confirmation passed by the appellate authority. The said doctrine postulates that there cannot be more than one operative decree governing the same subject matter at a given point of time.*
>
> *24. It is trite that when an Appellate Court passes a decree, the decree of the trial court merges with the decree of the Appellate Court and even if and subject to any modification that may be made in the appellate decree, the decree of the Appellate Court supersedes the decree of the trial court. In other words, merger of a decree takes place irrespective of the fact as to whether the Appellate Court affirms, modifies or reverses the decree passed by the trial court. When a special leave petition is dismissed summarily, doctrine of merger does not apply but when an appeal is dismissed, it does. [See V.M. Salgaocar and Bros. Pvt. Ltd. Vs. Commissioner of Income-tax, AIR 2000 SC 1623].*
>
> *25. The concept of doctrine of merger and the right of review came up for consideration recently before this Court in Kunhayammed and Others Vs. State of Kerala and Another (2000) 6 SCC 359 wherein this Court inter alia held that when a special leave petition is disposed of by a speaking order, the doctrine of merger shall apply stating:*

(SCC p.383, paras 41-43)

> *"41. Once a special leave petition has been granted, the doors for the exercise of appellate jurisdiction of this Court have been let open. The order impugned before the Supreme Court becomes an order appealed against. Any order passed thereafter would be an appellate order and would attract the applicability of doctrine of merger. It would not make a difference whether the order is one of reversal or of modification or of dismissal affirming the order appealed against. It would also not make any difference if the order is a speaking or non-speaking one. Whenever this Court has felt inclined to apply its mind to the merits of the order put in issue before it though it may be inclined to affirm the same, it is customary with this Court to grant leave to appeal and thereafter dismiss the appeal itself (and not merely the petition for special leave) though at times the orders granting leave to appeal and dismissing the appeal are contained in the same order and at times the orders are quite brief. Nevertheless, the order shows the exercise of appellate jurisdiction and therein the merits of the order impugned having been subjected to judicial scrutiny of this Court.*
>
> *42. "To merge" means to sink or disappear in something else; to become absorbed or extinguished; to be combined or be swallowed up. Merger in law is defined as the absorption of a thing of lesser importance by a greater, whereby the lesser ceases to exist, but the greater is not increased; an absorption or swallowing up so as to involve a loss of identity and individuality. (See Corpus Juris Secundum, Vol. LVII, pp. 1067-68)*
>
> *43.We may look at the issue from another angle. The Supreme Court cannot and does not reverse or modify the decree or order appealed against while deciding a petition for special leave to appeal. What is impugned before the Supreme Court can be reversed or modified only after granting leave to appeal and then assuming appellate jurisdiction over it. If the order impugned before the Supreme Court cannot be reversed or modified at the SLP stage obviously that order cannot also be affirmed at the SLP stage."*

26. In Kunhayammed (supra), it was observed: (SCC p.370, para 12)

> *"12.....Once the superior court has disposed of the lis before it either way - whether the decree or order under appeal is set aside or modified or simply confirmed, it is the decree or order of the superior court, tribunal or authority which is the final, binding and operative decree or order wherein merges the decree or order passed by the court, tribunal or the authority below. However, the doctrine is not of universal or unlimited application. The nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or which could have been laid shall have to be kept in view."*

27.The said decision has been followed by this Court in a large number of decisions including Union of India and Others Vs. West Coast Paper Mills Ltd. and Another [(2004) 2 SCC 747]."

19. What thus emerges from the aforesaid exposition of law is that once the award passed by the Land Acquisition Collector or the learned District Judge in reference is under challenge in appeal before this Court, then the judgment rendered by this Court either affirming and dismissing the appeal, the award originally passed becomes inoperative since the lacuna of merger will come into play. The doctrine of merger does not make a distinction between an order

of reversal, modification or an order of confirmation passed by the appellate authority. The said doctrine postulates that there cannot be more than one decree governing the same subject matter at a given point of time.

20. As regards the other findings recorded by the Land Acquisition Collector that this Court while disposing of the writ petition had remained silent on the question of adopting 1+2+3 formula as also the findings of limitation, to say the least, are perverse. Compensation in accordance with law as directed by this Court would essentially mean, the law as determined in ***Sunder's case*** (supra) and this Court was not required to direct the respondents to calculate the compensation in a particular manner. How the compensation is to be calculated, is the job of the Collector and not this Court, who is required to ensure that the mandate in ***Sunder's case*** (supra) is followed in letter and spirit.

21. As regards the claimants having not approached the Forum within the statutory period, suffice it to say, that the period of limitation for executing the award, which is in nature of money decree, would be 12 years, that too, to be computed from 23.04.2007 when the writ petitions filed by both the respective parties finally came to be disposed of by this Court.

22. In view of the aforesaid discussion, this Court has no hesitation to conclude that the order passed by the Land Acquisition Collector is not only erroneous, but the same is also perverse and the same is accordingly quashed and set aside.

23. The petition is accordingly allowed. The respondents are directed to deposit the balance amount of compensation strictly in terms of judgment in ***Sunder's case*** (supra) within two months from the receipt of certified copy of this judgment, failing which the respondents, apart from being liable to pay interest in terms of ***Sunder's case*** (supra), would be further liable to pay additional interest on the amount due till its payment @ 9% per annum.

24. The petition stands disposed of in the aforesaid terms, leaving the parties to bear their own costs. Pending application, if any, also stands disposed of.

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