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EDITOR
RAKESH KAINTHLA
Director,
H.P. Judicial Academy,
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Code of Civil Procedure, 1908- Section 47- A petition was filed for executing the award passed by the sole arbitrator – objector filed an objection petition pleading that the signed copy of the award was not supplied to the judgment debtor and the award is not executable – the award was to be made within three months from the date of appointment but was not made nor any extension of time was sought and the award is bad - held that signed copy of the award was sent vide letter dated 12.11.2009- judgment debtor also admitted in the information supplied under Right to Information Act that the copy of the award was received by it – the plea regarding the lapse of time could have been raised by filing objection under Section 34 of the Act and cannot be taken in objection to the execution – petition dismissed.(Para-8 to 21) Title: M/s Sai Engineering Foundation Vs. Himachal Pradesh State Electricity Board Ltd. Page-583

Code of Civil Procedure, 1908- Section 86- Plaintiff filed a civil suit for restraining the defendants No.2 to 6 from recovering the special road tax and seeking damages – it was pleaded that the plaintiff is the owner of the bus and had entered into an agreement to sell the bus to defendant No.1 – the bus was financed by defendant No.5 – it was agreed that outstanding taxes and amount shall be paid by the defendant No.1- the bus met with an accident and was released in favour of defendant No.1- plaintiff filed a revision and the possession was delivered to the plaintiff- defendant No.1 dis not pay the taxes and notices were issued – the suit was partly decreed and separate appeals have been filed by the parties – held in appeal that the execution of the agreement was not disputed – defendant No.1 had not performed his part of the agreement – plaintiff is the owner and liable to pay the taxes – the decree passed by Trial Court modified and plaintiff held entitled to the recovery of Rs.1,56,890/- from defendant No.1 along with interest @ 6% per annum from the date of filing of suit till realization. (Para-12 to 19) Title: Piara Ram Vs. Pawan Kumar and others Page-618

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Code of Civil Procedure, 1908- Section 114 read with Order 47 and Section 151- An original application was filed by the petitioner assailing the NOC granting to respondents No.3 to 8, which was allowed and it was held that respondent No. 3 to 8 did not fulfill the eligibility criteria and NOC in their favour was ordered to be quashed- a writ petition was filed assailing the order passed by the Tribunal, which was allowed and it was held that Tribunal had no jurisdiction to entertain the application as the applicant was not a person aggrieved and no public interest litigation is permissible in a service matter – the petitioner filed SLP before the Supreme Court, which was disposed of with a direction that petitioner will file a review petition before the High Court – the petitioner has filed a review petition pleading that he was directly affected by the grant of NOC, therefore, he was an aggrieved party – held that no relief was sought by the applicants for themselves in the original application- a person is an aggrieved, only if he has suffered a legal grievance – a person who is disappointed with the result of a caseis not a person aggrieved – he must be disappointed of a benefit, which he would have received if the order had gone the other way – once no relief was sought by the applicants for themselves, they could not be held to be person aggrieved – the original application was in the nature of public interest

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Code of Civil Procedure, 1908- Order 6 Rule 17- An application for amendment was filed on the ground that defendants started raising construction over the suit land in violation of the interim order passed by the Court- application was rejected on the ground that the same was filed after the commencement of the trial- issue regarding mandatory injunction has already been framed and no purpose would be served by allowing the application- held that the issue regarding mandatory injunction has already been framed and, therefore, amendment is not necessary- proper course for the applicant would have been to file the application for violation of the order of the Court under Order 39 Rule 2-A – Trial Court had rightly dismissed the application- petition dismissed. (Para-2 to 4) Title: Madal Lal Sharma vs. Pritam Singh and others Page-757

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Code of Civil Procedure, 1908- Order 23 Rule 1(3)- An application for withdrawing the civil suit with liberty to institute a fresh suit was filed – the application was allowed by the Trial Court- held that anobjection was taken in the written statement that suit was not properly valued for the purpose of court fees and jurisdiction and on proper valuation, the Court will have no jurisdiction – the plea, if accepted would have taken away the jurisdiction of the Court to try the suit – thus, the permission was rightly granted by the Trial Court- petition dismissed. (Para-2 and 3) Title: Ashok Kumar Vs. Nirmala & others Page-653

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Code of Civil Procedure, 1908- Order 41 Rule 3-A- Partition proceedings were initiated by respondents No.1 to 8- the order passed by Assistant Collector First Grade was assailed before Sub-Divisional Collector by filing an appeal –the appeal was barred by limitation and an

application for condonation of delay in filing the appeal was filed- a stay application was also filed, Sub Divisional, Collector stayed the operation of impugned order – an application for recalling the order was filed, which was allowed and Sub Divisional Collector ordered the suspension of ad-interim stay granted by him on the ground that no appeal was pending before him without condoning the delay and no order could have been passed- aggrieved from the order, the present petition has been filed- held that Order 41 Rule 3-A specifically provides that no order for stay shall be granted unless the application for condonation of delay is decided – Sub-Divisional Collector had committed a mistake, which was apparent on the face of the record and the Collector had rightly reviewed the order, when the mistake was pointed out to him- no appeal was pending before the Collector and no stay order could have been granted by him – however, the party can file an application under the inherent powers of the Court – permission granted to file an application for grant of interim stay.(Para-4 to 15) Title: Ajudhya Devi and another Vs. Pramod Kumar Sharma and others Page-712

Code of Civil Procedure, 1908- Order 47- Section 114- The petitioner has sought the review of the judgment passed by the Court vide which the respondents were permitted to start the course for the sessions 2015-2017 subject to transfer of land and built up area in the name of educational institution within a period of four weeks- the review is sought on the ground that the Court could not have varied the schedule of admission and the judgment was contrary to the judgment passed by Hon'ble Supreme Court- held that as per the schedule,codal formalities were to be completed by the end of the March, whereas, in the present case the decision was taken in the month of May, much later than the date fixed in the schedule – the grounds sought to be raised in the review petition were not taken before the writ court and cannot be raised for the first time – the petition dismissed. (Para-6 to 10) Title: Northern Regional Committee (NRC) & another Vs. Shimla Education Society Trust & another (D.B.) Page-731

Code of Criminal Procedure, 1973- Section 127- The wife filed a petition for maintenance for herself and for her minor child – the petition was allowed and maintenance of Rs. 300 and Rs. 200 was granted respectively to them- the maintenance amount was enhanced by Learned Additional Sessions Judge to Rs. 500 and Rs. 300, respectively- wife filed an application for enhancement and maintenance was enhanced to Rs. 3,000/- another application for enhancement was filed, which was allowed and maintenance was enhanced to Rs. 6,000/- per month- a revision was filed and the maintenance was enhanced to Rs. 8,000/- - aggrieved from the order, present revision petition has been filed- held that husband had not challenged the order of granting maintenance @ Rs. 6,000/- per month – the husband is drawing salary of Rs. 46,560/- per month- maintenance of Rs. 6,000/- was awarded in the year 2011 in view of the increase of the prices, age of the wife and the resources of the husband, the enhancement to Rs. 8,000/- cannot be said to be unjustified – petition dismissed.(Para-6 to 9) Title: Titlu Ram Vs. Darshnu Devi Page-775

Code of Criminal Procedure, 1973- Section 321- An application for withdrawal from prosecution was filed before the Special Judge, which was dismissed – aggrieved from the order, present revision has been filed –held that the original mark sheet stated to have been forged was not produced on record- expert has not given any opinion on the photocopy of the mark sheet – the Public Prosecutor acted in a bona fide manner while seeking withdrawal from prosecution- the permission was wrongly refused by the Trial Court – revision allowed – order passed by Trial Court set aside- prosecutor permitted to withdraw from the prosecution.(Para-9 to 20) Title: State of Himachal Pradesh Vs. Singhi Ram & others Page-820

Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the petitioner for the commission of offences punishable under Sections 420 & 120-B of I.P.C and Section 66-C of I.T. Act- the allegations against the petitioner include misappropriation of public money by fraudulent transaction of Rs.58,50,000/- which is a huge amount – custodial interrogation of the petitioner is required for the purpose of investigation- other accused are to be arrested- hence,

bail cannot be granted – the contention of the counsel that if bail is not granted, it will send a wrong message to the society amounts to browbeating the judge as well as playing to the gallery and is to be deprecated. (Para-3 to 5) Title: Ajay Singh Vs. State of Himachal Pradesh Page-740

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commission of offence punishable under Section 302 of I.P.C.- accused and deceased were first cousins – there was no enmity between them and their families- the incident started when the deceased molested the wife of the accused, which shows that incident had stared at the spur of moment- accused is permanent resident of Ani and there is no likelihood of his jumping over the bail- hence, bail application allowed and the accused ordered to be released on bail of Rs. 50,000/- along with one surety in the like amount. (Para-5 to 7) Title: Sanjay Kumar Vs. State of Himachal Pradesh Page- 741

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commission of offences punishable under Section 12 and 29 of N.D.P.S. Act for the possession of 2 boxes of tablets Lomotil each containing 100 strips and 20 cartons of SpasmoProxyvon, which were allegedly sold by the petitioner- the petitioner filed the bail petition pleading that he is innocent and was falsely implicated- held that commercial quantity was recovered in this case- keeping in view the manner in which the petitioner was apprehended and that the petitioner is likely to temper with prosecution evidence, bail petition dismissed. (Para-6) Title: Parveen Kumar vs. State of Himachal Pradesh Page-738

Code of Criminal Procedure, 1973- Section 457- Two applications were filed for the release of same bus, which was impounded by the policein connection with FIR registered for the commission of offences punishable underSections356, 147 and 149 of IPC - it was alleged that the bus was snatched along with the documents by accused N – signatures of the complainant were taken on some papers – it was pleaded in one application that E had purchased the bus from its registered owner N after payment of sale consideration- owner had executed a receipt and an irrevocable power of attorney in favour of E – N pleaded in his application that he was registered owner and thus entitled to the possession of the bus – the Court allowed the application of E and dismissed the application filed by N- held in revision that findings recorded by the Court that bus was sold in favour of E was supported by documents – merely because the registration certificate was in favour of N will not entitle him to the custody of the bus, when the documents showed the transfer of bus by him- further, he had forcibly snatched the bus and the case has been registered against him- petition dismissed.(Para-10 and 11) Title: Najakat Ali Hashmi Vs. State of Himachal Pradesh and another Page-565

Code of Criminal Procedure, 1973- Section 482- A petition is filed for compounding the FIR registered for the commission of offences punishable under Sections 279 and 337 of I.P.C and 187 of Motor Vehicles Act on the ground that matter has been compromised between the parties – held that the High Court has inherent power to quash the proceedings where the parties have compromised the matter voluntarily and no useful purpose will be served by continuation of the proceedings – the parties have made the statements regarding the settlement – the chances of conviction of the accused would be weak in such circumstances and no useful purpose will be served by continuing the proceedings- petition allowed and FIR ordered to be cancelled. (Para- 3 to 8) Title: Vikas Kashyap Vs. State of H.P. & Another Page-616

Code of Criminal Procedure, 1973- Section 482- An FIR was registered for the commission of offences punishable under Sections 498-A, 403, 406, 420 and 120-B of I.P.C- the challan was presented by the police- the matter was compromised between the parties and the complainant agreed to withdraw the complaint, the petition under Section 125 Cr.P.C., complaint under Section 12 of Protection of Women from Domestic Violence Act and the FIR – since, the offence punishable under Section 498-A of I.P.C is non-compoundable, therefore, the petition was filed for quashing the proceedings – held that compromise is genuine – hence, the petition is accepted

and proceedings pending before the Court arising out of the FIR ordered to be quashed.(Para-6 to 13) Title: Neha Goel and others Vs. State of Himachal Pradesh Page-645

Code of Criminal Procedure, 1973- Section 482- Petition has been filed for the cancellation of bail granted to respondent No.2in FIR No. 235/2015 registered for the commission of offences punishable under Sections 420, 467, 468 and 120-B of I.P.C – High Court had dismissed the earlier bail application filed by the petitioner- however, bail was granted by Learned Magistrate despite the fact that the dismissal of bail application was brought to her notice by the I.O. – held that the Magistrate has violated the judicial discipline – she had granted bail to another accused whose bail application was also dismissed by the High Court– the act of the Magistrate amounts to judicial impropriety and judicial indiscipline – hence, the petition allowed and the order passed by the Magistrate granting bail set aside. (Para-2 to 32) Title: Prerna Sharma Vs. State of H.P. and another Page-688

Code of Criminal Procedure, 1973- Section 482- Petitioner was summoned for the commission of offence punishable under Section 138read with Section 142 of N.I. Act – he challenged the summoning order contending that Magistrate was bound to follow the procedure under Section 200 of Cr.P.C by examining the complainant and recording preliminary evidence – held that the complaint was accompanied by an affidavit – there is no requirement of examination of the complainant on solemn affirmation – petition dismissed.(Para-3 to 7) Title: Lal Chand Vs. Union Bank of India Page-813

Constitution of India, 1950- Article 226- A complaint was filed by the respondent No.4 against the petitioner before Judicial Magistrate, Khagaria, Bihar- as per the complaint, complainant had provided mason and Labourersfor which no payment was made – the agreement was executed at Kalpa – part of cause of action had arisen within the jurisdiction of the Himachal Pradesh High Court and the Writ petition is maintainable- the dispute between the parties is civil in nature and does not attract the criminal liability – mensrea was not proved – petition allowed and the proceedings pending before Judicial Magistrate, Khagaria, Bihar quashed. (Para- 4 to 10) Title: Satish Kumar and Another Vs. State of Himachal Pradesh and others Page-555

Constitution of India, 1950- Article 226- An advertisement was issued for filling the post in Himachal Pradesh Judicial Services – the petitioner and respondent No.3 appeared in the examination- the petitioner is shown senior to the respondent No.3 in the gradation list – respondent No. 3 made a representation to the Registrar General, High Court of H.P. for correction of the seniority list on the ground that she was shown higher in the merit list prepared by H.P. Public Service Commission- the representation was accepted and the respondent No.3 was shown senior to the petitioner and S, another judicial officer - aggrieved from the order, the present writ petition has been filed- held that the respondent No.3 was shown higher in merit list to the petitioner and S – the Government could not have picked up the petitioner and S for appointment prior to respondent No.3 – the seniority fixed by the Commission was to be maintained – petition dismissed.(Para-4 to 7)Title: Rajinder Kumar Vs. Hon'ble High Court of H.P. and others Page-809

Constitution of India, 1950- Article 226- Petitioner appeared in MA (Economics) examination in June, 2004 and was shown to be absent in paper-VI – the petitioner represented that he was not absent – his result was conveyed but he was told that he was absent in paper-III and therefore, he should surrender the earlier marks sheet – he again represented that he was present in both the papers - this fact was verified from the attendance sheet but his result was not declared- the respondent stated that marks of paper–VI were wrongly reflected against the marks for paper-III- the petitioner was required to re-appear in paper-III- hence, his result was not declared – held, that conducting examination, declaring results, posting marks, issuing certificate and awarding degrees is a delicate function to be performed by University with due diligence and care – if any, mistake is committed, the same is required to be rectified within reasonable period – however, in

the present case the University had behaved in careless, irresponsible and negligent manner – the University stated for the first time in the year 2008that the petitioner had obtained 19 marks in paper-III- hence, direction issued to the University to grant three chances to the petitioner to pass in paper-III – cost of Rs.40,000/- also imposed upon the respondent.(Para-11 to 18) Title: Naveen Kumar vs. H.P. University and another Page-758

Constitution of India, 1950- Article 226- Petitioner is established as Learning Centre for paramedical courses under distance education programme and is duly approved and affiliated by Punjab Technical University – respondent No. 3 denied the registration to the student of the petitioner on the ground that no objection certificate was not taken from the Government of Himachal and its degrees cannot be recognized – the petitioner filed a writ petition seeking direction to give recognition to it and to register the students qualified from the petitioner – respondent No. 3 pleaded that it is necessary to obtain permission before starting any paramedical courseunder Section 19 of Himachal Pradesh Paramedical Council Act, 2003,– Punjab Technical University cannot maintain and run off campus learningcentre- held that it is mandatory to obtain permission from the State Government for establishing a paramedical institute- the petitioner does not have any such recognition – it is within the legislative domain of the State Government to enact the law – respondent No. 3 had rightly denied the recognition to the petitioner – petition dismissed.(Para-9 to 13) Title: Adarsh Bala Medical Institute Vs. State of Himachal Pradesh & Ors. (D.B.) Page-579

Constitution of India, 1950- Article 226- Petitioner was found to be encroacher and was ordered to be evicted- the petitioner filed the present petition for quashing the order pleading that he has removed the encroachment and had deposited a sum of Rs.20,000/- + Rs.2,000/- as costs imposed upon him – the petition is opposed by pleading that the petitioner was found to be an encroacher and he has admitted the encroachment – therefore, the petition for quashing the order cannot be allowed- held that the petitioner had contested the election, which was set aside on the ground that petitioner is not qualified to contest the election as he was an encroacher- the purpose of filing the petition is to get over the disqualification already incurred by the petitioner to contest the election for the post of Pardhan – the petitioner has not approached the Court with clean hands – the judicial process should not become an instrument of oppression or abuse to suffer injustice – the petition dismissed with cost of Rs. 20,000/-. (Para- 5 to 24) Title: Yashwant Singh Vs. State of H.P. and others (D.B.) Page-708

Constitution of India, 1950-Article 226- Petitioner was one out of the two contestants to the post of Pardhan, Gram Panchayat- the petitioner secured 471 votes, whereas, respondent No.4, the other contestant, secured 465 votes – respondent No.4 sought re-counting of vote- 8 votes in favour of the petitioner were declared invalid and the number of votes secured by the petitioner fell to 463, whereas, the votes of respondent No.4 remained the same i.e. 465- the petitioner objected to the recount and on recount both the parties secured 465 votes- Assistant Returning Officer went for draw of lots in which respondent No.4 was declared elected- the petitioner filed an election petition, which was dismissed – the petitioner filed an appeal, which was also dismissed- the petitioner filed a writ petition against the orders – held that the petitioner has sought recounting of votes in the writ petition- an order of recount cannot be granted as a matter of course – there must be proper evidence regarding improper acceptance of valid votes or improper rejection of valid votes- re-counting cannot be ordered because of the fact that there was a very thin margin – petitioner has not pleaded material facts regarding irregularity in the counting – the petitioner is seeking fishing and roving inquiry, which is not permissible – the decision to carry out draw of lots is in accordance with Act- petition dismissed. (Para- 8 to 28) Title: Durga Devi Vs. State of Himachal Pradesh and others (D.B.) Page-748

Constitution of India, 1950- Article 226- Petitioner was serving as a head teacher in a school affiliated with H.P. Board of School Education – she was removed from service on the ground that she was untrained and did not possess requisite minimum qualification – aggrieved from the

order, the present writ petition has been filed- held that the school is not an authority or instrumentality of the State – the State has constitutional obligation to provide educational facilities to its citizens – respondent No.4 had acted under the Statute and was acting on behalf of the State – its action was part of public duty and is amenable to the writ jurisdiction – a period of five years has been provided under the Statute to acquire the qualification and hence termination of petitioner is bad – further, the record shows that petitioner was removed on the ground that she was not cooperating with the management in replacing the teachers –her age was 56 years on the date of removal – hence, the compensation of Rs.75,000/- awarded along with due and admissible benefits on her retirement.(Para- 4 to 22) Title: Surjeet Kaur Vs. State of Himachal Pradesh & others Page-559

Constitution of India, 1950- Article 226- Principal Secretary (Elementary Education) to the Government of Himachal Pradesh directed the Director (Elementary Education) to initiate the proceeding for conducting common entrance test for admission for two years J.B.T. Course - it was specifically mentioned in the advertisement that J.B.T. training did not guarantee government service after the completion of the course – the petitioners claimed regular appointment after the completion of the course – the writ petition was dismissed by the Court, but directions were issued to offer jobs on contract basis keeping in view the availability of the vacancies – held that it was specifically made clear that completion of the course will not guarantee the appointment – the appointment is to be made in accordance with Recruitment and Promotion Rules, which provided appointment on contract basis – simply because the trainees of earlier batches were offered appointment on regular basis will not entitle the petitioner to regular appointment – Court cannot question a policy decision unless the same is unconstitutional dehors the provision of the Act, beyond the delegated authority or contrary to statutory or legal policy – the writ Court had rightly dismissed the writ petition – appeal dismissed.(Para- 4 to 14) Title: Naresh Kumar and Ors. Vs. State of H.P. and Anr. (D.B.) Page-830

Constitution of India, 1950- Article 226- Respondent No.2 was designated as Principal Private Secretary to Hon'ble the Chief Justice, High Court of H.P. on 6.9.2013- petitioner contended that seniority was not taken into consideration while making the promotion – the petitioner was senior to respondent No.2 and he was ignored in the process – the petitioner made a representation, which was rejected– respondent No.1 stated that the respondent No.2 was discharging higher duties and responsibilities attached to the post satisfactorily – nothing adverse was found against him – respondent No.2 was more qualified and was promoted on adhoc basis – no prejudice was caused to the petitioner – hence, it was prayed that the petition be dismissed- held that the sanction was granted by the Government for the post of a Secretary to the Hon'ble Chief Justice- the post of respondent No.2 was upgraded with a condition that he would draw his own pay, grade pay and special pay etc. and other allowances as admissible under law for discharging the duties and the responsibilities of a higher post- name of respondent No. 2 was figuring in the communications as the incumbent who was to be upgraded by respondent No.1- initial designation of respondent No.2 as a Private Secretary was not challenged by the petitioner – when the original order is not challenged, then the subsequent acts, which are the result of that original order or act cannot be assailed – the candidature of five senior most secretaries, which included the petitioner as well as respondent No.2 was considered for the purpose of promotion on ad hoc basis- respondent No. 2 was found more eligible and was promoted – same exercise was undertaken before conferring regular promotion upon respondent No. 2 – the person senior to the petitioner have not assailed the promotion of respondent No. 2 and the petitioner does not have the locus standi to challenge the same – petition dismissed.(Para-10 to 31) Title: Ramesh Chand Vs. Hon'ble High Court of Himachal Pradeshat Shimla and another Page-662

Constitution of India, 1950- Article 226- The land of the petitioners was utilized for the construction of the road- petitioners filed a writ petition seeking the acquisition of the land and payment of compensation – the respondent pleaded that the petition is highly belated and involves adjudication of the complicated questions of facts- held that the State has not claimed

that the land was utilized with the consent of the petitioners- State had initiated proceedings for acquisition but dropped them on the ground of delay- State cannot deprive a person of his property except in accordance with Law – petition allowed- State directed to initiate proceedings for acquisition of land and to pay compensation in accordance with Law.(Para-9 to 19) Title: Baldev Singh and others Vs. State of Himachal Pradesh and others Page-551

Constitution of India, 1950- Article 226- Workman filed a claim petition which was decided in his favour with a direction to reinstate the workman in service with seniority and continuity without back wages – a writ petition was filed, which was dismissed- held that Writ Court came to a definite conclusion that the workman was appointed as a pharmacist- he was assigned miscellaneous work – inquiry was initiated against him and his services were dispensed with – the plea of abandonment taken by the employer was not proved – Writ Court cannot interfere with the findings of facts recorded by Labour Court unless it is shownthat Tribunal had erroneously refused to admit admissible and material evidence or had erroneously admitted inadmissible evidence which has influenced its findings- appeal dismissed.(Para- 6 to 15) Title: H.P. State Civil Supplies Corporation Ltd. Vs. Presiding Judge and another (D.B.) Page-728

'E'

Employees Compensation Act, 1923- Section 4- The Commissioner awarded a sum of Rs.8,06,640/- as compensation and directed the insurer to satisfy the liability – he further directed to pay the penalty on failure of deposit of the amount within one month from the award – held that the statutory penalty is to be paid by the employer and not by the insurer- however, the insurer can be directed to pay the penal interest on failure of deposit of the amount – the award passed by the Commissioner modified. (Para- 2 to 5) Title: The New India Assurance Company Limited Vs. Sunita and others Page-677

'H'

H.P. Co-operative Societies Act, 1968- Section 69- Father of petitioner No.1 was the founding member of the society and worked as Secretary w.e.f. 1946 till his death in 1981 – the petitioner was appointed as a Secretary on 9.1.1981– audit was conducted and it was found that Secretary had committed irregularities and had caused losses by misutilization of the funds of the society- surcharge proceedings were initiated against the petitioner – an appeal was filed and the case was remanded for fresh inquiry – a writ petition was filed and the order passed by the Appellate Authority was set aside – Appellate Authority dismissed the appeal and directed the payment of compensation of Rs.5 lacs in addition to the amount already paid – this order was challenged before Secretary (Co-operation), who held the petition to be not maintainable – held that the basis for a claim under surcharge proceedings is the misappropriation, fraudulent retention of any money or property or commission of breach of trust - respondent No. 2 had recorded detailed findings and had appreciated the evidence correctly – power of judicial review is not intended to assume a supervisory role- a co-operative society cannot act like a private individual and the decision taken by the general body has to be in accordance with H.P. Co-operative Societies Act, 1968 and H.P. Co-operative Societies Rules, 1971- the conduct of chairman/president, officer bearers and members of the society has to be above board– there is no illegality or perversity in the impugned orders – appeal dismissed.(Para-14 to 44) Title: Kamal Kumar and others Vs. State of Himachal Pradesh and others Page-842

H.P. Public Premises and Land (Eviction and Rent Recovery) Act, 1971- Section 4- The predecessor-in-interest of the petitioner was found to be an encroacher over the government land – an order of eviction was passed- an appeal was filed, which was dismissed –High Court had passed an order in CWP No.7879 of 2014 titled Mehar Singh Versus State of H.P. and others directing the competent authority to pass orders in 192 cases of encroachment within four weeks after getting demarcation– the petitioner had not removed the encroachment and he was served

with a notice of eviction – the petitioner filed the present writ petition pleading that he cannot be evicted without demarcation – the respondents pleaded that Tehsildar, Karsog was directed to demarcate the land and to submit his report regarding unauthorized construction/encroachment – the Field Kanungo reported to the Tehsildar five cases of encroachment including the one relating to the father of the petitioner- the petitioner had not demolished the verandah of first and second floors of his residential house – held that demarcation has been conducted and the encroached portion has been shown with red colour on the spot – the encroachment of the ground floor was removed but that of the first and second floors still remains – the encroachment is liable to be removed in accordance with Mehar Singh's case – petition dismissed.(Para-7 and 8) Title: Manoj Kumar Vs. State of Himachal Pradesh and others(D.B.) Page-638

H.P. Tenancy and Land Reforms Act, 1974- Section 118- A report was made by the Tehsildar that P, S and G had violated Section 118 of H.P. Tenancy and Land Reforms Act by executing a Power of Attorney in favour of G, who was a non-agriculturist – the Collector ordered the vestment of land in favour of the State- an appeal was filed, which was dismissed – a revision was filed, which was allowed- held that there was no bar in execution of power of attorney – however, the provision was amended and the transfer by way of Special or General Power of Attorney or by way of agreement is not permissible after 22.3.1995 – the power of attorney was executed in the year 1990 and therefore, the amendment was not applicable to it- the Financial Commissioner had rightly allowed the revision- petition dismissed.(Para-11 to 25) Title: State of H.P. Vs. Shri Sarvjot Singh Bedi and others (D.B.) Page-596

H.P. Urban Rent Control Act, 1987- Section 14- Landlord filed an eviction petition against the tenant on the ground of arrears of rent, change of user of shop, causing damage to wall and floor of the shop impairing the value and utility of the shop materially and bona-fide requirement to settle his son during his lifetime- the petition was allowed by the Rent Controller and eviction order was passed on the ground of arrears of rent and changing the use of shop without the consent of the landlord – the claim of the landlord that tenant had caused material alterations and additions in the premises and the premises were required by landlord for running his shop was rejected – separate appeals were filed before the Appellate Authority, which were dismissed – held in revision that tenant had admitted in his cross-examination that he had not paid the rent since 25.5.2011 till his deposition in the Court – the tenant also admitted in cross-examination that he is running business of ladies sandal, garments, and purse from the shop in question- he claimed that he is running business of electronics goods in the shop but it was not proved – worker of the tenant admitted that tenant had replaced the floor and had made changes in wall of that shop – tenant also admitted in the photographs of the showroom situated in the front of the shop being run by the son of the tenant – thus, it was established that value and utility of the shop was materially impaired – son of the landlord is running a fast food corner next to the shop in question and bona-fide requirement was not established- revision petition partly allowed- tenant held to be in arrears of rent and ordered to be evicted on the ground of change of users and materially impairing the value and utility of the shop.(Para-20 to 35) Title: Ishwar Dass Vs. Vinay Kumar Page-655

H.P. Urban Rent Control Act, 1987- Section 14- Petition was filed seeking eviction of the tenant on the ground that tenant had changed the user of the premises without the permission of the landlord and that tenant is in arrears of rent – the petition was allowed by Rent Controller – appeal was dismissed- held in revision that landlord has proved that tenant is in arrears of rent – further the tenant had put the premises to the commercial use without the written consent of the landlord- in these circumstances, the evictionwas rightly ordered- petition dismissed.(Para-8 to 13) Title: Jogeshwar Prasad Vs. Narender Kumar Page- 681

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Income Tax Act, 1961- Section 194-A- The Insurance Company deposited an amount of Rs.60,902/- as TDS on interest paid to the respondent on the compensation awarded – a direction was issued by the Court to deposit the amount deducted by the company- held that the interest is part of compensation and no income tax is payable on the same – the deduction is illegal and contrary to law – direction issued to refund the tax to the company and thereafter the company directed to disbursethe amount to the claimant. (Para-2 to 6) Title: Oriental Insurance Company Ltd. Vs. Satya Devi and others Page-860

Indian Evidence Act, 1872- Section 138- An application for re-examination of two witnesses was filed on the ground that witnesses had admitted during the course of their cross-examination that no payment was made in their presence and it was necessary to clarify this ambiguity in the cross-examination- the application was dismissed by the trial court- held that counsel was present at the time of cross-examination and the right was to be exercised after the conclusion of cross-examination- this provision cannot be used for prolonging the trial- Trial Court had rightly rejected the application- petition dismissed. (Para-3 to 8) Title: Dinesh KumarVs. Vipan Kumar and others Page-773

Indian Penal Code, 1860- Section 279 and 304-A- Accused was driving a van in a rash and negligent manner - Van ran over a pedestrian who succumbed to the injuries- the van mounted on a pavement abutting a highway, struck against an upper wall and then stopped- the accused was tried and convicted by the Trial Court- an appeal was filed, which was dismissed- held in revision that the accused has admitted that he was driving a maruti van at the relevant time – testimony of the informant was not supported by independent witnesses – PW-13 admitted that site of occurrence was not visible from the stairs where the informant was standing- the negligence of the accused is not established by the mere factum of accident- onus is upon the prosecution to prove that the vehicle was being driven rashly and negligently – there are contradictions in the statements of the eye witnesses and the prosecution version was not proved beyond reasonable doubt- petition allowed- accused acquitted of the commission of offence punishable under Sections 279 and 304-A of I.P.C.(Para-7 to 32) Title: Maheshwar Bali Vs. State of Himachal Pradesh Page-569

Indian Penal Code, 1860- Section 279 and 337- Accused was driving a car in a rash and negligent manner and caused accident- he and another occupant of the car suffered injuries – accused was convicted by the Trial Court- an appeal was filed, which was dismissed- held in revision that alleged eye witnesses were not present at the spot at the time of accident – driver and conductor of the bus were examined but passengers were not examined- spot map shows that car was on its own side of the road and conductor also admitted this fact- accident had taken place on a curve and the possibility of the driver of the bus driving the bus towards the centre of the road while over taking another bus cannot be ruled out- criminal negligence was not proved and the accused was wrongfully convicted by the Courts- appeal allowed - judgment set aside and accused acquitted of the commission of offences punishable under Sections 279 and 337 of I.P.C. (Para- 8 to 14) Title: Suresh Kumar Vs. State of H.P. Page-606

Indian Penal Code, 1860- Section 279, 337 and 338- Accused was driving a jeep – it rolled down a hill and hit T who sustained injuries- the accused was tried and acquitted by the Trial Court – held in appeal that the alleged eye witness was at a distance of half kilometer from the place of occurrence – Trial Court had properly appreciated the evidence- appeal dismissed.(Para-8 and 9) Title: State of H.P. Vs. Deep Kumar Page-743

Indian Penal Code, 1860- Section 279, 337, 338 and 201- **Motor Vehicles Act, 1988-** Section 187- Accused was driving a car in a rash and negligent manner- the car hit a motorcycle - driver and pillion rider suffered injuries – the accused was tried and convicted by the Trial Court – an appeal was preferred, which was dismissed – held in revision that the mechanical reports

corroborated the prosecution version – minor discrepancy in the registration number of the car will not make the prosecution case doubtful – the accused was found under the influence of alcohol – the Courts had rightly appreciated the evidence- however, considering the time lapsed since the time of incident, the sentence of imprisonment modified .(Para- 12 to 26) Title: Janki Dass Thakur Vs. State of Himachal Pradesh Page-788

Indian Penal Code, 1860- Section 279, 337, 338 and 304-A- **Motor Vehicles Act, 1988-** Section 187- Accused was driving a truck in a rash and negligent manner – the truck hit a scooter on a wrong side due to which the driver and his daughter sustained grievous injuries- driver succumbed to his injuries at PGI, Chandigarh- the accused was tried and acquitted by the Trial Court – held in appeal that no test identification parade was conducted to prove that the accused was driving the vehicle at the relevant time – there was no other evidence to connect the accused with the incident- the accused was rightly acquitted by the trial Court- appeal dismissed.(Para-6 to 9) Title: State of Himachal Pradesh Vs. Rakesh Thakur Page-745

Indian Penal Code, 1860- Section 302- Dead body of R was found hanging from a tree – body had sustained marks of injuries on the face and nose – it was found on investigation that deceased and accused had consumed liquor together – the accused attacked the deceased due to which he fell down – accused took out Rs. 7,000/- from his pocket and assuming him to be dead, hanged him from a tree to give it a colour that the deceased had committed suicide – recoveries were effected at the instance of the accused- the accused was tried and acquitted by the trial Court- held in appeal that case of the prosecution rests upon circumstantial evidence based upon the theory of last seen together – all the circumstances from which inference of guilt is to be drawn must be cogently and firmly established in case of circumstantial evidence - PW-3, PW-6 and PW-16 did not support the prosecution version and were declared hostile – the prosecution version that accused and deceased were last seen together is not established – similarly, the fact that deceased had withdrawn Rs.8,000/- from the bank and the accused was aware of this fact was also not established – the possibility of suicide cannot be ruled out- the prosecution version has not been proved beyond reasonable doubt- the Trial Court had taken a reasonable view while acquitting the accused– appeal dismissed.(Para-10 to 55) Title: State of H.P. Vs. Sunil Kumar (D.B) Page-763

Indian Penal Code, 1860- Section 376 and 366- **Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989**- Section 3(xii)- Accused raped the prosecutrix on the pretext of marrying her – he disclosed subsequently that he was married and had children – he expressed his inability to marry the prosecutrix – FIR was registered at the instance of the prosecutrix – the accused was tried and convicted by the Trial Court- held in appeal that the prosecutrix is major and capable of giving consent –there was a delay in reporting the matter to the police, which was not explained - the prosecutrix had permitted repeated sexual intercourse, which shows her consent – the Trial Court had not properly appreciated the evidence – appeal allowed and judgment of Trial Court set aside. (Para-9 to 13) Title: Kapil Devvs. State of H.P. Page-800

Indian Penal Code, 1860- Section451, 325, 323, 506-II/34- Complainant was sleeping in a room with his family – accused T and R enteredthe room at about 11:45 P.M. – T pushed the door due to which bolt was opened – accused trespassed into the room and started beating the complainant with fist and kick blows- complainant was dragged to a courtyard where T gave a blow on his head with a bangi – complainant shouted for help on which his mother, wife and son came – the accused were tried and convicted by the Trial Court- an appeal was preferred, which was allowed and the judgment passed by the Trial Court was set aside- held in appeal that conduct of witnesses was unnatural – there was insufficient light to identify the accused- the clothes of the victim were not taken in possession to corroborate the prosecution version- bangi produced in the Court did not have the blood stains and cannot be connected to the commission of crime –the recovery was not preceded by the statement of the accused under Section 27 of the

Evidence Act – the Appellate Court had correctly appreciated the evidence- appeal dismissed.(Para-9 to 17) Title: State of H.P.Vs. Tara Chand and another Page-624

Indian Penal Code, 1860- Section 498-A, 406 and 506-I read with Section 34- Marriage of the complainant was solemnized with accused No.1 on 21.11.2001 and a female child was born – the accused demanded dowry from the complainant – accused No.1 started abusing the complainant and levelled allegations of un-chastity against the complainant – accused No.2 to 5 threatened to beat the complainant if she came without Rs.1 lac- the matter was compromised and accused No.1 brought the complainant to Jhansi at the place of his posting – complainant was ousted from her matrimonial home after 21 days of the birth of the female child – the accused also misappropriated the Stridhan given to the complainant – the accused were tried and acquitted by the Trial Court- held in appeal that no specific incidents of beating and criminal intimidation were mentioned by the complainant and her witnesses – the evidence regarding misappropriation and the details of the articles handed over as Stridhan are not satisfactory –Trial Court had taken a reasonable view while acquitting the accused – appeal dismissed.(Para-9 to 11) Title: Bandana Devi Vs. Surjeet Singh & others Page-734

Industrial Disputes Act, 1947- Section 25- Workmen K and M filed a claim before Labour Court that they were engaged by the respondent and their services were illegally terminated- respondent pleaded that the services of workmen were engaged through a contractor who had supplied labour for maintenance of work- the services were terminated on the expiry of the contract – respondent did not lead any evidence in the case of K - M was neither cross-examined nor any evidence was led in support of the respondent's claim- Labour Court drew an adverse inference and ordered reinstatement – a writ petition was filed and the Writ Court upheld the findings of the Labour Court- a review petition was filed, which was dismissed- held in appeal that no evidence was led to prove the plea of the respondent – no application for additional evidence was filed – the finding of Labour Court on facts cannot be questioned – appeal dismissed.(Para-14 to 18) Title: Executive Engineer, BSNL Civil DivisionVs. Krishan Chand and another (D.B.) Page-723

'L'

Land Acquisition Act, 1894- Section 18- The land of the claimants was acquired by the Board for the construction of Uhl Hydro Project Stage-III- Land Acquisition Collector awarded compensation keeping in view the nature of the acquired land- Reference Court held that the market value of the land determined by the Land Acquisition Collector was more than the price of the land sold vide sale deeds produced in evidence by the claimants- the court further held that value is to be determined uniformly keeping in view the purpose of acquisition- aggrieved from the award of the Reference Court, present appeal has been filed- held that land was acquired for the construction of Uhl Hydro Electric Project and, therefore, category, potentiality and utility of theacquired land lose their significance- Reference Court had rightly awarded compensation at uniform rate- appeal dismissed. (Para-9 to 12) Title: HPSEB Ltd.Vs. Amar Singh Page-609

Land Acquisition Act, 1894- Section 18- The Reference Court relied upon the report prepared by PW-2 – it was contended that he had valued the house twice and there was a difference of Rs.25,000/- in two valuations; hence, the report should have been rejected- held that the witness has explained that the assessment charges were added which led to the difference in the valuation- this was not challenged in the cross-examination – Executive Engineer, PWD was not examined to prove the report and the Court had rightly rejected the report – there is no infirmity in the award announced by the Reference Court – appeal dismissed. (Para- 4 to 9) Title: General Manager, NHPC Vs. Kiran Rekha Sood Page-786

'M'

Motor Vehicles Act, 1988- Section 149- The Tribunal held the owner liable to pay compensation on the ground that the driver was not possessing a valid licence on the date of accident – held in appeal that the insurance policy is a private car/liability only policy and not a comprehensive policy – the insurance company cannot be asked to indemnify the insured for the components which are not covered under the policy – Act only policy will not cover the risk of an occupant of a car and the risk can only be covered, if the policy is comprehensive/package policy – appeal dismissed.(Para-8 to 12) Title: Prashant Kapoor Vs. Tulesh Kumar and others Page-806

Motor Vehicles Act, 1988- Section 166- Petitioner was travelling in a vehicle which met with an accident due to the rash and negligent driving of his driver – the petitioner sustained multiple injuries- the Tribunal awarded compensation of Rs. 2,95,000/- along with interest at the rate of 8% per annum – held in appeal that an amount of Rs. 1 lac was rightly awarded by the Tribunal for the loss of studies of two years does not warrant any interference – amount of Rs.10,000/- on account of services of an attendant cannot be denied even if the claimant was attended by his family members- the licence was valid till 22.1.2015 and the driver had a valid licence at the time of the accident – Tribunal had awarded Rs.1,50,000/- for the removal of injured spleen which includes loss of future income as well- the Tribunal had assessed the compensation properly- appeal dismissed. (Para-11 to 16) Title: Bajaj Allianz General Insurance Company Limited Vs. Pankaj Sharma and others Page-781

Motor Vehicles Act, 1988- Section 166- The monthly income of the deceased was Rs.3600/- per month- 50% is to be added towards future income and the income of the deceased would be Rs.5400/- - 50% is to be deducted towards personal expenses and the loss of dependency has to be taken as Rs.2700/- per month- the age of the deceased was 30 years and multiplier of 18 will be applicable – therefore, compensation for loss of dependency will be Rs.5,83,200/- (2700 x 12 x 18) – an amount of Rs. 50,000/- awarded as compensation for love and affection, Rs. 10,000/- towards funeral expenses, Rs.5,000/- towards transportation of dead body and total compensation of Rs.6,48,200/- awarded along with interest @ 9% per annum. (Para- 10 to 14) Title: National Insurance Company Limited Vs. Darshana Devi & others Page-838

'N'

Negotiable Instruments Act, 1881- Section 138, 142 and 147- Accused was convicted by the Trial Court- an appeal was filed, which was dismissed- aggrieved from the order, present revision has been filed- the parties filed application pleading that matter has been compromised between them and the complainant be permitted to compound the offence- application allowed – the accused directed to deposit the cost within three weeks. (Para- 3 to 6) Title: Leela Dhar Vs. Labh Singh Page-684

'P'

Prevention of Food Adulteration Act, 1954- Section 16(1)(a)(i)- A complaint was filed for selling adulterated food articles – the accused filed an application for impleading the seller – the seller filed an application for impleading the manufacturer – the seller died in the meantime – the Court allowed the application and impleaded the manufacturer – held that once the seller has died without leading any evidence, the Court could not have allowed the application- petition allowed and order passed by the Court quashed and set aside.(Para-8 to 16) Title: M/s R. K. Trading Company Vs. State of Himachal Pradesh and others Page-816

Punjab Excise Act, 1914- Section 61(1)(a)- Accused was found in possession of 9 pouches of country liquor bearing mark 'Hero No.1' each containing 750 ml. without having any valid permit – the accused was tried and acquitted by the Trial Court- held in appeal that independent witnesses were declared hostile- there are material contradictions in the statements of the official

witnesses - three pouches were sent for analysis and it was only proved but accused was found in possession of three pouches which is not an offence- the Trial Court had rightly acquitted the accused- appeal dismissed.(Para-7 to 16) Title: State of H.P. Vs. Ram Lal Page-640

Punjab Excise Act, 1914- Section 61(1)(a)- Accused was found in possession of 8 boxes of country liquor Patiala and 7 boxes of country liquor Una No.1 each containing 12 bottles of country liquor in it- the accused was tried and acquitted by the Trial Court- held in appeal that one independent witness had not supported the prosecution version and other was not examined- two bottles were sent for analysis and it was proved that accused was in possession of two bottles, which is not an offence- the accused was rightly acquitted by the Trial Court- appeal dismissed.(Para-7 to 13) Title: State of H.P.Vs. Ajay Kumar and Anr. Page-635

'S'

Specific Relief Act, 1963- Section 20- Defendant No.1 executed an agreement to sell the suit land to the plaintiff for a consideration of Rs.35,000/- - a sum of Rs.13,000/- was paid at the time of the agreement and the remaining amount was to be paid at the time of registration of the sale deeds – the possession was delivered and an agreement was executed acknowledging the receipt of Rs. 30,000/- - a sum of Rs. 3200/-was paid by the brother of the plaintiff and a sum of Rs. 1800 was to be paid by the plaintiff- defendant No.1 executed a sale deed in favour of defendant No.2- hence, the plaintiff filed a civil suit for seeking the relief of specific performance of the contract- defendant denied the case of the plaintiff- the suit was decreed by the Trial Court – an appeal was filed and the decree was modified – plaintiff was not held entitled for the decree of specific performance – held in second appeal that execution of the agreement and delivery of possession were duly proved – defendant No. 2 was not proved to be a bona-fide purchaser for consideration – the Trial Court had rightly decreed the suit for specific performance and the Appellate Court had wrongly allowed the appeal- the appeal allowed – judgment passed by Appellate Court set aside and that passed by Trial Court restored. (Para- 11 to 20) Title: Vinod Kumar Vs. Negi Ram & ors. Page-629

Specific Relief Act, 1963- Section 34- Plaintiffs pleaded that the suit land was allotted to father of plaintiff No.4 and husband of plaintiff No.5- the allotment was cancelled by Deputy Commissioner, Bilaspur, which order was upheld by Divisional Commissioner, Mandi- the original allottee expired and plaintiffs succeeded to him – the suit was opposed by the defendant pleading that the plot was allotted in exchange but the exchange was cancelled- an appeal was preferred before Divisional Commissioner but the same was dismissed- it was found that the suit land is adjacent to National Highway and any activity in the same would invite trouble for vehicles and pedestrians – the allotment was properly cancelled – the suit was dismissed by the Trial Court- an appeal was filed, which was also dismissed- held in second appeal that the suit land was an undeveloped/uncreated plot and there is bar in the Rules for the allotment of such plot- therefore, the exchange was rightly cancelled by the authorities – the Courts had properly appreciated the evidence- appeal dismissed.(Para-8 to 10) Title: Anand Kumar and others Vs. State of H.P. through Deputy Commissioner, Bilaspur Page-777

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit seeking permanent prohibitory injunction for restraining the defendants from taking possession of the best part of the suit land- it was pleaded that defendants have become the owners after purchasing part of the suit land and they be restrained from interfering in the possession of the plaintiff- the suit was decreed by the Trial Court- an appeal was filed, which was dismissed – held in second appeal that a co-sharer in exclusive possession cannot be dispossessed except in accordance with law – a purchaser of the joint land cannot take forcible possession from another co-owner – the Courts had rightly granted the relief to the plaintiff- appeal dismissed. (Para-7) Title: Roop Singh and another Vs. Surat Ram (died) through LRs. Page-705

Specific Relief Act, 1963- Section 38- Plaintiff is owner in possession of the suit land - the defendants threatened to divert the natural flow of water from original course to the land of the plaintiff- the defendants also threatened to cut the tree of Sheesham, Simbal and Banana without any right to do so – the defendants pleaded that land has been demarcated and the plaintiff wants to cut the trees from the adjacent land – the suit was decreed by the Trial Court – an appeal was filed, which was allowed and the judgment passed by the Trial Court was set aside- held in second appeal that the land of the defendant is located above the land of the plaintiffs- the report of demarcation was rejected by the Appellate Court on the ground that Local Commissioner had not demarcated the suit land, which was proper- the Trial Court had wrongly placed reliance on the report of the Local Commissioner- appeal dismissed. (Para-7 to 9) Title: Kishori Lal Vs. Roshan Lal & others Page-803

Specific Relief Act, 1963- Section 38- Plaintiffs pleaded that they are owners in possession of the suit land- the name of the T, predecessor-in-interest of defendants No. 1 (i) to 1(v) is wrongly recorded in cultivating possession of the suit land – defendants No.2 and 3 filed written statement pleading that suit land was owned and possessed by Deity- one J was its Kardar- Kardar wrongly recorded himself as tenant of the suit land- he was not competent to do so- defendant No.1 was inducted as a tenant joined the Army and relinquished the possession and T was inducted as a tenant- defendants inherited his estate- T had become the owner on the commencement of H.P. Tenancy and Land Reforms Act- the suit was dismissed by the Trial Court- an appeal was filed, which was also dismissed- held in second appeal that an additional plaint was filed and the Court had framed issues on the basis of same- hence, plea that amended plaint was ignored by the Trial Court is not acceptable- T is recorded to be the tenant at Will- no evidence was led to rebut the presumption of correctness- proprietary rights were also conferred upon his successors- Courts had properly appreciated the evidence- appeal dismissed. (Para-9 to 12) Title: Kamal Kant (since deceased) through his LRs and others Vs. Chint Ram & others Page-794

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Susheela Mohan and others Vs. Lakhbir Singh Sethi, reported in Latest HLJ 2011 (HP) 329

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'Y'

Yashpal Singh and others vs. State of H.P. and another, I L R 2016 (IV) HP 2286 (D.B.)

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

Sh. Baldev Singh and others ....Petitioners

Versus

State of Himachal Pradesh and others ...Respondents

CWP No. 2644 of 2009
Date of Decision: 9.3.2017

Constitution of India, 1950- Article 226- The land of the petitioners was utilized for the construction of the road- petitioners filed a writ petition seeking the acquisition of the land and payment of compensation – the respondent pleaded that the petition is highly belated and involves adjudication of the complicated questions of facts- held that the State has not claimed that the land was utilized with the consent of the petitioners- State had initiated proceedings for acquisition but dropped them on the ground of delay- State cannot deprive a person of his property except in accordance with Law – petition allowed- State directed to initiate proceedings for acquisition of land and to pay compensation in accordance with Law.(Para-9 to 19)

Cases referred:

State of Maharashtra Vs. Digambar (1995) 5 SCC 683

State of H.P. and others Vs. Baldev and others, I L R 2015 (V) HP 1201 (D.B.)

Jai Ram Vs. State of H.P. & others 2011 (3) Shim. LC 91

Hindustan Petroleum Corporation Ltd. Vs. Darius Shapur Chenai and others (2005) 7 SCC 627

K.B. Ramchandra Raje Urs (dead) by legal representatives Vs. State of Karnataka and others (2016) 3 SCC 422

For the Petitioners: Mr.Rohit Chauhan, Advocate, vice Mr.Suneet Goel, Advocate.

For the respondents: Mr. Varun Chandel, Additional Advocate General with Mr.Pankaj Negi, Deputy Advocate General.

The following judgment of the Court was delivered:

Vivek Singh Thakur , Judge (Oral):

By way of present petition, petitioners have sought directions to respondents to pay compensation to them after acquiring their lands in accordance with law utilized for construction of Maryog via Narag-Shariar (Ochhghat Narag Dharyar) Road. It is claimed by petitioners that the said road was constructed without acquiring the land in accordance with law and also without consent of owners.

2. Petitioners have placed on record jamabandies of villages Sharia Bhajog and Masria Panjhopad (Annexure P-1 and P-2), wherein land measuring 0-5 bigha in Khasra No. 89, 0-5 bigha in Khasra No. 150, 0-3 bigha in Khasra No. 61, 0-2 bigha in Khasra No. 145 situated in village Sharia Bhagog and land measuring 0-2 bighas in Khasra No. 486, 0-3 bigha in Khara No. 288 and 0-2 bigha in Khasra No. 295 situated in village Masria Panjhopad belonging to petitioners have been reflected as Gair Mumkin Sarak.

3. Petitioners have relied document Annexure P-3, copy of letter issued by Land Acquisition Collector, HPPWD, Solan to Executive Engineer, Nahan Division, HPPWD Nahan, whereby he had forwarded notification dated 28th August, 1986 under Section 4 of Land Acquisition Act, 1894 pertaining to nineteen villages including villages of petitioners for publication intending to acquire land of petitioners comprised in Khasra No. 89/1, 150/1, 61 and 145/1 of village Sharia Bhajog and land comprised in Khasra No. 288/1 and 295/2 of village Masria Phajheped utilized by respondents for construction of the Daryar-Narag-Ochhghat Road.

4. It is submitted by petitioners that said proposal of acquisition/notification was allowed to lapse by respondents for negligence of concerned authorities. Failure of respondents to acquire the land of petitioners utilized for construction of road led issuance of notice dated 10.1.2006 (Annexure P-4) to respondents asking for acquisition of land in question. Inaction of respondents to acquire the land followed filing of present petition in the year 2009 invoking jurisdiction of this Court under Article 226 of the Constitution.

5. In reply to the petition, utilization of land of petitioners for construction of road, non-payment of compensation for the said utilization and issuance of notice by petitioners are not disputed. However, dismissal of petition has been sought for delay and laches on the part of petitioners with further averments that land in question was utilized for construction of road between KM 17/0 to 18/0 in the year 1975-76 and the said construction was never objected nor compensation was sought for the said land utilized for construction of link road, rather construction was allowed and petitioners are enjoying usufructs of this connectivity and therefore, after such an inordinate delay of about 33 years, petitioners are not entitled to invoke extra ordinary jurisdiction of this Court. It is further submitted that petitioners have raised highly disputed question of law and fact in respect to the damage caused to them for user of their land, which cannot be adjudicated in present writ petition, but only in a civil suit. In support of their plea, respondents have relied upon judgment passed by Hon'ble Apex Court in ***State of Maharashtra Vs. Digambar (1995) 5 SCC 683.***

6. During pendency of petition, in response to direction to file fresh supplementary affidavit specifically stating therein about steps/initiative taken in pursuance to proposal to acquire land dated 28.8.1986 Annexure P-3 and notice dated 10.1.2006 Annexure P-4, affidavit of Superintending Engineer concerned on behalf of respondent No. 3 was filed, stating that no steps/initiatives were taken by respondents-Department pursuant to Annexure P-3 and P-4 for the reason that case of petitioners seeking acquisition at a belated stage was found time barred and despite the fact that Land Acquisition Officer prepared draft papers for acquisition during the year, 1987, respondents had rightly not issued/published the said notice and in view of law laid down by Apex Court in *Digambar's* case, no action was taken by the Government in pursuance to notification under Section 4 (Annexure P-3) and also notice (Annexure P-4). Respondents also relied upon judgments of Full Bench passed in ***CWP No. 1966 of 2010, titled Shankar Das Vs. State of H.P., decided on 2.3.2013***, wherein it was held as under:-

> *"As per the view of the majority, the reference is answered as follows:-*
>
> *"In cases where the State has not taken steps under the Land Acquisition Act for the purpose of construction of roads on the ground that the required land had been willingly surrendered either orally or otherwise or with implied or express consent by the owners at the relevant time, they can invoke the jurisdiction refuting such express or implied consent or the stand of the State on voluntary surrender, only within the time within which such a relief can be claimed in a Civil Suit. Once such a question is thus raised in a Writ Petition the same can be considered in the writ petition itself."*

Respondents have also referred judgments passed in ***CWP No. 649 of 2015, Ram Murti & others Vs. State of H.P. & others, decided on 29.4.2015, CWP Nos. 661 to 664 of 2015, Nikka Ram and others Vs. State of Himachal Pradesh and others, decided on 15.7.2015, RSA No. 6 of 2014 State of H.P. and others Vs. Baldev and others, decided on 14.10.2015 and CWP No. 6945 of 2013 Sant Ram & others Vs. State of H.P. & others, decided on 16.9.2013***, wherein, as per respondents, this Court had declined to issue directions to pay compensation to land owners in similar circumstances. It is also submitted that judgment in *Sant Ram's* case has attained finality as the Apex Court had also dismissed SLP (C) 215/2015 on 28.11.2006 preferred by land owner petitioner, with observation that no legal and valid ground for interference was found.

7. Petitioners have relied upon judgments passed by this High Court in ***Jai Ram Vs. State of H.P. & others 2011 (3) Shim. LC 91, CWP No. 5023 of 2010, Tek Chand and***

others Vs. State of Himachal Pradesh and another and CWP No. 3467 of 2009 Shri Prakarti Bhushan Singh Vs. The State of H.P. and others, decided on 7.7.2016 and 11.8.2016, respectively, wherein as per petitioners, direction to acquire land has been issued in similar circumstances. Reliance has also been put on judgment dated 29.10.2015 passed the Apex Court in Civil Appeal No. 9105 of 2015 (arising out of SLP (C) No. 2373 of 2014) titled ***Raj Kumar Vs. State of H.P.***, wherein it has been held as under:-

> *"There is in our opinion considerable merit in the submission made by Mr. Nag. It is true that the appellant had approached the High court rather belatedly inasmuch the land had been utilized for some time in the year 1985-86 while the writ petition was filed by the appellant in the year 2009. At the same time it is clear from the pleadings in the case at hand that the user of the land owned by the appellant is not denied by the State in the counter affidavit filed before the High Court or that filed before us. It is also evident from the averments made in the counter affidavit that the State has not sought any donation in its favour either by the appellant or his predecessor in interest during whose life time the road in question was constructed. All that is stated in the counter affidavit is that the erstwhile owner of the land "might have donated" the land to the State Government. In the absence of any specific assertion regarding any such donation or documentary evidence to support the same, we are not inclined to accept the ipsit disit suggesting any such donation. If that be so as it indeed is, we fail to appreciate why the State should have given up the land acquisition proceedings initiated by it in relation to the land of the appellant herein. The fact that the State Government had initiated such proceedings is not in dispute nor is it disputed that the same were allowed to lapse just because the road had in the meantime been taken under the Pradhan Mantri Gram Sadak Yojna. It is also not in dispute that for the very same road the land owned by Kanwar Singh another owner had not only been notified for acquisition but duly paid for in terms of Award No. 10 of 2008."*

8. It is submitted on behalf of petitioners that in present case there was no implied or express consent of the owners of land and for that reason only State had initiated process for acquisition of land in question by taking steps for issuing notification under Section 4 of Land Acquisition Act and also after acquiring land of adjoining villages, used for the same road, compensation was paid to land owners and as there was no implied or express consent of owners in present case, it is not covered by law laid by the Full Bench of this High Court in *Shankar Das's* case, in which the owners had willingly surrendered their lands either orally or otherwise or with implied or express consent for construction of road but, later on, were asking for compensation.

9. The ratio of law laid down by Full Bench of this Court in *Shankar's case* will be applicable in those cases where not only State has not initiated any steps for acquisition of land but also claims consent of land owners for construction of road. In present case Respondents have not placed on record any document to establish consent of owners at the time of construction of road or any point of time thereafter. Rather, State had initiated process for acquisition and termination of that process was for delay and laches but not for consent of land owners. Therefore, judgment of *Shankar Das's* case (FB) is not applicable to present case. All other cases relied upon by respondents-State also not deal with the issue where the road was constructed, compensation was paid to some of adjoining land owners and acquisition of land, utilized for construction of road, was proposed by undertaking process for issuing notification under Section 4 of the Land Acquisition Act, but allowed to lapse for laxity on part of authorities/department concerned despite having no consent of land owners to utilize the land for road construction. Therefore, on facts, case law cited by respondents is distinguishable and not applicable in the present case.

10. In *Sant Ram's* case, land of petitioners therein was utilized for construction of road, but without undertaking any process for its acquisition under the Act. Whereas, in present

case, State itself had proposed acquisition of land in question by preparing notification under Section 4 of the Land Acquisition Act for publication. Therefore, ratio of law laid down in the said case is not applicable in present case. In *Ram Murti's* and *Nikka Ram's* case, road was construction under Pradhan Mantri Gramin Sarak Yojna (PMGSY) on popular demand of people of area, only after voluntarily surrender of possession of their lands by villagers, whereas in present case, road is not constructed under PMGSY and there is nothing on record to establish that road was constructed on popular demand of people of area only after surrender of possession by villagers. Rather, contrary to that, there is a proposal of acquisition of land in question which was deliberately allowed to be lapsed for inaction on part of State, but payment of compensation to other land owners for utilization of their land for the same road has not been denied. Therefore, State cannot claim benefit on account of its own inaction as proposal of State has raised hope that sooner or later their land is going to be acquired.

11. In *Baldev Sing's* case (RSA No. 6 of 2014), relief of compensation or recovery of possession was declined by the Court for the reason that plaintiffs had not prayed for the said relief in their pleadings and no foundation was laid for that releif. Whereas in present case, petitioners have specifically prayed for direction to respondents to pay compensation after acquisition of land in question. Therefore, this judgment is also not relevant in present case.

12. In *Jai Ram's* case supra this Court has held that in absence of consent of land owners, the act of State or its agencies, to utilize private lands without payment of compensation to the land owners, is not permissible under law being contrary to mandate of Article 300A of the Constitution of India and not raising of objection by land owner when his land is being encroached upon either by State or its agencies or even by private persons, does not disentitle him to seek his legal remedy.

13. Though Article 19 (f) of the Constitution of India, declaring right to acquire, hold and dispose of property a fundamental right, has been omitted by Constitution (44th Amendment) Act, 1978 w.e.f. 20.6.1979, however by the same Amendment Act, Chapter 4 in part XII of the Constitution, containing Article 300A declaring that no person shall be deprived of his property save by authority of law, has been inserted w.e.f. 20.6.1979.

14. In case ***Hindustan Petroleum Corporation Ltd. Vs. Darius Shapur Chenai and others (2005) 7 SCC 627***, the Apex Court, having regard to the provisions contained in Article 300A of the Constitution, has held it to be akin to a fundamental right and in view of these provisions, the State in exercise of its power of eminent domain can interfere with the right of property of a person by acquiring the same, only for a public purpose and paying reasonable compensation therefor.

15. Constitution provides protection from depriving a person of his property except by due process of law. State cannot be permitted to practice and propagate principle of might is right, as "Rule of Law" is the basic essence of the Constitution and any arbitrary act is antitheses to rule of law. In present case, State has adopted pick and choose method and has acquired land of some of land owners utilized for construction of same road, but has left petitioners without paying any compensation.

16. State is custodian of rights of citizens and life and property of citizens is to be protected, not to be grabbed by the State. It is duty of State to establish and maintain "Rule of Law".

17. In ***K.B. Ramchandra Raje Urs (dead) by legal representatives Vs. State of Karnataka and others (2016) 3 SCC 422,*** the Apex Court has held that writ petitioners may not be entertained and any order thereon may not be passed for inordinately delayed in filing petition with further observation that this issue need not to detain the Court from entertaining such petition as time and again it has been held that while exercising jurisdiction under Article 226 of Constitution, the High Court is not bound by any strict rule of limitation and if substantial

issue of public importance touching upon the fairness of governmental action is raised, the delayed approach to reach the Court, will not stand in the way of exercise of jurisdiction by the Court. In present case, it is undisputed that land owners of adjacent villagers were compensated for using their lands for construction of the same road for which land of persons was utilized, but despite initiating proposal for publication of Section 4 notification under Land Acquisition Act, intending acquisition of land of petitioners and other villagers, the same was dropped, depriving the petitioners from lawful compensation, for which they were and are entitled. State is supposed to act impartially and fairly, but the facts in the present case establish that State has acted arbitrarily and unfairly, therefore, plea of delay and laches raised by respondents to oust petitioners, cannot be a ground to dismiss present petition.

18. Co-ordinate Bench of this Court almost in similar circumstances in ***Shankar Singh and others Vs. State of H.P. and another, CWP No. 3031 of 2009, decided on 7.7.2016 and Shri Prakarti Bhushan Singh Vs. The State of H.P. and others CWP No. 3467 of 2009, decided on 11.8.2016*** has directed respondent-State to acquire land, utilized for constriction of road, in accordance with law.

19. In view ratio of law laid down by the Apex Court and in pronouncements of this High Court, in the given facts and circumstances of the case in hand, as discussed above, petition is allowed and respondents are directed to initiate acquisition process within three months from production/receipt of copy, whichever is earlier, to acquire land of petitioners utilized without paying any compensation for construction of road and to ensure completion of process and payment of compensation within time stipulated in the relevant provisions of law as applicable. The petition stands disposed of, so also pending application(s), if any.

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

Satish Kumar and Another. ....Petitioners

Versus

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

CWP No. 10122 of 2011
Date of Decision: 16.3.2017

Constitution of India, 1950- Article 226- A complaint was filed by the respondent No.4 against the petitioner before Judicial Magistrate, Khagaria, Bihar- as per the complaint, complainant had provided mason and Labourersfor which no payment was made – the agreement was executed at Kalpa – part of cause of action had arisen within the jurisdiction of the Himachal Pradesh High Court and the Writ petition is maintainable- the dispute between the parties is civil in nature and does not attract the criminal liability – mensrea was not proved – petition allowed and the proceedings pending before Judicial Magistrate, Khagaria, Bihar quashed. (Para- 4 to 10)

Cases referred:

Navinchandra N. Majithia Vs. State of Maharashtra and others (2000) 7 SCC 640
Anil Mahajan Vs. Bhor Industries Ltd. and another (2005) 10 SCC 228

For the Petitioners: Mr.B.C. Negi, Senior Advocate with Mr.Narender Thakur, Advocate.
For the Respondents: Mr. Pankaj Negi, Deputy Advocate General, for respondents No. 1 and 2.
Respondent No. 4 already ex parte.

The following judgment of the Court was delivered:

Vivek Singh Thakur , Judge (Oral)

Petitioners have assailed issuance of process against them by Judicial Magistrate, Khagaria, Bihar in case No. 86C/10 in complaint filed by respondent No. 4 against them under Section 406 IPC.

2. On service, respondents-State has filed reply whereas complainant-respondent No. 4 has not preferred to be represented in this petition much less to file reply. Reply of respondents-State is formal reply, wherein except admitting filing of complaint by complainant-respondent No. 4, no response to plea of petitioners has been preferred either stating it needed no reply or for want of knowledge.

3. Petitioners have been served with notice (Annexure P-3) issued by Judicial Magistrate for appearing in the said Court. Copy of complaint, served along with notice is also part of Annexure P-3.

4. As per complaint, complainant-respondent No. 4 and his witnesses had worked for petitioners earlier also and therefore, believing them, complainant-respondent No. 4 had provided five masons and six labourers who worked for petitioners w.e.f. 24.4.2009 to 24.8.2009 and agreed rate of daily wage for mason and labourer was Rs. 300/- and Rs. 150/- respectively and complainant and his witnesses worked on site of petitioners daily since 9 A.M. to 5:50 P.M. According to complaint, a balance payment of Rs. 2,25,000/-, to be paid by petitioner against wages to complainant-respondent No. 4 and witnesses labourer, was being avoided by petitioners on one pretext or other, whereupon a notice dated 7.1.2010 was also served upon petitioners asking them to make payment within a week, but petitioners did not pay the said balance amount and on 22.1.2010, petitioners again visited house of complainant-respondent No. 4 and in presence of witnesses, at about 12 Noon, they assured for payment of balance amount with request to return on work of petitioners, but complainant-respondent No. 4 and his witnesses refused to work for petitioners without payment of balance amount, whereupon petitioners left the place abusing complainant-respondent No. 4 and others and also threatened for not to make payment of balance amount. With averment of belief that petitioners are intentionally not making payment of balance amount, prayer for taking cognizance of illegal act of petitioners has been made in the complaint.

5. Petitioners have also placed on record copy of agreement dated 24.9.2009, executed between petitioner No. 1 and complainant-respondent No. 4 at Kalpa in presence of witnesses which is also notarized on the same date. Complainant-respondent No. 4 has also made reference of agreement in his complaint. As per this agreement, complainant-respondent No. 4 had agreed to provide mason and labourer to petitioner No. 1 till 15th November, 2009 against payment of wages to be made every month but balance amount was to be paid by 10th November, 2009 and in case of leaving work prior to settled time, right to receive balance amount was to be forfeited.

6. Process against petitioners has been issued by learned Judicial Magistrate, Khagaria, Bihar, which, undisputedly, is beyond the territory of Himachal Pradesh, so also beyond the territorial jurisdiction of this Court. Maintainability of this petition in this Court is primary issue to be decided first of all. Thereafter, only in case petition is maintainable, merits of plea to quash notice issued and complaint and proceedings pending before learned Judicial Magistrate Khagaria, Bihar are to be adjudicated on the basis of material on record.

7. Learned counsel for the petitioners has relied upon ratio of law laid down by Hon'ble Apex Court in case titled ***Navinchandra N. Majithia Vs. State of Maharashtra and others (2000) 7 SCC 640***, in which it was held as under:-

> *"**36**. It was the said decision of the Constitution Bench which necessitated Parliament to bring the Fifteenth Amendment to the Constitution by which clause*

(1-A) was added to Article 226. That clause was subsequently renumbered as clause (2) by the Constitution Forty-Second Amendment. Now clause (2) of Article 226 reads thus:

> *"226. (2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories."*

***37**. The object of the amendment by inserting clause (2) in the article was to supersede the decision of the Supreme Court in Election Commission v. Saka Venkata Sabba Rao AIR 1953 SC 210 and to restore the view held by the High Courts in the decisions cited above. Thus the power conferred on the High Courts under Article 226 could as well be exercised by any High Court exercising jurisdiction in relation to the territories within which "the cause of action, wholly or in part, arises" and it is no matter that the seat of the authority concerned is outside the territorial limits of the jurisdiction of that High court. The amendment is thus aimed at widening the width of the area of reaching the writs issued by different High Courts.*

***38**. "Cause of action" is a phenomenon well understood in legal parlance. Mohapatra, J. has well delineated the import of the said expression by referring to the celebrated lexicographies. The collocation of the words "cause of action, wholly or in part, arises" seems to have been lifted from Section 20 of the Code of Civil Procedure, which section also deals with the jurisdictional aspect of the courts. As per that section the suit could be instituted in a court within the legal limits of whose jurisdiction the "cause of action wholly or in part arises". Judicial pronouncements have accorded almost a uniform interpretation to the said compendious expression even prior to the Fifteenth Amendment of the Constitution as to mean "the bundle of facts which would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court."*

8. In present case, agreement relied upon by both parties i.e. petitioners and complainant-respondent No. 4 was executed at Kalpa District Kinnaur in Himachal Pradesh. The masons along with labour were also provided by complainant-respondent No. 4 at Kalpa and the payment of some wages was also made in Kalpa, and complainant-respondent No. 4 has filed complaint for not making payment of balance amount of wages for work done in Kalpa in pursuance of agreement executed at Kalpa. Therefore, it can be safely inferred that major part of cause of action has arisen in territorial jurisdiction of this Court. In view of bare provisions of Article 226(2) of the Constitution of India and also as explained in ratio of law laid down in judgment of *Navinchandra N. Majithia* (supra), I am of the view that present petition is maintainable in this Court.

9. Petitioners have challenged issuance of notice in Criminal Complaint filed for non-payment of wages in furtherance to the agreement (Annexure P-1) executed between petitioner and complainant-respondent No. 4. Learned counsel for the petitioners submits that there is no act on the part of the petitioners inviting their criminal culpability, so as to summon them in a Criminal Complaint filed for non-abiding, if any, the terms and conditions of the agreement. It is further contended that if averments of the complaint are considered to be gospel truth even then as evident from contents of the complaint itself, it is a civil dispute as the masons and labourers provided by respondent No. 4 had worked w.e.f. 24.4.2009 to 24.8.2009 whereas as per agreement, placed on record, they had to work till 15th November, 2009 and balance payment was to be made on 10th November, 2009 with rider that in case of abandoning work prior to fixed date, right to receive balance payment had to be forfeited. It appears from material on record that work was not completed and only for that reason, as mentioned in complaint,

petitioners had requested complainant-respondent No. 4 and others to come back on work and to have the balance wages. In my opinion dispute between parties is civil in nature and whether complainant-respondent No. 4 is entitled to recover balance payment or petitioners have right to withhold the alleged balance payment is to be adjudicated by Civil Court only. I also draw support from pronouncement of Hon'ble Apex Court in ***Anil Mahajan Vs. Bhor Industries Ltd. and another (2005) 10 SCC 228***, relied upon by petitioners, wherein it has been held as under:-

> *"6. The order of the Magistrate was challenged before the Court of Session. The learned Additional Sessions Judge, Pune, by order dated 19-10-2001 has set aside the order of the Magistrate issuing process. It has been stated by the learned Additional Sessions Judge in the order that:*
>
> > *"In this case there is no allegation that the accused made unlawful representation. Even, according to the complaint, they entered into memorandum of understanding. Grievance seems to be that the accused failed to discharge obligations under the MOU. In the complaint, there was no allegation that there was fraud or dishonest inducement on the part of the applicant and thereby the opponent parted with the property."*
>
> *Reliance has been placed, in that order, on various decisions of this Court holding that from mere failure of a person to keep up promise subsequently, a culpable intention right at the beginning, that is, when he made the promises cannot be presumed. A distinction has to be kept in mind between mere breach of contract and the offence of cheating. It depends upon the intention of the accused at the time of inducement. The subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent, dishonest intention is shown at the beginning of the transaction.*
>
> *7. The order of the learned Additional Sessions Judge has been set aside by the High Court by the impugned judgment. The High Court, except noticing that the ratio of the judgment of this Court cannot be applied to all cases in a uniform way, has neither discussed the said judgment nor stated as to how it was wrongly applied by the learned Additional Sessions Judge. There is hardly any discussion in the impugned judgment for reversing a well-considered judgment of the learned Additional Sessions Judge.*
>
> *8. The substance of the complaint is to be seen. Mere use of the expression "cheating" in the complaint is of no consequence. Except mention of the words "deceive" and "cheat" in the complaint filed before the Magistrate and "cheating" in the complaint filed before the police, there is no averment about the deceit, cheating or fraudulent intention of the accused at the time of entering into MOU wherefrom it can be inferred that the accused had the intention to deceive the complainant to pay……."*

10. The ratio of law laid down in aforesaid judgment is fully applicable in the given facts and circumstances of present case and as the dispute between petitioners and respondent No. 4 is purely civil in nature, attracting no criminal culpability on the part of petitioners. Even if, the contents of complaint filed by respondent No. 4 are relied as it is, then also, there is no averment therein so as to infer mensrea on part of petitioners and to draw inference that even prima facie petitioners are liable for facing criminal trial in complaint filed by complainant-respondent No. 4. Therefore, learned Magistrate has erred in issuing the process against petitioners in criminal complaint filed by respondent No. 4. Therefore, notice (Annexure P-3) along with complaint is quashed and petition is allowed accordingly. Though it is obvious, but to avoid any misconstruction, it is clarified that consequently proceedings pending before Judicial Magistrate, Khagaria, Bihar filed by complainant-respondent No. 4 also stands quashed. The petition stands disposed of, so also the pending application(s), if any.

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

Surjeet Kaur ...Petitioner

Versus

State of Himachal Pradesh & others ...Respondents

CWP No. 8724 of 2011
Date of Decision: 20.03.2017

Constitution of India, 1950- Article 226- Petitioner was serving as a head teacher in a school affiliated with H.P. Board of School Education – she was removed from service on the ground that she was untrained and did not possess requisite minimum qualification – aggrieved from the order, the present writ petition has been filed- held that the school is not an authority or instrumentality of the State – the State has constitutional obligation to provide educational facilities to its citizens – respondent No.4 had acted under the Statute and was acting on behalf of the State – its action was part of public duty and is amenable to the writ jurisdiction – a period of five years has been provided under the Statute to acquire the qualification and hence termination of petitioner is bad – further, the record shows that petitioner was removed on the ground that she was not cooperating with the management in replacing the teachers –her age was 56 years on the date of removal – hence, the compensation of Rs.75,000/- awarded along with due and admissible benefits on her retirement.(Para- 4 to 22)

Cases referred:

D.S. Veer Ranji versus Ciba Specialty Chemicals (I) Ltd. and another, (2005) 6 Supreme Court Cases 657

K. K. Saksena Vs. International Commission on Irrigation & Drainage and others, (2015) 4 SCC 670

Sobha George Adolfus Versus State of Kerala, AIR 2016 SCC 73

For the petitioner : Ms. Shalini Thakur, Advocate,

For the respondents 1 & 2. : Mr. Varun Chandel, Additional Advocate General with Mr. Pankaj Negi, Deputy Advocate General.

For respondents No. 3 & 4 : Mr. Mohar Singh, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge (Oral)

Petitioner was serving as Head Teacher in Bawa Amerjeet Kaur Memorial School, Sham Sherpur Paonta Sahib, District Sirmaur, since 1993. The school was having recognition and affiliation with H.P. Board of School Education. In present petition, she has assailed her termination and relieving vide notice dated 30.04.2011 (Annexure P-5) whereby she was removed from service for the reasons that she was untrained teacher and was not having requisite minimum qualifications as per norms. As per petitioner, she was removed illegally by respondent No. 4 under the garb of enactment of norms providing minimum qualification under 'The Right of Children to Free and Compulsory Education Act, 2009 (here-in-after referred as 'Act, 2009'.)

2. It is submitted on behalf of petitioner that under 'The Right of Children to Free and Compulsory Education Act, 2009", minimum qualification for the post of which she was working has been prescribed as Bachelor of Education and respondent No. 4 under the garb of Enactment prescribing minimum qualification for teacher under the Act, 2009 had removed and relieved her from service vide impugned notice dated 30.04.2011 (Annexure P-5), whereas, she

was entitled for 5 years lean period from the commencement of the Act, 2009 for acquiring minimum qualification prescribed as per norms.

3. Respondent-State has filed reply to the petition stating that respondent No. 1 has no role to play regarding the appointment of petitioner as appointment and control of teacher of such schools is with the School Management. However, it is stated that under the Act 2009, Private Schools are given recognition w.e.f. 2011-12 session and after that their recognition is renewed every year by the concerned Deputy Director of Elementary Education at District Level.

4. Mr. Nimish Gupta, Advocate is representing respondent No.3 Principal of the School and also respondent No. 4 Management Committee of the School. However, reply of respondent No. 3 only, has been preferred defending the action of respondent No. 4 stating therein that on 06.03.2011, in a meeting of Management Committee, it was decided to remove those teachers who were not having requisite minimum qualification as per norms and replace them with trained teachers and thereafter in the next meeting held on 20.04.2011, such teachers were served with notice and relieved by paying one month's salary in advance. Copies of the proceedings of the meeting have also been placed on record as Annexure A-1 and Annexure A-2 with the reply. It is contended on behalf of respondent No. 4 that respondent No. 4 is a Private and un-aided school being managed by Society and is not an instrumentality of State and therefore, relief claimed by petitioner cannot be granted in present petition being not maintainable. Appointment of petitioner as Head Teacher since, 1993 and her removal for want of requisite minimum qualification is not disputed in the reply. Action of the Management has been claimed in consonance with the Rules and Regulations of the Board. However, no such Rules and Regulations have been placed on record. The petitioner has placed on record the Right of Children to Free and Compulsory Education, Himachal Pradesh Rules, 2011 (in short HP Rules 2011) Rule 14 of the said Rules provides as under:

> *"14. Acquiring minimum qualifications under proviso to section 23(2):- (1) The State Government shall provide adequate teacher education facilities to ensure that all teachers in schools referred to in Sub-clause (i) of clause (n) of section 2, who do not possess the minimum qualifications laid down under section 23, at the time of commencement of the Act, to acquire such minimum qualifications within a period of five years from the commencement of the Act.*

5. HP Rules 2011 have been enacted exercising power under Section 38 of the Act, 2009 and in Section 23 of the Act, 2009, academic qualification of teachers has been providing time in which it is required to be acquired by the un-trained teachers already working in the Educational Institutions. Section 23 reads as under:-

> "23" (1*) Any person possession such minimum qualifications, as laid down by an academic authority, authorized by the Central Government by notification, shall be eligible for appointment as a teacher.*
>
> *(2) Where a State does not have adequate institutions offering courses or training in teacher education, or teachers possessing minimum qualifications as laid down under sub-section (1) are not available in sufficient numbers, the Central Government may, if it deems necessary, by notification, relax the minimum qualifications required for appointment as a teacher, for such period, not exceeding five years, as may be specified in that notification;*
>
> *Provided that a teacher who, at the commencement of this Act, does not possess minimum qualifications as laid down under sub-section (1), shall acquire such minimum qualifications within a period of five years.*
>
> *(3) The salary and allowances payable to, and the terms and conditions of service of, teachers shall be such as may be prescribed".*

6. By referring the provisions of Act, 2009 petitioner has claimed that she was entitled 5 years lean period from date of commencement of the Act to acquire minimum educational qualification.

7. Respondent No. 4 has raised objection with regard to maintainability of the writ petition against un-aided private educational institution run by Society pointing out that no mandamus can be issued against respondents No. 3 & 4 as a writ under Article 226 of the Constitution of India is not maintainable against them and petitioner, for redressed of his grievance, if any, should have approached the Civil Court. This issue is not res integra and a writ petition against a private person/entity is maintainable under Article 226 of the Constitution subject to fulfilling certain conditions.

8. The Apex Court in case Binny Limited and another Versus V. Sadasivan and others with D.S. Veer Ranji versus Ciba Specialty Chemicals (I) Ltd. and another reported in ***(2005) 6 Supreme Court Cases 657*** has held as under:-

> *"11" The Judicial review is designed to prevent the cases of abuse of power and neglect of duty by public authorities. However, under our Constitution, Article 226 is couched in such a way that a writ of mandamus could be issued even against a private authority. However, such private authority must be discharging a public function and that the decision sought to be corrected or enforced must be in discharge of a public function. The role of the State expanded enormously and attempts have been made to create various agencies to perform the governmental functions. Several corporations and companies have also been formed by the government to run industries and to carry on trading activities. These have come to be known as Public Sector Undertakings. However, in the interpretation given to Article 12 of the Constitution, this Court took the view that many of these companies and corporations could come within the sweep of Article 12 of the Constitution. At the same time, there are private bodies also which may be discharging public functions. It is difficult to draw a line between the public functions and private functions when it is being discharged by a purely private authority. A body is performing a "public function" when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest. In a book on Judicial Review of Administrative Action (Fifth Edn.) by de Smith, Woolf & Jowell in Chapter 3 para 0.24, it is stated thus:*
>
> *"A body is performing a "public function" when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest. This may happen in a wide variety of ways. For instance, a body is performing a public function when it provides "public goods" or other collective services, such as health care, education and personal social services, from funds raised by taxation. A body may perform public functions in the form of adjudicatory services (such as those of the criminal and civil courts and tribunal system). They also do so if they regulate commercial and professional activities to ensure compliance with proper standards. For all these purposes, a range of legal and administrative techniques may be deployed, including: rule-making, adjudication (and other forms of dispute resolution); inspection; and licensing.*
>
> *Public functions need not be the exclusive domain of the state. Charities, self-regulatory organizations and other nominally private institutions (such as universities, the Stock Exchange, Lloyd's of London, churches) may in reality also perform some types of public function. As Sir John Donaldson M.R. urged, it is*

important for the courts to "recognise the realities of executive power" and not allow "their vision to be clouded by the subtlety and sometimes complexity of the way in which it can be exerted". Non-governmental bodies such as these are just as capable of abusing their powers as is government."

9. In K. K. Saksena Vs. International Commission on Irrigation & Drainage and others, reported in ***(2015) 4 SCC 670,*** the Apex Court has held as under:-

" 43. What follows from a minute and careful reading of the aforesaid judgments of this Court is that if a person or authority is a 'State' within the meaning of Article 12 of the Constitution, admittedly a writ petition under Article 226 would lie against such a person or body. However, we may add that even in such cases writ would not lie to enforce private law rights. There are catena of judgments on this aspect and it is not necessary to refer to those judgments as that is the basic principle of judicial review of an action under the administrative law. Reason is obvious. Private law is that part of a legal system which is a part of Common Law that involves relationships between individuals, such as law of contract or torts. Therefore, even if writ petition would be maintainable against an authority, which is 'State' under Article 12 of the Constitution, before issuing any writ, particularly writ of mandamus, the Court has to satisfy that action of such an authority, which is challenged, is in the domain of public law as distinguished from private law.

44. Within a couple of years of the framing of the Constitution, this Court remarked in Election Commission of India v. Saka Venkata Subba Rao [10] that administrative law in India has been shaped in the English mould. Power to issue writ or any order of direction for 'any other purpose' has been held to be included in Article 226 of the Constitution 'with a view apparently to place all the High Courts in this country in somewhat the same position as the Court of the King's Bench in England. It is for this reason ordinary 'private law remedies' are not enforceable through extraordinary writ jurisdiction, even though brought against public authorities (See - Administrative Law; 8th Edition; H.W.R. Wade & C.F. Forsyth, page 656). In a number of decisions, this Court ha held that contractual and commercial obligations are enforceable only by ordinary action and not by judicial review.

45. On the other hand, even if a person or authority does not come within the sweep of Article 12 of the Constitution, but is performing public duty, writ petition can lie and writ of mandamus or appropriate writ can be issued. However, as noted in Federal Bank Ltd. (supra), such a private body should either run substantially on State funding or discharge public duty/positive obligation of public nature or is under liability to discharge any function under any statute, to compel it to perform such a statutory function".

10. In case Mrs. Sobha George Adolfus Versus State of Kerala, reported in ***AIR 2016 SCC 73,*** after considering various judgments on this issue the Apex Court has held as under :-

"15. *The State under Article 21A of the Constitution is obliged to provide free and compulsory education upto the age of 14 years. Thus, there may not be any difficulty in holding that, even an unaided educational institution imparting education to the children upto the age of 14 years is discharging a State function. Thus, a W.P.(C).No.30712/2015 writ petition would be maintainable as against a private body which discharges a State function of imparting education to the children upto the age of 14 years.*

..... 20. The fundamental right guaranteed under Article 21 has been given horizontal application in several judgments of the Hon'ble Supreme Court by

applying into private actions. In Consumer Education & Research Centre and others v. Union of India and others [1995 3 SCC 42], the Hon'ble Supreme Court in a challenge made in a Public Interest Litigation ordered enforcement of fundamental rights as against private employers by directing them to provide protective measures to the workmen".

11. In view of ratio of law laid down by Apex Court, it is clear that writ of mandamus can be issued against a private person/institution in the given facts and circumstances of the case where the said person/Institution is discharging public duty or positive obligation of public nature or is under liability to discharge any function under any statute; to compel it to perform such statutory function.

12. In present case admittedly respondent No. 4 is not an authority or instrumentality of the State under Article 12 of the Constitution. Its status is like a private person. Respondent No. 4 is discharging function of imparting education. Article 21 of the Constitution of India provides protection of life and personal liberty and right of livelihood which is a Fundamental Right and without opportunity of living life with dignity, it cannot be said that right to life is protected. Education is a basic requirement to enjoy life in dignified manner. Therefore, right to have education is also part of right to life i.e. Fundamental Right guaranteed under the Constitution. As the education has influence on personality and conduct of an individual ultimately affecting his right to enjoy life with freedom and according to own will as provided in the Constitution. Thus, State has constitutional obligation to provide educational facilities to its citizens and a body or person, ventured in the same field, is performing the said function on behalf of State and is performing public function. Therefore, respondent No. 4 while performing function of imparting education is discharging public duty i.e. a state function.

13. In present case, impugned action of respondent No. 4 is also based on the statutory provisions enacted by the State. In this case, not only for imparting education but also for discharging a function in furtherance to a duty cast upon it under a Statute at the time of determining the condition of service to its teachers, writ petition under Article 226 of the Constitution is maintainable against respondent No. 4 as for ousting petitioner from job, respondent No. 4, has referred norms prescribed by the Board with respect to minimum requisite qualifications to be possessed by teachers. Therefore, at the time of deciding the removal of teachers including petitioner, respondent No.4 was acting on behalf of the State and was discharging function of the State in pursuance to the duty assigned to the Management of the School as per the provisions of Act, 2009 and H.P. Rules, 2011 framed thereunder.

14. For the aforesaid reasons, impugned action of respondent No. 4 is also part of public duty devolved upon it under provisions of Statute and, therefore, in present case impugned action is amenable to writ jurisdiction of this Court. Hence, present petition is maintainable against the respondent No.4, irrespective of the fact that whether institution is aided or un-aided one.

15. Now it is to be considered whether the action taken by respondent No. 4, in removing petitioner, is in consonance with the provisions of law or not.

16. Section 23 of the Act, 2009 provides qualifications for appointment and also terms and conditions of service of teachers. It also provides that a teacher, who, at the time of commencement of the Act 2009, does not possess minimum qualifications laid down in this Section, shall acquire such minimum qualification within a period of 5 years and similarly Rule 14 of the H.P. Rules 2011, also provides 5 years lean period to teachers from the date of commencement of the Act, for acquiring the requisite qualifications. The Act, 2009 came into force w.e.f. 01.04.2010 and the H.P. Rules 2011, have been enacted with effect from 05.03.2011. Petitioner has been removed from service on 30.04.2011 under the garb of enactment of the Act and Rules supra prescribing requisite minimum qualification despite the

fact that petitioner was entitled for 5 years lean period i.e. at least upto 01.04.2015 to acquire requisite qualification provided in Section 23 of the Act, 2009 and Rule 14 of H.P. Rules 2011.

17. Further, from the proceedings of meetings of the Management placed on record, it appears that petitioner was not removed for want of qualification but her removal from post was decided by Management with effect from 30.04.2011 for the reason that she was not cooperating with the Management in replacing teachers. Be it as may be, in any case, notice dated 30.04.2011 relieving the petitioner specifically states that she has been removed being untrained teacher whereas in view of lean period of 5 years provided in the Act 2009 and the H.P. Rules 2011, she was entitled to serve the said period and, therefore, impugned action of respondent No. 4 is not only contrary to the provisions of the relevant Act and Rules but also in violation of right of petitioner provided under the said provisions to have a chance to acquire requisite qualifications within 5 years.

18. It is submitted by the respondent No. 4 that in any case, petitioner was not entitled to be continued in service after 58 years of age as she was to be retired from service after 58 years and on the date of removal of service she was 56 years old and her date of birth 20.05.1955 is also mentioned in Annexure P-2 placed on record by her. Therefore, petitioner is not entitled to have mandamus for reinstatement, as prayed for and as such, quashing of notice dated 30.11.2011 (Annexure P-5) will be a futile exercise.

19. Learned counsel for petitioner submits that statutory right of petitioner has been infringed for redressal of which petitioner has approached the Court within reasonable time and there is no fault on the part of petitioner for pendency of petition for adjudication and, therefore, she submits, in changed circumstances, the Court has power to mould the relief and to award adequate compensation for illegal removal of petitioner as petitioner has also prayed for passing of any other order in facts and circumstances of the case.

20. It is settled law that for the interest of justice, the Court can mould the relief, more particularly, when prayer for any other order in facts and circumstances of the case has also been made.

21. Monthly wages of the petitioner as mentioned in notice of removal dated 30.04.2011 (Annexure P-5), was Rs.5000/-, which is not disputed. Petitioner has completed 58 years on 20.05.2013. She has been removed 25 months earlier to date of her retirement. Had she been in service, she would have received at least Rs.1,25,000/- during May 2011 to June 2013 and petitioner would also have earned interest thereupon. Though it is also hard fact that petitioner has not worked for this period but at the same time it is also true that she had not desisted from performing her job on her own but was prevented by respondent No. 4 from discharging her duty as Head Teacher for impugned removal.

22. Considering respective submissions of learned counsel of parties and documents placed on record, and also in facts and circumstances discussed above, it is appropriate that an amount of Rs.75,000/- is awarded as compensation in favour of the petitioner with direction to respondent No. 4 to pay the said amount on or before 31.8.2017, failing which petitioner shall also be entitled for interest thereupon @ 6% per annum w.e.f. 01.06.2013 till full and final payment. It is also made clear that petitioner is also entitled for all other due and admissible benefits, for which she would have been entitled on her retirement on completion of 58 years by treating her in service till her retirement at the age of 58 years, to be calculated on the basis of salary as has been paid to her counterpart engaged after her removal or her own salary whichever is higher. Needless to say delay in payment of such benefits, if any, will also invite payment of interest thereupon @6% per annum w.e.f. 1.6.2013 till full and final payment.

23. Writ petition is allowed in the aforesaid terms. Pending application(s), if any, also stand disposed of. No order as costs.

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

Sh. Najakat Ali Hashmi .....Petitioner.

Versus

State of Himachal Pradesh and another .....Respondents.

Cr. Revision No. 240 of 2010
Reserved on : 20.04.2017
Date of decision: 27.04.2017

Code of Criminal Procedure, 1973- Section 457- Two applications were filed for the release of same bus, which was impounded by the policein connection with FIR registered for the commission of offences punishable underSections356, 147 and 149 of IPC - it was alleged that the bus was snatched along with the documents by accused N – signatures of the complainant were taken on some papers – it was pleaded in one application that E had purchased the bus from its registered owner N after payment of sale consideration- owner had executed a receipt and an irrevocable power of attorney in favour of E – N pleaded in his application that he was registered owner and thus entitled to the possession of the bus – the Court allowed the application of E and dismissed the application filed by N- held in revision that findings recorded by the Court that bus was sold in favour of E was supported by documents – merely because the registration certificate was in favour of N will not entitle him to the custody of the bus, when the documents showed the transfer of bus by him- further, he had forcibly snatched the bus and the case has been registered against him- petition dismissed.(Para-10 and 11)

Cases referred:

Sahrif Mohammad Vs. State of H.P., 2004(1) S.L.J.353

Vasantha Vishwanathan and others Vs. V.K. Elayalwar and others, AIR 2001 Supreme Court 3367

For the petitioner: Mr. Imran Khan, Advocate.

For the respondents: Mr. Vikram Thakur and Ms. Parul Negi, Deputy Advocate Generals, for respondent No. 1.
Mr. Neeraj Gupta, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge:

By way of this revision petition, the petitioner has challenged order dated 03.08.2010 passed by the Court of learned Judicial Magistrate 1st Class, Court No. 2, Paonta Sahib, whereby learned Court below while allowing Cr. M.A. No. 189/4 of 2010 filed by Ekant Garg (present respondent No. 2) under Section 457 of the Criminal Procedure Code, dismissed a similar application filed by the present petitioner, i.e. Cr. M.A. No. 188/4 of 2010.

2. Brief facts necessary for the adjudication of the present petition, as are borne out from the records of the case, are that two applications were filed before the learned Court below, i.e. one by the present petitioner and another by present respondent No. 2 for release of same bus bearing registration No. HP-17-9786, chassis No. 359350UTQ-016110, which was impounded by the police of Police Station Paonta Sahib in connection with FIR No. 210, dated 17.06.2010, registered under Sections 356, 147 and 149 of the Indian Penal Code. Records further demonstrate that on 17.06.2010, complainant Rizwan Ali filed a complaint that he was employed as Conductor by Ekant Garg (applicant in Cr. M.A. No. 189/4 of 2010) and while the said bus was coming from Shimla to Paonta Sahib, accused Nazakat Ali (present petitioner), who was already present at Bus Stand, Paonta Sahib alongwith 20-25 persons, stopped the bus and

forcibly boarded the same and snatched its documents. Further, as per the complainant, the petitioner misbehaved with him and assaulted him and forcibly obtained his signatures on certain papers and thereafter took forcible possession of the bus. On the basis of the said complaint filed by Rizwan Ali, FIR No. 210, dated 17.06.2010 was registered at Police Station Paonta Sahib and the possession of the bus was taken by the police vide a separate memo.

3. After seizure of the said vehicle, two applications were filed for custody of the same under Section 457 of the Criminal Procedure Code, i.e. one by the present petitioner and the other by present respondent No. 2. Case put forth by Ekant Garg (present respondent No. 2) in the application which was so filed by him before the learned Court below was that he had purchased the bus in question from its registered owner Nazakat Ali (present petitioner) on 05.05.1999 and had paid full and final payment qua the sale consideration of the same to its owner, who had executed an irrevocable power of attorney in his favour and had also executed a receipt confirming therein full and final receipt of consideration by Nazakat Ali from Ekant Garg. It was further the case of Ekant Garg that Nazakat Ali had handed over the possession of the bus in question alongwith route permit, Registration Certificate including Insurance to him and thereafter, he was owner of the vehicle in question. Further, as per him, vendor Nazakat Ali had also executed and sworn an affidavit dated 08.06.2001 in respect of having received full and final consideration of the bus in issue and handing over possession of the same to the vendee and had also given his no objection certificate for transfer of the vehicle in the name of vendee, i.e. Ekant Garg. Further as per Ekant Garg, Nazakat Ali had also executed Forms No. 29 and 30 in his favour for the purpose of transfer of ownership and for registration of the bus in the name of the vendee. It was further his case that since then, he was plying the bus as per time table allowed by RTO and he was also paying all the taxes regularly to the State of Himachal Pradesh. It was further his case that as per policy of the State of Himachal Pradesh, as the route permit of the bus was not transferable in the name of the applicant, for this reason, the bus could not be transferred in his name. As State of Himachal Pradesh subsequently changed the policy and declared that route permit could be transferred in favour of purchaser of bus on payment of Rs.10,000/-, it was for this reason that when this fact came to the notice of Nazakat Ali, he with the help of unwanted elements and with *malafide* intention snatched the said bus from the driver and conductor and forcibly took possession of the same on 17.06.2010. Further, as per Ekant Garg, as he was owner of the vehicle in question, he was suffering huge loss on account of his not being able to ply the bus and on these bases, he filed the application for release of bus on supurdari basis.

4. The application which was filed for release of the bus on supurdari before the learned Court below by the present petitioner was to the effect that he was registered owner of the bus in question, which stood impounded by the police pursuant to the abovementioned FIR and since the investigation in the above case was complete and the vehicle was no more required by the police, therefore, the same be released in his favour on supurdari.

5. Both these applications were disposed of by the learned Court below vide order dated 03.08.2010, which is under challenge by way of this revision petition.

6. It is pertinent to mention at this stage that though two applications were decided by the learned Court below vide its order dated 03.08.2010, however, the petitioner herein has only assailed the dismissal of his application by the learned Court below and no revision petition has been filed against the factum of the application of Ekant Grag having been allowed by the learned Court below. This is evident from the head note of the revision petition, which is being quoted hereinbelow as well as the reliefs prayed for which are also quoted hereinbelow:

> *"CRIMINAL REVISION UNDER SECTION 397 READ WITH SECTION 401 AND 482 OF THE CODE OF CRIMINAL PROCEDURE AGAINST THE IMPUGNED ORDER DATED 3.8.2010 PASSED BY LD. JMIC, COURT NO. 2, PAONTA SAHIB, DISTRICT SIRMOUR, H.P. WHEREBY HE HAS DISMISSED APPLICATION OF THE PETITIONER UNDER SECTION 457 CR.P.C."*
>
> *"It is, therefore, respectfully prayed:*

(i) That this revision petition may kindly be allowed and the order dated 3.8.2010 passed by JMIC-II, Paonta Sahib in Cr. M.A. No. 184-4 of 2010 may kindly be set aside.

(ii) That the custody of the vehicle No. HP-17-9786 may kindly be given to the petitioner.

(iii) Entire record of the case may kindly be summoned.

(iv) Any other relief which this Hon'ble Court deemed fit and proper in the facts and circumstances of the case may kindly be granted in favour of the applicant/complainant."

It is further pertinent to mention here that even Cr. M.A. number is wrongly mentioned in the relief clause.

7. Be that at it may, the fact of the matter remains that learned Court below while allowing the application filed by Ekant Garg for releasing bus in question on supurdari in his favour, dismissed a similar application which was filed by the present petitioner with the same prayer. While allowing the application filed by Ekant Garg and dismissing the application filed by the present petitioner what weighed with the learned Court below was that though Registration Certificate of the bus was in the name of the present petitioner, however, investigation and perusal of documents recovered in the course of investigation revealed that the vehicle in question was sold by the present petitioner to respondent No. 2 for a sale consideration of Rs.5,45,000/-, which stood received by the present petitioner from respondent No. 2. Learned Court below also took note of the fact that present petitioner had executed an affidavit dated 08.06.2001 in favour of respondent No. 2 to the effect that he had received full and final consideration of the vehicle in question from Ekant Garg and he had no objection if the said vehicle was transferred in the name of respondent No. 2. Further, what weighed with the learned Court below was that the present petitioner had also filled in Forms No. 29 and 30 with regard to vehicle in question addressed to Registering Authority, Paonta Sahib for transfer of ownership of the vehicle in the name of Ekant Garg. On these basis, it was held by the learned Court below that the present petitioner could not be allowed to derive benefit of the fact that Registration Certificate of the vehicle in issue reflected his name as owner, because in fact he stood divested of his ownership rights of the vehicle in question the moment he executed an affidavit in favour of respondent No. 2 and receipt qua having received sale consideration of vehicle in question in favour of Ekant Garg. Learned Court below also held that there was substance in the contention of Ekant Garg that the vehicle in question was in fact in his possession and the same was forcibly snatched by the petitioner from its previous owner, on the basis of which, FIR No. 210 dated 17.06.2010 was registered. Learned Court below also held by relying upon the judgment of this Court in **Sahrif Mohammad** Vs. **State of H.P.**, 2004(1) S.L.J.353 that seized property cannot be released in favour of the accused unless he had cleared himself of the accusations alleged against him or at least unless he satisfies the Court that the accusations against him are unfounded and the seizure is illegal. Learned Court below also held that in the instant case, Ekant Garg was owner in possession of the vehicle in question, which was proved on the basis of documents executed by the present petitioner in favour of Ekant Garg and it was the present petitioner who forcibly took possession of the vehicle in question. By relying upon the judgment of the Hon'ble Supreme Court in **Vasantha Vishwanathan and others** Vs. **V.K. Elayalwar and others,** AIR 2001 Supreme Court 3367, it was held by the learned Court below that sale of the vehicle in question was in fact complete in favour of Ekant Garg by the present petitioner. Learned Court below also held that the present petitioner had no locus to seek the custody of the vehicle and if there was any liability of the vehicle, the same was that of Ekant Garg. It was further held by the learned Court below that the terms and conditions of the sale of the vehicle could be enforced against Ekant Garg, but on these bases the custody of the vehicle could not be denied to him. Thereafter, learned Court below ordered the release of the bus in issue in favour of Ekant Garg alongwith its documents on his furnishing supurdari bond to the tune of Rs.5.5 lacs

with one surety in the like amount on conditions as find mentioned in the impugned order, whereas application filed with the similar prayer by the present petitioner was dismissed.

8. Feeling aggrieved by the dismissal of his application, the present petitioner has filed this revision petition.

9. I have heard the learned counsel for the parties and have also gone through the records of the case as well as the order passed by the learned Court below.

10. A perusal of the records of the case demonstrate that the vehicle in issue was seized by the police on the basis of FIR No. 210 dated 17.06.2010 which was lodged at the Police Station by one Shri Nazakat Ali, who in his complaint so filed to the police had alleged that he was engaged as driver of bus bearing registration No. HP-17-9786 and while he was plying the said bus from Shimla to Paonta Sahib, the possession of the same was forcibly taken from him by the present petitioner with the help of 20-25 persons alongwith the documents of the vehicle. Perusal of the records further demonstrate that there is a Special Power of Attorney dated 05.05.1999 executed by the present petitioner, whereby he has appointed and constituted respondent No. 2 Ekant Garg to be his true and lawful attorney to do deeds and things pertaining to the management of vehicle No. HP-17-9786. There is also on record a receipt executed by the present petitioner, which is witnessed by one Sheetal Nath Dhiman and by one Ayaz Ahmed to the effect that the present petitioner has received an amount of Rs.5,45,000/-, i.e. the settled price of bus bearing registration No. HP-17-9786 alongwith route permit No. P.ST.S.78-Reg/97 from Shri Ekant Garg, son of Shri Inder Pal Garg, resident of village Bhuppur, Tehsil Paonta Sahib, District Sirmaur. There is also an affidavit executed by the present petitioner on record dated 08.06.2001 to the effect that he had sold bus bearing registration No. HP-17-9786 in favour of respondent No. 2 and had received full and final consideration in lieu of the said sale from the purchaser and he has no objection in case the said bus was transferred in the name of purchaser. There are also on record Form No. 29 and Form No. 30, wherein it is mentioned that the present petitioner has sold his bus to respondent No. 2 Ekant Garg.

11. In view of the said material on record, it cannot be said that the findings returned by the learned Court below to the effect that the bus in issue in fact stood sold by the petitioner in favour of respondent No. 2 are perverse findings or are not borne out from the records of the case. On the contrary, the findings so returned by the learned Court below are duly substantiated from the evidence produced on record by respondent No. 2. During the course of arguments, learned counsel for the petitioner could not demonstrate as to what was the perversity with the findings so returned by the learned appellate Court. The entire contention of the learned counsel for the petitioner was that as the Registration Certificate was in the name of the petitioner, therefore, it was he who was entitled for the custody of bus on supurdari. I am afraid, there is no merit in the said contention of the learned counsel for the petitioner. Undoubtedly, the Registration Certificate is still in the name of the petitioner, however, there is ample evidence on record which demonstrates that not only bus in issue stands sold by him in favour of respondent No. 2, but he has also received the entire sale consideration in lieu of the said sale and had also executed Special Power of Attorney and affidavit to this effect in favour of respondent No. 2 and had also filled in Forms No. 29 and 30 to facilitate the change of registration of the bus in issue from his name in favour of respondent No. 2. Even otherwise, by way of order which is under challenge, all that the learned Court below has done, is that it has released the bus on supurdari in favour of respondent No. 2. Keeping in view the fact that the said bus was taken into custody by the police on the basis of a complaint which was so filed by a person who was engaged as driver by respondent No. 2, who categorically stated that the possession of the bus was forcibly taken by the petitioner with the help of 20-25 persons and further keeping in view the fact that there is ample evidence on record which suggests that the said bus in fact stood sold by the petitioner in favour of respondent No. 2 and in lieu of the same, he has received full and final consideration from respondent No. 2, in my considered view, there is neither any illegality nor any perversity with the order so passed by the learned Court below vide which while dismissing the

application so filed by the present petitioner to hand over the custody of the bus to him on supurdari, it has allowed a similar application filed by respondent No. 2.

12. In view of the above reasonings, as there is no merit in the present revision petition, the same is accordingly dismissed. Miscellaneous application(s), if any, stand disposed of.

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

Maheshwar Bali ...Petitioner
Versus
State of Himachal Pradesh ...Respondent

Cr. Revision No. 15 of 2011
Decided on: May 15, 2017

Indian Penal Code, 1860- Section 279 and 304-A- Accused was driving a van in a rash and negligent manner - Van ran over a pedestrian who succumbed to the injuries- the van mounted on a pavement abutting a highway, struck against an upper wall and then stopped- the accused was tried and convicted by the Trial Court- an appeal was filed, which was dismissed- held in revision that the accused has admitted that he was driving a maruti van at the relevant time – testimony of the informant was not supported by independent witnesses – PW-13 admitted that site of occurrence was not visible from the stairs where the informant was standing- the negligence of the accused is not established by the mere factum of accident- onus is upon the prosecution to prove that the vehicle was being driven rashly and negligently – there are contradictions in the statements of the eye witnesses and the prosecution version was not proved beyond reasonable doubt- petition allowed- accused acquitted of the commission of offence punishable under Sections 279 and 304-A of I.P.C.(Para-7 to 32)

Cases referred:
State of H.P. Vs. Manpreet Singh, Latest HLJ 2008 (HP) 538
State of Karnataka v. Satish, (1998) 8 SCC 493
Ravi Kumar v. State of Rajasthan, (2012) 9 SCC 284
State of Punjab versus Saurabh Bakshi, 2015 (5) SCC 182
State of Kerala Vs. Puttumana Illath Jathavedan Namboodiri (1999)2 SCC 452
Braham Dass versus State of H.P. (2009) 7 Supreme Court Cases 353
State of Karnataka v. Satish,"1998 (8) SCC 493
Ravi Kapur versus State of Rajasthan (2012) 9 SCC 285
State of Punjab versus Saurabh Bakshi 2015 (5) SCC 182

For the petitioner: Mr. Peeyush Verma, Advocate.
For the respondent: Mr. Ramesh Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Instant criminal revision petition filed under Section 397 read with Section 401 CrPC is directed against judgment dated 29.12.2010 passed by the learned Sessions Judge, Shimla in Criminal Appeal No. 24-S/10 of 2008, affirming judgment /order of conviction dated 22.5.2008/26.5.2008, passed by learned Judicial Magistrate 1st Class, Court No. 2, Shimla in

case No. 42/2 of 2000/96, whereby the learned trial Court, while holding petitioner-accused ('accused' hereafter) guilty of having committed offence punishable under Sections 279 and 304A IPC, convicted and sentenced him to undergo imprisonment for a period of three months for the commission of offence punishable under Section 279 IPC, for a period of six months for commission of offence punishable under Section 304A IPC.

2. Briefly stated the facts, as emerge from the record are that Shri Kanshi Ram, (PW-3) reported to the police that on 3.11.1996 at about 11.25 am, while he was at some distance from Police Station, a young man was noticed on the wheels of Maruti Van No. HP-02-4757, who had suddenly turned the van in front of Gurdwara, in a rash and negligent manner and ran over a pedestrian. The van mounted on the pavement abutting highway, and struck against upper wall and then stopped. The pedestrian succumbed to the injuries. On the basis of aforesaid complaint, police recorded statement of complainant under Section 154 CrPC, upon which FIR Ext. PW-11/A was registered against accused in the Police Station, Chhota Shimla. After completion of investigation, police presented the *Challan* in the competent court of law under Sections 279 and 304A IPC. Learned trial Court, after finding prima facie case against accused, framed charge under Sections 279 and 304A IPC, against accused, to which he pleaded not guilty and claimed trial. Subsequently, learned trial Court vide judgment/order dated 22.5.2008/26.5.2008, held petitioner guilty of having committed offence punishable under Sections 279 and 304A IPC and accordingly convicted and sentenced him as described herein above. Accused being aggrieved and dissatisfied with the aforesaid judgment of conviction recorded by learned trial Court, preferred an appeal before the learned Sessions Judge, Shimla, which came to be registered as Criminal Appeal No. 24-S/10 of 2008, However, the fact remains that the appeal was dismissed, as a result of which, judgment/order of conviction passed by learned trial Court, came to be upheld. Hence this criminal revision by the accused, seeking his acquittal after setting aside judgments/order passed by learned Courts below.

3. Mr. Peeyush Verma, learned counsel representing the accused, vehemently argued that the impugned judgments/order passed by the learned Courts below are not sustainable in the eyes of law as the same are not based upon correct appreciation of evidence adduced on record by the prosecution. Mr. Verma, while inviting attention of this Court to the impugned judgments passed learned Courts below, vehemently argued that bare perusal thereof suggests that same are not based upon correct appreciation of record and both the learned Courts below have fallen in grave error while not appreciating the evidence its right perspective, as a result of which, erroneous findings have come on record, to the detriment of the accused, who is admittedly an innocent person. Mr. Verma, further contended that learned appellate court below, while upholding judgment passed by learned trial Court, misconstrued and misappreciated the provisions of Sections 279 and 304A IPC, which has resulted in miscarriage of justice because, bare reading of allegations made against accused, even if assumed to be correct, do not constitute any offence under Sections 279 and 304A IPC and as such, there existed no prima facie case against accused as such judgments of courts below being erroneous deserve to be set aside. While inviting attention of this Court to the evidence led on record by the prosecution, Mr. Verma, contended that both the learned Courts below failed to take note of the fact that none of the witnesses established identity of accused, responsible for alleged occurrence. He further contended that PW-5 Avinash Kumar, nowhere supported the case of prosecution and instead categorically deposed that deceased Jia Lal Sharma, was hit by some bus. Mr. Verma, further contended that in view of candid statement having been made by PW-5 Avinash Kumar, no reliance could be placed by the learned Courts below on the statement of PW-3 Kanshi Ram. Mr. Verma, contended that version put forth by the PW-3 is highly improbable and doubtful in view of the statements having been made by PW-13, wherein he categorically stated that the site of occurrence is/was not visible from the stairs, as such, adverse inference ought to have been drawn against prosecution and benefit of same was required to be given to the accused. While concluding his arguments, Mr.Verma contended that none of the prosecution witnesses has stated anything specific with regard to rash and negligent driving of accused, as such, he could not be charged under Sections 279 and 304A IPC. While placing reliance upon judgment passed

by this Court in **State of H.P. Vs. Manpreet Singh**, Latest HLJ 2008 (HP) 538, Mr. Verma, contended that onus was upon prosecution to prove rash and negligent driving by the accused, which, it has miserably failed to do. He further contended that mere fact that death was caused in the accident, is/was not sufficient to conclude that at the relevant time, vehicle in question was being driven in a rash and negligent manner by the accused.

4. He further contended that rash and negligent driving is/was required to be established by prosecution and can not be automatically presumed on the principle of *res ipsa loquitur*, because mere driving vehicle at a high speed can not be construed to be negligent or rash driving on the part of driver. In this regard, he placed reliance upon judgment passed by the Apex Court in **State of Karnataka v. Satish**, (1998) 8 SCC 493. Mr. Verma, further contended that the doctrine of *res ipsa loquitur* can only be applied if direct evidence with regard to accident is not available on record. He placed reliance upon judgment of Apex Court in **Ravi Kumar** v. **State of** Rajasthan, (2012) 9 SCC 284. Mr. Verma, while referring to the evidence led on record by the prosecution forcefully contended that both the learned Courts below erred in law by assuming that the accused was driving rashly or negligently and on account of rash and negligent driving, one person died, because, on the basis of aforesaid evidence, as led on record by the prosecution, it can not be said that prosecution proved its case beyond reasonable doubt. Lastly, Mr. Verma, contended that in case, aforesaid submissions having been made by him, do not find favour with this Court, in that eventuality, benefit of Probation of Offenders Act, may be extended to the accused, who is admittedly a first offender. He further stated that more than 20 years have passed after alleged incident and during this period, accused has always remained under trauma, as such, he has already undergone agony of trial. Besides this, he is the sole bread-winner of the family and incase he is sentenced to imprisonment, entire family would be ruined.

5. Mr. Ramesh Thakur, learned Deputy Advocate General while refuting aforesaid submissions having been made by the learned counsel representing the accused, vehemently argued that there is no illegality or infirmity in the judgments passed by Courts below and same are based upon correct appreciation of evidence adduced on record by the respective parties, as such same deserve to be upheld. Mr. Thakur, while inviting attention of this Court to the judgments passed by learned Courts below, contended that both the learned Courts below have dealt with evidence in right perspective and have also dealt with each and every aspect of the matter meticulously, as such, there is no scope of interference by this Court, especially in view of concurrent findings of fact and law recorded by learned Courts below. Mr. Thakur, made this Court to travel through evidence led on record by the prosecution to demonstrate that prosecution proved beyond reasonable doubt that on the relevant day, vehicle in question was being driven rashly and negligently by the accused, as a result of which, one person lost his life. While concluding his arguments, Mr. Thakur invited attention of this Court to judgment passed by Hon'ble Apex Court in **State of Punjab** versus **Saurabh Bakshi,** 2015 (5) SCC 182 and stated that no leniency can be shown to the reckless drivers, who, day in and day out, endanger lives of others. Mr. Thakur, further contended that apart from above, this Court has a very limited scope to re-appreciate evidence in present proceedings. In this regard, he placed reliance upon judgment of Apex Court in **State of Kerala** Vs. **Puttumana Illath Jathavedan Namboodiri** (1999)2 SCC 452.

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

7. As far as scope of power of this Court while exercising revisionary jurisdiction under Section 397 is concerned, 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. The relevant para of the judgment is reproduced as under:-

> "8. The object of Section 483 and the purpose behind conferring the revisional power under Section 397 read with Section 401, upon the High Court is to invest continuous supervisory jurisdiction so as to prevent miscarriage of justice or to correct irregularity of the procedure or to mete out justice. In addition, the inherent power of the High Court is preserved by Section 482. The power of the High Court, therefore, is very wide. However, the High Court must exercise such power sparingly and cautiously when the Sessions Judge has simultaneously exercised revisional power under Section 397(1). However, when the High Court notices that there has been failure of justice or misuse of judicial mechanism or procedure, sentence or order is not correct, it is but the 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."

8. In the instant case, prosecution, with a view to prove its case, examined as many as sixteen witnesses. After having carefully perused the record, this Court, is of the view that statements having been made by PW-1 C. Rajesh Kumar, PW-3 Sh. Kanshi Ram (complainant) and PW-4 Mr. Hem Dutt (son of deceased Jia Lal Sharma), PW-5 Sh. Avinash Kumar, the eye witness of the incident and PW-13 ASI Desh Raj, are material for adjudication of the controversy at hand. Perusal of statement of accused recorded under Section 313 CrPC, clearly suggests that he has admitted that he was driving ill fated Maruti Van, at the relevant time and as such, there is no dispute with regard to identity of the vehicle and its driver.

9. Learned courts below while holding accused guilty of having committed offence under Sections 279 and 304A IPC have placed heavy reliance upon testimony of PW-3 Kanshi Ram, i.e. complainant, who stated that on 3.11.1996, at about 11 am, he was on his way to police station Shimla East, one young man suddenly turned vehicle and ran-over a pedestrian, on the basis of which FIR Ext. PW-13/A was registered. As per version of PW-3, he saw a young man driving Maruti Van No. HP-02-4757. Driver had suddenly turned the vehicle and knocked down the pedestrian.

10. PW-4 Hem Dutt, son of the deceased, deposed before the Court that his father, Shri Jia Lal was knocked down by Maruti Van bearing registration No. HP-02-4757, as a result of which, he received injuries. He also stated that Jia Lal, succumbed to injuries. Aforesaid witness, in his cross-examination stated that his father was 67 years of age and he had a good eye-sight. However, he stated that his father used to wear spectacles for the purpose of reading. In his cross-examination, he could not say due to whose negligence, alleged accident had occurred. After having carefully perused the version put forth by this witness, this Court is of the view that no reliance, if any, could be placed upon the statement having been made by him, as he is a hearsay witness, because he had no occasion to witness the alleged accident with his own eyes. Apart from above, it has also come in his statement that his father was hard of hearing and he used to wear hearing aid machine.

11. PW-5 Avinash Kumar, nowhere supported the case of the prosecution, rather, he gave altogether different version of alleged accident, in which deceased Jia Lal lost his life. PW-5, Avinash Kumar, in his statement stated that one mini bus knocked down pedestrian, as a result of which he died. Though this witness was declared hostile but, even in his cross-examination, conducted by the learned APP, nothing could be extracted from this witness, from where it could be inferred that he has deposed falsely with a view to help the petitioner-accused.

12. PW-10 Subhash Chand, who happened to owner of the ill-fated Maruti Van, though admitted that police had impounded the van and he had got the same released but, in his cross-examination, he stated that his vehicle did not meet with any accident.

13. PW-13, Desh Raj, Investigating Officer, stated that site of accident was at a distance of 50 yards from the Police Station, Shimla, East. He further stated that shoe and cap of the pedestrian were found below Maruti van and there was pool of blood below and on one side of Maruti van. He further stated that the vehicle was mounted on pavement. In his cross-examination, PW-13 Desh Raj admitted that site of occurrence was not visible from the stairs of Gurdwara, from where PW-3, Kanshi Ram, allegedly saw the accused driving Maruti van, who allegedly hit the deceased Jia Lal.

14. This Court, after having carefully perused material evidence, as has been discussed herein above, sees substantial force in the arguments of learned counsel representing the accused that the learned Courts below have fallen in error while holding accused guilty of having committed offence punishable under Sections 279 and 304A IPC, because, Courts below have not appreciated the evidence its right perspective, as a result of which erroneous findings have come on record. Case of the prosecution entirely hinges upon statement of PW-3, wherein he specifically stated that while going to Chhota Shimla Bus Stand, he was climbing stairs of Gurdwara street, and he saw a young man turning Maruti van. He further stated that driver turned the vehicle suddenly and knocked down the pedestrian. Aforesaid version put forth by PW-3 Kanshi Ram, has been nowhere corroborated by any independent witness.

15. PW-5 Avinash Kumar, who also allegedly witnessed the unfortunate incident, stated that deceased Jia Lal was hit by a bus. Apart from above, admission having been made by PW-13 Desh Raj, in his cross-examination, casts doubt with regard to veracity of statement of PW-3 that he saw young man driving ill fated Maruti van at the time of alleged incident. PW-13 Desh Raj, in his cross-examination specifically admitted that site of occurrence was not visible from the stairs of Gurdwara street, but the learned Court below while ignoring material admission having been made on behalf of PW-13, Kanshi Ram placed undue reliance upon the statement of PW-3 Kanshi Ram, who happened to be police official. None apart from PW-3 Kanshi Ram stated anything specific with regard to accident being caused due to rash and negligent driving on the part of accused.

16. If evidence led on record by the prosecution is examined and analyzed carefully, there are only two witnesses, who can be termed to be eye witnesses i.e. PW-3 Kanshi Ram and PW-5 Avinash Kumar. As per PW-3 Kanshi Ram, accident occurred due to rash and negligent driving of the accused. This version is doubtful because of admission having been made by PW-13 Desh Raj, that site of occurrence was not visible from stairs of Gurdwara. PW-5 Avinash Kumar has nowhere supported the case of the prosecution rather, he stated that pedestrian Jia Lal suffered injury after being hit by bus. Apart from above, none of the prosecution witnesses is a spot witness as such no much reliance, if any, could be placed upon their statements, while holding accused guilty of having committed offence under Sections 279 and 304A IPC.

17. True, it is that accused in his statement recorded under Section 313 CrPC, admitted that he was driving Maruti Van at the relevant time but he has further stated that he has falsely been implicated in the case. After having carefully perused the judgments passed by courts below, this Court finds that both the learned Courts below placed undue reliance upon the statement of PW-3 Kanshi Ram, completely ignoring statement of PW-10 Subhash Chand, owner of Maruti van involved in the incident, who, in his statement, stated that his vehicle did not meet with any accident. Aforesaid statement having been made by PW-10 Subhash Chand is /was significant especially in view of deposition made by PW-5 Avinash Kumar, whereby he claimed that deceased Jia Lal suffered injury after being hit by bus. It appears that neither there is an attempt on the part of investigating agency to probe involvement, if any, of the bus in the accident, nor the learned Courts below made any endeavour to examine and analyse evidence led on record by prosecution vis-à-vis statement of accused recorded under Section 313 CrPC as well as statement of PW-5, Avinash Kumar.

18. As discussed above, statement of PW-4, Hem Dutt, son of the deceased, is/ was of no relevance while determining fault, if any of the accused, because, admittedly, he was not present at the time of accident, rather, admission having been made by him that his father was

hard of hearing, compels this Court to agree with the contention of Mr. Peeyush Verma, learned counsel representing the accused that deceased suffered injury as he failed to notice sound of approaching vehicle while crossing the road.

19. Leaving everything aside, this Court, after having gone through entire evidence led on record finds that no evidence, if any, has been led on record by prosecution with regard to rashness and negligence, if any, on the part of accused. None of the prosecution witnesses, as has been discussed above, stated anything specific with regard to negligence on the part of accused. Similarly, none of the prosecution witnesses stated anything specific with regard to high speed of the vehicle of accused at the time of unfortunate incident. It is not understood, on what basis learned Courts below held accused guilty of offence punishable under Sections 279 and 304A IPC, especially in the absence of specific evidence, if any, led on record by prosecution, to prove rashness and negligence on the part of accused.

20. This Court, is in agreement with the arguments advanced by the learned Additional Advocate General that one person lost his life in the alleged accident, but, simultaneously this Court can not lose sight of the fact that onus was upon prosecution to prove rash and negligent driving, which ultimately led to death of a person namely Jia Lal. In the instant case, this Court has no hesitation to conclude that prosecution has miserably failed to prove on record by way of adducing cogent and convincing evidence that there is/was negligence on the part of the accused.

21. It is well settled that for the purpose of criminal law high degree of negligence is required to be proved before the felony is established. But in the instant case, there is hardly any evidence to establish that accused was negligent at the time of accident. It was incumbent upon the prosecution to prove negligence, if any, on the part of the accused to render him liable to be convicted for offence punishable under charged sections. Prosecution, with a view to prove negligence, if any, on the part of accused, should have led evidence to prove on record recklessness and negligence on the part of accused, and certainly same should be more than normal or ordinary. In the instant case, both the learned Courts below, while placing undue reliance upon the statement of PW-3 Kanshi Ram, came to the conclusion that vehicle in question was being driven rashly and negligently by accused but, at the cost of repetition, it may be stated that no much reliance, could be placed upon the statement of PW-3 Kanshi Ram, in the teeth of candid admission have been made by PW-13 DeshRaj, that site of occurrence is/was not visible from Gurdwara.

22. If, for the sake of arguments, version put forth by PW-3 Kanshi Ram is accepted to be correct, even in that eventuality, there is /was no occasion for the learned Courts below to conclude that vehicle in question was being driven rashly and negligently, because, admittedly, PW-3 Kanshi Ram, has nowhere stated that vehicle was being driven at high speed, rashly and negligently by the accused. In his statement, PW-3 Kanshi Ram simply stated that he saw a young man driving Maruti van, who suddenly turned the vehicle and knocked down the pedestrian. There is not even a whisper, if any, with regard to rashness and negligence on the part of accused. Apart from these witnesses, none of the material witnesses of the prosecution supported the version put forth by the prosecution. Though, PW-4, in his statement claimed that vehicle in question was being driven rashly and negligently but, in his cross-examination, he admitted that he was not present at the site of occurrence, as such, no reliance, could be placed upon his statement, while holding accused guilty of having committed offence under Sections 279 and 304A IPC.

23. Mere bald statements, if any, made by the prosecution witnesses could not be termed to be sufficient to hold the accused guilty of having committed offence punishable under Sections 279 and 304A IPC, as such this Court, is compelled to conclude that prosecution has miserably failed to prove on record rashness and negligence on the part of accused beyond reasonable doubt.

24. It is settled law that a person cannot be held criminally accountable for his rashness and negligence merely because evil consequences flow from his act, rather rashness must be such as to endanger human life or personal safety of others. Similarly, for criminal liability, rashness or negligence must show a disregard for human life or personal safety of others. Question whether an act is criminally rash or negligent is a question of fact, depending upon the circumstances of a peculiar case and as such, needs to be elucidated minutely and with certain degree of precision. In this regard, reliance is placed upon the judgment passed by the Hon'ble Apex Court in ***Braham Dass versus State of H.P***. (2009) 7 Supreme Court Cases 353. The relevant para No. 6 and 8 are reproduced herein below:-

> "6. In support of the appeal, learned counsel for the appellant submitted that there was no evidence on record to show any negligence. It has not been brought on record as to how the appellant-accused was negligent in any way. On the contrary what has been stated is that one person had gone to the rooftop and the driver started the vehicle while he was there. There was no evidence to show that the driver had knowledge that any passenger was on the rooftop of the bus. Learned counsel for the respondent on the other hand submitted that PW-1 had stated that the conductor had told the driver that one passenger was still on the roof of the bus and the driver started the bus.
>
> 8. Section 279 deals with rash driving or riding on a pubic way. A bare reading of the provision makes it clear that it must be established that the accused was driving any vehicle on a public way in manner which endangered human life or was likely to cause hurt or injury to any other person. Obviously the foundation in accusations under Section 279 IPC is not (sic) negligence. Similarly, in Section 304-A the stress is on causing death by negligence or rashness. Therefore, for brining on application of either Section 270 or 304-A it must be established that there was an element of rashness or negligence. Even if the prosecution version is accepted in toto, there was no evidence led to show that any negligence was involved."

25. The Hon'ble Apex Court in case titled "***State of Karnataka v. Satish,"1998 (8) SCC 493***. The relevant paras of which are being reproduced herein below:-

> "1. Truck No. MYE-3236 being driven by the respondent turned turtle while crossing a "nalla" on 25-11-1982 at about 8.30 a.m. The accident resulted in the death of 15 persons and receipt of injuries by about 18 persons, who were travelling in the fully loaded truck. The respondent was charge-sheeted and tried. The learned trial court held that the respondent drove the vehicle at a high speed and it was on that account that the accident took place. The respondent was convicted for offences under Sections 279, 337, 338 and 304A IPC and sentenced to various terms of imprisonment. The respondent challenged his conviction and sentence before the Second Additional Sessions Judge, Belgaum. While the conviction and sentence imposed upon the respondent for the offence under Section 279 IPC was set aside, the appellate court confirmed the conviction and sentenced the respondent for offences under Sections 304A, 337 and 338 IPC. On a criminal revision petition being filed by the respondent before the High Court of Karnataka, the conviction and sentence of the respondent for all the offences were set aside and the respondent was acquitted. This appeal by special leave is directed against the said judgment of acquittal passed by the High Court of Karnataka.
>
> 2. We have examined the record and heard learned counsel for the parties.
>
> 3. Both the trial court and the appellate court held the respondent guilty for offences under Sections 337, 338 and 304A IPC after recording a finding that the respondent was driving the truck at a "high speed". No specific finding has been recorded either by the trial court or by the first appellate court to the effect that

the respondent was driving the truck either negligently or rashly. After holding that the respondent was driving the truck at a "high speed", both the courts pressed into aid the doctrine of res ipsa loquitur to hold the respondent guilty.

4. Merely because the truck was being driven at a "high speed" does not bespeak of either "negligence" or "rashness" by itself. None of the witnesses examined by the prosecution could give any indication, even approximately, as to what they meant by "high speed". "High speed" is a relative term. It was for the prosecution to bring on record material to establish as to what it meant by "high speed" in the facts and circumstances of the case. In a criminal trial, the burden of providing everything essential to the establishment of the charge against an accused always rests on the prosecution and there is a presumption of innocence in favour of the accused until the contrary is proved. Criminality is not to be presumed, subject of course to some statutory exceptions. There is no such statutory exception pleaded in the present case. In the absence of any material on the record, no presumption of "rashness" or "negligence" could be drawn by invoking the maxim "res ipsa loquitur". There is evidence to show that immediately before the truck turned turtle, there was a big jerk. It is not explained as to whether the jerk was because of the uneven road or mechanical failure. The Motor Vehicle Inspector who inspected the vehicle had submitted his report. That report is not forthcoming from the record and the Inspector was not examined for reasons best known to the prosecution. This is a serious infirmity and lacuna in the prosecution case.

26. Careful perusal of aforesaid judgments clearly suggests that there can not be any presumption of rashness or negligence, rather, onus is always upon the prosecution to prove beyond reasonable doubt that vehicle in question was being driven rashly and negligently. In the aforesaid judgment, it has been specifically held that in the absence of any material on record, no presumption of rashness or negligence can be drawn by invoking maxim *res ipsa loquitur*.

27. The Hon'ble Apex Court in case titled **Ravi Kapur** versus **State of Rajasthan** (2012) 9 SCC 285 have held as under:

"15. The other principle that is pressed in aid by the courts in such cases is the doctrine of res ipsa loquitur. This doctrine serves two purposes – one that an accident may by its nature be more consistent with its being caused by negligence for which the opposite party is responsible than by any other causes and that in such a case, the mere fact of the accident is prima facie evidence of such negligence. Secondly, it is to avoid hardship in cases where the claimant is able to prove the accident but cannot prove how the accident occurred. The courts have also applied the principle of res ipsa loquitur in cases where no direct evidence was brought on record. The Act itself contains a provision which concerns with the consequences of driving dangerously alike the provision in the IPC that the vehicle is driven in a manner dangerous to public life. Where a person does such an offence he is punished as per the provisions of Section 184 of the Act. The courts have also taken the concept of 'culpable rashness' and 'culpable negligence' into consideration in cases of road accidents. 'Culpable rashness' is acting with the consciousness that mischievous and illegal consequences may follow but with the hope that they will not and often with the belief that the actor has taken sufficient precautions to prevent their happening. The imputability arises from acting despite consciousness (luxuria). 'Culpable negligence' is acting without the consciousness that the illegal and mischievous effect will follow, but in circumstances which show that the actor has not exercised the caution incumbent upon him and that if he had, he would have had the consciousness. The imputability arises from the neglect of civic duty of circumspection. In such a case the mere fact of accident is prima facie evidence

of such negligence. This maxim suggests that on the circumstances of a given case the res speaks and is eloquent because the facts stand unexplained, with the result that the natural and reasonable inference from the facts, not a conjectural inference, shows that the act is attributable to some person's negligent conduct. [Ref. Justice Rajesh Tandon's 'An Exhaustive Commentary on Motor Vehicles Act, 1988' (First Edition, 2010].

20. In light of the above, now we have to examine if negligence in the case of an accident can be gathered from the attendant circumstances. We have already held that the doctrine of res ipsa loquitur is equally applicable to the cases of accident and not merely to the civil jurisprudence. Thus, these principles can equally be extended to criminal cases provided the attendant circumstances and basic facts are proved. It may also be noticed that either the accident must be proved by proper and cogent evidence or it should be an admitted fact before this principle can be applied. This doctrine comes to aid at a subsequent stage where it is not clear as to how and due to whose negligence the accident occurred. The factum of accident having been established, the Court with the aid of proper evidence may take assistance of the attendant circumstances and apply the doctrine of res ipsa loquitur. The mere fact of occurrence of an accident does not necessarily imply that it must be owed to someone's negligence. In cases where negligence is the primary cause, it may not always be that direct evidence to prove it exists. In such cases, the circumstantial evidence may be adduced to prove negligence. Circumstantial evidence consists of facts that necessarily point to negligence as a logical conclusion rather than providing an outright demonstration thereof. Elements of this doctrine may be stated as :

- The event would not have occurred but for someone's negligence.
- The evidence on record rules out the possibility that actions of the victim or some third party could be the reason behind the event.
- Accused was negligent and owed a duty of care towards the victim."

28. It emerges from the aforesaid judgment passed by Hon'ble Apex Court, that maxim of *res ipsa loquitur* can only be applied if no direct evidence is available, but in the present case, as per prosecution story, PW-3 Kanshi Ram and PW-5 Avinash Kumar, had an occasion to see the accident but none of these witnesses stated anything specific with regard to rash and negligent driving on the part of accused, as such the maxim of *res ipsa loquitur* can not be invoked.

29. The Hon'ble Apex Court in case titled " 2008 Latest HLJ HP 538, have held as under:

"4. Legally, in a case of rash and negligent act, if the prosecution is able to prove the essential ingredients of the offence, the onus to disprove it shifts upon the respondent to show that he had taken due care and caution to avoid the accident. It is an admitted fact that said Shri Daya Ram had died in the accident caused by the respondent but still it is incumbent upon the prosecution to prove that it was the rash and negligent act of driving to conclude the rash and negligent driving of the respondent. In other words, it must be proved that the rash or negligent act of the accused was causa causans and not causa sin qua non (cause of the proximate cause). There must be some nexus between the death of a person with rash or negligent act of the accused. According to Rupinder Parkash (PW4) deceased was hit by the motor cycle which was in a high speed but the speed is not criteria to hold the act as rash or negligent. The respondent in his statement under Section 313 of the Code of Criminal Procedure has explained that on seeing the deceased, he had blown the horn and he(deceased) stopped on the road. As soon as he reached near him, he

immediately tried to cross the road and got hit. His version has been duly corroborated by Hardeep Singh (DW1) who was a pillion rider with him. Ajay Kumar (PW-1) has admitted this version that the respondent had blown the horn and Daya Ram on hearing it, had stopped for a while. In these circumstances, if a person suddenly crosses the road, without taking note of the approaching vehicle and its driver may not be in a position to save the accident, it will not be possible to hold the Driver guilty of the offence. In the instant case, the deceased knowing fully well at least the approaching vehicle stopped on haring the horn while crossing the road but when the motor cycle reached near him, he darted before it and the accident took place. Thus in my opinion the prosecution could not prove the offence charged against the respondent beyond reasonable doubt that the respondent was driving the vehicle rashly or negligently. Therefore, in these circumstances, the learned trial Court had rightly acquitted the respondent of the charges framed against him. As such, no interference in the impugned judgment of acquittal is called for. Accordingly the appeal is dismissed. The respondent is discharged of his bail bounds entered upon by him at any stage of the trial."

30. This Court is fully conscious of judgment of Hon'ble Apex Court in ***State of Punjab*** *versus* ***Saurabh Bakshi 2015 (5) SCC 182,*** wherein it has been held that no leniency should be shown to reckless drivers. The Hon'ble Apex Court has observed as follows:-

"25. Before parting with the case we are compelled to observe that India has a disreputable record of road accidents. There is a nonchalant attitude among the drivers. They feel that they are the "Emperors of all they survey". Drunkenness contributes to careless driving where the other people become their prey. The poor feel that their lives are not safe, the pedestrians think of uncertainty and the civilized persons drive in constant fear but still apprehensive about the obnoxious attitude of the people who project themselves as "larger than life". In such obtaining circumstances, we are bound to observe that the law-makers should scrutinize, relook and revisit the sentencing policy in Section 304-A IPC, so with immense anguish."

31. There can not be any disagreement with the concern expressed by the Hon'ble Apex Court in the aforesaid judgment with regard to carelessness /recklessness of the drivers especially under the influence of alcohol. But in the instant case, as has been discussed above, prosecution was not able to prove beyond reasonable doubt that ill fated vehicle was being driven by accused rashly and negligently, rather, version put forth by prosecution appears to be untrustworthy in view of material contradictions in the statements of the alleged eye witnesses i.e. PW-3 Kanshi Ram and PW-5 Avinash Kumar, and as such, this Court sees no application of aforesaid law laid down by the Apex Court in the instant case.

32. After bestowing thoughtful consideration to the statements of witnesses on record and law as cited above, I find merit in the present petition, which is accordingly allowed. Judgment dated 29.12.2010 passed by the learned Sessions Judge, Shimla in Criminal Appeal No. 24-S/10 of 2008, affirming judgment /order of conviction dated 22.5.2008/26.5.2008 passed by learned Judicial Magistrate 1st Class, Court No. II, Shimla in case No. 42/2 of 2000/96, is set aside. Accused is acquitted of the offences under Sections 279 and 304A IPC. Fine amount, if any deposited by the petitioner shall be refunded to him.

33. Bail bonds, if any, furnished by the accused are discharged. Pending applications are disposed of.

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

Adarsh Bala Medical Institute ... Petitioner
Versus
State of Himachal Pradesh & Ors. ... Respondents

CWP No. 4568 of 2010
Date of decision: 16.05.2017

Constitution of India, 1950- Article 226- Petitioner is established as Learning Centre for paramedical courses under distance education programme and is duly approved and affiliated by Punjab Technical University – respondent No. 3 denied the registration to the student of the petitioner on the ground that no objection certificate was not taken from the Government of Himachal and its degrees cannot be recognized – the petitioner filed a writ petition seeking direction to give recognition to it and to register the students qualified from the petitioner – respondent No. 3 pleaded that it is necessary to obtain permission before starting any paramedical courseunder Section 19 of Himachal Pradesh Paramedical Council Act, 2003,– Punjab Technical University cannot maintain and run off campus learningcentre- held that it is mandatory to obtain permission from the State Government for establishing a paramedical institute- the petitioner does not have any such recognition – it is within the legislative domain of the State Government to enact the law – respondent No. 3 had rightly denied the recognition to the petitioner – petition dismissed.(Para-9 to 13)

Case referred:
Prof. Yashpal and another Vs. State of Chhattisgarh and others, (2005) 5 Supreme Court Cases 420

For the petitioner: Mr. Rajiv Rai, Advocate.
For the respondents: Mr. Shrawan Dogra, Advocate General with Mr. Romesh Verma and Mr. Anup Rattan, Addl. Advocate Generals, for respondents No. 1, 2 and 4.
Ms. Tanu Sharma, Advocate, for respondent No. 3.
Mr. Narender Sharma, Advocate, for respondent No. 6.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J. (Oral):

The petitioner institute has prayed for the following reliefs:-

(a) That the Hon'ble Court may kindly be please to issue the writ of Mandamus whereby the respondent no. 1 to 4 may kindly be directed to give recognition to the petitioner institute and to consider the registration of all the students who has possessed the paramedical qualification from the Petitioner institute.

(b) That the Hon'ble Court may kindly be please to declare provision under Section 19(1)(a)(i) of the Paramedical Counsel Act, 2003 as Ultra virus.

(c) That the Hon'ble Court may kindly be please to direct the respondent no. 1 to 4 to exempt the petitioner institute from the condition incorporated under Section 19(1)(a)(i) in view of the fact that the respondent has not issued any guidelines or notification for granting the NOC to the Distance learning Centre in the state of Himachal Pradesh in alternative the respondent no. 1 to 4 may kindly be directed to provide the forms and list of required terms and condition for getting the approval from the State Government if the Hon'ble Court finds that the institute necessarily requires permission from the Government to

run the paramedical courses even through the mode of distance education programme as Learning Centre of any deemed University and which is duly recognized by the UGC and has approval for running the learning cenrtre from the Distance Education Counsel of IGNOU.

(d) That the Records of the case may kindly also be summoned.

(e) That the present petition may kindly be allowed with cost.

Any other or further order as this Hon'ble Court deems fit and proper may kindly also be passed in the interest of justice and fair play."

2. The case of the petitioner is that it is a medical institute affiliated with the Punjab Technical University, Jalandhar, situated in District Una and deals in imparting the Para-Medical courses such like DMLT (Diploma in Medical Lab Technology), DOTT (Diploma in Operation Theater Technician), B. Sc MLT (Bachelor of Science in Medical Lab Technology) and Bio Technology, through Distance Education Programme. As per the petitioner institute, it stands established as such as a learning centre for the paramedical courses under the Distance Education Programme and has been duly approved and affiliated by the Punjab Technical University, Jalandhar. The institute is running since 2005. It has been recognized as deemed university by the University Grants Commission and also has approval from Distant Education Council for running Distance Education Programme of the Indira Gandhi National Open University, hereinafter referred to as "the IGNOU". The case of the petitioner is that in the year 2008 when one of its students who had done his B. Sc MILT Course in January, 2008, approached respondent No. 3 for his registration under the Himachal Pradesh Paramedical Council, respondent No. 3 denied the said registration on the ground that the petitioner institute had not obtained No Objection Certificate from the Government of Himachal Pradesh. In this background it approached respondent No. 3 and intimated the said respondent that the petitioner institute was affiliated with respondent No. 5 university and it was duly recognized by the University Grants Commission and was also having approval from the Distance Education Council and Distance Education Programme Committee of the IGNOU. As per the guidelines issued by respondent No. 6 from time to time, "the distance education and online education cannot have the territorial jurisdiction". However, as per the petitioner institute, respondent No. 3 was adamant that as the petitioner institute has not obtained prior permission from the Government of Himachal Pradesh under Section 19(1)(a)(i) of the Himachal Pradesh Paramedical Council Act for running or functioning the programme in issue, as such, its degree/ diploma holders cannot be registered with the Himachal Pradesh Paramedical Council. In this backdrop petition stands filed.

3. Respondent No. 3 in its reply has contested the claim of the petitioner interalia on the ground that Section 19 of the Himachal Pradesh Paramedical Council Act, 2003, provides that no Paramedical institution shall open a new or higher course of study or training which would enable a student of such course or training to qualify himself for the award of any recognized Paramedical qualification, or shall increase its admission capacity in any course of study or training, except with the prior permission of the State Government. As per respondent No. 3, in view of the said statutory provisions, it is incumbent upon any Paramedical institution in the State to obtain permission from the State Government before starting any Paramedical course. It is further the stand of respondent No. 3 that respondent No. 5 university is created under the State Legislature Act of Government of Punjab and that the said university has got approval from the Distance Education Council for running the Distance Education Programme of Indira Gandhi National Open University, however, the same can be done within the territorial jurisdiction of the State of Punjab and as such, respondent No. 5 university cannot run learning centers outside the State, which would be illegal without the permission from the Central Government. It is further mentioned in the reply that the petitioner does not fall within the purview of Section 2(f) of the U.G.C. Act as the same was an off campus learning centre which could be recognized for the said purpose only by the Central Government/Parliament and for that matter respondent No. 5 university had to seek permission from the centre to function

in distance education at National Level. It was further mentioned in the reply that a public note dated 11.07.2006 stood issued by the Distance Education council, New Delhi, to the effect that it was mandatory for all the institutions to obtain the approval of the Distance Education Council before commencing any program/course for degree/diploma/ certificate through distance mode. It was further mentioned in the reply that the Act to which respondent No. 5 owes its origin even otherwise cannot mandate respondent No. 5 university to run off campus learning centres outside the State of Punjab. On these basis, claim of the petitioner institute was denied by the respondent on the ground that as per Section 19 of the Himachal Pradesh Paramedical Council Act, 2003, petitioner institute had to seek prior permission to run learning centre in the respondent State.

4. No rejoinder has been filed to the said reply.

5. In its reply filed by respondent No. 6, the said respondent has stated that an institute can run education pragramme only after due approval from Distance Education Council and respondent No. 6 gives affiliation/recognition/ approval to only those institutions which were duly approved by the DEC i.e. Distance Education Council. It was further mentioned in the reply that the Distance Education Council gives institutional recognition and recognition is not given to a particular program/course and it is mandatory for the respective institution to have had procured statutory approvals if any required for running their courses under Distance Education Programme.

6. Paras 4, 5 and 9 of the reply on merit are quoted herein below:-

> "4. That in reply to para 4 of the petition, it is submitted that the replying university gives approval/affiliation to institutes/universities not for particular programme for running courses under distance education provided the same are approved by Distance Education Council (DEC). The respondent No. 5 Punjab Technical University has been given approval (i.e. post facto approval) by DEC as such IGNOU has given affiliation for the same to run courses through distance education. It was for the respondent No. 5 to get the necessary approval from respective statutory bodies to run these programmes. The DEC gives institutional recognition not against particular course.
>
> 5. That the averments made in para 5 of the petition does not pertain to replying respondent, as such warrants no reply from respondent University. However, it is reiterated and submitted that condition of getting statutory approval/NOC was incumbent upon respondent No. 5. The replying respondent only gives institutional affiliation.
>
> 9. That the contents of para 12 of the petition are admitted. It is submitted that distance and online education can not have the territorial jurisdiction. The replying respondent affiliates or provide recognition to institute approved by Distance Education Council. However registration of a institute within a State before running courses is purely subject matter of State concerned and it is incumbent upon the concerned institute respondent No. 5 in the instant case to get the necessary approval/NOC from statutory bodies and State concerned before starting these courses. As such reply is warranted for the said respondent."

7. No rejoinder has been filed to the said reply also.

8. We have learned counsel for the parties.

9. It is apparent that the bone of contention in the present case is non-registration of the petitioner institute with respondent No. 3 as per the provisions of Section 19 of the Himachal Pradesh Paramedical Council Act, 2003.

10. Section 19 of the Himachal Pradesh Paramedical Council Act, 2003, is quoted herein below:-

> "**19. Permission for establishment of new paramedical institution**. –
>
> (1) Notwithstanding anything contained in this Act.-
>
> (a) no person shall establish a para-medical institution; and
>
> (b) no paramedical institution shall –
>
> (i) open a new or higher curse of study or training which would enable a student of such course or training to qualify himself for the award of any recognized paramedical qualification; or
>
> (ii) increase its admission capacity in any course of study or training, except with the previous permission of the State Government obtained in accordance with the provisions of this section.
>
> Explanation.- For the purposes of this section, the expression "person" includes any University or a trust but does not include the State Government."

11. A perusal of the said Section demonstrates that no new or higher course of study or training which would enable a student to qualify himself for the award of any recognized paramedical qualification or increase its admission capacity in any course of study or training can be opened without the prior permission of the State Government obtained in accordance with the provisions of Section 19. It is not in dispute that the petitioner does not has any such permission to open a new or higher course of study or training which would enable a student of such course or training to qualify himself for the award of any recognized paramedical qualification from the Government of Himachal Pradesh, as is the statutory requirement of Section 19 of the Himachal Pradesh Paramedical Council Act, 2003. Though a prayer has been made in the writ petition that the provisions of Section 19 (1)(a)(i) of the Himachal Pradesh Paramedical Council Act, 2003, are ultra vires, however, during the course of arguments learned counsel for the petitioner could not substantiate as to how the said provisions was ultra vires. Petitioner was not able to point out that Section 19 of the Act was beyond the legislative competence of the respondent State or the conditions imposed in the said section were unconstitutional. Even otherwise, in our considered view, Section 19 of the Act supra is not unconstitutional because it is within the legislative domain of the State Government and these provisions have been obviously made by the State Government to ensure that no paramedical institution is run within the territorial limitation of the State Government without its permission which would secure and protect the interest of students who were to study or obtain training from the same.

12. A three Judge Bench of Hon'ble Supreme Court of India in ***Prof. Yashpal and another Vs. State of Chhattisgarh and others***, ***(2005) 5 Supreme Court Cases 420***, has held as under:-

> "Dr. Dhawan has also drawn the attention of the Court to certain other provisions of the Act which have effect outside the State of Chhattisgarh and thereby give the State enactment an extra territorial operation. Section 2(f) of the amended Act defines "off-campus centre" which means a centre of the University established by it outside the main campus (within or outside the State) operated and maintained as its constituent unit having the university's complement of facilities, faculty and staff. Section 2(g) defines "off-shore campus" and it means a campus of the university established by it outside the country, operated and maintained as its constituent unit, having the university's complement of facilities, faculty and staff. Section 3(7) says that the object of the university shall be to establish the main campus in Chhattisgarh and to have study centres at different places in India and other countries. In view of Article 245 (1) of the Constitution, Parliament alone is competent to make laws for the whole or any part of the territory of India and the legislature of a State may make laws for the

whole or any part of the State. The impugned Act which specifically makes a provision enabling a university to have an off-campus centre outside the State is clearly beyond the legislative competence of the Chhattisgarh legislature."

13. In the present case as the petitioner institute admittedly did not obtain any prior permission from the State of Himachal as is contemplated in Section 19 of the Himachal Pradesh Paramedical Council Act, 2003, we do not find any infirmity with the act of respondent No. 3 in not granting recognition to the petitioner institute.

14. Therefore, in view of the discussion held above, there is no merit in the present writ petition and the same is accordingly dismissed. No order as to costs. Miscellaneous applications, if any, also stand disposed.

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

M/s Sai Engineering Foundation ....Decree Holder/non-objector

Versus

Himachal Pradesh State Electricity Board Ltd. ....Judgment debtor/Objector

OMP No. 381 of 2016
In Ex. Petition No. 16 of 2016
Decided on: May 16, 2017

Code of Civil Procedure, 1908- Section 47- A petition was filed for executing the award passed by the sole arbitrator – objector filed an objection petition pleading that the signed copy of the award was not supplied to the judgment debtor and the award is not executable – the award was to be made within three months from the date of appointment but was not made nor any extension of time was sought and the award is bad - held that signed copy of the award was sent vide letter dated 12.11.2009- judgment debtor also admitted in the information supplied under Right to Information Act that the copy of the award was received by it – the plea regarding the lapse of time could have been raised by filing objection under Section 34 of the Act and cannot be taken in objection to the execution – petition dismissed.(Para-8 to 21)

Cases referred:

Binod Bihari Singh v. Union of India, AIR 1993 SC 1245
Bhawarlal Bhandari v. M/s. Universal H.M.L. Enterprises, AIR 1999 SC 246
Satwant Singh Sodhi v. State of Punjab, AIR 1999 SC 2040
Food Corporation of India v. Dilip Kumar Dutta, AIR 1999 Calcutta 75
Subhas Projects & Marketing Ltd. v. Assam U.W.S.&S. Board, AIR 2003 Gauhati 158

For the Decree Holder/ Non-objector Mr. Vikas Chauhan, Advocate.
For the judgment debtor/ objector Mr. J.S. Bhogal, Senior Advocate with Mr. Satish Sharma, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (Oral):

By way of instant original miscellaneous petition (OMP), respondents-judgment debtor has filed objections under Section 47 CPC to the execution petition filed by the Decree Holder, seeking therein dismissal of execution proceedings instituted by the Decree Holder.

2. Before adverting to the merits of the application, it may be noticed by way of instant execution petition filed under Order 21 Rule 11 CPC read with Section 36 of the Arbitration & Conciliation Act, 1996, Decree Holder has sought execution of award dated 30.5.2009 passed by Shri D.N. Bansal, Sole Arbitrator.

3. It emerges from the record that Shri D.N. Bansal, Chief Engineer (Retd.) and ex-member of the HPSEB was appointed as Sole Arbitrator by the HP Electricity Regulatory Commission vide order dated 25.2.2008 in Petition No. 139 of 2007, titled M/s Sai Engineering Foundation vs. HPSEB, for adjudication of dispute between the parties concerning evacuation of power from Titang Mini Hydel Project, Kinnaur. Arbitrator, in the present case, was appointed in terms of conditions contained in Power Purchase Agreement dated 3.10.2000, signed between the parties for the said project. Aforesaid Sole Arbitrator passed award on 30.5.2009.

4. By way of above referred execution petition, Decree Holder has prayed that total amount of Rs.1,21,41,958/- alongwith interest @ 18% p.a. upto actual date of payment, be realized by way of sale of attached property of judgment debtor, as well as from its bank accounts. In the aforesaid background, judgment debtor has filed instant objections by way of instant application under Section 47 CPC.

5. Mr. J.S. Bhogal, Senior Advocate duly assisted by Mr. Satish Sharma, Advocate, while inviting attention of this Court to objections filed by them, contended that award dated 30.5.2009, is not executable as signed copy of award was not supplied to judgment debtor, as such, provisions of Section 36 of the Arbitration & Conciliation Act would not apply in the instant case. Mr. Bhogal, learned Senior Advocate, further contended that objections with regard to signed copy of award not having been supplied to the judgment debtor was also taken by them before HP Electricity Regulatory Commission in petition No. 136/2011, wherein, award in question came to be passed in favour of Decree Holder as also subsequent arbitration proceedings between same parties before arbitral tribunal. Mr. Bhogal, learned Senior Advocate, further contended that award sought to be executed in the present proceedings is not executable since time for filing application for setting aside award under Section 34 of the Act has still no elapsed. Apart from above, Mr. Bhogal, contended that HP Electricity Regulatory Commission had appointed Shri D.N. Bansal, retired Chief Engineer, as Sole Arbitrator vide order dated 25.2.2008, for adjudication of dispute between the parties, whereby, he was directed to make award within a period of three months. In the instant case, above named Sole Arbitrator failed to make award within time so stipulated and at no point of time, he sought extension of time, as such, award dated 30..2009, is no award in the eyes of law and same is not capable of being executed. While concluding his arguments, Mr. Bhogal, learned Senior Advocate further contended that bare perusal of award passed by learned Sole Arbitrator itself suggests that no amount has been awarded in favour of the Decree Holder, rather, arbitrator has only made recommendations that too without any justification, as such, present execution petition deserves to be dismissed. Mr. Bhogal, further contended that learned arbitrator himself arrived at positive finding against issue No. 2 to the effect that the judgment debtor has not in any manner violated provisions of Article 9 of the PPA. These findings have not been challenged at any time, by the Decree Holder in any forum, as such, same has attained finality against Decree Holder. In the aforesaid background, Mr. Bhogal, learned Senior Advocate prayed that present execution petition filed by Decree Holder deserves to be dismissed.

6. Mr. Vikas Chauhan, learned counsel representing the Decree Holder, opposed aforesaid prayer having been made by the learned counsel representing the judgment debtor. Mr. Chauhan, while refuting the aforesaid contentions/submissions having been made by the learned counsel representing the judgment debtor, invited attention of this Court to the communication dated 12.11.2009 (Annexure A-2), annexed to the reply to the objections, to demonstrate that signed copy of award was sent to the judgment debtor, as per Sub-section (5) of Section 31 of the Arbitration & Conciliation Act, for necessary action on the part of judgment debtor. Mr. Chauhan, also invited attention of this Court to the information furnished by the PIO-cum-Superintending Engineer (Electricity) o/o Chief Engineer, (P&M), HPSEB, Shimla (Annexure A-1) of reply, to

substantiate his aforesaid argument that signed copy of award was duly received by the Board on 12.11.2009. While placing reliance upon annexure A-1 i.e. information dated 24.9.2011, procured under Right to Information Act. Mr. Chauhan, contended that signed copy of award was received in Board's diary on 12.11.2009, which was further marked to Chief Engineer (Projects), HPSEB, Shimla. Mr. Chauhan, with aforesaid submissions seriously disputed contentions having been made by Mr. Bhogal, learned Senior Advocate that execution petition is premature as time to file objections under Section 34 of the Arbitration Act, has not still expired. Mr. Chauhan, contended that it stands duly proved on record that signed copy of awrd was received by the judgment debtor on 12.11.2009, but despite that it failed to file objections under Section 34 of the Act being aggrieved by the award passed by Sole Arbitrator within stipulated period of three months. Mr. Chauhan, with a view to refute another contention of Mr. Bhogal, learned Senior Advocate that no amount has been awarded by the Sole Arbitrator, invited attention of this Court to the award passed by the arbitrator, whereby learned arbitrator has specifically recommended compensation, while deciding issue No.3. While concluding his arguments, Mr. Chauhan, contended that other objections as raised in the present application, are not maintainable in view of the fact that legality, if any, of the award can not be challenged in the execution proceedings, rather, same was required to be laid challenge by way of objections, if any, filed under Section 34 of the Act.

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

8. After having carefully perused pleadings adduced on record by respective parties, this Court sees no force in the contentions of Mr. J.S. Bhogal, learned Senior Advocate that execution petition is premature and no signed copy of award was made available to the judgment debtor. Perusal of communication dated 12.11.2009, annexure A-2, clearly shows that Sole Arbitrator, in compliance to Sub-section (5) of Section 31 of the Arbitration & Conciliation Act, had sent a signed copy of arbitral award to the Secretary of the Board, for necessary action. Contents of annexure A-2 dated 12.11.2009, are reproduced herein below:

"To

M/S. Sai Engineering Foundation,

Sai Bhawan,

Shimla-9 (H.P.)

Subject:- Arbitration case (Pet.No. 139/07) in the matter of M/ Sai Engineering Foundation, Sai Bhawan,New Shimla-9(claimant) V/s Himachal Pradesh State Elect. Board (Respondent)

Sir,

A signed copy of arbitral award on the subject cited arbitration case is enclosed as per Sub-section (5) of section 31 of the Arbitration and Conciliation Act, 1996 for your kind information and necessary action.

Please acknowledge the receipt.

Yours faithfully,

Sd/-

(D.N. Bansal)

ARBITRATOR

Enclosure-Copy of arbitral award.(Please read compensation recommended as compensation awarded at page-9 under Table-II).

Signed copy of arbitral award to:

1. Secretary HPSEB, Vidyut Bhawan Shimla-4 as per Sub-section (5) of section 31 of the Arbitration and Conciliation Act, 1996 for kind information and necessary action. He is requested to acknowledge the receipt.

Enclosure- Copy of arbitral award.

(Please read compensation recommended as compensated awarded at page-9 under Table II)

2. Secretary HPERC, Keonthal Commercial complex, Khalini, Shimla-171002 (HP) with reference to her office letter no. HPERC-ARB/Reader:3093 dated 4.11.09.

Enclosure- Original copy of arbitral award.

(Please read compensation recommended as compensation awarded at page-9 under Table-II)."

9. Though, aforesaid communication has been addressed to M/s Sai Engineering Foundation i.e. Decree Holder but note appended in the aforesaid letter clearly suggests that a signed copy of award was sent to the judgment debtor also. Factum with regard to sending signed copy of award to the judgment debtor further stands corroborated by information supplied to the Decree Holder by the PIO-cum-Superintending Engineer (Elect.), wherein, it has been specifically informed that a copy of award was received in Board's diary on 12.11.2009, which was further marked to the Chief Engineer (Projects), HPSEB Shimla. At this stage, Mr. Bhogal, contended that there is no mention, if any, of signed copy of award, but aforesaid plea of Mr. Bhogal is not sustainable in view of the fact that there is acknowledgment in the information supplied under Right to Information Act that Board had received copy of award vide communication dated 12.11.2009, wherein, admittedly, signed copy of arbitral award was sent to Secretary, HPSEB. This Court deems it fit to reproduce the relevant portion of information supplied to Decree Holder under Right to Information Act, as under:

"HIMACHAL PRADESH STATE ELECTRICITY BOARD LIMITED

No. HPSEBL(Sectt)410-RTI/11-73337 Dated: 24-9-11

To

The Chief Information Commissioner,
Room No. 222, Armsdale Building,
HP Secretariat,
Shimla-171002 (HP).

Sub:- Notice under Section 19(3) of the Right to Information Act, 2005.

Ref:- Appeal/case No. SIC-1(A)0045/2011-12-2495 dated 25.8.201

Sir,

With reference to above it is to inform that the subject cited information under RTI Act, 2005 in response to application dated 26.03.2011 and 28.05.2011 has been supplied to the General Manager (H), Sai Engineering Foundation, Sai Bhawan, Sector IV, New Shimla consisting of sheets P-1 to P-25 having 29 pages. However, the point wise reply as desired by the appellant is appended as below: --

i) The date on which the copy of the award given by Er. D.N. Bansal, Arbitrator vide his No. DNB/Sai Arbitration/10-12 dated 12.11.2009 in the Arbitration case (Pet. No. 139/07) in the matte of Sai Engineering Founation, Sai Bhawa, New Shimla-9 (Claimant) V/S Himachal Pradesh State Electricity Board	The copy of award was received in Board's dairy on 12.11.2009 which was further marked to the Chief Engineer (Projects), HPSEB Ltd. Shimla-4.

(Respondent) was received by the Secretary, HPSEB Ltd.	

10. This Court, after having carefully perused reply filed by the Decree Holder, especially communications dated 12.11.2009 and 24.9.2011, (Annexure A-1 and Annexure A-2, respectively, sees no force, much less substantial, in the arguments of Shri Bhogal, learned Senior Advocate, that since no signed copy of award was received by the judgment debtor, it was precluded from filing objections to the award passed by the Sole Arbitrator. It stands duly proved on record that signed copy of award was received by the judgment debtor on 12.11.2009, as such, limitation as prescribed under section 34 of the Arbitration & Conciliation Act had commenced from 12.11.2009, when admittedly, signed copy of award was received by the judgment debtor. Since objections were not filed within time as prescribed under Section 34 (3) of the Arbitration Act, arguments having been made by Mr. Bhogal, learned Senior Advocate, can not be accepted that present execution petition is premature, rather, this Court, after having carefully perused the pleadings as well as impugned award has no hesitation to conclude that execution petition having been filed by the Decree Holder, is maintainable and not premature, as claimed by the judgment debtor.

11. As far as another contention made by Mr. Bhogal, learned Senior Advocate that present award is not executable since no compensation has been awarded in favour of Decree Holder, is concerned, this Court sees no merit in the same. Careful perusal of award in question clearly suggests that the Sole Arbitrator, while deciding issue No.3 i.e. "**exact amount of loss, if any, suffered by the claimant"**, has held Decree Holder entitled to compensation, which has been recommended in Table-II of award, which is also reproduced herein below:

Table-II

Compensation recommended

S.No.	Year	Generation at 35% PLF (800x24x365x0.35)	Generation as per actual.	Generation to be compensated	Compensation ** at the rate of Rs.2.50 per kWh
		(kWh)	(kWh)	(kWh)	(Rs.)
1.	4/02 to 3/03	24,52,800	22,27,148	2,25,652	5,64,130/-
2.	4/03 to 3/04	24,52,800	28,20,300	-	-
3.	4/04 to 3/05	24,52,800	18.18,700	6,39,100	15,97,750/-
4.	4/05 to 3/06	24,52,800	22,36,867	2,15,933	5,39,832/-
5.	4/06 to 3/07	24,52,800,	20,59,050	3,93,750	9,84,375/-
6.	4/07 to 3/08	24,52,800	17,96,542	6,56,258	16,40,645/-
7.	4/07 to 3/08	24,52,800	24,69,549	-	-

12. Apart from above, learned Sole Arbitrator, while returning his findings with respect to terms of reference as contained in HPERC reference No. HPERC:CMN:139:07:1481 dated 14.3.2008 also reiterated that quantum of compensation has been worked in Table-II, (as finds mention at page-27 of paper-book in the initial lines). Learned Sole Arbitrator, while

awarding compensation as detailed in table-II, also made certain recommendations, while answering reference No. 3 i.e., "*to make recommendations for efficient resolution of such disputes in future as also for developing processes which impede such events.",* as such dispute in future is also for developing processes, which impede such events.

13. Hence, this Court, after having carefully perused award, is in agreement with the contentions of Mr. Vikas Chauhan, learned counsel representing the Decree Holder that specific amount has been awarded as compensation to the Decree Holder by the Sole Arbitrator, in the award sought to be executed.

14. Another contention of Mr. Bhogal, learned Senior Advocate with regard to passing of award by Sole Arbitrator beyond period of three months can not be looked into in the present proceedings because, in execution proceedings, executing Court is only required t ensure execution of decree/award passed by the Court. Aforesaid plea as has been raised herein above, could only be raised by the judgment debtor in the objections, if any, filed under Section 34 of the Arbitration Act. As far as effect of finding returned by the Sole Arbitrator that the Board has not, in any manner, violated the provisions of Article 9 of PPA vis-à-vis amount awarded as compensation to the Decree Holder, is concerned, that can also not be looked into in the present proceedings, because, admittedly, certain amount has been ordered to be paid as compensation to the Decree Holder and Decree Holder is well within its right to get that amount of compensation by way of execution of award passed by Sole Arbitrator. Otherwise also, perusal of award clearly suggests that aforesaid finding with regard to provisions of Article 9 of the PPA was returned by Sole Arbitrator while answering issue No.1, "*Whether the provisions of article 9 of the PPA has be violated by the respondent*" and, Sole Arbitrator while holding that respondent Board has not, in any manner, violated provisions of Article 9 of the PPA, has not awarded any amount under aforesaid issue. Amount as detailed in Table-II has been awarded qua issue No. 3, "*Exact amount of loss, if any, suffered by the claimant."*

15. Apex Court in **Binod Bihari Singh v. Union of India**, AIR 1993 SC 1245, has held as under:

> "10. After giving our anxious consideration to the facts and circumstances of the case, we do not find any reason to interfere with the decision of the High Court. In our view, the High Court has rightly held that the application made by the appellant was an application for directing the arbitrator to file the award in Court so that such award is made a rule of Court. In this case, there was no express authority given by the arbitrator to the applicant to file the award to make it a rule of Court although a signed copy of the award was sent to the applicant. The forwarding letter clearly indicates that the award was sent for information. Accordingly, the decision of this Court made in Kumbha Mauji's case (supra) is applicable. The High Court has given very cogent reasons which, we have indicated in some details, for not accepting the case of the appellant that he had received a signed copy of the award and the forwarding letter some time in May, 1965 and we do not find any reason to take a contrary view. The applicant has not produced the registered cover received by him which would have established the actual date of the receipt of the postal cover by the applicant convincingly. We are also not inclined to hold that the delay in presenting the application deserves to be condoned in the facts and circumstances of the case. The appellant has taken a very bold stand that he had received the signed copy of the award only in May, 1965 and only within three weeks of such receipt, he had filed the application. On the face of such statement, the plea of ignorance of the change in the Limitation Act need not be considered and accepted. As the case sought to be made out by the appellant that he had received the signed copy of the award only in May, 1965 has not been accepted, and we may add, very rightly by the Court, the question of condonation of delay could not and did not arise. In our view, it is not at all a fit case where in the anxiety to render justice

to a party so that a just cause is not defeated, a pragmatic view should be taken by the Court in considering the sufficient cause for condonation of delay under Section 5 of the Limitation Act. Coming to the contention of Mr. Ranjit Kumar that to defeat a just claim of the appellant, the ignoble plea of bar of limitation sought to be raised by the respondent should not be taken into consideration, we may indicate that it may not be desirable for the government or the public authority to take shelter under the plea of limitation to defeat a just claim of a citizen. But if a claim is barred by limitation and such plea is raised specifically the court can not straightway dismiss the plea simply on the score that such plea is ignoble. A bar of limitation may be considered even if such plea has not been specifically raised. Limitation Act is a statute of repose and bar of a cause of action in a court of law, which is otherwise lawful and valid, because of undesirable lapse of time as contained in the Limitation Act, has been made on a well accepted principle of jurisprudence and public policy. That apart, the appellant, in this case, having taken a false stand on the question of receipt of the signed copy of the award to get rid of the bar of limitation, should not be encouraged to get any premium on the falsehood on his part by rejecting the plea of limitation raised by the Respondent. We may also indicate here that the High Court is justified in its finding that the objection petition has been filed within time by the respondent and the service of the copy of the application made by the appellant on the counsel of the respondent who had appeared in an earlier proceeding did not constitute a notice as contemplated under Article 119(b) of the Limitation Act. In the aforesaid circumstances, the appeal must fail and is dismissed but we make no order as to costs."

16. Apex Court in **Bhawarlal Bhandari v. M/s. Universal H.M.L. Enterprises,** AIR 1999 SC 246, has held as under:

"8. In view of the aforesaid rival contentions, the following points arise for bur Consideration ; -

(i) Whether the award decree dated 2.6.1989 was a nullity being barred by limitation.

(ii) Whether the executing Court can go behind such a decree,

(iii) Whether any interference under Article 136 of the Constitution is called for.

9. Having given our anxious consideration to the rival contentions, we find that none of the aforesaid points for determination can be sustained in favour of the respondent-judgment debtor. The reasons are obvious.

Point Nos. .(i) & (ii):

10. THE award dated 17/4/1985 was filed in the court on 23/3/1989 by the arbitrator and the court proceeded to deal with the question whether the award should be made the rule of the court or not. Notice was issued by the court to the respondent to show cause as to why this award should not be made the rule of the court. There is no dispute that this notice was served on the respondent. Despite such service of notice, for reasons best known to the respondent, it did not think it fit to contest the proceedings nor did it file any objection under Section 30 of the Arbitration Act, 1940. In the result, the court passed an award decree on 2/6/1989 on account of the absence of any contest by the judgment-debtoR.It is true that this award decree was sought to be executed years thereafteR.But the said delay on the part of the decree- holder in executing the decree within the permissible period for limitation in execution of such decree cannot give any sustainable right to the judgment- debtor to challenge the execution proceedings on that ground. The contention of Shri Javali, learned

Senior Counsel for the respondent that the award was a mock one and was not intended to be enforced cannot be sustained as that stage has gone for the respondent. In execution proceedings, such a contention requiring the executing court to go behind the decree cannot be sustained. The question whether the award decree was filed by the arbitrator on his own or not was a mixed question of law and fact. The division bench in the impugned judgment itself has noted that if a the award was filed by the arbitrator suo motu, then the award decree cannot be said to be barred by limitation but If, on the other hand, the award was filed by the arbitrator at the instance of the appellant-decree-holder, then the question of limitation would arise. The aforesaid observation of the division bench itself indicates that this is a mixed question of law and fact. That was an issue to be raised before the award was made a rule of the court. But such a plea can never make the decree a nullity especially when the respondent for reasons best known to it did not think it fit to file objections under Section 30 of the Arbitration Act, 1940. It is well settled that the executing court, cannot go behind the decree unless it is shown that it is passed by a court having inherent lack of jurisdiction, which would make it a nullity. In the case of lttyavira Mathai v. Varkey Varkey a bench of four learned Judges of this court speaking through Mudholkar, J. observed that when the question of limitation was not raised before the trial court or before the High court, it could not be raised for the first time before this court even in the hierarchy of proceedings arising from the suit when such question of limitation raised before the court was not a pure question of law but was a mixed question of law and fact. In the case of Vasudev Dhanjibhai Modi v. Rajabhai Abdul Rehman J.C. Shah, J. speaking for a three-Judge bench of this court made the following pertinent observation in connection with the jurisdiction of the executing court, when called upon to execute the decree and on the question as to under what circumstances the executing court can go behind the decree sought to be executed. The observation at SCR p. 68 of the Report deserves to be extracted in extenso

> "6. A court executing a decree cannot go behind the decree: between the parties or their representatives it must take the decree according to its tenor, and cannot entertain any objection that the decree was incorrect in law or on facts. Until it is set aside by an appropriate proceeding in appeal or revision, a decree even if it be erroneous is still binding between the parties,

When a decree which is a nullity, for instance, where it is passed without bringing the legal representatives on the record of a person who was dead at the date of the decree, or against a ruling prince without a certificate, is sought to be executed an objection in that behalf may be raised in a proceeding for execution. Again, when the decree is made by a court which has no inherent jurisdiction to make it, objection as to its validity may be raised in an execution proceeding if the objection appears on the face of the record: where the objection as to the jurisdiction of the court to pass the decree does not appear on the face of the record and requires examination of the questions raised and decided at the trial or which could have been but have not been raised, the executing court will have no jurisdiction to entertain an objection as to the validity of the decree even on the ground of absence of jurisdiction. In Jnanendra Mohan Bhaduri v. Rabindra Nath Chakravarti the Judicial Committee held that where a decree was passed upon an award made under the provisions of the Indian Arbitration Act, 1899, an objection in the course of the execution proceeding that the decree was b made without jurisdiction, since under the Indian Arbitration Act, 1899, there is. to provision for making a decree upon an award, was competent. That was a case in which the decree was on the face of the record without jurisdiction."

(11) THE aforesaid decision of this court squarely applies to the facts of the present case. This is not a case in which the award decree on the face of c it was shown to be without jurisdiction. Even if the decree was passed beyond the-period of limitation, it would be an error of law or at the highest, a wrong decision which can be corrected in appellate proceedings and not by the executing court which was bound by such decree. It is not the case of the respondent that the court which passed the decree was lacking inherent jurisdiction to pass such a decree. This becomes all the more so when the d respondent did not think it fit to file objection against the award which was sought to be made the rule of the court."

17. Apex Court in **Satwant Singh Sodhi** v. **State of Punjab**, AIR 1999 SC 2040 has held as under:

"7. Section 14 of the provides that when the arbitrator or umpire has made his award, he shall sign it and shall give notice in writing to the parties of the making and signing thereof and of the amount of fees and charges payable in respect of the arbitration and award. In the language of the Section, an award will be complete as soon as it is made and signed. Thus mere writing of an award would not amount to making of an award. There can be no finality in the award except when it is signed because signing of the award gives legal effect to it and to give validity to an award. It is not necessary that it should also be delivered or pronounced or filed in the court. Making and delivery of the award are different stages of an arbitration proceeding. An award is made when it is authenticated by the person who makes it. The word made suggests that the mind of the Arbitrator as being declared and it is validly deemed to be pronounced as soon as the Arbitrator has signed it and once an award has been given by the Arbitrator he becomes functus officio. If this is the position in law, it becomes difficult to support the view taken by the High Court in stating that the interim award was not pronounced though it was made and signed by the Arbitrator. If he had made the award the question of superseding the same could not arise. Therefore, the view of the High Court appears to us to be fallacious.

8. On this aspect of the matter we may refer to some of the decisions on the aspect as to when an award becomes final. In Janardhan Prasad vs. Chandrashekhar, AIR 1951 Nagpur 198, after examining the scope of Section 14 of the Act, it was held as follows :

> the award becomes valid and final so far as the arbitrators or umpire are concerned the moment it is made and signed by them. The provision for giving notice in writing to the parties of the making and signing thereof and of the amount of fees and charges payable in respect of the arbitration and the award is for the purpose of limitation under Art. 178 of the Limitation Act, entitling either party to apply to the Court for the filing in Court of the award.

No time is fixed for the giving of such notice by the Arbitrator and it has been held in several cases that it may be done within reasonable time either by the Arbitrator or by his agent. A notice may be given to one party and may not be given to another party for a much longer period. It cannot be said that an award becomes final so far as the first party is concerned and no as against the other entitling the Arbitrators to scrap the award and make a fresh one.

> There is thus a fundamental difference between the making, signing and delivery of a judgment and making and signing and giving notice of an award. In the former case all three must be simultaneous acts and parts of the same transaction. In the latter case the first two may be simultaneous and the notice of the award can be postponed.

That award does not become invalid because notice of the making of it has not been given. An Arbitrator is entitled to file an award in Court under Section 14, sub-s.(2). If he does so, the Court is bound to give notice to the parties of the filing of the award.

9. The circumstances in which these observations are made by the court are as follows :

> The Arbitrators had made and signed an award on January 11, 1944 which was registered on January 13, 1944. Thereafter the Arbitrators made a second award on January 26, 1944. It was contended that as they did not pronounce the award by issuing a notice of having signed it, they had not become functus officio and could, therefore, make and deliver the second award dated January 26, 1944. The learned Judges of the High Court refused to hold that the first award was not final and could be superseded by the second award because no notice was given before January 26, 1944. This view was followed by the Andhra Pradesh High Court in Badarla Ramakrishnamma & Ors. vs. Vattikonda Lakshmibayamma & Ors., AIR 1958 Andhra Pradesh 503, at para 2. Again in Ram Bharosey vs. Peary Lal, AIR 1957 All.265, it was observed as under :

It is true that in the present case the Arbitrators did not give notice to the parties of the making and the signing of the award. But the arbitrators after making and the signing the award filed it in the court. The validity of the award does not depend upon the notice of the same being given to the parties. When an award is duly make, signed and filed in Court it is a valid document.

10. This position was reiterated in Asad-ul-lah vs. Muhammad Nur, ILR 27 All. 459(A) and it was held that :

> for the making of an award it is enough that the Arbitrators act together and finally make up their minds and express their decision in writing. This writing must be authenticated by their signatures. The award is thus made and signed and is complete and final so far as the Arbitrators are concerned.

11. This Court in Rikhabdas vs. Ballabhdas & Ors., 1962 (1) SCR Supp. 475, held that once an award is made and signed by the Arbitrator the Arbitrator becomes functus officio. In Juggilal Kamlapat vs. General Fibre Dealers Ltd., 1962 (2) SCR Supp. 101, this Court held that an Arbitrator having signed his award becomes functus officio but that did not mean that in no circumstances could there by further arbitration proceedings where an award was set aside or that the same Arbitrator could never have anything to do with the award with respect to the same dispute. Thus in the present case, it was not open to the Arbitrator to re-determine the claim and make an award. Therefore, the view taken by the trial court that the earlier award made and written though signed was not pronounced but nevertheless had become complete and final, therefore, should be made the rule of the court appears to us to be correct with regard to Item No.1 inasmuch as the claim in relation to Item No.1 could not have been adjudicated by the Arbitrator again and it has been rightly excluded from the second award made by the Arbitrator on January 28, 1994. Thus the view taken by the trial court on this aspect also appears to us to be correct. Therefore, the trial court has rightly ordered the award dated January 28, 1994 to be the rule of the court except for Item No.1 and in respect of which the award dated November 26, 1992 was ordered to be the rule of the court."

18. Single Judge of Punjab and Haryana High Court in **Inderjit Goel vs. Punjab Reliable Investment (P) Ltd. and Anr** decided on 1.2.2005, has held as under:

"3. The facts, which are relevant for the decision of the present case are that in a dispute between the parties an ex parte award dated 18-7-2000 was passed by the Arbitrator (respondent No. 2). Thereupon, respondent No. 1 filed execution petition under Section 36 of the Act. The execution petition was transferred from the Court of Civil Judge (Junior Division) Jalandhar to the Court of Addl. Distt. Judge, Tis Hazari Courts, Delhi. In the petition under Section 9 of the Act filed by the present appellant it was alleged that the said execution proceedings were fixed in the Courts at Delhi for 5-9-2003 for filing of the original copy of the award. It was alleged in the said petition that the present appellant was not served a valid notice about the arbitration proceedings and even the impugned award dated 18-7-2000 had not been served upon him and as such he was prevented to exercise a legal right to file petition under Section 33 and 34 of the Act for setting aside the award. It was alleged that these points were brought to the notice of the Court at Delhi by filing objection petition on 26-7-2002 but these objections were withdrawn in view of the order dated 18-7-2003 passed by the Delhi High Court. It was alleged that under Section 31(5) of the Act, it is mandatory to send a copy of the award to the parties which had not been done and as such limitation to file petition under Section 34 of the Act had not started and the execution proceedings pending in the Court at Delhi were premature. It was accordingly prayed that the execution proceedings may be dismissed as premature and in the alternate the enforcement of the award dated 18-7-2000 be stayed till a signed copy of the award it supplied to him.
4. In the reply filed by respondent No. 1, it was alleged that registered A.D. notice was sent to the parties by the Arbitrator but the appellant did not join the proceedings and was proceeded against ex parte and thereupon ex parte award for Rs. 3,64,780/- with interest and costs had been passed on 18-7-2000 and the copy of the award was sent to the parties by UPC. It was alleged that the appellant had appeared in the Executing Court at Delhi on 26-7-2002 and copy of the award was attached with the execution proceedings.

5. After hearing both sides and perusing the record, the learned Distt. Judge dismissed the petition under Section 9 of the Act, holding that the Court was not competent to hold the proceedings pending in the Executing Court to be premature nor such a relief was covered under the provisions of Section 9 of the Act. Aggrieved against the order dated 17-11-2003, passed by the Distt. Judge, present appeal has been filed.

6. After hearing the learned counsel and perusing the record, in my opinion, there is no merit in this appeal and the same is liable to be dismissed. Section 9 of the Act reads as under :-

"9. Interim measures, etc. by Court.- A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with S. 36, apply to a Court –
(i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or
(ii) for an interim measure of protection in respect of any of the following matters, namely :-
(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;
(b) securing the amount in dispute in the arbitration;
(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be

tried, which may be necessary or expedient for the purpose of obtaining full information or evidence :
(d) interim injunction or the appointment of a receiver;
(e) such other interim measure of protection as may appear to the Court to be just and convenient.
and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it."
7. From a perusal of the above, it would be clear that under Section 9 of the Act, the Court is competent to pass such interim order which may appear to the Court to be just and convenient even after the making of the arbitral award and before it is enforced. In the present case the prayer of the appellant is that the proceedings pending in the Executing Court may be dismissed as premature or enforcement of the said award dated 18-7-2000 passed by the Arbitrator may be stayed till a signed copy of the award is supplied to him. In my opinion, such a prayer would not be covered by the provisions of Section 9 of the Act and in any case on the facts and circumstances of the present case, no case was made out for the Distt. Judge, Jalandhar, either to have dismissed the executing proceedings pending in the Court of Addl. Distt. Judge, Delhi as premature or to have stayed those proceedings till a signed copy of the award is supplied to the appellant. It is not disputed before me that the copy of the award was attached with the execution proceedings. It is also not disputed before me that the appellant has appeared in the execution proceedings pending in the Court at Delhi. It is also not disputed before me that so far the appellant has not filed any objection against the award given by the Arbitrator under Section
34 of the Act or otherwise, seeking the setting aside of the award on any ground. As referred to above, the case of respondent No. 1 is that copy of the award was sent to the appellant under UPC. The question as to whether the appellant received copy of the award or not is a question of fact which cannot be gone into in the present proceedings. If the appellant was aggrieved against the award passed by the Arbitrator on any of the grounds whether on merits or otherwise, including non-supply of a copy of the award to him by the Arbitrator, the appellant could have raised all these points by filing objection petition under Section 34 of the Act before the competent Court and if any such objection had been filed the Court would have considered the same in accordance with law. However, in the present case nothing of the kind was done. On the other hand the appellant filed a petition under Section 9 of the Act, which is intended for interim measures etc. by the Court. In the present case, as referred to above, the Arbitrator has already given the award and the execution proceedings are pending in the Courts at Delhi and admittedly no objection petition under Section 34 of the Act has been filed by the appellant. Under these circumstances, in my opinion, learned Distt. Judge was perfectly justified in holding that no case for holding the execution proceedings to be premature was made out. Similarly, in my opinion, no case was made out for staying the proceedings which were pending before the Executing Court merely on the ground that the appellant had not received a copy of the award from the Arbitrator.

8. In view of the above, in my opinion, no case for interfering with the present appeal is made out. Hence the present appeal is dismissed. Appeal dismissed."

19. High Court of Calcutta in **Food Corporation of India v. Dilip Kumar Dutta,** AIR 1999 Calcutta 75, has held as under:

"30. No doubt the Court has power to extend) the time which is available under Section 28 as well as Schedule 1 paragraph 3 of the Act. It is also clear that Court can enlarge the time but Court must decide such question judicially.

Therefore, factual position has to be ascertained before passing any order. In the instant case, no doubt, parties have participated in the arbitration proceedings before the expiry of the time and after the expiry of the time on the basis of the time extended at the instance of Food Corporation of India, petitioner herein. The petitioner, in one hand, voluntered before the Arbitrator for extending the time and has taken the plea reverse to such stand now before the Court to frustrate the award. Therefore conduct of the petitioner cannot be said to be good. Moreover such act is hit by principle of aprobate and reprobate. In the premises the conduct of the Arbitrator may be construed as irregular but not as illegal. Irregularity may be condoned but illegality is not.

31. Under such circumstances, I think it should not be fair on my part of say that award is illegal and to hold in favour of the petitioner. Therefore, defect, if any, is condoned and time to make and publish the award is formally extended under this order with the retrospective effect."

20. A Division Bench of Gauhati High Court in **Subhas Projects & Marketing Ltd. v. Assam U.W.S.&S. Board,** AIR 2003 Gauhati 158, has held as under:

"7. The submissions advanced by the learned counsel for the parties have been duly considered by us. Section 31 of the Act does not prescribe any particular form or manner of passing an award. An award is an expression of an adjudication of a dispute between the parties and as long as the manifestation of the decision on the dispute raised is clear and unambiguous, it will not be correct to hold an award to be invalid merely because it does not subscribe to any particular format. An unstamped or insufficiently stamped award is at best a curable irregularity. Viewed from the aforesaid perspective, the objections of the respondent Board regarding the validity of the award on the aforesaid two grounds would hardly call for any serious consideration of this Court.

8. The law relating to the power of an executing Court under the provisions of Section 47 of the Code of Civil Procedure is well settled. The difficulty is not with regard to the principles of law, but with regard to the application of such principles. In view of the clear language of Section 47 of the Code of Civil Procedure, it has always been understood that while the executing Court cannot go behind the decree to determine its legality, objections regarding the validity of the decree has to be decided in an execution proceeding. However, such objections must appear on the face of the record and cannot be left to be determined by a long drawn process either of evidence or reasoning. The same principles of law would undoubtedly apply to the execution of an award under Section 36 of the Act. It is also our considered view that the inhibitions that would operate upon the Court while executing an award would be somewhat more in view of the provisions of Section 34 of the Act. As Section 34 of the Act has enumerated specific grounds on which an application for setting aside of an award may be filed, any such objection to the award on the grounds enumerated in Section 34 cannot be allowed to be agitated or re-agitated while resisting the execution of the award. To that extent, the argument advanced by Mr. Markunda appearing on behalf of the revision petitioner is well founded. In the instant case no objection under Section 34 of the Act was filed on behalf of the respondent board. In such a situation to permit the respondent Board to raise the question of jurisdiction of the arbitral Tribunal to pass the interim award in question in its objections resisting the execution of the award cannot be understood to be permissible in law. Such a course of action would render the provisions of Section 34 virtually redundant. As evident from the subsequent facts of the case on which there is no dispute at the Bar, it appears that the arbitral proceeding has now to recommence. The question of jurisdiction of the arbitral Tribunal which has not yet been decided, therefore, must be decided by the Tribunal itself

and we are confident that this question if agitated by any party, would be brought to its logical conclusion by the Tribunal. However, entertainment of said question by the learned District Judge in an execution proceeding and in treating the conclusion reached by it as the foundation for its decision cannot be said to be corrective law."

21. After having bestowed my thoughtful consideration to the facts of the case, law cited herein above as well as submissions of learned counsel representing the parties, I see no merit in the present objections having been filed by the judgment debtor and same are dismissed.

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

State of H.P. .....Petitioner
Versus
Shri Sarvjot Singh Bedi and others .....Respondents

CWP No. 4623 of 2015
Decided on: May 17, 2017

H.P. Tenancy and Land Reforms Act, 1974- Section 118- A report was made by the Tehsildar that P, S and G had violated Section 118 of H.P. Tenancy and Land Reforms Act by executing a Power of Attorney in favour of G, who was a non-agriculturist – the Collector ordered the vestment of land in favour of the State- an appeal was filed, which was dismissed – a revision was filed, which was allowed- held that there was no bar in execution of power of attorney – however, the provision was amended and the transfer by way of Special or General Power of Attorney or by way of agreement is not permissible after 22.3.1995 – the power of attorney was executed in the year 1990 and therefore, the amendment was not applicable to it- the Financial Commissioner had rightly allowed the revision- petition dismissed.(Para-11 to 25)

Cases referred:
Smt. Santosh Malhotra versus State of H.P. and Others, 2003 (3) Shim. L.C. 342
Garikapatti Veeraya vs. N. Subbiah Choudhury, 1957 SCR 488
Dhyan Singh vs. State of Himachal Pradesh and others, 2012 (3) Shim. L.C. 1741
Commissioner of Income Tax versus Bazpur Co-Operative Sugar, 1988 SCR (3)1034

For the petitioner : Mr. Shrawan Dogra, Advocate General with Mr. Anup Rattan and Mr. Romesh Verma, Additional Advocate Generals and Mr. J.K. Verma, Deputy Advocate General, Advocate.
For the respondents : Mr. R.L. Sood, Senior Advocate with Mr. Arjun Lal, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

By way of present writ petition filed under Articles 226/227 of the Constitution of India, petitioner-State has laid challenge to order dated 30.9.2014 passed by Financial Commissioner (Appeals), Himachal Pradesh in Revenue Revisions No. 74/2013 (156/97) & 75/2013 (157/97), whereby revision petitions of the respondents herein have been allowed and possession of land has been ordered to be returned back to the owners of the land and orders dated 13.5.1996 passed by the Divisional Commissioner, Shimla and dated 20.9.1995 passed in Case No. 15/13 of 1991 by Collector, Solan have been set aside.

2. The genesis of the entire case is based on the order of Collector, Solan, passed in Cases No. 15/13 of 91. In nutshell, case of the State was that Tehsildar, Kasauli reported that in Mauza Shilora Khurd, one Prem Singh bought 14 Bigha of land in Khasra Nos. 228 and 229 measuring 36-13 Bighas. Out of this 14 Bigha of land was sold by him to one Sarvjot Singh Bedi son of Shri Madhu Sudan Bedi, resident of Una. Subsequently, Shri Sarvjot Singh Bedi transferred this land to Shri G.S. Chopra of Delhi, through Astra Construction Company. After receipt of this report, notice was issued to all the three parties for violation of Section 118 of the Himachal Pradesh Tenancy and Land Reforms Act. Sarvjot singh and G.S. Chopra, filed written replies in response to the notice. The State, in support of its claim produced Patwari Kasauli and Tehsildar Kasauli as witnesses, whereas from other side, one witness Kedar Nath was examined. Respondents No. 2 and 3 produced documents to show that Astra Construction Company was a construction company and General Power of Attorney, was only executed in favour of G.S. Chopra, for construction of flats on behalf of the original owner namely Sarvjot Singh.

3. The petitioner-State pleaded before the Collector Solan that from the report of Tehsildar Kasauli, it was clear that Sarvjot Singh Bedi, who was owner of 7 Bigha of land, had transferred this land to Shri G.S. Chopra, of Astra Estate Company in violation of Section 118 of the Act, as G.S. Chopra was a non-agriculturist and this fact remained unrebutted by the respondents. Patwari and Tehsildar, who were examined, deposed that G.S. Chopra was found in possession of suit land and he was constructing various flats and was selling them of his own. He also drew attention to the General Power of Attorney given by Shri Sarvjot Singh Bedi on 25.6.1990 in favour of Shri G.S. Chopra It was further argued that as per paras 6 to 10 of the General Power of Attorney, all the powers to manage this property had been given to G.S. Chopra and for all intents and purposes, land had been transferred to G.S. Chopra and Sarvjot Singh was no more in picture. On the other hand, respondents before the Collector stated that Prem Singh had sold suit land to Sarvjot Singh, who was an agriculturist of Himachal Pradesh. Sarvjot Singh in his reply stated that he purchased land vide sale deeds dated 15.6.90 and 12.7.90 and Astra Estate Company was only carrying out construction work on his behalf. He also drew attention towards the reply filed by G.S. Chopra, in which he had replied that Sarvjot Singh Bedi vide two sale deeds dated 15.6.90 and 12.7.90 had bought land from Prem Singh of village Manoon, Tehsil Kasauli, and he, as a Director of Astra Estate Company was constructing tourist resort for Sarvjot Singh Bedi. In his reply, he also mentioned that since company cannot be given power of attorney to carry out the work, the Power of Attorney had been given in his favour as representative of the company.

4. The learned Collector below, after hearing the parties and appreciating the evidence adduced before him, held that land measuring 7 Bigha comprising of Khasra Nos. 228 and 229 situate in Mauza Shilora Khurd, Village Manoon had been transferred by Sarvjot Singh Bedi in favour of G.S. Chopra, who was a non-agriculturist, in violation of Section 118 of the Act ibid and therefore, in exercise of powers under Section 118 of the Act, ordered the land in question to be vested in the State Government with all structures, buildings and other attachments free from all encumbrances. Tehsildar, Kasauli, was directed to take over the possession.

5. Being aggrieved, Sarbjot Singh Bedi and G.S. Chopra, filed an appeal under Section 61 of the Act ibid before Divisional Commissioner, Shimla, who vide order dated 13.5.1996, upheld the findings returned by the Collector, Solan and dismissed the appeal.

6. Aforesaid persons, being further aggrieved, filed revision petition before the Financial Commissioner (Appeals), being Revenue Revision Nos. 74/2013 (156/97) and 75/2013 (157/97), which were disposed of by the aforesaid authority on 30.9.2014, holding that the Power of Attorney putting a non-agriculturist in possession of land, was more of functional autonomy given to the company and also securitizing their investments. The authority below further held that there was no registration, sale deed etc. which could be construed as violation of the Act ibid.

7. The State being aggrieved by order dated 30.9.2014, has preferred instant writ petition laying therein challenge to the aforesaid order.

8. Mr. Shrawan Dogra, learned Advocate General duly assisted by Mr. Anup Rattan, learned Additional Advocate General, vehemently opposed the order passed by the Financial Commissioner (Appeals) stating that the same was perverse and inconsistent with the provisions of Section 118 of the Act ibid and same is not based upon correct appreciation of record. Mr. Dogra, further stated that Section 118 of the Act ibid specifically prohibits transfer of land into the hands of a non-agriculturist by way of sale, gift, exchange, lease, mortgage, power of attorney, agreement etc. It was further argued by the learned Advocate General that the findings of the learned Financial Commissioner (Appeals) would encourage such illegal transactions and undermine the interest of general public. It was further argued on behalf of the State that the learned Collector below had rightly held the transaction to be *Benami* as, by way of Power of Attorney, land had been transferred to a non-agriculturist. Learned Advocate General further argued that huge loss had been caused to the State Exchequer due to non-affixing of stamp duty. Mr. Shrawan Dogra, learned Advocate General prayed that the order passed by Financial Commissioner (Appeals) be set aside and that of the Collector Solan and Divisional Commissioner, Shimla be upheld.

9. Mr. R.L. Sood, learned Senior Advocate duly assisted by Mr. Arjun Lal, Advocate, supported the order passed by Financial Commissioner (Appeals). Mr. Sood argued that there was no violation of Section 118 of the Act as rigors of amendment carried out in the Act ibid admittedly on 22.3.2015, could not be applied retrospectively. He further argued that the fact that the revenue petitions filed by the respondents were initially decided against respondents on 13.5.1996 and as such respondents laid challenge to the same by filing CWP No. 1088 of 2003, which was disposed of on 1.10.2013, setting aside order of the Financial Commissioner (Appeals) and directing the said authority to decide the petitions afresh taking on record fresh material and considering all the pleas raised by the respondents, pursuant to which, order dated 30.9.2014 was passed, which is under question in this petition. Mr. Sood, further argued that the Power of Attorney and agreement were dated 26.5.1990 and 30.6.1990, and same did not show that land had been transferred in the name of respondent No.3 and as such rigors of amendment to Section 118 of the Act, carried out on 22.3.1995 could not be given retrospective effect.

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

11. At the very outset, it may be noticed that issue with regard to validity of Section 118 of the Act, stands settled by a Division Bench of this Court vide judgment dated 1.10.2013 passed in CWP No.443 of 1995, titled **Som Kirti alias Som K.Nath and others** vs. **State of H.P. and others**, whereby the Division bench has upheld the validity of Section 118 of the Act and as such this Court has no occasion, whatsoever, to examine validity, if any, of Section 118 of the Act.

12. However, this Court, with a view to ascertain the correctness and legality of the impugned order passed by the learned Financial Commissioner (Appeals) as well as arguments having been advanced by Mr. R.L. Sood, learned Senior Advocate, wherein he argued that no penal action, if any, in terms of Section 118 of the Act could be taken against the respondents, even if it is presumed that Power of Attorney in question was executed to sell land in favour of the Mr. G.S. Chopra, would be examining the issue at hand in light of provisions contained in Section 118 of the Act.

13. After having gone through the facts as emerge from the record, in nutshell, case of the respondents before authorities below was that there is / was no intention, if any, to effect sale of land in question, in favour of G.S. Chopra by Sarvjot Singh and Power of Attorney was only given for carrying out construction on the land owned and possessed by Sarvjot Singh.

14. The State of Himachal Pradesh enacted H.P. Tenancy and Land Reforms Act, 1972, Chapter-XI deals with Control on transfer of land, wherein under Section 118 transfer

of land to non-agriculturists is prohibited, it would be relevant to reproduce herein below Section 118 amended by amendment Act, 1988:-

> "118. Transfer of land to Non-agriculturists Barred.-(1) Notwithstanding anything to the contrary contained in any law, contract, agreement, custom or usage for the time being in force, but save as otherwise provided in this Chapter, on transfer of land (including sales in execution of a decree of a civil Court or for recovery of arrears of land revenue), by way of sale, gift, exchange, lease, mortgage with possession or creation of a tenancy shall be valid in favour of a person who is not an agriculturist.
>
> (2). Nothing in sub-section (1) shall be deemed to prohibit the transfer of land by any person in favour of-(a) to (h) .....
>
> (i) a non-agriculturist with the permission of State Government for the purpose that may be prescribed:
>
> Provided.....
>
> (3) No Registrar or the Sub-Registrar appointed under the Indian Registration Act, 1908 (16 of 1908), shall register any document pertaining to a transfer of land, which is in contravention to sub-section (1) and such transfer shall be void ab initio and the land involved in such transfer, if made in contravention of sub-section (1), shall, together with structures, buildings or other attachments, if any, vest in the State Government free from all encumbrances."

15. Aforesaid provisions of law clearly suggest that no land could be transferred by way of sale, gift, will, exchange, lease, mortgage with possession, creation of tenancy or in any other manner, in favour of a person, who is not an agriculturist. Further, the proviso to provision referred herein above, clearly provides that even a non-agriculturist can purchase land with prior approval of the State Government. However, close scrutiny of aforesaid provision as amended; certainly suggests that there is / was no bar to transfer land by way of agreement and power of attorney. But, at this stage, it may be noticed that H.P. Tenancy and Land Reforms (Amendment) Act, 1994 came into force on 22.3.1995, wherein explanation of Section 118 (1) of the amending Act was incorporated as under:

> "Explanation.- For the purpose of this subsection, the expression "transfer of land" shall include:-
>
> (a) a benami transaction in which land is transferred to an agriculturist for a consideration paid or provided by a non agriculturist, and
>
> (b) an authorization made by the owner by way of special or general power of attorney or by an agreement with the intention to put a non-agriculturist in possession of the land and allow him to deal with the land in the like manner as if he is a real owner of that land."

16. It clearly emerges from aforesaid amendment, which came into force on 22.3.1995, that no transfer of land could be made, by way of special or general power of attorney or by an agreement with the intention to put a non-agriculturist in possession of the land and allow him to deal with like manner, as if he is real owner of that land. But, explanation appended to aforesaid amendment, which admittedly came into operation on 22.3.1995, certainly suggests that no transfer of land could be made by way of agreement as well as Power of Attorney after this amendment.

17. In the case in hand, as clearly emerges from record, alleged Power of Attorney was executed by Sarvjot Singh, in favour of G.S. Chopra, in the year 1990 i.e. admittedly before coming into operation of the HP Tenancy and Land Reforms (Amendment) Act, 1994, whereafter, transfer of land was made prohibitive by way of agreement and Power of Attorney. Though, in the instant case, respondents from the very inception of proceedings initiated against them, for violating the provisions contained in Section 118 of the Act, have taken stand that they never

intended to effect sale, if any, in favour of G.S. Chopra, rather, Power of Attorney was executed for construction of flats on the land owned and possessed by Sarvjot Singh. But, even if, for the sake of arguments, it is presumed that Power of Attorney in question was for effecting sale, which was admittedly executed on 25.6.1990, this Court sees force in the arguments of Mr. R.L. Sood, learned Senior Advocate that there was no bar as such prior to coming into force of the amending Act, for execution of Power of Attorney as well as agreement.

18. This Court, after having carefully perused aforesaid amendment, which came into force on 22.3.1995, as well as case law relied upon by the learned Financial Commissioner (Appeals), while allowing the revision having been preferred by the respondents, i.e. **Smt. Santosh Malhotra** versus **State of H.P. and Others**, 2003 (3) Shim. L.C. 342, has no hesitation to conclude that there is no illegality in the impugned order passed by the Financial Commissioner (Appeals).

19. At this stage, this Court deems it necessary to refer to the law made by this Court in the aforesaid case of Santosh Malhotra, where this Court has held as under:-

> "12. I have duly considered the respective contentions of the learned counsel for the parties. From the perusal of the original record of the Collector, Shimla, it is not in dispute that notices were issued by the collector to Jaidev Malhotra, Sh.B.N. Malhotra, Smt.Santosh Malhotra and Suresh Kumar Shukla under Section 119(1) of 'the Act' and Rule 38(B) of H.P. Tenancy and Land Reforms Rules, 1975. All the parties have appeared before the Collector. Sh.B.N. Malhotra made the specific statement that his son Jaidev Malhotra purchased land in Kachhighati on which building had been constructed Jaidev Malhotra made the statement that the land in dispute belongs to his mother Smt. Santosh Malhotra on which he constructed the building. The Collector Shimla passed the order dated 20.2.1995 (Annexure P-2) in case No.1/94 against Jaidev Malhotra on the basis of the Income-tax returns filed by him before the Income Tax Department for the assessment years 1993-94 and 1994-95 in which he had shown having spent a sum of Rs.1,90,000/-on the construction of the building. The Collector Shimla in his order recorded the findings that as the General Power of Attorney (Annexure P-1) has been executed by Suresh Kumar Shukla owner of the land in favour of Smt.Santosh Malhotra keeping in view the fact that no sale deed could be executed in favour of Smt.Santosh Kumar Mahlotra as she is not the agriculturist of State of H .P. and Jaidev Malhotra invested a sum of Rs.1,90,000/- for the construction of the building, therefore, the land has been acquired by him in violation of Section 118 of 'the Act'. The order of the Collector has been affirmed both by the Divisional Commissioner and by the Financial Commissioner in appeal.
>
> 13. The State of Himachal Pradesh enacted the H.P. Tenancy and Land Reforms Act, 1972. Chapter XI deals with Control on transfer of land. Section 118 prohibits the transfer of land to non-agriculturists which reads as under:
>
> > "118. Transfer of land to Non-Agriculturists Barred-(1) Notwithstanding anything to the contrary contained in any law, contract, agreement, custom or usage for the time being in force, but save as otherwise provided in this Chapter, on transfer of land (including sales in execution of a decree of a civil court or for recovery of arrears of land revenue), by way of sale, gift, exchange, lease, mortgage with possession or creation of a tenancy shall be valid in favour of a person who is not an agriculturist.
> >
> > (2) Nothing in sub-section (1) shall be deemed to prohibit the transfer of land by any person in favour of—
> >
> > (a) to (h).....

(i) a non-agriculturist with the permission of State Government for the purpose that may be prescribed: Provided.....

(3) No Registrar or the Sub-Registrar appointed under the Indian Registration Act, 1908 (16 of 1908), shall register any document pertaining to a transfer of land, which is in contravention to sub-section (1) and such transfer shall be void ab initio and the land involved in such transfer, if made in contravention of sub-section (1), shall, together with structures, buildings or other attachments, if any, vest in the State Government free from all encumbrances.

14. The revenue authorities below have mis-directed themselves in applying the above extracted provisions of Section 118 of the Act' in the present case. Suresh Kumar Shukla has not transferred his ownership rights and interest in the property in favour of Smt. Santosh Malhotra by way of General Power of Attorney (Annexure P-1) and the transfer by way of execution of the General Power of Attorney is not incorporated in Section 118(1) of the Act. The transfer of land to non-agriculturist is only barred under Section 118 (1) if the transfer is by way of sale gift, exchange, lease, mortgage with possession or creation of tenancy including sales in execution of a decree of a Civil Court or for recovery of arrears of Land Revenue. The General Power of Attorney has been executed on 7.11.1991 by Suresh Kumar Shukla the owner of the property in favour of Smt. Santosh Malhotra in which she has only been authorized to look after, manage, sell or construct the building on the piece of land, to enter into agreement, to sell, to receive the earnest money, to execute or sign on the sale deed etc. etc. On bare reading of General Power of Attorney it cannot be concluded that Suresh Kumar Shukla has transferred the land by way of sale, gift, etc. etc. envisaged in Section 118 (1) of the Act in favour of Smt. Santosh Malhotra or in favour of Jai Dev Malhotra nor it is proved on record that Smt. Santosh Malhotra has sold the land to her son Jaidev Malhotra on the strength of the General Power of Attorney. The reasoning of the Collector that as Jaidev Malhotra had spent a sum of Rs.1,90,000/- on the construction of the building on the land as reflected by him in his Income-tax returns will not be a sufficient proof that Suresh Kumar Shukla has transferred the land to Jaidev Malhotra on the basis of the General Power of Attorney executed in favour of his mother. The H.P. Tenancy and Land Reforms (Amendment) Act, 1994 came into force on 22.3.1995 whereas the General Power of Attorney (Annexure P-1) has been executed on 7.11.1991, as noticed above and the Collector passed the order (Annexure P-2) on 20.2.1995, prior to the date of the enforcement of the amended Act. Explanation of Section 118 (1) of the Amendment Act reads as under:

"Explanation – For the purpose of this sub-section, the expression "transfer of land" shall include:-

(a) a benami transaction in which land is transferred to an agriculturist for a consideration paid or provided by a non agriculturist, and

(b) an authorization made by the owner by way of special or general power of attorney or by an agreement with the intention to put a non agriculturist in possession of the land and allow him to deal with the land in the like manner as if he is a real owner of that land."

15. On perusal of the above said amendment, it is clear that an authorization made by the owner by way of special or general power of attorney or by an agreement with the intention to put a non-agriculturist in possession of the land and allow him to deal with the land in like manner as if he is a real owner of the land has been brought on the statute on 20.2.1995 and this restriction was not the mode incorporated in Section 118 (1) of the Principal Act.

16. In that view of the matter, the revenue authorities below have passed the impugned orders against Jaidev Malhotra contrary to the provisions of Section 118 of the Principal Act as the provisions of the Amendment Act cannot be applied retrospectively in the present case."

20. During proceedings of the case, this Court had an occasion to go through entire record including orders passed by authorities below, perusal whereof clearly suggests that authorities below, held that respondents have executed General Power of Attorney in favour of G.S. Chopra in violation of Section 118 of the Act. Admittedly, in the instant case, as clearly emerges from the record and pleadings, General Power of Attorney was executed by Sarvjot Singh in favour of G.S. Copra on 25.6.1990, for the construction of flats on the land in question prior to coming into operation of HP Tenancy and Land Reforms (Amendment) Act, 1994. There was no bar as such under Section 118 (1) for transferring land by way of Power of Attorney and agreement, rather, bar under Section 118 for sale was by way of gift, exchange, will, lease, exchange, mortgage with possession or tenancy (including sales in execution of a decree of land revenue). In the instant case, General Power of Attorney as well as agreement were executed by Sarvjot Singh, original owner of property in favour of G.S. Chopra admittedly prior to amendment carried out in Section 118 of the Act and moreover, that was for construction of flats on the land in question, on behalf of original owner, Sarvjot Singh.

21. Though, Shri Shrawan Dogra, learned Advocate General, has contended that as per Section 2 (2) of the Act, an agriculturist means a land owner, who cultivates the land personally in the State and in the instant case, revenue record clearly suggests that grand father and father of Smt. Tara Chopra, who happened to wife of G.S. Chopra, was a *Pattadar* and they enjoyed status of lessee and not owner. Mr. Dogra, further contended that perusal of record, nowhere suggests that Smt. Tara Chopra, wife of G.S. Chopra, was cultivating land personally and as such she can not be said to be enjoying status of an agriculturist. He further stated that perusal of agreement itself suggests that very intention of original owner Sarvjot Singh was to effect sale because agreement provides that Astra Construction Company will construct 30 cottages, motel, club house, shops, health spa, sports and museum facilities. No right of owner shall exist till construction cost is paid to company and after construction of the complex, parties shall start running the tourist resort in collaboration with each other for a period of 30 years commencing from the date the complex becomes functional in which the share of the owner will be 15% and 85% share belongs to contractor company. But, as has been observed above, controversy, which is required to be decided by this Court at this stage is whether Power of Attorney and agreement dated 25.6.1990/30.6.1990, whereby original owner Sarvjot Singh, allegedly intended to effect sale in favour of G.S. Chopra, can be termed to be in violation of Section 118 of the amending Act?

22. Similarly, this Court needs to examine, whether agreement dated 30.6.1990, can be considered as transfer of land on permanent basis, in violation of the Act or a functional/temporary transfer simply for the purpose of execution of contract. The H.P. Tenancy and Land Reforms (Amendment) Act, 1994 came into force on 22.3.1995 whereas the General Power of as well as agreement have been executed on 25.6.1990 and 30.6.1990, respectively, as noticed above and the Collector passed the order on 20.2.1995 prior to the date of the enforcement of the amended Act. Explanation of Section 118(1) of the Amendment 'Act' reads as under:

> "Explanation – For the purpose of this sub-section, the expression "transfer of land" shall include:-(a) a benami transaction in which land is transferred to an agriculturist for a consideration paid or provided by a non agriculturist, and (b) an authorization made by the owner by way of special or general power of attorney or by an agreement with the intention to put a non agriculturist in possession of the land and allow him to deal with the land in the like manner as if he is a real owner of that land." (Pp.347,348 & 349)

23. A Coordinate Bench of this Court, in judgment passed in **Santosh Malhotra's** case (supra) has categorically held that provisions contained in the principal Act by amending Act, 1994, which came into force on 22.3.1995, can not be made applicable in case, which pertains to years prior to the amendment carried out in the Act, which came into force on 22.3.1995. Hence, this Court sees no illegality in the findings returned by the learned Financial Commissioner (Appeals) that revenue authorities have passed impugned orders against the respondents, contrary to the provisions of Section 118 of the amending Act, because the amending Act, which came into force on 22.3.1995, could not be made applicable retrospectively, in the present case. It is well settled that in the absence of anything specific in the enactment to show that it is to have retrospective effect, it can not be so construed as to have the effect of altering the law applicable to claim under litigation at the time when the Act was passed (See: **Garikapatti Veeraya** vs. **N. Subbiah Choudhury**, 1957 SCR 488).

24. This Court, after having carefully perused provisions contained in the HP Tenancy and Land Reforms (Amendment) Act, 1994, whereby expression, 'transfer of land', was amended, this Court was unable to lay its hand on specific clause, if any, stating therein that amendment would have retrospective operation and as such, it can be safely inferred that amending Act, 1994 was prospective in nature. It clearly emerges from the judgment passed by this Court in Santosh Malhotra's case that, issue at hand is no more res integra, rather, after passing aforesaid judgment, this Court in a number of judgments has reiterated the view taken in Santosh Malhotra's case (supra). It is also not disputed that the law settled in Santosh Malhotra's case (supra) has attained finality. This Court also deems it fit to take note of judgment passed by this Court in **Dhyan Singh** vs. **State of Himachal Pradesh and others**, 2012 (3) Shim. L.C. 1741, wherein, while dealing with aforesaid aspect of amendment, it has also dealt with issue of retrospectivity. It would be profitable to refer to para-6 of the judgment:-

> "6. Learned Counsel also places reliance on the decision of the Supreme Court in Maharaja Chintamani Saran Nath Shahdeo v. State of Bihar and others, (1999)8 SCC 16. The Court holds:
>
> 22. In view of the facts and circumstances of the case and in the alternative Mr. Agarwal, the learned counsel for the respondent has urged that the amending Act being substituted legislation would have retrospective effect.
>
> 23. In Garikapatti Veeraya v. N. Subbiah Choudhury, [1957] SCR 488, Chief Justice S.R. Das speaking for the Court observed as follows :
>
> > "The golden rule of construction is that, in the absence of anything in the enactment to show that it is to have retrospective operation, it cannot be so construed as to have the effect of altering the law applicable to a claim in litigation at the time when the Act was passed."
>
> 24. We may also refer to Francis Bennion's Statutory Interpretation, 2nd Edn.,at p. 214 wherein the learned author commented as follows:
>
> > "The essential idea of a legal system is that current law should govern current activities. Elsewhere in this work a particular Act is likened to a floodlight switched on or off, and the general body of law to the circumambient air. Clumsy though these images are, they show the inappropriateness of retrospective laws. If we do something today, we feel that the law applying to it should be the law in force today, not tomorrow's backward adjustment of it. Such, we believe, is the nature of law. Dislike of expost facto law is enshrined in the United States Constitution and in the Constitutions of many American States, which forbid it. The true principle is that Lex prospicit non respicit (law looks forward not back). As Willes, J. said, retrospective legislation is 'contrary to the general principle that legislation by which the conduct of mankind

is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law."

25. This Court in Hitendra Vishnu Tlutkur and Others v. State of Maharashtra and Others, [1994] 4 SCC 602 has culled out the principles with regard to the ambit and scope of an amending Act and its retrospective operation as follows :

(i) A statute which affects substantive rights is presumed to be prospective in operation unless made retrospective, either expressly or by necessary intendment, whereas a statute which merely affects procedure, unless such a construction is tex-tually impossible, is presumed to be retrospective in its application, should not be given an extended meaning and should be strictly confined to its clearly defined limits.

(ii) Law relating to forum and limitation is procedural in nature, whereas law relating to right of action and right of appeal even though remedial is substantive in nature.

(iii) Every litigant has a vested right in substantive law but no such right exists in procedural law.

(iv) A procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished.

(v) A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication." [P.25 & 26)

25. The Apex Court, in **Commissioner of Income** Tax versus **Bazpur Co-Operative** Sugar, 1988 SCR (3)1034, while dealing with issue of 'retrospectivity' have observed as under:

"It was submitted by Mr. Ahuja, learned counsel for the appellant (revenue) that the amendment of bye-law 50, although it was purported to be made with retrospective effect could, in fact, have no retrospective effect in law. It was submitted by him that a co-operative society governed by the Co-operative Societies Act, 1912 was not a body constituted by the said Act nor a statutory body. The power to make bye-laws was conferred upon the society by delegation under rules which themselves were framed by the Government in exercise of power delegated to the Government by the legislature under Section 43 of the aforesaid Act of 1912. It was submitted by him that as there was no delegation of any power on the respondent society to make bye-laws with retrospective effect, it had no power to do so and the amendment of bye-law 50 made by the society, although purporting to be retrospective, could not be given any such effect. In support of this submission, Mr. Ahuja relied upon the decision of this Court in Income-tax Officer, Alleppey v. M.C. Poonnoose & Ors., [1970] 1 S.C.R. p. 678 in which the Court held as follows:

"Where any rule or regulation is made by any person or authority to whom such powers have been delegated by the legislature it may or may not be possible to make the same so as to give retrospective operation. It will depend on the language employed in the statutory provision which may in express terms or by necessary implication empower the authority concerned to make a rule or regulation with retrospective effect. But

where no such lenguage is to be found it has been held by the courts that the person or authority exercising subordinate legislative functions cannot make a rule, regulation or bye-law which can operate with retrospective effect (see Subba Rao J., in Dr. Indramani Pyarelal Gupta v. W.R. Nathu & Others. [1963] SCR 721-the majority not having expressed any different opinion on the point; Modi Food Products Ltd., v. Commissioner of Sales Tax U.P., A.I.R. 1956 All. 356; India Sugar Refineries Ltd. v. State of Mysore, A.I.R. 1960 Mys. 326 and General S. Shivedev Singh & Another v. The State of Punjab & Others, [1959] P.L.R. 514.") The aforesaid observations have been cited with approval by this Court in Hukum Chand etc. v. Union of India & Others, [1973] 1 S.C.R. p. 896 where the Central Govenment was held to have acted in excess of its powers in so far as it gave retrospective effect to the Explanation to Rule 49 framed under the Displaced Persons (Compensation and Rehabilitation) Act, 1954, exercising the powers conferred by Section 40 of the Act. We may also refer here to the decision of this Court in Co-operative Central Bank Ltd. & Ors. v. Additional Industrial Tribunal, Andhra Pradesh & Ors., [1970] 1 S.C.R.p. 205 where it has been stated by this Court as follows:

"We are unable to accept the submission that the bye-laws of a co-operative society framed in pursuance of the provisions of the Act can be held to be law or to have the force of law. It has no doubt been held that, if a statute gives power to a Government or other authority to make rules, the rules so framed have the force of statute and are to be deemed to be incorporated as a part of the statute,. That principle, however, does not apply to bye-laws of the nature that a co-operative society is empowered by the Act to make. The bye- laws that are contemplated by the Act can be merely those which govern the internal management, business or administration of a society."

We may mention that the Act under which the bye-laws were framed was the Andhra Pradesh Co-operative Societies Act, 1964.

26. After bestowing our thoughtful consideration qua facts and circumstances of the case, especially law settled by this Court in Santosh Malhotra's case (supra) and Dhyan Singh's case (supra) as also in **Geeta Devi** versus **State of H.P. & Another**, decided on 7.10.2016, which has attained finality, as we are informed that aforesaid judgment has not been challenged further, we find no illegality or infirmity in the order passed by Financial Commissioner (Appeals), wherein he has rightly held that there would be no application of the amending Act, 1994, qua General Power of Attorney and agreement, admittedly executed by respondent Sarvjot Singh in favour of G.S. Chopra on 25.6.1990/30.6.1990, which is prior to the date when amendment came into force i.e. 22.3.1995. Apart from above, this Court is also of the view that amending Act has come into operation with effect from 22.3.1995, prohibiting transfer of land by way of agreement/Power of Attorney, is not retrospective, rather is prospective, for all intents and purposes, as such, agreement or Power of Attorney, if any, executed by respondents prior to amending Act, 1994, can not be said to be in violation of the provisions of Section 118 of the Act ibid.

27. In view of above, the petition is dismissed. Order passed by Financial Commissioner (Appeals) is upheld. No order as to costs.

28. Pending applications are disposed of.

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

Suresh Kumar .....Petitioner
Versus
State of H.P. .....Respondent

Criminal Revision No. 158 of 2009
Decided on: 19th May, 2017

Indian Penal Code, 1860- Section 279 and 337- Accused was driving a car in a rash and negligent manner and caused accident- he and another occupant of the car suffered injuries – accused was convicted by the Trial Court- an appeal was filed, which was dismissed- held in revision that alleged eye witnesses were not present at the spot at the time of accident – driver and conductor of the bus were examined but passengers were not examined- spot map shows that car was on its own side of the road and conductor also admitted this fact- accident had taken place on a curve and the possibility of the driver of the bus driving the bus towards the centre of the road while over taking another bus cannot be ruled out- criminal negligence was not proved and the accused was wrongfully convicted by the Courts- appeal allowed - judgment set aside and accused acquitted of the commission of offences punishable under Sections 279 and 337 of I.P.C. (Para- 8 to 14)

Cases referred:
Raj Kumar vs. State of H.P., 1997(2) Shim.L.C. 161
Manju Baradia vs. State of Chhatisgarh, 2002(1) Accidents Compensation Judicial Reports 24

For the petitioner: Ms. Sunita Sharma, Advocate.
For the respondent: Mr. Varun Chandel, Addl. A.G.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)

Convict Suresh Kumar has filed this petition with a prayer to quash and set aside the judgment dated 15.10.2009 passed by learned Session Judge, Hamirpur in Criminal Appeal No. 58 of 2009, whereby learned lower appellate Court has affirmed the judgment passed by learned Chief Judicial Magistrate, Hamirpur in Criminal Case No. 229-I of 07/50-II/2008 and dismissed the appeal.

2. As a matter of fact, the petitioner (hereinafter referred to as the 'convict') has been convicted by learned trial Court for the commission of an offence punishable under Section 279 and 337 of the Indian Penal Code and sentenced to undergo simple imprisonment for a period of three months and Rs. 1000/- as fine under Section 279 IPC, whereas, to undergo simple imprisonment for a period three months and Rs. 500/- as fine under Section 337 IPC. Learned lower appellate Court has concurred with the findings recorded by learned trial Court and maintained the findings of conviction and sentence recorded against the petitioner-convict.

3. It is seen that accident of HRTC bus No. HP-38 7618 enroute Deotsidh to Hamirpur had taken place near Jagtamba Udyog at Kehdru District Hamirpur with maruti car No. HP 55-4095 on 15.10.2007 at 4.30 p.m. Petitioner-convict was on the wheel of the offending car. After the accident, he fell unconscious. Another occupant of the car also received injuries on his person. The driver of the offending bus Tilak Raj (PW-2) had shifted the petitioner-convict to Bhota hospital and later on to the hospital at Hamirpur. The police came to the hospital, where statement of PW-2 was recorded under Section 154 Cr.P.C Ext. PW-2/A. On the basis of the same FIR came to be registered. During the course of investigation conducted by the police spot map Ext. PW-11/B was prepared. The place of accident was got photographed vide photographs Ext.

P-1 to Ext. P-8. Both the vehicles were taken into possession along with the documents. The MLC Ext. PW-8/B of the convict-petitioner that of Sunil Kumar, occupant of offending car Ext. PW-8/A were obtained. The mechanical examination of the bus vide report Ext. PW-9/A and that of the car vide Ext. PW-9/B was got conducted from HHC Ramesh Chand (PW-9) M.T.O Police Line, Hamirpur. PW-5 Bishan Dass and PW-7 Smt. Sandhya Devi were associated as eye witnesses to the accident. Besides the complainant, PW-2, conductor of the offending bus and Kirpal Singh (PW-4) were also associated to substantiate the prosecution case. The remaining witnesses, however, are formal as they were associated during the course of the investigation to prove link evidence. On the completion of the investigation, challan was filed against the petitioner-convict.

4. Learned trial Magistrate taking into consideration the police report and the documents annexed therewith and after being satisfied qua the existence of a prima-facie case under Section 279 and 337 IPC charged him vide notice of accusation dated 2.7.2008. The convict, however, pleaded not guilty to the charge. The prosecution had thus produced the evidence oral as well as documentary to prove its case against him.

5. The statement of accused was recorded under Section 313 Cr.P.C. He has admitted that while on the wheel of the offending car HP-55 4095 on 15.10.2007. Its accident had taken place with HRTC bus bearing registration No. HP 38 7618. He along with Sunil Kumar, the another occupant of the car had received injuries on their person and they were medically examined by PW-8 Dr. Sanjay Sood. The injuries on their person, however, were simple in nature. The car which was being driven by him was taken into possession by the police and the documents thereof were produced before police by its owner PW-4 Manoj Kumar. His driving licence Ext. PW-11/A was taken into possession by the police. Rest of the incriminating circumstances appearing against him in the prosecution case were, however, denied either being wrong or for want of knowledge. In his defence, it was pleaded that he is innocent and driving the car in his own side of the road. It is the driver of the bus overtaking another vehicle on a curve hit the car with the bus on middle of it i.e. near fuel tank.

6. Learned trial Court on appreciation and on hearing the parties on both sides has arrived at a conclusion that the prosecution has pleaded and proved beyond all reasonable doubt that the convict-petitioner was driving the offending car in rash and negligent manner and as a result thereof, the accident had occurred. He, therefore, was convicted and sentenced under Section 279 and 337 IPC.

7. The legality and validity of the impugned judgment has been questioned on the grounds inter-alia that the reasons recorded by both Courts below while convicting the petitioner-convict are based on surmises, hypothesis and conjectures. The material contradictions in the testimony of prosecution witnesses have been completely ignored. The factum of the so called prosecution witnesses PW-5 and PW-7 have not supported the prosecution case at all has been completely ignored and to the contrary reliance has been placed on the sole testimony of PW-2, the driver of offending bus and its conductor PW-4, while recording the conviction against the convict-petitioner. The photographs produced in evidence not at all advance a substantial piece of evidence have erroneously been given undue weightage.

8. On analyzing the rival submissions and going through the records, a question that evidence available on record was cogent, reliable and sufficient to persuade both Courts below to record findings of conviction against the petitioner-convict has arisen for determination by this Court. Before coming to the adjudication thereof, it is desirable to take note of as to what in legal parlance constitute an offence punishable under Section 279 and 337 IPC. This Court in ***Raj Kumar*** vs. ***State of H.P., 1997(2) Shim.L.C. 161*** has held that mere rashness and negligence is not sufficient for recording the findings of conviction against an offender, however, such rashness and negligence must be criminal rashness and negligence which in view of the ratio of the judgment ibid is more than mere carelessness or error of judgment. The prosecution is also required to plead and prove that it was an act on the part of the accused alone responsible for the accident in question. The High Court of Chhatisgarh in ***Smt. Manju Baradia*** vs. ***State of***

Chhatisgarh, 2002(1) Accidents Compensation Judicial Reports 24 has gone one step further while holding that the speed of offending vehicle alone is no criteria to come to the conclusion that the same was being driven in rash and negligent manner but other factors such as density of traffic, width of the road and the attempt of the driver to take precautions to avert the accident etc. also need to be taken into consideration. It is also observed in this judgment that the latest trend to hold a driver of the vehicle guilty in case of accident is contrary to the law unless it is shown by the prosecution by leading cogent, reliable and positive evidence that it was accused alone rash and negligent, hence responsible for the accident in question.

9. Therefore, in view of the above legal position, it is crystal clear that rashness and negligence due to which an accident is occurred should not be mere rashness and mere negligence and rather criminal rashness and criminal negligence.

10. Now it is to be seen that the prosecution has been able to prove beyond all reasonable doubt that rashness and negligence on the part of the convict-petitioner alone has resulted in this accident. The material prosecution witnesses associated by the prosecution were PW-5 Bishan Dass and PW-7 Smt. Sandhya Devi. As a matter of fact, they were associated to give eye witness count of the accident. The perusal of their testimony makes it crystal clear that they were not at all present on the spot when the accident had taken place and rather arrived at the spot when the accident had already taken place and the convict-petitioner as well as the other occupant of the vehicle were lying in an injured condition there. The remaining part of their testimony is not so important because they have deposed about the accident of bus and car having taken place on the spot and the injured removed to hospital for treatment. The prosecution case, therefore, hinges upon the testimony of PW-2 Tilak Raj and PW-4 Kirpal Singh, none else but the driver and conductor of the offending bus. When the defence of the convict-petitioner as emerges from the trend of cross-examination and appeared in his statement recorded under Section 313 Cr.P.C is that the accident occurred at a stage when PW-2 while driving the bus was negotiating a curve as well as over taking another vehicle came on the wrong side of road, it is not safe to place reliance on the testimony of said witness and also that of the conductor of the bus to arrive at a conclusion that the accident had occurred due to rash and negligent driving attributed to the convict. Some tangible evidence could have come on record from the testimony of the passengers traveling in the bus because as per own admission of the conductor of the bus, the passengers were traveling in the bus at the time of accident. It is not known as to why the efforts were not made to associate the passengers traveling in the bus. Therefore, oral evidence is not at all sufficient for recording findings of conviction and sentence against the convict-petitioner.

11. Now if coming to the documentary evidence, the spot map Ext. PW-11/B has been heavily relied upon to connect the convict-petitioner with the commission of the offence. The position of both vehicles in this document make it crystal clear that while HRTC bus on the curve is adjacent to the white dotted driving line in its right side leaving considerable space which has been mentioned as 4" 8' in its left side, the car due to strike with the bus near the diesel tank got reversed and is standing partly in pucca portion of the road, whereas, a portion whereof is in kuchha portion. The car is in its own side of the road. Even the conductor PW-4 has also admitted so while in the witness box. No doubt, in the same breath, he clarified that it got pushed behind due to its strike with the bus. However, his testimony that the car was not being driven in rash and negligent manner or in its wrong side cannot be believed to be true for the reasons that from the circumstances prevalent on the spot, the car atleast was being driven in its own side of the road and not in wrong side. Though nothing can be said about the speed of the car, however, in a case of accident, speed of the vehicle is not so relevant nor on the basis of high speed of a vehicle, it can be said that the accident had taken place due to high speed. Any how, there is even no evidence to suggest that the rashness and negligence on the part of the convict-petitioner was criminal rashness or criminal negligence. Therefore, spot map Ext. PW-11/B is also of no help to the prosecution case.

12. Now if coming to the photographs. It is crystal clear that the bus is touching the white dotted dividing line in the middle of the road leaving sufficient space in its left side. The car, no doubt, had struck against the bus but it is not on account of rash and negligent driving attributed to the convict-petitioner and rather the possibility of the driver of the bus was rash and negligent, cannot be ruled out for the reason that had it been not so, the accident would have not occurred in view of road at that place was quite wide. The accident had taken place on a curve. The possibility of the driver of the bus while negotiating a curve and while overtaking another vehicle had drove the same in centre of the road i.e. touching white dotted line and while negotiating curve struck against the car, cannot be ruled-out.

13. Therefore, both Courts below have failed to appreciate the evidence available on record in its right perspective and went wrong while recording the findings of conviction against the petitioner-convict. True it is that the High Court in exercise of its revisional jurisdiction should not normally interfere with the findings of facts recorded by both Courts below on appreciation of the evidence available on record, however, in case the evidence is misread, misconstrued or misinterpreted causing thereby miscarriage of justice, serious in nature to the aggrieved party, the High Court in exercise of its revisional jurisdiction can certainly quash and set aside the impugned judgment being perverse as well as the findings are vitiated on account of misappreciation, misconstruction and misreading of evidence available on record.

14. In view of what has been said hereinabove, the impugned judgment is not legally sustainable and the same, as such, is accordingly set aside. Consequently, the accused is acquitted of the notice of accusation put to him for the commission of an offence punishable under Section 279 and 337 of the Indian Penal Code and the findings of sentence recorded against him are also quashed and set aside. The amount of fine, if already deposited by him, be refunded under proper receipt. The personal bond he executed shall stand cancelled and surety discharged.

15. This petition is accordingly allowed and stands disposed of. Pending application(s), if any, shall also stand disposed of.

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

HPSEB Ltd.
Versus
Amar Singh.

RFA No. 190 of 2012 with RFA Nos. 191 to 209 and 211 to 221 of 2012.
Decided on: 24.5.2017.

Land Acquisition Act, 1894- Section 18- The land of the claimants was acquired by the Board for the construction of Uhl Hydro Project Stage-III- Land Acquisition Collector awarded compensation keeping in view the nature of the acquired land- Reference Court held that the market value of the land determined by the Land Acquisition Collector was more than the price of the land sold vide sale deeds produced in evidence by the claimants- the court further held that value is to be determined uniformly keeping in view the purpose of acquisition- aggrieved from the award of the Reference Court, present appeal has been filed- held that land was acquired for the construction of Uhl Hydro Electric Project and, therefore, category, potentiality and utility of theacquired land lose their significance- Reference Court had rightly awarded compensation at uniform rate- appeal dismissed. (Para-9 to 12)

Cases referred:
Vidya Sagar vs. The Land Acquisition Collector and others, I L R 2016 (III) HP 562

Dadu Ram vs. Land Acquisition Collector and others, I L R 2016 (II) HP 636

For the appellant(s):	Mr. Satyen Vaidya, Sr. Advocate with Mr. Vivek Sharma, Advocate.
For the respondents:	Mr. H.S. Rangra, Advocate for private respondent(s). Mr. Parmod Thakur, Addl. AG for the respondent-State.

The following judgment of the Court was delivered:

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

This appeal and its connected matters have arisen from common award dated 22.10.2011 passed by learned Addl. District Judge, Mandi, in Reference Petition No. 19 of 2007 and its connected references registered as reference petitions No. 2 to 16, 18, 22, 23, 20, 26 to 30, 33 to 37 of 2007, whereby while arriving at a conclusion that the compensation should have been determined and awarded at flat rates, irrespective of nature and category of the acquired land, has re-determined the market value thereof at flat rates i.e. Rs. 4,00,000/- per bigha and accordingly enhanced the compensation and awarded the same to the respondents herein (petitioners-claimants in the trial Court) together with all statutory benefits.

2. Since the legality and validity of the impugned award has been assailed on common grounds in all these appeals, therefore, the same were tagged for the purpose of hearing altogether and disposal by a common judgment in order to avoid repetition of facts and also the evidence available on record as well as conflicting findings.

3. The petitioners-claimants are residents of village (Mauja) Darat Bagla, PO Jalpehar, Tehsil Jogindernagar, Distt. Mandi. The appellant-Board (hereinafter referred to as the respondent) was in need of land in the said village for public purpose, namely, construction of 'Uhl Hydro Project, Stage-III'. The notification under Section 4 of the H.P. Land Acquisition Act (hereinafter referred to as the Act), issued by the Government of Himachal Pradesh on 4.7.2003 was published in Rajpatra and also in Hindi daily "Amar Ujala" and "Divya Himachal" in its issue dated 16.7.2003. Besides, wide publicity was also made in the locality on 7.8.2003. The notification under Section 6 of the Act was issued and published in Rajpatra on 19.6.2004 and also in two leading newspapers i.e. "Dainik Bhaskar" and "Amar Ujala" on 14.6.2004. Wide publicity in this regard was also made in the locality on 16.6.2004.

4. Learned Land Acquisition Collector after compliance of statutory provisions and codal formalities determined the market value of different kind of acquired land measuring 60-06-05 bighas as follows:

"(vii)	Dhani Awal	Rs. 4,00,000/- per bigha
(viii)	Dhani Doem	Rs. 3,60,000/- per bigha
(ix)	Kalahu Awal	Rs. 3,90,000/- per bigha
(x)	Kalahu Doem	Rs. 3,00,000/- per bigha
(xi)	Bagicha kalahu Phaldar & barani chaye	Rs. 4,10,000/- per bigha
(xii)	Bagicha barani Phaldar	Rs. 3,85,000/- per bigha
(vii)	Barani Awal	Rs. 3,50,000/- per bigha
(viii)	Barani Doem	Rs. 3,25,000/- per bigha
(ix)	Barani Some	Rs. 1,75,000/- per bigha
(x)	Banjar Kabel Kashat	Rs. 1,25,000/- per bigha
(xi)	Kharyatar	Rs. 1,00,000/- per bigha

(xii)	Gair mumkin bir & Nale	Rs. 1,00,000/- per bigha
(xiii)	Gair mumkin Awadi	Rs. 4,00,000/- per bigha"

5. The Land Acquisition Collector has awarded the compensation accordingly to the petitioners-claimants in respect of acquired land, together with all statutory benefits.

6. The petitioners-claimants, however, were not satisfied with determination of different market value of different kind of acquired land, hence preferred the references as aforesaid under Section 18 of the Act with a prayer to re-determine the same and pay compensation at enhanced rates together with all statutory benefits. The market value of the acquired land so determined was also claimed to be highly inadequate. Learned Reference Court below on appreciation of the entire record and also the evidence available on record has noticed that the market value of the acquired land determined by the Land Acquisition Collector was more than the price of land sold vide sale-deeds produced in evidence by the petitioners-claimants. Therefore, the evidence in the nature of the sale instances and oral evidence to substantiate the same was not considered nor discussed and rightly so because the Land Acquisition Collector has already determined the market value of the land over and above the sale consideration for which the land as per such sale instances was sold and also awarded the compensation more than that to the petitioners-claimants in respect of their holdings.

7. The Reference Court below, while taking note of the purpose for which the land was acquired and also the law laid down by this Court as well as the Apex Court has re-determined the market value of the acquired land irrespective of its nature and category at flat rate i.e. Rs. 4,00,000/- per bigha of Dhani Awal/Gair Mumkin Abadi category of land determined by the Land Acquisition Collector and enhanced the compensation accordingly irrespective of the category and nature of the acquired land.

8. The legality and validity of the impugned award has been assailed in these appeals on the grounds, *inter alia*, that the market value of the acquired land was rightly assessed by the Land Acquisition Collector. The Reference Court below allegedly erred in law in assessing the value of the land i.e. Kharyatar, gair mumkin bir and nale etc. at the rate of Rs. 4,00,000/- per bigha. The market value thereof was rightly assessed by the Land Acquisition Collector @ Rs. 1,00,000/- per bigha. The land mostly is situated in rural area and being sloppy as well as spread over far off area i.e. at distant places from road side, the market value thereof could have not been determined as Rs. 4,00,000/- per bigha. The other statutory benefits were also erroneously awarded on the enhanced amount of compensation.

9. On hearing Mr. Satyen Vaidya, Sr. Advocate assisted by Mr. Vivek Sharma, Advocate for the appellant-Board and Sh. H.S.Rangra, Advocate, learned counsel for the petitioners-claimants as well as going through the record, it would not be improper to conclude that learned Reference Court below has not committed any illegality or irregularity in determining the market value of the acquired land at flat rates irrespective of kind and nature of the acquired land and awarded the compensation to the petitioners-claimants accordingly, together with all statutory benefits. The land has been acquired for the public purpose, namely, 'Construction of Uhl Hydro Project, Stage-III'. Therefore, when Uhl Hydro Electric Project, Stage-III was to be constructed on the acquired land, its category, potentiality and utility loses significance. Law on the issue is no more *res-integra* as this Court in ***RFA No. 24 of 2010***, titled as ***Vidya Sagar vs. The Land Acquisition Collector and others*** and its connected matters decided on ***9.5.2016*** has held as under:

> "18. As already discussed, the Land Acquisition Collector has determined different rates qua different kind of land. The reference Court below while arriving at a conclusion that the acquisition is for the public purpose namely construction of railway line, no distinction could have been made viz-a-viz cultivable and non-cultivable land while determining its market value in view of its comparative utility to remain as it is irrespective of its category. Learned

reference Court has also placed reliance to substantiate this part of the findings so recorded with the help of law laid down by a Division Bench of this Court in ***L.A.C Solan and another*** V. ***Bhoop Ram along with its connected matters, 1997(2) Sim.L.C. 229*** and also that of the ***Hon'ble Apex Court in 1998(2) All India Land Acquisition Act LACC(1) SC***. The findings so recorded by learned reference Court below are absolutely legal and valid as it is well established at this stage that when the land is acquired for a public purpose namely construction of road or for that matter construction of railway line as in these appeals, its market value should be determined at flat rates, irrespective of its nature and category. Support in this regard can be drawn from the judgment of this Court in ***Executive Engineer*** V. ***Dila Ram, Latest HLJ 2008 (HP) 1007***. The relevant portion of the judgment reads as follows:

> "12. The Collector has awarded compensation of acquired land as per classification of the land. The learned District Judge has enhanced the compensation of the acquired land as per classification. One of the questions in the above appeals is whether awarding of compensation as per classification of the land is proper or not. The purpose of the acquisition in the present case is for construction of road and for that purpose classification completely looses significance. The acquired land is to be used/developed as a single unit for the construction of road. In ***H.P. Housing Board*** vs. ***Ram Lal and others, 2003(3) Shim L.C. 64***. The acquisition was made for construction of housing board colony and compensation was assessed as per classification by the Collector. In the High Court the persons interested limited their claim for enhancement of compensation to Rs. 400/- per square meter irrespective of classification. On those facts, a learned single Judge of this court has held that when the land is being developed for constructing housing colony, the classification completely looses significance and awarded compensation on flat rate of Rs. 200/- per square meter for the entire land irrespective of classification or nearness to the road. In ***Union of India*** vs. ***Harinder Pal Singh and others 2005(12) SCC 564***, the Hon'ble Supreme Court has approved the view of the High Court assessing the market value of the lands under acquisition in the five villages at uniform rate of Rs. 40,000/- per acre, irrespective of their nature or quality and whether the same was situated nearer to the road or at some distance therefrom. In the present case also, the acquired land is to be used/developed for the construction of the road as a single unit and therefore, classification of the land looses significance. In these circumstances, the persons interested are entitled to compensation at the rate of Rs. 6,000/- per biswa of Rs. 1,20,000/- per bigha of the acquired land irrespective of classification, which is more than the market value assessed by learned District Judge."

19. A Division Bench of this Court in ***Bhoop Ram's*** case supra qua this aspect of the matter has also held as under:

> "11.....The Land Acquisition Collector and the District Judge have determined the market value at a lesser rate for the acquired land, which was classified as Bangar Doem, Bangar Kadim, Ghasni, Charand and Gair Mumkin but in our view the classification of acquired land for the agricultural purpose is not relevant looking to the common purpose of acquisition for the construction of road and uniform rate of Rs. 40 per square meter or Rs. 30,000 per Bigha

should be awarded irrespective of the classification of the acquired land……."

10. Similar is the ratio of the judgment, again that of this Court, in ***RFA No. 246 of 2008***, titled as ***Dadu Ram vs. Land Acquisition Collector and others*** and its connected matters, decided on ***29.3.2016***. The relevant text reads as follows:

"18. Now, if coming to the 2nd point, it is seen that learned reference Court has categorized the land in two categories i.e. 'Majrua' and 'Gair Majrua', of course on the request of the petitioners, as is apparent from the perusal of award announced by the Land Acquisition Collector. In view of the evidence available on record, prior to inception of Kol Dam Project, no developmental activities had taken place there by that time. Meaning thereby that the entire area was in the process of being developed. The land was acquired for the construction of project. Therefore, taking into consideration, the purpose for which the land was acquired, the same should not have been classified 'Majrua' or 'Gair Majrua' for the reason that the land was acquired for the construction of project and as such, the classification of the acquired land completely looses significance. I am drawing support in this regard from the judgment of this Court in ***Executive Engineer and another*** v. ***Dila Ram, Latest HLJ 2008 (HP) 1007***, the relevant portion of the judgment reads as follows:

"12. The Collector has awarded compensation of the acquired land as per classification of the land. The learned District Judge has enhanced the compensation of the acquired land as per classification. One of the questions in the above appeals is whether awarding of compensation as per classification of the land is proper or not. The purpose of the acquisition in the present case is for construction of road and for that purpose classification completely looses significance. The acquired land is to be used/developed as a single unit for the construction of road. In ***H.P. Housing Board vs. Ram Lal and others, 2003 (3)Shim.L.C 64*** the acquisition was made for construction of housing board colony and compensation was assessed as per classification by the Collector. In the High Court the persons interested limited their claim for enhancement of compensation to Rs. 400/- per square meter irrespective of classification. On those facts, a learned single Judge of this court has held that when the land is being developed for constructing housing colony, the classification completely looses significance and awarded compensation on the flat rate of Rs. 200/- per square meter for the entire land irrespective of classification or nearness to the road. In ***Union of India vs. Harinder Pal Singh and others 2005 (12) SCC 564***, the Hon'ble Supreme Court has approved the view of the High Court assessing the market value of the lands under acquisition in the five villages at uniform rate of Rs. 40,000/- per acre, irrespective of their nature or quality and whether the same was situated nearer to the road or at some distance therefrom. In the present case also, the acquired land is to be used/developed for the construction of the road as a single unit and, therefore, classification of the land looses significance. In these circumstances, the persons interested are entitled to compensation at the rate of Rs. 6,000/- per biswa of Rs. 1,20,000/- per bigha of the acquired land irrespective of classification, which is more than the market value assessed by learned District Judge."

19. The point in issue, therefore, is squarely covered by the judgment supra. Learned reference Court, therefore, should have determined the market value of the acquired land at flat rates, irrespective of its categorization. It is seen that

the Court below has assessed the market value of the land categorized as 'Majrua' @ Rs. 4,68,497.00/- and 'Gair Majrua' @ Rs. 1,04,117.44/-. In view of the above, this Court determine the market value of the acquired land at flat rates, irrespective of its nature as Rs. 4,68,497.00/-"

11. Since in the case in hand, the acquired land has been used/developed for the construction of "Uhl Hydro Project, Stage-III", as a single unit, therefore, the classification thereof as made by Land Acquisition Collector loses significance. The factors, such as nature of the acquired land, its quality and the same is situated near road or at some distance therefrom also loses significance. On behalf of the appellant-Board, nothing to the contrary has been brought on record to persuade this Court to take a view contrary to the one taken by learned Reference Court below. Therefore, all the appeals being devoid of any merit deserve dismissal.

12. In view of what has been said hereinabove, all these appeals fail and the same are accordingly dismissed. Pending application(s), if any, shall also stand disposed of.

Copy of this judgment duly authenticated be placed on the record of each of the connected appeals.

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

Shri Pritam Lal. .....Appellant.

Versus

Himachal Pradesh State Electricity Board & ors. .....Respondents.

RSA No. 129 of 2017.
Date of decision: May 24, 2017.

Code of Civil Procedure, 1908- Order 22 Rule 4- Plaintiff No.2 died before the pronouncement of the judgment by the Appellate Court – the judgment was pronounced without taking note of his death and therefore, the judgment is a nullity- the question regarding the abatement or bringing on record his legal representatives has to be decided by the Appellate Court, where the matter was pending on the date of death- appeal allowed- case remanded to the Appellate Court for disposal in accordance with law. (Para- 4 to 9)

Cases referred:

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

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

For the appellant	:	Mr. Dibender Ghosh, Advocate.
For respondent No. 1	:	Mr. Vivek Sharma, Advocate.
For respondents No. 2 to 5	:	Nemo.

The following judgment of the Court was delivered:

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

Shri Ashok Kumar alias Amar Lal was plaintiff No. 2 in the suit whereas appellant No. 2 in the appeal filed before learned Lower Appellate Court. Interestingly enough, he, however, has not been shown to be a party in the present appeal may be on account of his death during the pendency of the appeal in the Lower Appellate Court.

2. Mr. Dibender Ghosh, Advocate, learned Counsel submits that aforesaid Ashok Kumar has expired on 21.9.2015 i.e. during the pendency of the appeal in the Lower Appellate Court. Averments to this effect find mention in para-6 of the grounds of appeal. The death certificate is also annexed as Annexure A-1 to the grounds of appeal, meaning thereby that the impugned judgment and decree having been passed against a dead person is nullity.

3. Be it stated that the appeal is not yet admitted and presently at the stage of admission.

4. Shri Ashok Kumar, plaintiff No. 2 had passed away on 21.9.2015 i.e. before the pronouncement of the judgment by the Lower Appellate Court. The appeal, however, has been dismissed by learned Lower Appellate Court without taking note of his death vide judgment and decree impugned before this Court in the present appeal. The impugned judgment, therefore, admittedly is against a dead person, i.e. plaintiff No. 2 Shri Ashok Kumar. There is no quarrel so as to he died well before the pronouncement of the judgment by the Lower Appellate Court.

5. Whether the appeal on the death of plaintiff No. 2 herein stands abated for want of consequential steps by the surviving appellant or his legal representatives or not, is a question which can only be gone into and determined by learned Lower Appellate Court alone. No doubt, copy of the death certificate of deceased plaintiff No. 2 Ashok Kumar has also been filed along with the present appeal. However, such material placed on record cannot be looked into by this Court. The appellant rather may bring the same on the record of Lower Appellate Court and to seek substitution of legal representatives of deceased plaintiff No.2 Ashok Kumar there.

6. Law on the point in issue is no more *res integra* as a Co-ordinate Bench of this Court in ***Jagan Nath and others*** versus ***Smt. Ishwari Devi, 1988 (2) Shim. L.C. 273***, has held that the question of substitution of legal representatives of a deceased party and the abatement of the suit/appeal for want of consequential steps has to be decided by that very Court where at the time of death of such party the *lis* was pending.

7. A Co-ordinate Bench of this Court, in ***Karam Chand and others*** versus ***Bakshi Ram and others, 2002(1) Shim. L.C. 9*** has again held as under:

> "***4. In the given circumstances of the case, one of the questions which arises for determination is as to the effect of death of Pohlo Ram and not bring on record his legal representatives in the appeal before the lower appellate Court or in other words, the questions now involved in the matter are as follows:***
>
> (i) Whether the appeal before the lower appellate Court had abated, if so the effect and extent of the abatement;
>
> (ii) Whether the abatement should be set aside or not; and
>
> (iii) Whether the legal representatives of the deceased may be allowed to be brought on record or not?
>
> **5. It is well settled that as and when the questions, as foresaid, arise in relation to a suit or appeal, at the first instance, these are to be decided by the Court in which the suit or appeal was pending at the time of the death of the party and abatement, if any, took place."**

8. In view of the legal as well as factual position discussed hereinabove, this Court is not left with any other and further option except to allow this appeal and set aside the impugned judgment and decree being nullity and remand the case to the Lower Appellate Court for deciding the question of substitution of legal representatives of deceased plaintiff No. 2 Ashok Kumar and that on his death the appeal stands abated or not and thereafter to dispose of the same afresh on merits after deciding such questions.

9. For all the reasons hereinabove, the impugned judgment and decree is quashed and set aside. The case is remanded to the Lower Appellate Court for disposal afresh in

accordance with law. The parties through learned Counsel representing them are directed to appear before learned Lower Appellate Court on ***7th July, 2017.***

10. Pending application(s), if any, shall also stand disposed of.

11. An authenticated copy of this judgment be sent to learned Lower Appellate Court for being taken on record and compliance.

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

Vikas Kashyap .....Petitioner.
Versus
State of H.P. & Another .....Respondents.

Cr.MMO No. 132 of 2017.
Decided on: 25th May, 2017

Code of Criminal Procedure, 1973- Section 482- A petition is filed for compounding the FIR registered for the commission of offences punishable under Sections 279 and 337 of I.P.C and 187 of Motor Vehicles Act on the ground that matter has been compromised between the parties – held that the High Court has inherent power to quash the proceedings where the parties have compromised the matter voluntarily and no useful purpose will be served by continuation of the proceedings – the parties have made the statements regarding the settlement – the chances of conviction of the accused would be weak in such circumstances and no useful purpose will be served by continuing the proceedings- petition allowed and FIR ordered to be cancelled.

(Para- 3 to 8)

Cases referred:

Kulwinder Singh and others versus State of Punjab, 2007(3)RCR (Criminal) 1052

Narinder Singh and others versus State of Punjab and another, (2014) 6 Supreme Court Cases 466

Mohar Singh versus State of Rajasthan, (2015) 11 Supreme Court Cases 226

For the petitioner : Mr. Ashish Verma, Advocate.
For the Respondents : Mr. Pramod Thakur, & Mr. Varun Chandel Addl. A.Gs. for respondent No.1.
Mr. Goldy Dhiman, Advocate for respondent No.2.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. (oral).

Petitioner is an accused in FIR No.176/14 registered under Sections 279, 337 of the Indian Penal Code and Section 187 of Motor Vehicles Act, in Police Station, Indora, District Kangra on 22.9.2014 at the instance of Prabhat Kumar, respondent No.2-complainant.

2. Mr. Ashish Verma, Advocate learned counsel representing the accused-petitioner has informed this Court that the challan in the case stands filed, which has been registered as criminal case No.33-II/2016 and pending disposal in the Court of learned Judicial Magistrate 1st Class, Indora, District Kangra.

3. Admittedly, charge has not been framed against the accused-petitioner, therefore, the pending criminal case is presently at its initial stage. Mr. Ashish Verma while placing reliance on a judgment of this Court in ***Cr.MMO No.134 of 2016***, titled ***Shyam Singh*** versus

State of H.P. & Another decided on 20.9.2016, has prayed for quashing of FIR and also the pending criminal proceedings.

4. It is seen that an offence punishable under Section 279 of the Indian Penal code is not compoundable under Section 320 of the Code of Criminal Procedure. The apex Court, however, in ***Gian Singh*** versus ***State of Punjab and another, (2012) 10 Supreme Court Cases 303*** has held that the High Court in exercise of inherent powers vested in it under Section 482 of the Code of Criminal Procedure may quash FIR/criminal proceedings in a case where the offence allegedly committed by the accused though is not compoundable, however, the victim and accused have settled the differences amicably. The powers, of Court can be exercised sparingly and only in appropriate cases, having arisen out of civil, mercantile, commercial, financial, partnership or such other transactions of like nature including matrimonial or the case relating to dowry etc., in which the wrong basically is done to the victim. This judgment further reveals that the compounding of offence in a case of serious nature like rape, dacoity and corruption etc., having serious impact in the society is not permissible.

5. The Punjab and Haryana High Court in ***Karamvir Singh*** versus ***State of Punjab and another, Crl. Misc. No. M-1586 of 2013 (O&M)*** decided on 13.9.2013 after placing reliance on Full Bench judgment of the same High Court in ***Kulwinder Singh and others*** versus ***State of Punjab, 2007(3)RCR (Criminal) 1052*** and also that of Apex Court in ***Gian Singh's*** case supra has allowed the compounding of offence in a case punishable under Sections 279, 337 and 338 of the Indian Penal Code in the similar circumstances with the observation that since the parties have arrived at a compromise and decided to live in peace, no useful purpose would be served in allowing the proceedings to continue.

6. The Apex Court in ***Narinder Singh and others*** versus ***State of Punjab and another, (2014) 6 Supreme Court Cases 466*** has even quashed the FIR under Section 307 of the Indian Penal Code with the following observations:

> "We have gone through the FIR as well which was recorded on the basis of statement of the complainant/victim. It gives an indication that the complainant was attacked allegedly by the accused persons because of some previous dispute between the parties, though nature of dispute etc. is not stated in detail. However, a very pertinent statement appears on record viz., 'respectable persons have been trying for a compromise up till now, which could not be finalized'. This becomes an important aspect. It appears that there have been some disputes which led to the aforesaid purported attack by the accused on the complainant. In this context when we find that the elders of the village, including Sarpanch, intervened in the matter and the parties have not only buried their hatchet but have decided to live peacefully in future, this becomes an important consideration. The evidence is yet to be led in the Court. It has not even started. In view of compromise between parties, there is a minimal chance of the witnesses coming forward in support of the prosecution case. Even though nature of injuries can still be established by producing the doctor as witness who conducted medical examination, it may become difficult to prove as to who caused these injuries. The chances of conviction, therefore, appear to be remote. It would, therefore, be unnecessary to drag these proceedings. We, taking all these factors into consideration cumulatively, are of the opinion that the compromise between the parties be accepted and the criminal proceedings arising out of FIR No.121 dated 14.7.2010 registered with Police Station LOPOKE, District Amritsar Rural be quashed. We order accordingly."

7. Be it stated that in a recent judgment title ***Mohar Singh*** versus ***State of Rajasthan, (2015) 11 Supreme Court Cases 226*** the Apex Court though has refused to do so on the ground that the offence punishable under Section 307 of the Indian Penal Code is

not compoundable, however, reduced the sentence awarded against the accused. In ***Mohar Singh's*** case the Hon'ble Apex Court has refused to grant the permission to compound the offence against the accused because in that case the accused was convicted after holding full trial not only by the trial Court but also by the High Court and it is such factors appear to have weighed with the Supreme Court while declining the permission to compound the offence as was sought in that case.

8. Now coming to the case in hand, the complainant-respondent No.2 is no more interested to prosecute the pending criminal case against the accused-petitioner any further. Both, accused-petitioner and respondent No.2-complainant, are present in person. Their statements have been recorded separately. Like in ***Narinder Singh's*** case supra, the proceedings in the criminal case presently are at its initial stage as charge has not yet been framed against the accused-petitioner. In view of the amicable settlement, respondent No.2-complainant is not going to support the prosecution case. Therefore, even if the trial is allowed to continue, the chances of conviction of the accused-petitioner will be bleak. Therefore, no useful purpose is likely to be served by allowing the criminal proceedings against the accused-petitioner to continue. Allowing such proceedings to continue would rather amount to abuse of the process of law.

9. The petition as such is allowed. Consequently FIR No. 176/14 Annexure P-1, registered against the accused-petitioner in Police Station, Indora and also the subsequent criminal proceedings pending disposal in the Court of learned Judicial Magistrate 1st Class, Indora, District Kangra, is ordered to be quashed. The petition is accordingly disposed of.

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

RFA No. 271 of 2007 along with RFA No. 186 of 2007
Reserved on : 16th May, 2017.
Decided on : 26th May, 2017.

1. RFA No. 271 of 2007.

Piara Ram ..... Appellant/Plaintiff.
Versus
Pawan Kumar and others .....Respondents/Defendants.

2. RSA No. 186 of 2007.

Pawan Kumar .....Appellant/Defendant No.1.
Versus
Piara Ram & others .....Respondents/defendants.

Code of Civil Procedure, 1908- Section 86- Plaintiff filed a civil suit for restraining the defendants No.2 to 6 from recovering the special road tax and seeking damages – it was pleaded that the plaintiff is the owner of the bus and had entered into an agreement to sell the bus to defendant No.1 – the bus was financed by defendant No.5 – it was agreed that outstanding taxes and amount shall be paid by the defendant No.1- the bus met with an accident and was released in favour of defendant No.1- plaintiff filed a revision and the possession was delivered to the plaintiff- defendant No.1 dis not pay the taxes and notices were issued – the suit was partly decreed and separate appeals have been filed by the parties – held in appeal that the execution of the agreement was not disputed – defendant No.1 had not performed his part of the agreement – plaintiff is the owner and liable to pay the taxes – the decree passed by Trial Court modified and plaintiff held entitled to the recovery of Rs.1,56,890/- from defendant No.1 along with interest @ 6% per annum from the date of filing of suit till realization. (Para-12 to 19)

For the Appellant(s):	Mr. T.S. Chauhan, Advocate in RFA No. 271 of 2007. Mr. Lovneesh Thakur, Advocate, vice counsel in RFA No. 186 of 2007.
For respondent No.1:	Mr. Lovneesh Thakur, vice counsel in RFA No.271 of 2007. Mr. T.S. Chauhan, Advocate, for in RFA No. 186 of 2007.
For respondent No.2, 3 and 6:	Mr. V.S. Chauhan, Addl. A.G., with Mr. Vivek Singh Attri, Dy. .A.G., in both appeals.
For respondent No.4:	Mr. Ashwani K. Sharma, Sr. Advocate with Mr. Jeewaj Kumar, Advocate.
For respondent No.5:	Mr. Lovneesh Thakur, Advocate in both appeals.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

Since, both these appeals arise out of a verdict pronounced by the learned District Judge, Una, H.P., in Civil Suit No. 5 of 2002, hence, both are liable to be disposed off by a common verdict.

2. The plaintiff instituted a suit against the defendants claiming therein a decree for damages in a sum of Rs.6,24,000/- with future interest @ 18% per annum being pronounced upon defendant No.1 Pawan Kumar also he claimed a decree for permanent prohibitory injunction, restraining defendants No.2, 3 and 6 from recovering from his special road tax in respect of bus bearing No. HP-20-1213 as also restraining defendants No. 4 and 5 from recovering from the plaintiff the installments in respect to the period 25.08.2000 to 13.12.2001. The suit of the plaintiff was partly decreed in a sum of Rs.1,06,890/-, decretal sum whereof was ordered to be realizable against defendant No.1. The aforesaid decretal amount was ordered to carry interest @6% from the date of decree till the realization of the decretal amount. However, the relief of the plaintiff qua defendants No.2, 3 and 6 for theirs being restrained from recovering special road tax in respect to bus bearing No. HP-20-1213 besides the relief of the plaintiff qua defendants No.4 and 5 standing to be restrained from recovering from the plaintiff the installments in respect to the bus for the period 25.8.2000 to 13.12.2001 was refused.

3. On standing aggrieved by the verdict of the learned trial Court, both the plaintiff as well as defendant No.1 concert to assail it by preferring therefrom the instant appeals.

4. The plaintiff's case in brief is that he is owner of bus No. HP-20—1213 which was got financed by him from Lal Hari Kishan (defendant No.5). On August 25, 2000, an agreement to sell the bus for a consideration of Rs.4 lacs was entered into between the plaintiff and defendant No.1. At the time of execution of the agreement, the said defendant paid to the plaintiff Rs.50,000/- as earnest money. One of the stipulation in the agreement was that the vendee shall pay the outstanding taxes and the amount payable to Lal Hari Krishan (defendant No.5) within a period of one month. The balance of sale consideration (i.e. Rs.3,50,000/- minus the outstanding taxes and the amount payable to defendant No.5) was covenanted to be paid to the plaintiff within the next following month. It was also agreed that the liability to pay the taxes, the amount of challan and the compensation amount in respect of Motor Accident Claim, if any, after the execution of the agreement shall be of the vendee. In view of the agreement, the plaintiff handed over the bus to defendant No.1 on the same day, and the latter started plying it on the basis of the same permit as was issued in favour of the plaintiff. On June, 2001, the bus, however, met with an accident and a case under sections 279 and 337, IPC was registered against the driver thereof at Police Station, Una, vide FIR No. 299/2001. The investigator took the bus into possession. Claiming ownership of the bus on the basis of agreement dated August 25, 2000, defendant No.1 moved an application before the Chief Judicial Magistrate, Una, for the release thereof. The plaintiff also moved a similar application. He sought release of the bus in his favour on the plea that defendant No.1 was not entitled to possession thereof, for he had failed to

perform his part of the agreement. His claim, however, did not find favour with the Court, and the bus was ordered to be released in favour of defendant No.1 vide order dated June, 21, 2001 of the learned Additional Chief Judicial Magistrate, Una. Aggrieved, the plaintiff preferred before this Court a revision petition which was allowed on December, 13, 2001. On the basis of this order, he took possession of the bus on December 21, 2001. Claiming the route of the bus to be highly profitable, the plaintiff averred that the net income derived from the bus was Rs.40,000/- per month, and that he was entitled to recover from defendant No.1 Rs.6,24,000/- for the period the bus remained in his custody. Alleging that defendant No.1 had failed to pay the road tax for the period the bus remained in his custody, the plaintiff further averred that a notice dated December, 18, 2001 requiring him to pay the said tax stood issued by defendant No.3, and that defendant No.4 also sought recovery of the insurance amount for the period, August 25, 2000 to December, 13, 2001. Defendant No.5, according to the plaintiff, also threatened to recover from him the outstanding amount. Hence the suit.

5. The defendants contested the suit and filed separate written statements. Defendant No.1 in his written statement admitted the fact of an agreement to sell standing executed inter se him and the plaintiff. He averred that on account of non-payment of taxes, the bus was impounded by the Regional Transport Authority concerned. He requested the plaintiff to get the bus released after paying the outstanding tax amounting to Rs.25,835/-. He then got the bus repaired by spending Rs.35,000/- and paid Rs.7,600/- in respect of challans. Besides, he paid Special Road Tax amount to Rs.8,410/- for the period w.e.f. 1.8.2000 to 30.09.2000. ON May 25, 2001, he paid to defendant No.5 Rs. 25,000/- He also paid to the Insurance charges amounting to Rs.8,418/- for the period from 26.08.2000 to 25.08.2001. On September 26, 2000, a sum of Rs. 10,000/-, according to him, was paid to the Excise Department as passenger tax. Besides, he paid to the plaintiff certain amount totaling Rs.52,200/-, on various occasions. It has been further averred that the contract was frustrated on account of the omission and commissions of the plaintiff. In the last week of June, 2001, the financer took away the bus from his possession and retained the same upto December 21, 2001. Refuting the plaintiff's claim as to the income derived from the bus, defendant No.1 further averred that the bus being an old model of 1992 was not in a good condition and that no benefit could be derived therefrom.

6. Defendants No.2, 3 and 6 in their joint written statement averred that the certificate of registration supplied to them showed the bus to have been held by the plaintiff under a hire purchase agreement with Mehatpuru Branch of Punjab National Bank, and that they were not informed to any agreement having been executed between the plaintiff and defendant No.1. The vehicle continued to be plied in the name of the plaintiff, and the liability to pay the Special Road Tax is therefore his. It has been averred that the plaintiff failed to pay special road tax for the periods; 1.6.2001 to 31.07.2001 and 1.11.2001 to 31.07.2002. It has been further pleaded that he was also liable to pay passenger tax amounting to Rs.1,20,300/- and interest amounting to Rs.57,383/- for the period from 6.4.1992 to 30.06.2002 under the H.P. Passenger Goods Tax.

7. Defendant No.4 in its written statement averred that defendant No.1 was an utter stranger to it and that the insurer of the vehicle was entitled to recover the premium of the policy from the plaintiff. It was also averred that the plaintiff did not have any enforceable cause of action against the insurer.

8. Defendant No.5 in his written statement denied that he is the financer of the vehicle in question in individual capacity. He has pleaded that he is an attorney of the firm namely M/s Partap Leasing Company, the said defendant averred that the vehicle was financed by the said firm under a hire purchase agreement and the plaintiff having executed the hire purchase agreement and other documents, the financer had every right to recover its dues from him as per the terms and conditions of the said agreement. It has been averred that the plaintiff has no enforceable cause of action against him nor did he have any locus standi to bring action.

9. 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.

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

1. Whether the plaintiff is entitled for the recovery of the suit amount, as alleged? OPP.
2. Whether the suit is bad for non- joinder and mis-joinder of parties? OPD
3. Whether the suit is not maintainable? OPD
4. Whether the plaintiff has no cause of action? OPD
5. Whether this court has no jurisdiction to try the suit? OPD.
6. Whether the suit is liable to be dismissed for non-compliance of the provisions of Section 80 CPC? OPD.
7. Whether the plaintiff is estopped by his act and conduct from filing the suit? OPD.
8. Relief.

11. On an appraisal of evidence, adduced before the learned trial Court, it proceeded to party decree the suit of the plaintiff.

12. Before proceeding to pronounce upon the efficacy of the respective submissions addressed before this Court by the respective learned counsels appearing for the parties, it is imperative to allude to the fact that in Ex.PW2/A, execution whereof remains not denied by either of the executants thereto, a recital is borne qua defendant No.1 agreeing to purchase from the plaintiff, bus bearing No. HP-20-1213 for a consideration of Rs.4,00,000/- also a recital being carried therein, that out of the aforesaid total amount of sale consideration, a sum of Rs.50,000/- , being handed over by defendant No.1 to the plaintiff, as earnest money. Furthermore, a recital occurs therein qua defendant No.1 undertaking therein, to within one month liquidate the remaining sale consideration to one Lala Hari Krishan, the financer of the relevant bus besides his undertaking to liquidate all the taxes levied by the assessing authorities concerned, upon the relevant bus. Also therein occurs a recital qua defendant No.1 taking possession of the relevant bus, on the day of execution of Ex.PW2/A. Recitals also occur therein that in case, the plaintiff refuses to perform his part of the contract, embodied in Ex.PW2/A, his being liable to pay Rs.1,00,000/- to defendant No.1 also a recital occurs therein that in case defendants No.1 refuses to perform his part of the obligation(s) constituted therein, thereupon, the earnest money paid by him to the plaintiff being liable to be forfeited by the latter.

13. Be that as it may, a studied and careful perusal of the oral as well as documentary evidence on record, is reflective of defendant No.1 not evidently complying with his part of the obligations cast upon him under Ex.PW2/A, non-compliance whereof is comprised in his not defraying to one Lala Harik Krishan, the financer, of the relevant bus, a sum of Rs. 3, 50,000/- within one month from the date of execution of Ex. PW2/A, nor also his tendering before the authorities concerned, the relevant taxes assessed by them qua the relevant bus, hence, in consonance with the mandate of the penal clause enshrined therein the forfeiture of earnest money held in a sum of Rs.50,000/- by the plaintiff was legally apt. Since,in consonance with the apt penal clause held in Ex.PW2/A, the forfeiture of earnest money comprised in a sum of Rs.50,000/- accrued vis-a-vis the plaintiff, thereupon, the learned trial Court in proceeding to deduct the aforesaid amount of earnest money from the total quantum of damages assessed in favour of the plaintiff, comprised in a sum of Rs.2,21,520/-, is grossly untenable. The aforesaid amount of Rs.50,000/-, as such, is required to be added to the principal decretal amount.

14. Be that as it may, the claim of the plaintiff that the learned trial Court under assessed the quantum of mesne profits, claim whereof is anvilled on the learned trial Court irrevering the quantum of moneys, comprised in the levy of taxes made upon the relevant vehicle

by the Assessing Authorities concerned, conspicuously when levy thereof holds commensuration with the passenger capacity/occupancy of the bus also hence its also marking the factum of the passenger occupancy of the relevant bus being in a numerical strength higher than the reckoning by the learned trial Court of profits earned by the relevant bus, profits whereof stood pegged in a sum of Rs.12,000/- per month, concomitantly, hence, enjoined the learned trial Court to assess mesne profit in a sum higher than Rs.12,000/- per month. However, when Ex.PW5/A makes a disclosure, with respect to assessment of Special Road Tax being made for the period commencing from June, 2001 to July, 2002, by the Assessing Authority Concerned, upon the relevant bus, and it being comprised in a sum of Rs.3,705/- also with Ex.PW5/A also disclosing that the Special Road Tax qua the period pertaining to August, September and October, 2001 standing paid besides its also disclosing that Special Road Tax w.e.f. January, 2000 to May, 2001 also standing paid by the owner of the relevant bus, however, with its not making any disclosure qua liquidation occurring qua the assessment, if any, of Special Road Tax made with respect to the relevant bus for the period June, 2001, July, 2001 and from November, 2001 to July, 2002, preponderantly, also with the levy upon the relevant bus of special road tax in the aforesaid sum by the assessing authority, is not based upon the numerical strength of passengers occupying the bus for the aforesaid period, rather is always in a fixed sum, hence, any reliance thereupon for computing mesne profits is inapt. The plaintiff has failed to adduce into evidence, any relevant record reflective of the fact that the Authorities concerned, had levied tax other than Special Road Tax on the relevant vehicle, levying whereof holding commensuration with the numerical strength of passengers occupying the bus for the period aforesaid. The adduction of the aforesaid material, was vital for gauging the numerical strength of passengers occupying the relevant bus for the aforesaid period, especially when levying of special road tax holds no relation with the numerical strength of the passenger occupying the bus rather when the numerical strength of passengers occupying the relevant bus, is fathomable only from assessment/levy upon the relevant bus by the authority concerned, of a tax other than special road tax, besides its relating to or being in commensuration with the numerical strength of passengers occupying the bus for the aforesaid period, evidence of levy whereof upon the relevant bus remains unadduced. Consequently, the relevant Assessing Authority in making assessment of special road tax, in a sum of Rs.3,705/- per month respectively, cannot also give any impetus to any conclusion that the passenger strength of the vehicle was numerically higher nor any conclusion can be formed that the relevant bus yielded higher profits " than Rs.12,000/- pr month unless" potent evidence in respect thereof stood adduced, comprised in the relevant record aforesaid maintained by the authority concerned. However, with no evidence standing adduced by the plaintiff in respect thereto, hence, it cannot be accepted that either the assessment of special road tax made upon the relevant bus, was based on the passenger strength of the bus for the aforesaid period nor it can be concluded that given the absence of evidence with respect to escalated rate(s) of apposite taxes appertaining to theirs holding commensuration with the passengers strength, taxes whereof stood levied by the authority concerned, with respect to the plying of the relevant bus, it concomitantly earned a higher profit also it cannot be concluded that the sum of mesne profits assessed by the learned trial Court, warranting any interference. Predominantly, also when the income tax returns, if any, filed by defendant No.1 before the income tax authority, reflective of the income earned by him from the relevant bus, stood also not adduced in evidence.

15. The learned counsel appearing for the appellant/plaintiff contends that the bus bearing No. HP-20-1213 met with an accident on 11.06.2001, in sequel whereto FIR No. 299/2001 under Section 279 and 337 of the IPC stood lodged with the Police Station concerned. Both the plaintiff and defendant No.1 instituted their applications before the learned Chief Judicial Magistrate, Una, wherein they sought the relief, that the bus be released in their favour. However, the application of defendant No.1 stood allowed, whereas, the application of the plaintiff stood dismissed. Defendant No.1 retained possession of the relevant bus since the making of the order by the learned Chief Judicial Magistrate on 21.06.2001 upto the decision recorded by the learned Sessions Judge on Criminal Revision Petition on 13th June, 2001, petition whereof stood instituted before it, by the aggrieved plaintiff. However, assessment of mesne profits with respect to the aforesaid period of time whereto defendant No.1 held possession of the bus under the

orders pronounced by the learned trial Magistrate, stood included by the learned trial Court in its making a computation of the total quantum of mesne profits payable by defendant No.1 to the plaintiff, with respect to his plying the relevant bus, computation occurred with evidently, defendant No.1 not performing his part of the contractual obligations, comprised in his defraying to the financer of the bus, the entire outstanding sale consideration of Rs.3,50,000/-. Since, defendant No.1, though was bestowed with a right under a pronouncement made by the learned C.J.M. concerned, to hold possession of the relevant vehicle, yet thereupon, he cannot escape from the consequences enshrined in the relevant agreement, consequences whereof evidently arose, on his not performing his part of the contractual obligations constituted in Ex.PW2/A, omission whereof is comprised in the fact of his not, within the stipulated period, defraying the outstanding sale consideration of Rs. 3,50,000/- to the financer of the relevant bus, whereupon, ensued the sequel of the agreement standing canceled. The rigor of the apt penal consequence(s) embodied in the relevant agreement arising from his not begetting compliance with all the recitals occurring therein, cannot to the mind of this Court be construed to stand overcome by the learned Chief Judicial Magistrate, recording an order for releasing the relevant bus qua defendant No.1, "more so", when the aforesaid orders stood set aside by the Revisional Court. Reiteratedly, the preeminence of the mandate of the relevant agreement also the preeminence of attraction of the apt penal clause(s) upon defendant No.1, on his evidently not begetting compliance with the apposite recitals occurring therein, cannot be either whittled nor undermined by the order pronounced by the learned C.J.M., concerned, whereby, he permitted defendant No.1 to hold possession of the relevant vehicle. Significantly, the further ensuing effect of the aforesaid inference, is that defendant No.1, cannot escape his liability to liquidate vis-a-vis the plaintiff mesne profits, assessed upon him by the learned trial Court, mesne profits whereof appertain to the period commencing from the date of the order pronounced by the learned C.J.M., upto the date of the order pronounced by the learned Revisional Court.

16. The learned trial Court has tenably dispelled the vigour of Ex. DW1/A, exhibit whereof makes a disclosure therein qua defendant No.1 expending a sum of Rs.35,000/- towards the repair of the bus after his receiving possession thereof, from the plaintiff. Since, defendant No.1 received the possession of the relevant bus, with his holding knowledge qua its condition, as also, qua its road worthiness, hence, when he, after its purchase, proceeded to expend money for effecting repairs thereof, whereby, it became roadworthy, cannot bestow any right in him to claim deduction of Rs.35,000/-, amount whereof stood expended by him towards the repairs of the relevant bus, from the quantum of mesne profits assessed by the learned trial Court in favour of the plaintiff. Moreover, the exclusion by the learned trial Court of the aforesaid amount from the mesne profit does not suffer from any gross infirmity.

17. The learned counsel appearing for defendant No.1/appellant in RFA No. 186 of 2007 submits that defendant has paid a sum of Rs.7800/- towards challans, Rs.25,000/- to Lala Hari Kishan and Rs. 10,000/- was paid to Excise Department, as such, the aforesaid amounts are liable to be deducted from the total sum of mesne profits assessed in favour of the plaintiff. The aforesaid submission addressed before this Court by the learned counsel appearing for defendant No.1 has no force, as no evidence exists on record, reflective of the fact that the purported liquidation by defendant No.1 of the aforesaid amounts was within the domain of the relevant contract nor any best evidence exists on record with respect to liquidation thereof by defendant No.1. Consequently, non-deduction of the aforesaid amounts by the learned trial Court from the total sum of mesne profits, does not suffer from any gross infirmity.

18. Be that as it may, the refusal by the learned trial Court to pronounce a decree of permanent prohibitory injunction against defendants No.2 to 6, for restraining them from recovering the levy of apposite taxes from him besides its refusing to restrain defendant No.4 from recovering the premium of insurance besides its refusing to restrain defendant No.5 from recovering the loan installments, does not necessitate any interference. The reason being that with the plaintiff evidently holding the registered ownership with respect to the relevant bus, he was enjoined to liquidate all the taxes levied by the authorities concerned with respect thereto, dehors any contractual stipulation held in respect thereto in the relevant agreement, stipulation

whereof could be enforced against defendant No.1, by after his defraying them, his instituting against defendant No.1 an apposite suit for their recovery. Relieteratedly, with the plaintiff being the registered owner of the relevant vehicle, he holds the enjoined obligation to defray all the taxes levied thereon to the defendants concerned. Also the defendants concerned hold the duty under law to recover them from the plaintiff, the registered owner of the relevant bus than from defendant No.1.

19. For the foregoing reasons RFA No. 271 of 2007 is partly allowed, whereas, RFA No. 186 of 2007 is dismissed. Consequently, the impugned judgment and decree is modified. Accordingly, the plaintiff is held entitled to recovery of a sum of Rs.1,56,890/- from defendant No.1. The amount aforesaid shall carry interest at the rate of 6% per annum from the date of the suit till the realization of the decretal amount. Decree sheet be drawn accordingly. No order as to the costs. All pending applications also disposed of.

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

State of H.P. .....Appellant.
Versus
Tara Chand and another ....Respondents.

Cr. Appeal No.384 of 2007.
Reserved on: 15.05.2017.
Date of Decision: 26th May, 2017.

Indian Penal Code, 1860- Section451, 325, 323, 506-II/34- Complainant was sleeping in a room with his family – accused T and R enteredthe room at about 11:45 P.M. – T pushed the door due to which bolt was opened – accused trespassed into the room and started beating the complainant with fist and kick blows- complainant was dragged to a courtyard where T gave a blow on his head with a bangi – complainant shouted for help on which his mother, wife and son came – the accused were tried and convicted by the Trial Court- an appeal was preferred, which was allowed and the judgment passed by the Trial Court was set aside- held in appeal that conduct of witnesses was unnatural – there was insufficient light to identify the accused- the clothes of the victim were not taken in possession to corroborate the prosecution version- bangi produced in the Court did not have the blood stains and cannot be connected to the commission of crime –the recovery was not preceded by the statement of the accused under Section 27 of the Evidence Act – the Appellate Court had correctly appreciated the evidence- appeal dismissed.(Para-9 to 17)

For the Appellant: Mr. Vivek Singh Attri, Dy. A.G.
For the Respondent: Mr. G.C. Gupta, Senior Advocate with Ms. Meera Devi, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal stands directed by the State of Himachal Pradesh against the judgment rendered on 16.07.2007 by the learned Sessions Judge, Shimla, H.P. in Criminal Appeal o. 3-S/10 of 2006, whereby, he set aside the judgement of conviction and sentence recorded upon the accused/respondents herein, by the learned trial Court.

2. The facts relevant to decide the instant case are that complainant Gian Chand made a statement under Section 154, Cr.P.C., before the police on 4.7.2003 to the effect that on

3.7.2003, he had gone to village Dhamoon to attend the Bhagwat. He came late. When he was sleeping in a single room along with his family. His son Santosh was sleeping in the veranda, in the meanwhile at about 11.45 p.m., his brother Tara Chand and Ram Lal came. Tara Chand had pushed the door, due to which bolt was opened and then both of them trespassed into the room. Both of them started beating the complainant with fists and kick blows. Thereafter, they dragged the complainant to the court-yard and then Tara Chand gave a blow on his head with "bangi" as a result of which blood started oozing out from the head. When he raised an outcry, his mother, wife and son came and rescued him. It was reported that both the accused were asking him to vacate the house or else he would be killed. His family members were also pushed around by the accused. On the aforesaid statement, a formal FIR was registered in the police station. Thereafter police completed all the formalities relating to the investigation of the case.

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

4. The accused stood charged by the learned trial Court for theirs committing offences punishable under Sections 451, 325, 323, 506-II/34 of the IPC. In proof of the prosecution case, the prosecution examined 14 witnesses. On conclusion of recording of the prosecution evidence, the respective statement(s) of the accused under Section 313 of the Code of Criminal Procedure were recorded by the learned trial Court wherein each of the accused claimed innocence and pleaded false implication in the case. They, examined two witnesses in defence.

5. On an appraisal of the evidence on record, the learned trial Court, returned findings of conviction upon the accused/respondent herein for his committing offences punishable under Sections 451, 325, 323, 506-II/34 of the IPC. In an appeal preferred therefrom by the accused/respondent herein before the learned Sessions Judge, Shimla, H.P, the latter reversed the apposite findings of conviction and sentence recorded in the judgment pronounced by the learned trial Court also he acquitted the accused of the offence(s).

6. The State of H.P. stands aggrieved by the judgment of acquittal recorded in favour of the accused/respondent by the learned Sessions Judge, Shimla, H.P.. The learned Deputy Advocate General appearing for the State has concertedly and vigorously contended qua the findings of acquittal recorded by the learned Sessions Judge, Shimla, standing not based on a proper appreciation of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation by him of the material on record. Hence, he contends qua the findings of acquittal warranting reversal by this Court in the exercise of its appellate jurisdiction and theirs being replaced by findings of conviction.

7. On the other hand, the learned Senior Counsel appearing for the accused/respondents herein has with considerable force and vigour, contended qua the findings of acquittal recorded by the learned Sessions Judge standing based on a mature and balanced appreciation by him of the evidence on record and theirs not necessitating any interference, rather theirs meriting vindication.

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

9. The genesis of the prosecution version is held in the apposite FIR, borne on Ex.PW10/A. The FIR qua the occurrence was registered by the police station concerned, on anvil of the statement of Gian Chand, the complainant/injured. The statement of the complainant/injured is embodied in Ex.PW1/A, wherein, he has disclosed that on 3.7.2003, at about 11.45 p.m., when he in a single room was "asleep", alongwith his other family members, then his brothers, accused Tara Chand and Ram Lal, after striking a kick blow at the door of the room, ingressing there into it. He communicates therein that at the relevant time one of his son(s), one Santosh Kumar, being asleep in the veranda occurring outside his room. He has

continued to disclose therein that after the aforesaid accused ingressing into the room, theirs proceeding to belabour him with kick and fist blows also both the accused dragging him outside onto the veranda, whereat, accused Tara Chand with the user of a "bangi", Ex. Pz, which was lying in the veranda, proceeding to strike its blows on his head, sequeling, oozing of blood therefrom, whereupon, he was constrained to raise an outcry, hence, resulting in his family members arriving at the relevant site of occurrence and on whose intercession, he was rescued from the clutches of both the accused.

10. The genesis of the prosecution version aforesaid, as occurs in Ex.PW1/A is the fulcrum, wherefrom, the veracity of the testification(s) of the prosecution witnesses is to be tested. In case, a close, circumspect perusal of the statements of the prosecution witnesses, makes a disclosure that they hence contradict the version qua the occurrence borne on Ex.PW1/A, thereupon, this Court would be constrained to conclude that the version borne in Ex.Pw1/A being incredible also it would foment an inference that hence, the prosecution failing to establish to the hilt the charge in respect whereto the accused stood tried.

11. In making a discernment, whether the prosecution witnesses contradict the version qua the occurrence embodied in Ex.PW1/A, an allusion to their respective depositions, significantly of the complainant, who deposed as PW-1, his son, who deposed as PW-2, his other son, who deposed as PW-5, lastly his wife, who deposed as PW-9, is imperative. Even though, the complainant in his testification, testifies in consonance with the version qua the occurrence enunciated in Ex.PW1/A, nonetheless, it would be unbefitting to therefrom conclude that the prosecution hence succeeding in proving to the hilt the charge in respect whereof the accused stood tried. Nowat, a perusal of the testification of PW-2, assumes significance, as he stands recited in Ex.PW1/A to be asleep in the "veranda", occurring outside the room, room whereof stood ingressed by both the accused, whereafter, "thereat" co-accused Tara Chand with "bangi", Ex.Pz recovered under recovery memo Ex.PW7/A, struck its blow on the head of PW-1. The singular fact which erases the veracity of his testification, is comprised in the fact that despite his being asleep at the relevant site of occurrence, there occurs no enunciation in Ex.PW1/A, qua his intervening in the scuffle which ensued inter se both the accused and his father, the complainant. Also when despite his being available at the site of occurrence, it is enigmatic that he omitted to preempt the accused concerned from striking blows of "bangi" Ex.Pz, on the head of the victim/complainant. Evident want of rescueatory efforts on the part of Santosh Kumar, despite his being available at the site of occurrence "does" constrain an inference that he was unavailable at the site of occurrence also it appears that the complainant while recording in Ex.PW1/A, that PW-2 was asleep in the veranda, whereat the illfated scuffle took place, has hence contrived his presence thereat. Conspicuously, also when the purported rescueatory efforts were made by his family members, who were asleep along with him in a single room and all of whose presence, at the site of occurrence stood aroused by shrieks and cries raised by the victim, in sequel to his being purportedly struck with blow(s) of "bangi" on his head, by accused Tara Chand. In aftermath, the testification of PW-2 in purported corroboration to the testification of PW-1, is unworthwhile. What ultimately erodes the effect of his testification is comprised in a disclosure occurring in his cross-examination qua accused Tara Chand being unavailable at the site of occurrence.

12. PW-3, though in her examination-in-chief purveys a version qua the incident, in purported corroboration to the testification of PW-1, yet effect thereof is obliterated, by the fact of hers in her cross-examination making a disclosure that given the darkness prevailing at the relevant time, hers being incapacitated to identify the assailants. PW-5, the other son of the complainant, in his testification occurring in his examination-in-chief, though lends succor to the deposition of his father, who testified as PW-1. However, the fact of his purportedly eye witnessing the occurrence, is rendered vulnerable to skepticism, given his father in Ex.PW1/A not naming him to be available at the site of occurrence, rather his naming, his sons Santosh Kumar being purportedly available at the site of occurrence and also his other son Parmod being available at the site of occurrence. Omission of PW-1 to in Ex.PW1/A, hence, narrate qua PW-5 being

available at the site of occurrence "when" construed in conjunction with Parmod not being examined by the prosecution, though, his name occurs in Ex.PW1/A, bolsters an inference that PW-6 is a invented witnesses to the occurrence, hence, his testification in purported corroboration to the tesification of PW-5, loses its vigour. Aggravation to the aforesaid inference, is awakened by the factum of his in his cross-examination making a communication with respect to his being unaware qua the cause of the illfated event. His feigning ignorance qua the cause which generated the illfated event, begets an inference that he obviously is an introduced or an invented witnesses to the occurrence, hence, concomitantly, his testification occurring in his examination-in-chief is also amenable to an inference that it purveys a concocted account in respect of the occurrence, in sequel thereto, it loses its creditworthiness.

13. The testification of PW-9 is also unworthwhile, given hers in her examination-in-chief disclosing that on her husband being dragged by the accused from his room onto the veranda, hers following him and Santosh also following her, whereas, in Ex.PW1/A, the complainant contrarily echoes qua the arrival of PW-9 at the site of occurrence being aroused by his raising shrieks and cries, in sequel to his being struck with blow(s) of 'bangi' on his head by accused Tara Chand. Also when in Ex.PW1/A, the complainant contrarily vis-a-vis PW-9 echoes that Santosh Kumar was asleep in the veranda, whereat the relevant occurrence took place, consequently, with PW-9 deposing that Santosh followed her from the room onto the relevant site of occurrence, her testification hence contradicts the version of PW-1 with respect to the presence of Santosh in the veranda, outside the room,besides contradicts the apposite recitals in respect thereto borne in Ex.PW1/A, whereupon, her testification is rendered incredible also enhances vigour to the aforesaid inference that Santosh is an invented witness.

14. PW-8, subjected the victim to medical examination, in sequel whereto he prepared MLC Ex.PW8/A, wherein, he has made a disclosure that at the time contemporaneous to his subjecting the victim to medical examination, his noticing oozing of fresh blood from the injuries occurring on the body of the complainant/victim. However, the Investigating Officer "despite" copious oozing of blood from the head injury sustained by the victim/complainant, on the latter being struck thereat with a blow of "bangi", Ex. Pz, by accused Tara Chand, neither collected, the clothes of the victim/complainant, which hence were imperatively enjoined to hold smears of blood or stains of blood nor "bangi" Ex. Pz holds any stain of blood. Be that as it may, the effect of the aforesaid non collection of the clothes of the complainant, by the Investigating Officer, as also non occurrence of blood smears on 'bangi' Ex. Pz, is that it sequels a derivative that the ill-fated occurrence took place in a manner other than as enunciated in Ex.PW1/A, whereupon, an aura of doubt shrouds the authenticity of the recitals borne on Ex.PW1/A, with a sequeling effect of the prosecution not proving the charge against the accused.

15. Be that as it may, apart from the fact that 'bangi' Ex. Pz, not holding any stain of blood though with purported user whereof, a blow upon the head of the complainant was struck by accused Tara Chand struck, hence, its purported user by accused Tara Chand standing negated. The further effect that 'bangi' Ex. Pz stood handed over by PW-9 to the Investigating Officer concerned, in sequel, whereto memo Ex.PW7/A stood prepared also does not render it to be construable to be the relevant weapon of offence, significantly when, for reasons ascribed hereinafter, the prosecution has not efficaciously proven its recovery at the instance of the accused.

16. The recitals borne on Ex.PW7/A, make a disclosure qua the wife of the complainant, PW-9, handing over 'bangi' Ex. Pz to the Investigating Officer concerned. However, therein, there is no reflection qua the date whereon she handed over 'bangi' to the Investigating Officer, rather at the end of Ex.PW7/A, the Investigating Officer makes an endorsement qua the aforesaid mode of handing over of 'bangi occurring on 4.7.2003. Since, Ex.PW7/A was throughout, in the custody of the Investigating Officer concerned, hence, he at the end of Ex.PW7/A, appears to have recorded an endorsement qua his preparing Ex.PW7/A, on 4.7.2003, whereas, for obtaining a firm conclusion therefrom, qua its being prepared on 4.7.2003 by the

Investigating Officer concerned, an apposite recital was enjoined to be embodied therein also the signatories thereto were enjoined to under their respective signatures occurring therein also make an endorsement qua its standing prepared on 4.7.2003. However, the aforesaid relevant endorsements do not visibly occur in Ex.PW7/A. Hence, it is to be concluded that the Investigating Officer concerned, through, sheer contrivance introducing 'bangi' as the purported weapon of offence, with user whereof, co-accused Tara Chand inflicted injuries on the head of the victim/complainant. Moreo so when, with respect to the date of preparation of Ex.PW7/A neither PW-7 nor PW-9 makes any unequivocal apposite communication. Even otherwise, 'bangi', Ex.Pz, is the incriminating piece of evidence against the accused. Normally recovery of any weapon of offence, has to occur within the domain of Section 27 of the Indian Evidence Act, wherein for any effectuation of recovery of any weapon of offence at the instance of the accused by the Investigating Officer concerned to hence acquire statutory vigour, enjoins the Investigating Officer concerned, to preceding his making the relevant recoveries, record a disclosure statement of the accused concerned. However, the Investigating Officer neither within the precincts of Section 27 of the Indian Evidence Act recorded a disclosure statement of any of the accused concerned nor he proceeded to subsequent thereto effect the relevant recoveries. Contrarily, he for reasons aforestated inefficaciously/fictitiously prepared Ex.PW7/A by recording a recital therein qua PW-9 handing over 'bangi' to him. The aforesaid incriminating piece of evidence against the accused, stand canvassed by the learned Deputy Advocate General to be not warranting disimputation of credence nor also it being open for this Court to discard their probative vigour, as the accused after using it left it at the site of occurrence, whereafter, they fled therefrom. Hence, he contends that PW-9 proceeded to handover the 'bangi' to the Investigating Officer concerned. He also proceeds to contend that since the Investigating Officer concerned not within the domain of Section 27 of th Indian Evidence Act effectuating its recovery, hence, there was no legal necessity cast upon him to obey its mandate nor hence on its mandate standing infringed, would give any capital to the accused. However, the aforesaid submission warrants rejection, as the aforesaid manner of effectuation of recovery of the purported weapon of offence, appears to be made by the Investigating Officer concerned, by his, actively circumventing the mandate of Section 27 of the Indian Evidence Act, whereas, with the aforesaid weapon of offence comprising the incriminating piece of evidence also when with respect to recovery thereof, apt provisions are encapsulated in the relevant Indian Evidence Act, hence, he was enjoined to for dispelling arousal of suspicion with respect to the efficacy of the relevant recovery, hence, revere mandate thereof rather than his proceeding to engineer an ingenious method, to proceed to make recovery of weapon of offence in the manner he did under memo Ex.PW7/A. The provisions of Section 27 of the Indian Evidence Act read as under:-

> "27. How much of information received from accused may be proved. -Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

Consequently, with this Court concluding that recovery of 'bangi' not holding any vigour, it is apt to conclude that the prosecution has failed to establish that the 'bangi' was used by the accused concerned, to inflict blows on the victim/complainant.

17. For the reasons which have been recorded hereinabove, this Court holds that the learned Sessions Judge concerned 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 Sessions Judge concerned does not suffer from any gross perversity or absurdity of mis-appreciation and non appreciation of germane evidence on record.

18. Consequently, the instant appeal is dismissed. In sequel, the judgment impugned hereat is maintained and affirmed. All pending applications also stand disposed of. Records be sent back forthwith.

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

Vinod Kumar ……Appellant.
Versus
Negi Ram & ors. …….Respondents.

RSA No. 468 of 2003.
Reserved on: 27.3.2017.
Decided on: 26.5.2017.

Specific Relief Act, 1963- Section 20- Defendant No.1 executed an agreement to sell the suit land to the plaintiff for a consideration of Rs.35,000/- - a sum of Rs.13,000/- was paid at the time of the agreement and the remaining amount was to be paid at the time of registration of the sale deeds – the possession was delivered and an agreement was executed acknowledging the receipt of Rs. 30,000/- - a sum of Rs. 3200/-was paid by the brother of the plaintiff and a sum of Rs. 1800 was to be paid by the plaintiff- defendant No.1 executed a sale deed in favour of defendant No.2- hence, the plaintiff filed a civil suit for seeking the relief of specific performance of the contract- defendant denied the case of the plaintiff- the suit was decreed by the Trial Court – an appeal was filed and the decree was modified – plaintiff was not held entitled for the decree of specific performance – held in second appeal that execution of the agreement and delivery of possession were duly proved – defendant No. 2 was not proved to be a bona-fide purchaser for consideration – the Trial Court had rightly decreed the suit for specific performance and the Appellate Court had wrongly allowed the appeal- the appeal allowed – judgment passed by Appellate Court set aside and that passed by Trial Court restored. (Para- 11 to 20)

For the appellant(s): Mr. V.D.Khidta, Advocate.
For the respondents: Mr.K.D.Sood, Sr. Advocate with Mr. Sanjeev Sood, Advocate for respondent No. 1.
Respondents No. 2 to 6 already ex-parte.

The following judgment of the Court was delivered:

Justice Dharam Chand Chaudhary, J.

Plaintiff is in second appeal before this Court. He is aggrieved by the judgment and decree dated 17.9.2003, passed by learned District Judge, Shimla (Camp at Rohru) in Civil Appeal No. 54-R/13 of 2003/2002, whereby the lower appellate Court has allowed the appeal i.e. in favour of respondent No. 1 (hereinafter referred to as defendant No. 2) and quashed the decree of specific performance of the contract which was passed by learned trial Court in favour of the plaintiff. He was also not held entitled to the relief of prohibitory injunction or declaration to the effect that the sale of the suit land by Puran Chand defendant No. 1 in favour of defendant No. 2 was illegal, null and void. The decree for permanent prohibitory injunction sought against the contesting defendants was also declined. However, while holding that agreement to sell Ext. PW-6/A was executed by defendant No. 1 in favour of plaintiff and that a sum of Rs. 13,000/- towards sale consideration was paid at the time of execution of the agreement, decreed the suit for recovery of the said amount in his favour and against defendant No. 1 Puran Chand. The Cross-Objections preferred by the plaintiff were also dismissed.

2. The appeal has been admitted on the following substantial questions of law?

"1) Whether the learned first Appellate Court was justified in holding that the subsequent purchaser of the suit land was a bonafide purchaser without notice of agreement to sell to the plaintiff in the absence of any foundation or plea in the written statement?

2) Whether the findings of learned first Appellate Court, that there was no evidence to show that the possession of the suit land was handed over to the appellant, are against the record and dehors the evidence?"

3. Defendant No. 1. Puran Chand along with defendants No. 7 to 9, was joint owner of the land bearing Khasra Haal 362, Sabik 156 measuring 0-70-39 hects., situated in Chak Jhaknoti, Tehsil Chirgaon, District Shimla, H.P. He later on became exclusive owner thereof consequent upon family settlement having taken place between him and the other co-owners defendants No. 7 to 9. He agreed to sell the suit land for a consideration i.e. Rs. 35,000/- to the plaintiff and executed the agreement Ext. PW-6/A on 11.2.1999. At the time of execution of the agreement, defendant No. 1 received a sum of Rs. 13,000/- from the plaintiff. The remaining amount of Rs. 22,000/- as per the agreement was to be paid to the said defendant at the time of registration of the sale deed. The possession of the disputed land allegedly was delivered by defendant No. 1 to the plaintiff at the time of execution of the agreement to sell. An affidavit was executed by defendant No. 1 on 6.4.1999 before Executive Magistrate Chirgaon, admitting thereby the receipt of a sum of Rs. 30,000/- towards part payment of the sale consideration and the balance i.e. Rs. 5,000/- allegedly was agreed to be paid by the plaintiff to him at the time of execution of the sale deed. However, on 24.4.1999, defendant No. 1 allegedly received a further sum of Rs. 3200/- from the brother of the plaintiff and as such a sum of Rs. 1800/- was left to be paid to the defendant by the plaintiff towards full and final payment of the sale consideration as agreed upon. According to him, he was always ready and willing to perform his part of the agreement i.e. payment of balance consideration of Rs. 1800/- to defendant No. 1, however, it is the latter who failed to execute the sale deed in his favour. To the contrary, the said defendant fraudulently and dishonestly executed sale deed of the land in dispute in favour of Negi Ram, defendant No. 2 for a consideration of Rs. 18,000/- on 18.11.1999. Therefore, declaration to the effect that the sale deed, being the result of fraudulent transaction, not only null and void but also sham transaction, hence was sought to be declared illegal, null and void. Since a sum of Rs. 20,000/- was spent by him for raising an apple orchard over the land in dispute, therefore, the decree for specific performance of the contract was sought to be passed against defendant No. 1 directing him thereby to execute the sale deed in favour of the plaintiff in accordance with the agreement dated 11.2.1999 Ext. PW-6/A and affidavit dated 6.4.1999 Ext. PW-1/A. The sale deed dated 18.11.1999 executed by defendant No. 1 in favour of Negi Ram, defendant No. 2 was also sought to be declared null and void. The defendants No. 2 & 3 were also sought to be restrained from causing any interference with the possession of the plaintiff in the suit land and also to get the mutation thereof attested on the basis of the sale deed in favour of defendant No. 1.

4. It is defendants No. 1 to 6 who had contested the suit whereas defendants No. 7 to 9 opted for not to put appearance despite service. In their joint written statement, the appearing defendants had come forward with the version that defendant No. 1 Puran Chand was mentally sick at the relevant time and the documents i.e. the agreement and affidavit were obtained by the plaintiff from him under misrepresentation of the facts. It was denied that a sum of Rs. 33,200/- was received by defendant Puran Chand from plaintiff, however, only a sum of Rs. 13,000/- was paid to him by the plaintiff. It was also denied that the sale deed executed by defendant No. 1 in favour of defendant No. 2 was the result of fraud and misrepresentation, hence, sham transaction. Defendant No. 2 rather was a bonafide purchaser and the mutation of the suit land was also sanctioned and attested in his favour by the revenue authorities.

5. Replication was also filed. On such pleadings of the parties, following issues were framed by learned trial Court:

"(1). Whether the plaintiff is entitled to the relief of specific performance of agreement to sell dated 11.2.1999, as alleged? ...OPP.

(2). Whether the sale deed executed by defendant No. 1 in favour of defendant No. 2 dated 18.11.1999 is result of fraud, as alleged, if so, its effect?...OPP.

(3). Whether the plaintiff is entitled to the relief of permanent prohibitory injunction, as prayed for?...OPP.

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

(5). Whether the suit of the plaintiff is not properly valued for the purpose of court fee and jurisdiction? ...OPD.

(6). Whether the plaintiff has not come to Court with clean hands, as alleged? ...OPD.

(7). Whether the plaintiff has obtained the agreement dated 11.2.1999 by misrepresentation of facts, insanity, illiteracy, poverty and backwardness of defendant No. 1, as alleged, if so, its effect? ...OPD.

(8). Whether the suit is bad for want of notice, as alleged? ...OPD.

(9). Whether the plaintiff is estopped from filing the present suit on account of his act, conduct and deed? ...OPD.

(10). Relief."

6. The plaintiff, in turn has himself stepped into the witness-box as PW-2 and in support of his case that on the day of execution of the agreement Ext. PW-6/A, the possession of the suit land was delivered to him by defendant No. 1, he has examined PW-3 Vijay Nand, PW-4 Padam Dass, PW-5 Prem Singh, PW-7 Bahadur Singh and PW-8 Kushal Singh. PW-1 Dinesh Kumar, Clerk in the office of Tehsildar, Chirgaon was examined to prove the affidavit Ext. PW-1/A, allegedly executed by Puran Chand defendant No. 1, whereas scribe of the agreement Ext. PW-6/A is PW-6 Jita Singh.

7. Defendant No. 2 Negi Ram has stepped into the witness box as DW-1 whereas defendant No. 1 Puran Chand as DW-3. In support of their case that the suit land was sold to defendant No. 2 and the said defendant was put in possession thereof, they have examined DW-2 Pyare Lal and DW-4 Darshan Dass.

8. Learned trial Judge, on appreciation of the evidence available on record has decreed the suit for the relief of specific performance of contract in favour of the plaintiff and against defendant No. 1. The sale deed Ext. PW-2/B executed by defendant No. 1 Puran Chand in favour of defendant No. 2 was also declared illegal, null and void. By way of prohibitory injunction, the contesting defendants No. 1 to 6 were restrained from interfering in the peaceful possession of the plaintiff over the suit land.

9. As noticed supra, learned lower appellate Court, though has decreed the suit, however, only for the recovery of Rs. 13,000/- against the defendant while holding that agreement Ext. PW-6/A was executed by Puran Chand defendant No. 1 and thereby agreed to sell the suit land to the plaintiff. However, the plaintiff was not found to have discharged his obligation under the agreement and as such, decree for specific performance was declined. The sale deed Ext. PW-2/B executed by defendant No. 1 in favour of defendant No. 2 Negi Ram was held legal and valid. The appeal was accordingly disposed of.

10. Aggrieved by the impugned judgment and decree, the plaintiff has assailed the legality and validity thereof on the grounds *inter-alia* that cross-objections preferred by him against that part of the judgment and decree whereby learned trial Court has directed defendant Puran Chand to execute the sale deed were erroneously dismissed in complete departure to the evidence suggesting that in a family partition, the entire suit land fell in the share of defendant Puran Chand and he agreed to sell entire suit land vide agreement Ext. PW-6/A. Even, the grounds taken by the plaintiff in the cross-objections have also not been considered nor discussed. The findings that towards part performance of contract, payment of Rs. 30,000/- is not proved are also stated to be contrary to the evidence available on record. In this regard, the reference was made to the affidavit Ext. PW-1/A executed by defendant No. 1 in which he had

deposed qua receipt of Rs. 30,000/- towards part payment of the total consideration Rs. 35,000/- . The receipt qua payment Ext. PX of further sum of Rs. 3200/- to defendant No. 1 Puran Chand by the brother of the plaintiff has also not been taken into consideration. Therefore, the findings that the plaintiff was not ready and willing to perform his part of the contract are stated to be beyond the pleadings and evidence available on record. When defendant Puran Chand has himself admitted his signatures over agreement to sell Ext. PW-6/A and the affidavit Ext. PW-1/A and as no evidence was produced to show that he was under the attack of insanity or his signatures thereon were obtained by way of misrepresentation of facts by taking advantage of his illiteracy, poverty and backwardness, learned lower appellate Court should have not suspected the credibility of the evidence produced by the plaintiff that too when the agreement to sell Ext. PW-6/A was held to be a legal and valid document executed by the defendant in favour of plaintiff qua sale of the suit land. The denial of defendant Puran Chand in his cross-examination qua receipt of Rs. 33,200/- from the plaintiff should have not been given any weightage. It has further been canvassed that defendant No. 2 Negi Ram is not a bonafide purchaser as he was aware of the suit land sold by defendant No.1 to the plaintiff by way of agreement Ext. PW-6/A. It is pointed out that in the joint written statement filed by defendants No. 1 & 2, their stand was that at the time of execution of the agreement Ext. PW-6/A and the affidavit Ext. PW-1/A, defendant no. 1 was under the severe attack of insanity as no evidence to show that the said defendant was suffering from any mental ailment or he signed these documents under misrepresentation of facts has come on record. Both the documents make it crystal clear that the possession of the suit land was handed over by defendant No. 1 to the plaintiff. When these documents have been held to be legal and valid by learned lower appellate Court, no findings that the plaintiff is not in possession of the suit land could have been recorded. The defendants rather were well aware of the fact that it is the plaintiff who was in possession of the suit land. Therefore, sale thereof to defendant No. 2 vide sale-deed Ext. PW-2/B was illegal. The version of defendant no. 1 while in the witness-box as DW-2 and that of defendant No. 2 as DW-1 that the land was sold to defendant No. 2 for a sum of Rs. 69,000/-, however, in the sale deed the sale consideration finds mention as Rs. 18,000/- the defendants seem to have played fraud with a view to evade payment of stamp duty to the government. This aspect of the matter has also not been taken into consideration.

11. The substantial question of law arising in this appeal have to be adjudicated in view of the arguments addressed on both sides and also the evidence available on record. However, before that the controversy as to whether the entire suit land bearing Kh. No. 362 has been agreed to be sold to the plaintiff by defendant No. 1 or it is only to the extent of his share has to be determined. Though, this part of the plaintiff's case does not pertain to either of the substantial questions of law arises for consideration in this appeal. The adjudication of substantial questions of law, however, need determination of the controversy as to whether the entire suit land bearing Kh. No. 362 was intended to be sold by defendant No. 1 to the plaintiff or not also.

12. Learned trial Judge, while answering issues No. 1,4, 6, 7 & 8 all together has noticed in para 12 of the judgment that though defendant No. 1 was in possession of the entire suit land bearing Kh. No. 362 new (old Kh. No. 156), however, not exclusively as owner thereof and rather in the capacity of a co-sharer with Vikramjit, Sansar Devi and Surgoni. The reference in this regard can be made to the entries in the jamabandi Ext. PW-2/A for the year 1996-97.

13. As a matter of fact, S/Sh. Vikramjit (son), Km. Sansar Dei (daughter) and Smt. Surgoni (widow) of Arki Lal are owners of the suit land to the extent of ½ share whereas defendant No. 2 to the extent of remaining ½ share. Though, he was in possession of the entire land bearing Kh. No. 362, however, not in exclusion to other co-sharers and rather on their behalf also. Therefore, he could have not agreed to sell the entire land bearing Kh. No. 362, being not competent to do so. The agreement to sell Ext. PW-6/A, if proved on record, has to be treated qua sale of the land bearing Kh. No. 362 to the extent of the share of defendant No. 1 i.e. ½ share. Learned trial Judge has appreciated the evidence available on record in its right

perspective while deciding this part of the controversy. The plaintiff, as such, is not justified to claim that by virtue of some family settlement, defendant No. 1 had become owner of the entire suit land particularly when no evidence qua partition thereof has been produced in evidence. There is also no evidence to show that on the day of execution of agreement to sell Ext. PW-6/A i.e. 11.2.1999, partition had already taken place. The entries in the jamabandi, Ext. PW-2/A prevalent at the time of execution of the agreement rather reveals that the plaintiff was only a co-sharer to the extent of ½ share in the suit land. This document has been issued on 30.11.1999 i.e. much after the execution of agreement to sell Ext. PW-6/A.

14. Now, if coming to substantial question of law numbered as (b) supra, it is the specific case of the plaintiff that on the day of execution of agreement to sell Ext. PW-6/A, he was put in possession of the suit land. The execution of the agreement stands proved on record and even both the Courts below have concluded that this document has been executed by defendant No. 2 in favour of the plaintiff. While, learned trial Court has decreed the suit for specific performance of the agreement i.e. Ext. PW-6/A, against the defendant and directed him to execute the sale deed of his ½ share in the land bearing Kh. No. 362, learned lower appellate Court has reversed such findings and formed an opinion that the plaintiff was not ready and willing to perform his part of the contract. The findings so recorded by learned appellate Court are farfetched and contrary to the evidence available on record. The plaintiff and the witnesses he examined have stated in one voice that the possession of the suit land was delivered to the plaintiff by defendant No. 1 at the time of execution of the agreement to sell Ext. PW-6/A. Reference to this effect can be made to the evidence as has come on record by way of the testimony of PW-3 Vijay Nand, PW-4 Padam Dass, PW-5 Prem Singh, PW-7 Bahadur Singh and PW-8 Kushal Singh. All have stated in one voice that it is the plaintiff who was in possession of the suit land. PW-6 Jita Singh is the scribe of Ext. PW-6/A and as per his version also, defendant No. 1 at the time of execution of the agreement had admitted the possession of the suit land having been delivered to the plaintiff. True it is that defendant No. 1 while in the witness-box as DW-3 has come forward with the version that prior to the sale of the suit land to defendant No. 2 Negi Ram, it is he who was in possession of the suit land. The possibility of he having deposed falsely to harass the plaintiff cannot be ruled out because when the agreement to sell Ext. PW-6/A stands proved on record and the factum of delivery of possession of the suit land finds recorded therein, it is not understandable as to how such recitals in this document could have been ignored by learned lower appellate Court. It is well settled that a person may depose falsely but not the document.

15. Now, if coming to the version of DW-2 Pyare Lal, the possession of the suit land was given to defendant No. 2 Negi Ram in his presence by way of digging the same with a shawal (machine). When cross-examined, he has disclosed Kh. No. of the suit land as 156 (old), however, when further cross-examined, as to what is the Kh. No. of his own land, he failed to answer the same, meaning thereby that he was a tutored witness as it is difficult to believe that a person remembers the khasra numbers of the land of others but not that of his own land. PW-4 Darshan Dass also seems to be a liar because as per his own testimony in cross-examination, he visited the suit land 4-5 years ago. How he could have said about delivery of the possession thereof by defendant No. 1 to defendant No. 2 ? Learned trial Court has appropriately taken note of the facts such as his statement was recorded on 2.6.2001 and as such he should have visited the suit land somewhere in the year 1996-97. Therefore, he had no occasion to witness the delivery of possession thereof on 18.11.1999 when the sale deed Ext. PW-2/B was executed.

16. Interestingly enough, as per the version of defendant No. 2 Negi Ram, the possession was delivered to him on 17.11.1999. When the sale deed Ext. PW-2/B was executed on 18.11.1999, there was no occasion to defendant No. 1 Puran Chand to have delivered the possession thereof to defendant No. 2 Negi Ram well before the execution of the sale deed. This Court, therefore, is satisfied that the delivery of possession of the suit land to the plaintiff by defendant No. 1 is duly proved, hence the findings so recorded cannot be said to be against the record and dehors the evidence at all.

17. Now if coming to the substantial question of law numbered as (1) hereinabove in this judgment, defendant No. 1 cannot also be said to be a bonafide purchaser for the reason that in the joint statement he filed to the averments in the plaint, the agreement to sell Ext. PW-6/A allegedly was got executed by the plaintiff on misrepresentation of facts and taking undue advantage of mental state of defendant No. 2. Therefore, it would not be improper to conclude that defendant No. 2 Negi Ram had knowledge of the sale of the suit land by defendant No. 1 to the plaintiff by way of agreement to sell Ext. PW-6/A. He, as such, cannot be said to be a bonafide purchaser.

18. Though the part performance of the contract by the plaintiff is again not covered under any of the substantial question of law, however, to adjudicate substantial questions of law under consideration, it is desirable to take note of the evidence available on record qua this aspect of the matter. Admittedly, a sum of Rs. 13,000/- towards sale consideration i.e. Rs. 35,000/- was received by defendant No. 1 on the date of execution of the agreement to sell Ext. PW-6/A. The execution of the affidavit Ext. PW-1/A also stands satisfactorily proved because defendant No. 1 has himself admitted his signatures thereon while in the witness-box. Otherwise also, PW-1, an official from the Office of Tehsildar Chirgaon, has produced record to substantiate this document. Since this record has been maintained by a public servant in the discharge of his official duties and produced in the Court by such official, therefore, its execution by defendant No. 1 cannot be at all suspected. This document lead to the only conclusion that the date i.e. 6.4.1999 when the same was executed, a sum of Rs. 30,000/- was received by defendant No. 1 from the plaintiff towards part payment of the sale consideration amounting to Rs. 35,000/-. The receipt Ext. PX (Mark 'Y'), over which also the defendant No. 1 has admitted his signatures reveals that a further sum of Rs. 3200/- was received by the said defendant towards remaining sale consideration which was Rs. 5,000/- from the brother of the plaintiff. In this way, against sale consideration i.e. Rs. 35,000/- the plaintiff has paid Rs. 32,200/- to defendant No. 1 Puran Chand leaving thereby the balance i.e. Rs. 1800/-. The plaintiff has successfully pleaded and proved that he was always ready and willing to perform his part of the contract on payment of the balance sale consideration i.e. Rs. 1800/-. The findings to the contrary recorded by learned lower appellate Court are as such farfetched and contrary to the evidence available on record.

19. Interestingly enough, as per the case of the defendants, the suit land was agreed to be sold by defendant No. 1 to defendant No. 2 for a sum of Rs. 69,000/-. The sale deed Ext. PW-2/B, however, reveals that the same was sold for a sum of Rs. 18,000/-. On this score also, the transaction of sale vide Ext. PW-2/B seems to be not genuine and rather to defeat the right of the plaintiff to get the sale deed executed in his favour. Defendant No. 2, therefore, cannot be said to be a bonafide purchaser by any stretch of imagination.

20. In view of the above, on account of mis-appreciation and misrepresentation of the evidence qua delivery of possession of the suit land by defendant No. 2 to the plaintiff by learned lower appellate Court, the findings recorded are certainly vitiated. Learned lower appellate Court has absolutely erred legally and factually while holding that defendant No. 2 was a bonafide purchaser, therefore, on this score also, the findings as recorded being vitiated are not legally sustainable. The impugned judgment and decree as such, is not legally and factually sustainable, hence deserves to be quashed and set aside whereas judgment and decree dated 30.11.2002 passed by learned Sub Judge Ist Class, Rohru (Court No. II), in Civil Suit No. 91-1 of 1999 are affirmed.

21. In view of what has been said hereinabove, this appeal succeeds and the same is accordingly allowed. Consequently, the impugned judgment and decree passed by learned lower appellate Court is quashed and set aside and that in Civil Suit No. 91-1 of 1999 by learned trial Court is affirmed. No orders as to costs.

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

State of H.P. .....Appellant
Versus
Ajay Kumar and Anr. .....Accused/Respondents.

Cr. Appeal No. 620 of 2008
Date of Decision: 29.05.2017

Punjab Excise Act, 1914- Section 61(1)(a)- Accused was found in possession of 8 boxes of country liquor Patiala and 7 boxes of country liquor Una No.1 each containing 12 bottles of country liquor in it- the accused was tried and acquitted by the Trial Court- held in appeal that one independent witness had not supported the prosecution version and other was not examined- two bottles were sent for analysis and it was proved that accused was in possession of two bottles, which is not an offence- the accused was rightly acquitted by the Trial Court- appeal dismissed.(Para-7 to 13)

Cases referred:
Surender Singh. V. State of H.P., Latest HLJ 2013 (2) 865
State of HP v. Jagjit Singh, Latest HLJ 2008 (HP) 919

For the appellants: Mr. M.L. Chauhan, Additional Advocate General with Mr. Ramesh Thakur, Deputy Advocate General.
For the respondent: Mr. Sandeep Chauhan, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Instant criminal appeal filed under Section 378 of the Cr.PC, is directed against the judgment of acquittal dated 10.7.2008, passed by the learned Additional Chief Judicial Magistrate, Sarkaghat, District Mandi, H.P., in case No. 6/III/2005, whereby the respondent-accused has been acquitted of the charge framed against him under Section 61(1) (a) of the Punjab Excise Act, as applicable to the State of Himachal Pradesh (in short "the Act").

2. Briefly stated facts as emerge from the record are that on 3.8.2004, at around 10:00 pm, ASI Manohar Lal along with HC Kashmir Singh, C. Vinod Kumar and C. Hoshiyar Singh intercepted Mahindra Jeep bearing No. PB-08-AD-9983 at a place called Brarta. The aforesaid Jeep was searched by the police and eight boxes of country liquor Patiala and seven boxes of country liquor Una No.1, were taken into possession. As per the story of prosecution, each box was containing twelve bottles of liquor and in total 180 bottles were recovered from the jeep. After effecting aforesaid recovery, one bottle out of eight boxes of country liquor Patiala and one bottle out of seven boxes of country liquor Una No.1 were taken as sample for chemical analysis and thereafter property was sealed at the spot. Subsequent to aforesaid recovery, rukka Ext.PW4/C was sent to the Police Station, on the basis of which, FIR Ext.PW3/A came to be registered. Police after investigation of case, presented challan in the competent court of law.

3. Learned Additional Chief Judicial Magistrate, Sarkaghat, District Mandi, H.P., on being satisfied that prima-facie case exists against the accused, charged them under Section 61(1) (a) of the Act, to which they pleaded not guilty and claimed trial. Subsequently, the learned trial Court on the basis of material adduced on record acquitted the accused-respondents of the offence supra. In the aforesaid background, present criminal appeal has been filed by the State against the acquittal of the respondents-accused before this Court.

4. Mr. M.L. Chauhan, learned Additional Advocate General duly assisted by Mr. Ramesh Thakur, learned Deputy Advocate General, vehemently argued that the impugned judgment of acquittal having been passed by the learned court below is not sustainable in the eye of law as the same is not based upon the correct appreciation of the evidence adduced on record by the prosecution and as such, same deserves to be quashed and set-aside. While referring to the impugned judgment passed by the court below, Mr. Chauhan, contended that bare perusal of the impugned judgment suggests that the learned court below has not appreciated the evidence in its right perspective as a result of which, erroneous findings have come on record. Mr. Chauhan, while inviting attention of this Court to the evidence led on record by the prosecution stated that prosecution proved its case beyond reasonable doubt that 180 bottles of country liquor were recovered from the conscious possession of the accused, who were admittedly sitting in the jeep at the time of the recovery. With the aforesaid submissions, Mr. Chauhan, contended that the respondents-accused deserve to be convicted after setting aside the judgment of acquittal recorded by the court below.

5. Mr. Sandeep Chauhan, learned counsel representing the respondents–accused supported the impugned judgment of acquittal. He while inviting attention of this Court to the impugned judgment of acquittal passed by the learned trial Court below strenuously argued that there is no illegality and infirmity in the same and the same is based upon the correct appreciation of the evidence available on record. With a view to refute the aforesaid contentions having been made by the learned Additional Advocate General, Mr. Sandeep, learned counsel, argued that none of the prosecution witness supported the case of the prosecution, rather all the so called eye witnesses stated nothing with regard to the alleged recovery effected from the conscious possession of the respondent–accused. Mr. Sandeep, Advocate, invited attention for this Court to the statement of PW2 Nitesh Kumar, in whose presence, liquor was allegedly recovered from the accused, to demonstrate that prosecution miserably failed to prove the recovery of the liquor from the spot. Learned counsel for the accused further contended that another eye witness Rakesh Kumar was not examined. Lastly, Mr. Sandeep Chauhan, contended that if the story put forth by the prosecution is believed that 180 bottles were recovered, no conviction, if any, could be recorded against the petitioner accused, solely for the reason that only two bottles each out of eight boxes of country liquor Patiala and seven boxes of country liquor Una No.1 were sent for the chemical examination. While placing reliance upon the judgment passed by this Court learned counsel stated that since two bottles were sent for chemical analysis, only two bottles are proved to be recovered from the possession of the accused. In the aforesaid background, Mr. Sandeep prayed for dismissal of the instant appeal being devoid of any merit.

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

7. While hearing the arguments having been made by the learned counsel for the parties, this Court had an occasion to peruse the impugned judgment as well as evidence led on record by the prosecution, perusal whereof certainly not suggests that prosecution was able to prove its case beyond reasonable doubt, rather, this Court after having gone through the statements having been made by the prosecution witnesses has no hesitation to conclude that recovery of liquor from the accused was not proved and as such, there is no illegality and infirmity in the judgment passed by the learned trial Court below.

8. In the instant case, prosecution with a view to prove its case examined as many as five witnesses. PW1 Constable Vinod Kumar stated that he had taken samples to CTL Kandhaghat, which were handed over to him by MHC, Rameshwar Das. Aforesaid factum with regard to sending samples to the CTL has been duly corroborated by MHC Rameshwar Dass PW3 but in his cross examination, PW3 categorically stated that no seal impression was found on the case property, whereas in rukka Ext.PW4/C, it has been specifically mentioned that the case

property was sealed at the spot with seal impression "H". Hence, it creates doubt with regard to the recovery and thereafter sealing of property.

9. PW2 Nitesh Kumar is an independent witness, who was associated as witness when he was coming on a scooter. But perusal of his statement nowhere supports the version put forth by the prosecution. He stated nothing with regard to the recovery, if any, of the liquor from the accused in his presence, rather in his cross examination, PW2 admitted that he saw accused for the first time in the Court. Interestingly, another witness of spot Rakesh Kumar has not been examined and as such, prosecution was not able to prove recovery from the accused. PW2 in his cross-examination also stated that liquor was that of liquor vendors

10. PW5 Inspector Hari Ram is formal witness and as such, his statement may not be relevant as far as adjudication of the present case is concerned.

11. ASI PW4 Manohar Lal (I.O.) though in his statement stated that vehicle of the accused was searched in front of independent witnesses but since PW2 Nitesh Kumar has not corroborated this fact, no reliance if any, could be placed on the statement of PW4.

12. Though , this Court after having carefully perused the evidence led on record by the prosecution sees no reason to differ with the finding recorded by the trial Court that prosecution failed to prove its case beyond reasonable doubt but even otherwise also, entire recovery as allegedly effected by the police stands vitiated on account of the fact that only two bottles out of the total alleged recovery from the accused were sent for chemical analysis and as such, there is recovery of only two bottles, which is admittedly within the permissible limits. At this stage, it would be profitable to refer to the judgment passed by this Court in case titled "***Surender Singh. V. State of H.P***.", Latest HLJ 2013 (2) 865, which reads as under:-

> "26. In the instant case, it be also noticed that there is yet another major flaw in the investigation by the police. Assuming that the contraband was actually recovered by the police party, police did not take samples from all the boxes. Samples only from few bottles out of some of the boxes, which they had opened, were taken. None of these witnesses have deposed that the remaining boxes were sealed; from outside appeared to be of the same make or brand; bearing serial numbers; the date of manufacture; or the place and the name of the manufacturer. All that these witnesses have deposed is that boxes of alcohol, as described above, were found in the vehicle. Inside the boxes could be anything. Police could not prove that the remaining boxes actually contained liquor. The samples cannot be said to be representative in character.
>
> 27. In similar circumstances, this Court in Mahajan versus State of Himachal Pradesh, 2003 Cr.L.J. 1346; State of H.P. versus Ramesh Chand, Latest HLJ 2007 (2) 1017; Dharam Pal and another versus State of Himachal Pradesh, 2009 (2) Shim. LC 208; and State of Himachal Pradesh versus Kuldeep Singh & others, 2010(2) Him.L.R. 825, acquitted the accused, as prosecution could not prove, beyond reasonable doubt, as to what was actually there in the remaining boxes.
>
> 28. As per version of PW-1, outside the boxes 'Sirmour No.1' was printed which version stands denied by PW-7. In the instant case, there is nothing on record to show that the remaining boxes were in fact containing liquor. Quantity of the remaining bottles of the boxes from which samples were drawn has also not been proved to be liquor. These aspects have not been considered by the Courts below. The cumulative effect is that the prosecution has failed to prove the charge against the accused, beyond reasonable doubt and as such judgments of the Courts below are not sustainable in law.

13. Reliance is also placed on the judgment passed by this Court ***State of HP v. Jagjit Singh, Latest HLJ 2008 (HP) 919,*** wherein this Court has observed in paras 6 and 7 as under:-

"6.At the very outset, I would like to say that neither the non-compliance of sub-section (6) of Section 100 of the Code of Criminal Procedure will render the search illegally nor the respondent can be acquitted on this sole ground. However, in the instant case the regrettable feature is that as per the case of the prosecution 72 pouches of country liquor of "Gulab" brand country liquor containing 180 ml. each were recovered from the possession of the respondent. Admittedly, one pouch of 180 ml. out of the recovered quantity was retained as a sample, which was of licit origin as opined by the Chemical Analyst.

7. There is nothing on record to show that the remaining 71 pouches alleged to have been recovered from the respondent also contain the country liquor more than the permissible quantity without the permit or licence. Before the respondent could be convicted for the offence charged, it was incumbent upon the prosecution to prove that the respondent was in actual and conscious possession of the licit liquor in excess of the prescribed limit."

14. Consequently, in view of the detailed discussion made herein above as well as law referred herein above, this court sees no illegality and infirmity in the judgment passed by the learned court below, which appears to be based upon the proper appreciation of evidence adduced on record and as such, same is upheld. Accordingly, the present appeal is dismissed.

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

Manoj Kumar ....Petitioner

Versus

State of Himachal Pradesh and others ....Respondents

CWP No. 3863 of 2015.
Date of decision: 29.5.2017

H.P. Public Premises and Land (Eviction and Rent Recovery) Act, 1971- Section 4- The predecessor-in-interest of the petitioner was found to be an encroacher over the government land – an order of eviction was passed- an appeal was filed, which was dismissed –High Court had passed an order in CWP No.7879 of 2014 titled Mehar Singh Versus State of H.P. and others directing the competent authority to pass orders in 192 cases of encroachment within four weeks after getting demarcation– the petitioner had not removed the encroachment and he was served with a notice of eviction – the petitioner filed the present writ petition pleading that he cannot be evicted without demarcation – the respondents pleaded that Tehsildar, Karsog was directed to demarcate the land and to submit his report regarding unauthorized construction/encroachment – the Field Kanungo reported to the Tehsildar five cases of encroachment including the one relating to the father of the petitioner- the petitioner had not demolished the verandah of first and second floors of his residential house – held that demarcation has been conducted and the encroached portion has been shown with red colour on the spot – the encroachment of the ground floor was removed but that of the first and second floors still remains – the encroachment is liable to be removed in accordance with Mehar Singh's case – petition dismissed.(Para-7 and 8)

For the Petitioner Mr. Rajiv Jiwan, Advocate.

For the Respondents Mr. Anup Rattan, Additional Advocate General with Mr. Kush Sharma, Deputy Advocate General, for respondent s No. 1 to 4 and 6.

Mr. Vivek Sharma Advocate, for respondent No.5.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge *(Oral)*

The predecessor-in-interest of the petitioner Jayanti Dass was found to be encroacher over the Government land comprised in Khasra No. 739/1 and 742/1, measuring 0-0-12 and 0-0-11 bighas situated in Muhal Karsog/416, in proceedings initiated against him under the H.P. Public Premises and Land (Eviction and Rent Recovery) Act, 1971 (for short 'Act'). The original order of eviction was passed by Sub Divisional Officer (Civil), Kasrog on 20.12.2001 and the appeal preferred against the said decision was also dismissed by the learned Divisional Commissioner, Mandi vide order dated 2.6.2004.

2. On 1.7.2015 this Court in CWP No. 7879 of 2014 titled as Mehar Singh vs. State of Himachal Pradesh and others directed the authorities to pass orders within four weeks in 192 cases of encroachments that had been detected by PWD authorities at Karsog after getting demarcation to this effect from the Tehsildar, Karsog.

3. Since the petitioner had not removed the encroachment, he too, was served with a notice of eviction and therefore apprehending his eviction, has filed the instant petition for the grant of following reliefs:

> *(a) That respondent No.3 be directed to not to proceed in pursuance to the order dated 20.12.2001(Annexure P-30) passed by Ld. Sub Divisional Collector under the H.P. Public Premises and Land (Eviction and Rent Recovery) Act 1971, till the final order is passed in the proposed CMPMO.*
>
> *b) In the alternative respondent No.3 be restrained from proceeding against the petitioner till demarcation is carried out by the Competent Authority as provided under Section 107 of the H.P. Land Revenue Act vis-à-vis the instructions contained under Clause 10.10 Chapter 10 on demarcation of the H.P. Land Record Manual by the competent authority in accordance with the procedure contained therein."*

4. It is averred that the petitioner cannot be evicted as no demarcation had been carried out to find out the exact extent of the land so encroached by him and moreover, the petitioner has already demolished the structure over the encroached land and thus nothing remains to be executed.

5. The respondents have contested the petition by filing reply wherein it is averred that in pursuance to the directions passed by this Court in ***Mehar Singh's*** case (supra), the Tehsildar Karsog was directed to demarcate the land and submit his report regarding unauthorized construction/ encroachment on Shimla Mandi Road via Tattapani (Karsog line) in Muhal Sanarli to Karsog Bazar including hospital road. The Field Kanungo reported to the Tehsildar Karsog 5 number of encroachment cases including the one relating to the father of the petitioner.

6. As regards the allegation of the petitioner that he had already removed the encroachment, it has been specifically stated that the Field Revenue Agency in order to ascertain the encroachment had marked the encroached land of the petitioner by red colour on the spot. The petitioner thereafter had himself in the presence of the revenue field staff demolished the wall and verandah of his shop on the ground floor but had not demolished the verandah of first and second floor of his residential house.

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

7. At the out-set, it may be observed that the parties are ad idem that as regards the encroachment on the ground floor the petitioner has removed the same. However, he has not demolished the verandah of the first floor and second floor of his residential house, which are

over-handing the encroached land. Confronted with this, learned counsel for the petitioner would argue that in absence of demarcation, the respondents cannot ask for the demolition.

8. We are afraid that such submission has been raised only to be rejected for the simple reason that the demarcation had already been carried out and the encroached portion of land was marked with red colour on the spot. It was thereafter that the petitioner of his own volition removed the encroachment, but that was only with respect to the ground floor. As regards the verandah of the first and second floor of his residential house, these still exist on the spot as is evident from the photographs annexed by the petitioner himself with the petition as Annexure P-4 and are thus liable to be demolished in terms of the judgment already rendered by this Court in ***Mehar Singh's*** case (supra)

9. In view of the above discussion, we find no merit in this petition and the same 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 SANDEEP SHARMA, J.

State of H.P. .....Appellant
Versus
Ram Lal .....Accused/Respondent.

Cr. Appeal No. 777 of 2008
Date of Decision: 29.05.2017

Punjab Excise Act, 1914- Section 61(1)(a)- Accused was found in possession of 9 pouches of country liquor bearing mark 'Hero No.1' each containing 750 ml. without having any valid permit – the accused was tried and acquitted by the Trial Court- held in appeal that independent witnesses were declared hostile- there are material contradictions in the statements of the official witnesses - three pouches were sent for analysis and it was only proved but accused was found in possession of three pouches which is not an offence- the Trial Court had rightly acquitted the accused- appeal dismissed.(Para-7 to 16)

Cases referred:
Surender Singh. V. State of H.P., Latest HLJ 2013 (2) 865
State of HP v. Jagjit Singh, Latest HLJ 2008 (HP) 919

For the apellant: Mr. M.L. Chauhan, Additional Advocate General with Mr. Ramesh Thakur, Deputy Advocate General.
For the respondent: Mr. J.S. Bagga, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Instant criminal appeal filed under Section 378 (3) of the Cr.PC, is directed against the judgment of acquittal dated 30.7.2008, passed by the learned Chief Judicial Magistrate, Solan, District Solan, H.P., in criminal case No. 206/3 of 2004, whereby the respondent-accused has been acquitted of the charge framed against him under Section 61(1) (a) of the Punjab Excise Act (in short "the Act")(as applicable to the State of Himachal Pradesh).

2. Briefly stated facts as emerge from the record are that on 31.3.2004, at around 10:45 p.m., ASI Rattan Chand along with Constable Jaswant Singh (PW4), received secrete

information that some person was coming from Deonghat carrying box. Accordingly, PW3 Het Ram and PW5 Puran Singh, went towards the Deonghat on patrolling. After seeing the police party, accused became nervous and tried to run away but was apprehended. As per prosecution, one box was found from the possession of the accused, wherein nine pouches of country liquor mark "Hero No.1" each containing 750 ml each were found without having any permit. As per own case of the prosecution, I.O. after the alleged recovery, took three pouches for sample and sealed the case property with seal impression 'A' and the seal was handed over to witness Puran Singh vide memo Ext.PW3/A. I.O. prepared rukka Ext.PW8/A and sent the same to the Police Station, on the basis of which, FIR Ext.PW7/A came to be registered. Police after investigation of case, presented challan in the competent court of law.

3. Learned Chief Judicial Magistrate, Solan, District Solan, H.P., on being satisfied that prima-facie case exists against the accused charged him under Section 61(1) (a) of the Act (as applied to the State), to which he pleaded not guilty and claimed trial. Subsequently, the learned trial Court on the basis of material adduced on record acquitted the accused-respondent of the offence supra. In the aforesaid background, present criminal appeal has been filed by the State against the acquittal of the respondent-accused before this Court.

4. Mr. M.L. Chauhan, learned Additional Advocate General duly assisted by Mr. Ramesh Thakur, learned Deputy Advocate General, vehemently argued that the impugned judgment of acquittal having been passed by the learned court below is not sustainable in the eye of law as the same is not based upon the correct appreciation of the evidence adduced on record by the prosecution and as such, same deserves to be quashed and set-aside. While referring to the impugned judgment passed by the court below, Mr. Chauhan, contended that bare perusal of the same suggests that learned court below has not appreciated the evidence in its right perspective as a result of which, erroneous findings have come on record. Mr. Chauhan, while inviting attention of this Court to the evidence led on record by the prosecution stated that prosecution proved its case beyond reasonable doubt that respondent-accused was apprehended carrying nine pouches of country liquor (Hero No.1) without any permit and as such, accused was liable to be punished by the learned trial Court. Mr. Chauhan, further contended that both the independent witnesses, who were allegedly associated at the time of alleged recovery, supported the case of the prosecution and as such, there was no occasion whatsoever, for the learned trial Court below to acquit the accused under Section 61 (1) (a) of the Punjab Excise Act. In the aforesaid background, Mr. Chauhan, contended that the respondent accused deserves to be convicted after setting aside the judgment of acquittal recorded by the court below.

5. Mr. J.S. Bagga, learned counsel representing the respondent –accused supported the impugned judgment of acquittal. He while inviting attention of this Court to the impugned judgment of acquittal passed by the learned trial Court below strenuously argued that there is no illegality and infirmity in the same as the same is based upon the correct appreciation of the evidence available on record. With a view to refute the aforesaid contentions having been made by the learned Additional Advocate General, Mr. Bagga, made this Court to travel through the statements of PWs 4 and 5 i.e. so called independent witnesses, to demonstrate that none of the witnesses were able to identify the accused in the Court, rather version having been put forth by them clearly belies the story of the prosecution and as such, there is no illegality and infirmity in the judgment passed by the court below and same deserves to be upheld.

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

7. This Court after having carefully perused the impugned judgment of acquittal passed by the learned trial Court sees no force much less substantial in the arguments of learned Additional Advocate General that there is complete misreading, mis-appreciation and mis-construction of evidence rather, this Court after having gone through the evidence led on record by the proseuciton, has no hesitation to conclude that court below has dealt with each and every

aspect of the matter very meticulously and there is no illegality and infirmity in the impugned judgment of acquittal and as such, same deserves to be upheld.

8. In the instant case, prosecution with a view to prove its case, examined as many as eight witnesses, whereas respondent-accused in his statement recorded under Section 313 Cr.PC denied the case of the prosecution in toto and specifically stated that all eye witnesses associated at the time of alleged recovery are interested witnesses and as such, version put forth by them could not be believed. However fact remains that he did not lead any evidence in support of his claim.

9. PW3 Het Ram i.e. alleged spot witnesses, stated that when he reached near Congress Bhawan, he met police and at that time, one person carrying white gunny bag was apprehended by the police and he was found carrying nine pouches of Hero No.1. He further stated that after alleged recovery of liquor, police took three pouches as sample and sealed remaining case property vide seizure memo Ext.PW3/A. But fact remains that aforesaid witnesses failed to identify the accused in the Court and also stated that bag is Ext.P1 and pouches are Ext.P2 to Ext.P7 and as such, he was declared hostile. However in his cross examination, he admitted that person apprehended by the police was named as Ram Lal, but he specifically denied that accused was the same Ram Lal. Similarly in his cross –examination, he failed to tell whether it was day time or night, rather, it has come in his statement that at that relevant time, 3-4 persons were available at the spot. He further stated that police told the name of the person as Ram Lal but he was unable to tell from whom, the liquor was allegedly recovered.

10. Another so called spot witness namely PW5 Puran Chand also not supported the case of the prosecution. PW5 though stated that at that relevant time, he was present near Congress Bhawan, where a person coming from Deonghat side was apprehended by the police but he also failed to state specifically that accused namely Ram Lal was apprehended. PW5 further stated that after seeing police, he became nervous and made an attempt to run away. He further stated that police seized nine pouches from the possession of person namely Ram Lal, out of which, three pouches were taken as sample as per seizure memo Ext.PW3/A. In his cross-examination, he stated that he was working in Pine Groove Hotel Parwanoo and he knew the accused as he was working in Wind More Hotel, Parwanoo. He like PW3 also stated that at that relevant time 2-3 other persons were present with the police at the spot. Most importantly, it has come in his statement that he was called on the spot by Constable Jaswant. PW5 further stated that when he reached the spot ASI was holding a bag. This witness was unable to tell the name of person present on the spot with the police. Interestingly, PW5 in his statement stated that when he reached the spot, I.O. showed him three pouches and liquor was taken out form three pouches and sealed the same on the spot and he signed the seizure memo. He also stated that he sent the memo around 10:30-11:00 o'clock. Thereafter he went away with police with the case property to the police station, however, he denied that he was deposing falsely.

11. PW4 Constable Jaswant, who was member of the raiding party. also corroborated the version put forth by PW5. He stated that I.O. had received secrete information that the accused was coming from Deonghat carrying liquor and thereafter, the accused was apprehended. He also stated that he met Het Ram and Puran Singh (independent witness) at the spot. He also supported the version put forth by the prosecution that the accused was carrying nine pouches of country liquor mark "Hero No. 1", which was subsequently impounded by the I.O. In his cross examination, PW4 admitted that the accused was apprehended near Congress Bhawan. PW4 also stated that they met independent witnesses near Dohri Deewar and they remained at the spot from 10:45 to 11:30 pm and thereafter, he took the rukka to the Police Station and returned to the spot at around 12:00am with the independent witnesses.

12. Conjoint reading of aforesaid prosecution witnesses, who were the spot witnesses, nowhere proves the case of the prosecution, rather, from the statement having been made by these witnesses, if read juxtaposing each other, it can be safely inferred that there are

material contradictions with regard to the timing, spot as well as association of independent witnesses by the raiding team allegedly constituted by PW8 ASI Rattan Chand.

13. PW8 ASI Rattan Chand while making an attempt to prove the case of the prosecution stated that when he was on patrolling at Dohri Deewar on 31.3.2004, he received secrete information around 10:40 pm, that one person was carrying box of liquor. Subsequently, he went towards the Congress Bhawan along with members of raiding party including the alleged independent witnesses, but interestingly, both the independent witnesses (PW3 and 5) nowhere stated that they were associated by I.O, as members of raiding team after having received secrete information, rather both the prosecution witnesses stated that they met police officials near congress Bhawan. (PW3) Het Ram though supported the case of the prosecution that when they reached near Congress Bhawan, one person carrying white gunny bag was apprehended by the police and he was found carrying nine pouches of country made liquor mark Hero No. 1, but he failed to identify the accused. Rather in his cross exanimation, he admitted that person apprehended by the police was named as Ram Lal but accused was not the same Ram Lal, who was apprehended by the police at the time of alleged occurrence. PW3 further stated that at that relevant time, 3-4 persons were also present on the spot and police told the name of person as Ram Lal.

14. In nutshell case of the prosecution is that accused was apprehended in the presence of PW3 and PW5 i.e. so called independent witness but as has been discussed above, PW3 Het Ram has not supported the case of the prosecution and he was declared hostile as he failed to identify the accused. Though, PW5 Puran Chand in his statement supported the version of the prosecution that liquor was recovered but he also stated that 3-4 other persons were also standing at the spot at the time of alleged recovery, whereas PW8 Rattan Chand in his statement stated that there was no other person present on the spot and only independent witnesses were joined by them. Hence, there is a material contradiction with regard to the presence of so called witnesses i.e. PW3 and PW5 at the time of the alleged occurrence.

15. Similarly, there is no explanation, if any, on the part of I.O. as to why other 4-5 people, who were present on spot, were not associated at the time of alleged apprehension of the accused, which omission certainly creates doubt with regard to the genuineness and correctness of the story put forth by the prosecution. This court though after having carefully perused the statement of aforesaid material PWs sees no reason to differ with the finding returned by the learned trial Court that the prosecution was unable to prove its case beyond reasonable doubt but otherwise also, if for the sake of argument, it is presumed that the alleged liquor was recovered from the conscious possession of the respondent–accused, even then as per own case of the prosecution, only three pouches were sent for the chemical analysis, meaning thereby, recovery of only three pouches was effectively proved, which is definitely within the permissible limit and as such, no case is made out against the accused. At this stage, it would be profitable to refer to the judgment passed by this Court in case titled "***Surender Singh. V. State of H.P***.", Latest HLJ 865, which reads as under:-

> *"26. In the instant case, it be also noticed that there is yet another major flaw in the investigation by the police. Assuming that the contraband was actually recovered by the police party, police did not take samples from all the boxes. Samples only from few bottles out of some of the boxes, which they had opened, were taken. None of these witnesses have deposed that the remaining boxes were sealed; from outside appeared to be of the same make or brand; bearing serial numbers; the date of manufacture; or the place and the name of the manufacturer. All that these witnesses have deposed is that boxes of alcohol, as described above, were found in the vehicle. Inside the boxes could be anything. Police could not prove that the remaining boxes actually contained liquor. The samples cannot be said to be representative in character.*

27. In similar circumstances, this Court in Mahajan versus State of Himachal Pradesh, 2003 Cr.L.J. 1346; State of H.P. versus Ramesh Chand, Latest HLJ 2007 (2) 1017; Dharam Pal and another versus State of Himachal Pradesh, 2009 (2) Shim. LC 208; and State of Himachal Pradesh versus Kuldeep Singh & others, 2010(2) Him.L.R. 825, acquitted the accused, as prosecution could not prove, beyond reasonable doubt, as to what was actually there in the remaining boxes.

28. As per version of PW-1, outside the boxes 'Sirmour No.1' was printed which version stands denied by PW-7. In the instant case, there is nothing on record to show that the remaining boxes were in fact containing liquor. Quantity of the remaining bottles of the boxes from which samples were drawn has also not been proved to be liquor. These aspects have not been considered by the Courts below. The cumulative effect is that the prosecution has failed to prove the charge against the accused, beyond reasonable doubt and as such judgments of the Courts below are not sustainable in law."

16. Reliance is also placed on the judgment passed by this Court ***State of HP v. Jagjit Singh, Latest HLJ 2008 (HP) 919,*** wherein this Court has observed in paras 6 and 7 as under:-

"6.At the very outset, I would like to say that neither the non-compliance of sub-section (6) of Section 100 of the Code of Criminal Procedure will render the search illegally nor the respondent can be acquitted on this sole ground. However, in the instant case the regrettable feature is that as per the case of the prosecution 72 pouches of country liquor of "Gulab" brand country liquor containing 180 ml. each were recovered from the possession of the respondent. Admittedly, one pouch of 180 ml. out of the recovered quantity was retained as a sample, which was of licit origin as opined by the Chemical Analyst.

7. There is nothing on record to show that the remaining 71 pouches alleged to have been recovered from the respondent also contain the country liquor more than the permissible quantity without the permit or licence. Before the respondent could be convicted for the offence charged, it was incumbent upon the prosecution to prove that the respondent was in actual and conscious possession of the licit liquor in excess of the prescribed limit."

The aforesaid judgments clearly suggest that before convicting the accused for offence qua which, they were charged it was incumbent upon the prosecution to prove that they were in actual and conscious possession of the illicit liquor in excess of the prescribed limit. In the instant case, as emerged from the record that nine pouches were allegedly recovered from the conscious possession of the petitioner-accused but interestingly, only three pouches were retained as sample and sent for opinion of chemical analyst. Now, if action of police in sending only three pouches out of nine allegedly recovered pouches for chemical analysis/examination is tested in light of aforesaid judgments passed by the Co-ordinate Bench of this Court, it can be concluded that prosecution could only prove recovery of three pouches of country liquor from their possession, which is admittedly not an offence.

17. Consequently, in view of the detailed discussion made herein above as well as law referred herein above, this court sees no illegality and infirmity in the judgment passed by the learned court below, which appears to be based upon the proper appreciation of evidence adduced on record and as such, same is upheld. Accordingly, the present appeal is dismissed.

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

Neha Goel and others ...Petitioners

Versus

State of Himachal Pradesh ...Respondent

Cr.MMO No. 131 of 2017
Decided on: May 30, 2017

Code of Criminal Procedure, 1973- Section 482- An FIR was registered for the commission of offences punishable under Sections 498-A, 403, 406, 420 and 120-B of I.P.C- the challan was presented by the police- the matter was compromised between the parties and the complainant agreed to withdraw the complaint, the petition under Section 125 Cr.P.C., complaint under Section 12 of Protection of Women from Domestic Violence Act and the FIR – since, the offence punishable under Section 498-A of I.P.C is non-compoundable, therefore, the petition was filed for quashing the proceedings – held that compromise is genuine – hence, the petition is accepted and proceedings pending before the Court arising out of the FIR ordered to be quashed.

(Para-6 to 13)

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

J.Ramesh Kamath and others versus Mohana Kurup and others AIR 2016 SC 2452

For the Petitioners : Mr. Naveen K. Bhardwaj, Advocate.

For the Respondent : Mr. M.L. Chauhan, Additional Advocate General with Mr. Ramesh Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (Oral)

By way of instant petition under section 482 CrPC, prayer has been made on behalf of the petitioners for quashing of proceedings pending before the learned Additional Chief Judicial Magistrate, Kangra under Section 498-A, 403, 406, 420 and 120B IPC in Criminal Case No. 2-I/2017 titled as State versus Himanshu Goel arising out of FIR No. 26 of 2016 dated 19.2.2016 registered at Police Station, Kangra, District Kangra, Himachal Pradesh.

2. Averments contained in the petition suggest that aforesaid FIR No. 26 of 2016 dated 19.2.2016, was registered at the behest of petitioner No.1- Ms. Neha Goel, wife of petitioner No.2- Himanshu Goel, at Police Station, Kangra, District Kangra, Himachal Pradesh. It further emerges from the record that, on the basis of aforesaid FIR, police after completion of investigation, presented *Challan* in the Court of Additional Chief Judicial Magistrate, Kangra against the petitioners No.2 and 3 under aforesaid provisions. However, the fact remains that during the pendency of the proceedings before learned trial Court, matter was sent for mediation, wherein parties agreed to resolve the matter amicably and, accordingly, entered into a compromise on 26.2.2017 (Annexure P-2). Perusal of annexure P-2 and annexure P-3, clearly suggests that petitioner No.1 has settled all disputes with petitioners No.2 and 3, outside the Court and she does not want to pursue the complaint pending before the Court below. However, perusal of compromise deed suggests that complainant has undertaken to withdraw the complaint as well as other cases i.e. petition under Setion 125 CrPC pending before ACJM, Kangra and complaint under Section 12 of the Protection of Women from Domestic Violence Act bearing case No. 132-II/2016 pending before Additional Chief Judicial Magistrate, Kangra and

FIR No. 135/2014 under Sections 406, 498A read with Section 34 IPC pending before Additional Chief Judicial Magistrate, Kangra. Further perusal of order dated 27.2.2017 passed by Additional Chief Judicial Magistrate, Kangra suggests that mediation report was furnished to the Court for passing appropriate orders, but the case registered under Section 498A IPC being non-compoundable one, Court, while keeping matter pending for further orders, reserved liberty to the parties to exhaust their remedy under Section 482 CrPC, before appropriate Court.

3. Mr. Naveen K. Bhardwaj, learned counsel representing the petitioners, while inviting attention of this Court to the mediation report, vehemently argued that since petitioners, who happen to be husband and wife (petitioners No.1 and 2), have agreed to live happily, present case can be ordered to be compounded by this Court, while exercising powers under Section 482 CrPC.

4. Mr. M.L.Chauhan, learned Additional Advocate General, representing the respondent-State, opposed the aforesaid prayer having been made by the learned counsel for the petitioners. Mr. Chauhan, further contended that the offence under Section 498A IPC is a non-compoundable offence and the crime is against the society.

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

6. This Court, after having carefully perused the compromise deed, sees substantial force in the prayer having been made by the learned counsel for the petitioners that offences in the instant case can be ordered to be compounded.

7. Since the application has been filed under Section 482 Cr.P.C, this Court deems it fit case to consider the present application 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 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 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".

8. Careful perusal of para 29.3 of the judgment suggest that such a power is not 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.

9. 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. This Court in CrMMO No. 330 of 2016 titled **Seena Devi and another** versus **State of H.P.**, decided on 24.11.2016, has also reiterated the above principles laid down by the Hon'ble Apex Court in **J.Ramesh Kamath and others** versus **Mohana Kurup and others** AIR 2016 SC 2452, wherein it was held as under:-

"11. The first contention advanced at the hands of the learned counsel for the appellants was, that the respondents-accused have been charged of offences under Sections 406, 408, 409, 477A and 120B of the Indian Penal Code. It was the pointed contention of the learned counsel for the appellants, that most of the provisions under which the accused-respondents had been charged, were non-compoundable under Section 320 of the Criminal Procedure Code. And as such, the matter could not have been compounded.

12. Whilst it is not disputed at the hands of the learned counsel for respondent nos.1 and 2, that most of the offences under which the accused were charged are non-compoundable, yet it was asserted, that the jurisdiction invoked by the High Court in quashing the criminal proceedings against respondent nos.1 to 3, was not under Section 320 of the Criminal Procedure Code, but was under Section 482 of the Criminal Procedure Code, as interpreted by this Court.

13. Insofar as the decisions of this Court are concerned, reference, in the first instance, was made to Madan Mohan Abbot v. State of Punjab, (2008) 4 SCC 582: (AIR 2008 SC 1969), wherefrom, our attention was invited to the following observations:

"5. It is on the basis of this compromise that the application was filed in the High Court for quashing of proceedings which has been dismissed by the impugned order. We notice from a reading of the FIR and the other documents on record that the dispute was purely a personal one between two contesting parties and that it arose out of extensive business dealings between them and that there was absolutely no public policy involved in the nature of the allegations made against

the accused. We are, therefore, of the opinion that no useful purpose would be served in continuing with the proceedings in the light of the compromise and also in the light of the fact that the complainant has on 11-1-2004, passed away and the possibility of a conviction being recorded has thus to be ruled out.

6. We need to emphasise that it is perhaps advisable that in disputes where the question involved is of a purely personal nature, the Court should ordinarily accept the terms of the compromise even in criminal proceedings as keeping the matter alive with no possibility of a result in favour of the prosecution is a luxury which the courts, grossly overburdened as they are, cannot afford and that the time so saved can be utilised in deciding more effective and meaningful litigation. This is a common sense approach to the matter based on ground of realities and bereft of the technicalities of the law." (Emphasis is ours)

A perusal of the conclusions extracted above, with a reading of the FIR and the supporting documents in the above case reveal, that the dispute was purely of a personal nature, between two contesting parties. Further that, the dispute arose out of private business dealings between two private parties. And furthermore, there was absolutely no public involvement, in the allegations made against the accused. Based on the aforesaid considerations, this Court had held, that in disputes where the question involved was of a purely personal nature, it was appropriate for Courts to accept the terms of compromise, even in criminal proceedings. It was sought to be explained, that in such matters, keeping the matters alive would not result, in favour of the prosecution. We are of the view, that the reliance on the above judgment would have been justified, if the inferences drawn by the High Court were correct, namely, that admittedly there was no misappropriation of the funds of the Association, and secondly, the offences alleged were purely personal in nature. We shall examine that, at a later stage.

14. Having placed reliance on the judgment in the Madan Mohan Abbot case (supra), which was determined by a two -Judge Division Bench of this Court, learned counsel for respondent Nos.1 to 3 went on to place reliance on Gian Singh vs. State of Punjab (2012) 10 SCC 303: (AIR 2012 SC (Supp) 838, para 55, 56, 57), which was decided by a three-Judge Division Bench. Insofar as the instant judgment is concerned, learned counsel for respondent Nos.1 to 3, in the first instance, invited this Court's attention to paragraph 37 thereof, wherein the earlier decision rendered by this Court in the Madan Mohan Abbot case, was duly noticed. Thereupon, the Bench recorded its conclusion as under:

"59. B.S. Joshi (2003) 4 SCC 675: (AIR 2003 SC 1386)Nikhil Merchant (2008) 9 SCC 677: (AIR 2009 SC 428), Manoj Sharma (2008) 16 SCC 1: (AIR 2008 SC (Supp) 1171)and Shiji (2011) 10 SCC 705: (AIR 2012 SC 409) do illustrate the principle that the High Court may quash criminal proceedings or FIR or complaint in exercise of its inherent power under Section 482of the Code and Section 320 does not limit or affect the powers of the High court under Section 482. Can it be said that by quashing criminal proceedings in B. S. Joshi, Nikhil Merchant, Manoj Sharma and Shiji this Court has compounded the non-compoundable offences indirectly? We do not think so. There does exist the distinction between compounding of an offence under Section 320 and quashing of a criminal case by the High Court in exercise of inherent power under Section 482. The two powers are distinct and different although the ultimate consequence may be the same viz. acquittal of the accused or dismissal of indictment.

60. We find no incongruity in the above principle of law and the decisions of this Court in Simrikhia (1990) 2 SCC 437: (AIR 1990 SC 1605) Dharampal (1993) 1 SCC 435: (AIR 1993 SC 1361),Arun Shankar Shukla (1999) 6 SCC 146:(AIR 1999 SC 2554),Ishwar Singh (2008) 15 SCC 667:(AIR 2009 SC 675), Rumi Dhar (2009) 6 SCC 364: (AIR 2009 SC 2195)and Ashok Sadarangani (2012) 11 SCC 321: (AIR 2012 SC 1563)The principle propounded in Simrikhia that the inherent

jurisdiction of the High Court cannot be invoked to override express bar provided in law is by now well settled. In Dharampal the Court observed the same thing that the inherent powers under Section 482 of the Code cannot be utilised for exercising powers which are expressly barred by the Code. Similar statement of law is made in Arun Shankar Shukla. In Ishwaqr Singh the accused was alleged to have committed an offence punishable under Section 307 IPC and with reference to Section 320 of the Code, it was held that the offence punishable under Section 307 IPC was not compoundable offence and there was express bar in Section 320 that no offence shall be compounded if it is not compoundable under the Code. In Rumi Dhar although the accused had paid the entire due amount as per the settlement with the bank in the matter of recovery before the Debts Recovery Tribunal, the accused was being proceeded with for the commission of the offences under Sections 120-B/420/467/468/471 IPC along with the bank officers who were being prosecuted under Section 13(2)read with 13 (1)(d) of the Prevention of Corruption Act. The Court refused to quash the charge against the accused by holding that the Court ould not quash a case involving a crime against the society when a prima facie case has been made out against the accused for framing the charge. Ashok Sadarangani was again a case where the accused persons were charged of having committed the offences under Sections 120-B, 465, 467, 468 and 471, IPC and the allegations were that the accused secured the credit facilities by submitting forged property documents as collaterals and utilised such facilities in a dishonest and fraudulent manner by opening letters of credit in respect of foreign supplies of goods, without actually bringing any goods but inducing the bank to negotiate the letters of credit in favour of foreign suppliers and also by misusing the cash-credit facility. The Court was alive to the reference made in one of the present matters and also the decisions in B.S.Joshi, Nikhil Merchant and Manoj Sharma and it was held that B.S.Joshi, and Nikhil Merchant dealt with different factual situation as the dispute involved had overtures of a civil dispute but the case under consideration in Ashok Sadarangani was more on the criminal intent than on a civil aspect. The decision in Ashok Sadarangani supports the view that the criminal matters involving overtures of a civil dispute stand on a different footing.

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 the 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 the offender in relation to the offences under special statutes like the 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 a 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, the High Court may quash criminal proceedings if in its view, because of the compromise between the offender and the victim, the possibility of conviction is remote and bleak and continuation of the criminal case would put the 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 the wrongdoer and whether to secure the ends of justice, it is appropriate that the criminal case is put to an end and if the answer to the above question(s) is in the affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding."
>
> (Emphasis is ours)
>
> 15. A perusal of the above determination, leaves no room for any doubt, that this Court crystalised the position in respect of the powers vested in the High Court under Section 482 of the Criminal Procedure Code, to quash criminal proceedings. It has now been decisively held, that the power vested in the High Court under Section 482 of the Criminal Procedure Code, is not limited to quashing proceedings within the ambit and scope of Section 320 of the Criminal Procedure Code. The three-Judge Division Bench in the above case, clearly expounded, that quashing of criminal proceedings under Section 482 of the Criminal Procedure Code, could also be based on settlements between private parties, and could also on a compromise between the offender and the victim. Only that, the above power did not extend to crimes against the society. It is also relevant to mention, that the jurisdiction vested in the High Court under Section 482 of the Criminal Procedure Code, for quashing criminal proceedings, was held to be exercisable in criminal cases having an overwhelming and predominatingly civil flavour, particularly offences arising from commercial, financial, mercantile, civil, partnership, or such like transactions. Or even offences arising out of matrimony relating to dowry etc. Or family disputes where the wrong is basically private or personal. In all such cases, the parties should have resolved their entire dispute by themselves, mutually.
>
> 16. The question which emerges for our consideration is, whether the allegations levelled in the complaint against respondent Nos.1 to 3, would fall within the purview of the High Court, so as to enable it to quash the same, in exercise of its jurisdiction under Section 482 of the Criminal Procedure Code?"

11. Accordingly, in view of the averments contained in the petition as well as the submission having been made by the learned counsel for the petitioners that the matter has been compromised, and keeping in mind the well settled proposition of law as well as the compromise being genuine, this Court has no inhibition in accepting the compromise and quashing the FIR as well as proceedings pending in the trial Court.

12. Consequently, in view of the peculiar facts and circumstances of the case, wherein parties have compromised 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 petitioners.

13. Accordingly, in view of the discussion made hereinabove, matter is ordered to be compounded. Proceedings pending before Additional Chief Judicial Magistrate, Kangra, District Kangra, HP in Criminal Case No. 2-I/2017 titled State versus Himanshu Goel, arising out of FIR No. 26/2016 dated 19.2.2016, registered at Police Station, Kangra, are quashed.

14. Accordingly, the present petition is allowed in the aforesaid terms. Pending application(s), if any, also stands disposed of.

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

Ashok Kumar ....Petitioner.
Versus
Nirmala & others ....Respondents.

CMPMO No. 113 of 2016.
Date of Decision: 31st May, 2017.

Code of Civil Procedure, 1908- Order 23 Rule 1(3)- An application for withdrawing the civil suit with liberty to institute a fresh suit was filed – the application was allowed by the Trial Court- held that anobjection was taken in the written statement that suit was not properly valued for the purpose of court fees and jurisdiction and on proper valuation, the Court will have no jurisdiction – the plea, if accepted would have taken away the jurisdiction of the Court to try the suit – thus, the permission was rightly granted by the Trial Court- petition dismissed. (Para-2 and 3)

For the Petitioners: Mr. Vivek Sharma, Advocate.
For Respondents No. 1 & 2: Mr. Y. Paul and Mr. Dinesh Kumar, Advocates.
For Respondent No.3 already proceeded against ex-parte.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral)

The plaintiffs had instituted a suit against the defendant/petitioner herein claiming therein a decree for declaration besides a decree for injunction with respect to the suit property. The suit was contested by defendant No.1/petitioner herein by his instituting a written statement thereto. However, during the pendency of the suit, an application cast under the provisions of Order23, Rule 1(3) of the Code of Civil Procedure (hereinafter referred to as the CPC), was filed by the plaintiffs before the learned trial Court. The relevant portions of the apposite application, comprised in paragraphs No.3 and 7 thereof are extracted hereinafter:-

> "3. That the written statement was filed and it came to the notice of the plaintiffs/applicants that in the suit, court fees has been insufficiently affixed and the proper facts of fraud have also not been narrated especially with regard to the illiteracy of the plaintiff and execution of sale deed under the garb of mortgage deed.
>
> 7. That there was a bonafide error in claiming proper relief of suit land because there was void transaction under the impression of mortgaging the land."

Therein the plaintiffs sought permission of the learned trial Court, to withdraw civil suit No. 78 of 2014, with liberty being granted to them to institute a fresh suit. The application "stood" under its impugned order rendered on 31.10.2015, hence, "allowed" by the learned trial Court. The petitioner herein/defendant No.1 is aggrieved by the impugned order, hence, for begetting its reversal, he has instituted the instant petition before this Court.

2. The learned counsel appearing for the petitioner/defendant No.1, has contended with vigour that the impugned order is gripped with a critical legal infirmity, comprised in the fact of the learned trial Court, though proceeding "to" within the domain of sub-rule (3), Rule 1 of Order 23 of the CPC, provisions whereof stand extracted herein, hence, pronounce the impugned

verdict, "whereas", none of the ingredients contained therein being evidently satiated. The provisions of Order 23, Rule 1(3) of the CPC reads as under:-

> "1. **Withdrawal of suit or abandonment of part of claim**:-
>
> (1).....
>
> (2).....
>
> (3) Where the court is satisfied,-
>
> (a) that the suit must fail by reason of some formal defect, or
>
> (b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim,
>
> **....."**

He submits that the import of the mandate of clause (a) of sub-rule (3) of Rule (1) of Order 23 of the CPC, wherein a coinage occurs (that a suit must fail by reason of some formal defect,", though permits the plaintiffs to, on account of an evident defect with respect to the valuation of the suit for the purpose of jurisdiction besides with non affixation thereon of ad velorem court fees, hence, claim that "its" constituting a formal defect also hence leveraging in the plaintiffs a right "to" with the leave of the Court withdraw the suit, with a further liberty to institute it in a Court holding the apposite pecuniary jurisdiction for trying it. He further submits that defendant No.1 had contested the apposite valuation made in the suit by the plaintiffs for the purpose of jurisdiction also had hence contended that court fees in commensuration thereto, not standing affixed thereon. He also concedes that the learned Civil Judge, Senior Division, on a proper valuation of the suit being made for the purposes of jurisdiction besides ad velorem court fee standing affixed thereon by the plaintiffs, would render him incapacitated to hold trial of the instant Civil Suit. He concedes that if the apposite permission to withdraw the suit with liberty to institute it afresh, in a Court holding the apposite pecuniary jurisdiction, stood hence rested solitarily on the aforesaid anvil, thereupon, its being granted to the plaintiff would render it to fall within the domain of clause (a) to sub-rule (3) of Rule (1) of Order 23 of the CPC, "whereas", with the plaintiffs apart from the above defect also in a duly permitted fresh suit concerting to introduce a plea with respect to theirs challenging the validity of the relevant sale deed, on the score of plaintiff No.2 being illiterate, hence, hers rearing an impression that she is executing a mortgage with respect to the suit land, thereupon, it is rendered to fall within the domain of the mandate of Order 2, Rule 2 of the CPC, hence, outside the ambit of clause (a) of sub-rule (3) of Rule (1) of Order 23 of the CPC. Consequently, he submits that with the provisions existing in Order 23 of the CPC enjoining theirs being read along with the provisions of Order 2, Rule 2 of the CPC, hence, with the plaintiffs, after withdrawing the instant suit, also theirs on the apposite leave being granted to them, hence instituting a fresh suit, when would render "it" to stand barred by the mandate of Order 2, Rule 2 of the CPC, thereupon, with the order impugned before this Court, hence, infringing its mandate, warrants its being interfered with.

3. For appreciating the aforesaid submission made before this Court by the learned counsel appearing for the defendant/petitioner, it is imperative to extract the provisions of Order2, Rule 2 of the CPC:-

> "**2. Suit to include the whole claim.-** (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.
>
> (2) Relinquishment of part of claim—Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) Omission to sue for one of several reliefs—A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs, but if he omits except with the leave of the court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted."

Even though, the provisions existing therein enjoin upon the plaintiff to include in the initially instituted suit/plaint, all the causes of action in respect tot he suit property also its containing a specific provision with respect to intentional relinquishments or abandonments by the plaintiff besides his intentional omissions to sue with respect to all causes of action besides to claim relief(s) in consonance therewith in the initially instituted suit/plaint, estopping him to institute a fresh suit in respect thereto. However, the provisions of Order 2, Rule 2 of the CPC "do not" create any absolute, rigid omnibus bar upon the plaintiffs to despite theirs omitting or abandoning to sue or theirs omitting to incorporate in the plaint all causes of action besides their omissions to claim all relief(s) in respect thereto, qua hence theirs being forestalled to avail the benefits of the mandate of the provisions incorporated in Order 23, Rule 1(3) of the CPC, conspicuously when there exists concurrence inter se the mandate of Order 2, Rule 2(3) of the CPC vis-a-vis the relevant mandate of Order 23, Rule 1(3) of the CPC. Moreover with the defendant being unable to prima facie establish that the relevant omissions/relinquishments or abandonments "were" intentional nor when he has been able to prima facie establish that despite evident knowledge of the plaintiffs with respect to the relevant facts, theirs hence intentionally failing to incorporate them in the suit/plaint, "whereas" prima facie satiation of the aforesaid sine qua non would render its mandate attracted, contrarily, want thereof not attracting its mandate hereat. Besides with the defendant/petitioner herein not de-establishing the illiteracy of the plaintiff concerned, whereupon, hence, the relevant omissions occurred "also" renders it to be unintentional. The mandate of sub-rule (3) of Rule (2) to Order (2) of the CPC being an exception to the preceding provisions thereto also when it holds concurrence with the provisions incorporated in Order 23, Rule 1 (3) of the CPC, comprised in the fact that, it facilitates the trial Court, to accord the apposite leave to the plaintiff to sue with respect to all causes of action besides to claim all relief(s) in respect thereto "despite" his in the initially instituted plaint omitting or abandoning to sue in respect thereto. Conspicuously, with hence there occurring no conflict inter se the provisions of Order 2, Rule 2 of the CPC vis-a-vis the provisions of Order 23, Rule 1(3) of the CPC, besides with the defendants contesting that the instant suit for want of its apposite valuation, for the purposes of jurisdiction is not triable by the learned trial Court, hence, for facilitating the effect of the rendition pronounced in respect thereto, whereupon, it would stand instituted in the apposite Court, also renders the other apposite averments made in the application being amenable for theirs being permitted to be incorporated therein. Consequently, the submission addressed herebefore by the learned counsel appearing for the petitioner is rejected.

4. For the foregoing reasons, there is no merit in the instant petition and it is dismissed accordingly. In sequel, the order impugned hereat is maintained and affirmed. All pending applications also stand disposed off.

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

Civil Revision Nos. 127 and 99 of 2014
Reserved on: 11.5.2017
Date of Decision: 31.5.2017

1. **Civil Revision No. 127 of 2014**

Ishwar Dass. ..Petitioner/Landlord

Versus

Vinay Kumar. ..Respondent/Tenant

2. **Civil Revision No. 99 of 2014**

Vinay Kumar. ..Petitioner/Appellant/Respondent

Versus

Ishwar Dass. ..Respondent/Petitioner

H.P. Urban Rent Control Act, 1987- Section 14- Landlord filed an eviction petition against the tenant on the ground of arrears of rent, change of user of shop, causing damage to wall and floor of the shop impairing the value and utility of the shop materially and bona-fide requirement to settle his son during his lifetime- the petition was allowed by the Rent Controller and eviction order was passed on the ground of arrears of rent and changing the use of shop without the consent of the landlord – the claim of the landlord that tenant had caused material alterations and additions in the premises and the premises were required by landlord for running his shop was rejected – separate appeals were filed before the Appellate Authority, which were dismissed – held in revision that tenant had admitted in his cross-examination that he had not paid the rent since 25.5.2011 till his deposition in the Court – the tenant also admitted in cross-examination that he is running business of ladies sandal, garments, and purse from the shop in question- he claimed that he is running business of electronics goods in the shop but it was not proved – worker of the tenant admitted that tenant had replaced the floor and had made changes in wall of that shop – tenant also admitted in the photographs of the showroom situated in the front of the shop being run by the son of the tenant – thus, it was established that value and utility of the shop was materially impaired – son of the landlord is running a fast food corner next to the shop in question and bona-fide requirement was not established- revision petition partly allowed- tenant held to be in arrears of rent and ordered to be evicted on the ground of change of users and materially impairing the value and utility of the shop.(Para-20 to 35)

Cases referred:

Shalimar Chemical Works Limited Vs. Surendra Oil and Dal Mills (Refineries) and others, (2010) 8 SCC 423

Union of India Vs. Ibrahim Uddin and Another (2012) 8 SCC 148

Surjit Singh and others Vs. Gurwant Kaur and Others (2015) 1 SCC 665

Wadi Vs Amilal and Others (2015) 1 SCC 677

Jodha Ram Vs. Rahul Chauhan & others Latest HLJ 2008 (HP) 1425

Jai Karan Vs. Madan Lal reported in 1997 (2) Sim.L.C. 264

Dashrath Baburao Sangale and others Vs. Kashimath Bhaskar Data 1994 Supp (1) SCC 504

M. Arul Jothi and another Vs. Lajja Bal (deceased) and another, (2000) 3 SCC 723

Susheela Mohan and others Vs. Lakhbir Singh Sethi, Latest HLJ 2011 (HP) 329

Mohan Lal Vs. Jai Bhagwan (1988) 2 SCC 474

Gurdial Batra Vs. Raj Kumar Jain (1989) 3 SCC 441

Rajinder Kumar Sharma Vs. Smt. Kanta Kumari Latest HLJ 2007 (HP) 73

Sain Ram Jhingta Vs. Surinder Singh, 2016 (1) CCC 743 (HP)

Civil Revision No. 127 of 2014

For the Petitioner: Mr.Karan Singh Kanwar, Advocate.

For the Respondent: Mr.B.C. Verma, Advocate.

Civil Revision No. 99 of 2014

For the Petitioner: Mr.B.C. Verma, Advocate.

For the Respondent: Mr.Karan Singh Kanwar, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge

These two Revision Petitions, arising out of a common judgment, passed by Appellate Authority under H.P. Urban Rent Control Act, 1987, preferred by landlord as well as tenant, are being decided by this common judgment.

2. Landlord filed an eviction petition against tenant on the ground of arrears of rent, change of user of shop, causing damage to wall and floor of the shop impairing the value and utility of shop materially and bonafide requirement to settle his son during his life time. It is also stated in the petition that tenant was also running a show room opposite the tenanted shop and was earning his livelihood from the said show room of garments.

3. In reply, claim of landlord was denied and it was stated that show room opposite tenanted shop belonged to son of tenant, with which tenant had no concern.

4. On the basis of pleadings of parties, following issues were framed:-

"(1) Whether the respondent is in arrears of rent, as alleged in the petition? OPP

(2) Whether the respondent without the consent of the petitioner has changed the user of the shop and made himself liable for eviction, as alleged? OPP

(3) Whether the respondent has caused material alterations and additions in the premises by replacing the floor etc. as alleged in the petition? OPP

(4) Whether the demised premises are required by the petitioner bonafidely for running of his shop, as prayed? OPP

(5) Whether the petition is based on mala fidies? OPR

(6) Whether the petition is not maintainable, as similar petition was dismissed in default earlier? OPR

(7) Relief.

5. Issues No. 5 and 6 were technical issues, neither any material for proving these issues was placed on record by tenant nor the issues have been agitated in present petition. Issue No. 7 will follow the consequences of findings returned against issues No. 1 to 4.

6. Rent Controller, on the basis of pleadings and evidence led by parties, passed order of eviction against tenant for arrears of rent and for changing the use of shop without consent of the landlord. However, claim of landlord that tenant had caused material alterations and additions in the premises by replacing the floor etc. and the premises in question was required by landlord bonafidely for running his shop, were rejected. Order of the Rent Controller was assailed by landlord as well as tenant by filing separate appeals before the Appellate Authority.

7. During pendency of appeal before Appellate Authority, tenant had preferred an application under Section 41 Rule 27 C.P.C. for leading additional evidence by placing on record various bills indicating sale of electronic goods from his shop being run in the tenanted premises. The appellate Authority dismissed this application and also both the appeals preferred by tenant and landlord affirming the order passed by Rent Controller, ordering eviction of tenant for arrears of rent and change of user of the shop.

8. Tenant has assailed the judgment of Appellate Authority by filing Civil Revision No. 99 of 2014, whereas Civil Revision No. 127 of 2014 has been filed by landlord.

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

10. Learned counsel for the landlord submits that Courts below have failed to consider the un-rebutted pleadings of landlord that additions and alterations, made by tenant for

changing business, have materially impaired the value and utility of the building causing damage to wall and floor of the premises despite admissions of these additions and alterations in statement of RW-1 Sharukh Ahmed. He submits that by rejecting the claim of landlord with respect to damage caused by material alterations and additions in the premises by tenant and also bonafide requirement of landlord, Courts below have committed a mistake in law and thus impugned judgment/order warrants interference for deciding these issues in favour of landlord.

11. Learned counsel for tenant though supports finding of Courts below on issues No. 3 and 4, but agitates rest impugned judgment on the ground that despite having sufficient proof on record with respect to payment of arrears of rent, Courts below have wrongly held tenant in arrears of rent. He also submits that there is no evidence on record with respect to change of user of shop in question, much less material altercations and additions in the premises, materially impairing the value and utility of the shop by damaging wall and floor. Therefore, he contended that Courts below have committed material illegality and irregularity by passing ejection order against tenant. He also submits that Appellate Authority has also committed a mistake in law by rejecting application of tenant under Order 41 Rule 27 C.P.C. filed for leading additional evidence, despite the fact that the documents proposed to be led in evidence were necessary for deciding the matter in controversy regarding change of user of the premises in question.

12. Rule 27 of Order 41 of CPC starts with negative clause that the parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary in the Appellate Court and therefore, this provision in fact prohibits leading of additional evidence in appeal, but subject to exceptions carved out in it and therefore, additional evidence in Appellate Court can be produced if facts and circumstances of the case fulfils criteria provided in exceptions of Order 41 Rule 27 C.P.C. According to it, additional evidence in Appellate Court may be allowed if Court below has refused to admit evidence which ought to have been admitted or parties seeking to produce additional evidence establishes that when such evidence was not within his knowledge or despite of exercise of due diligence the said evidence could not be produced by him at the time of passing of decree appealed or if Appellate Court considers any document necessary to be produced or any witness to be examined to enable it to pronounce judgment or for any other substantial cause.

13. In present case, from very beginning, case of landlord is that there is change of user of premises in question and specific issue was also framed by the trial Court on this point. The documents proposed to be led as additional evidence are not anything else, but bills pertaining to alleged sale of electronic items by tenant from his shop in question. These bills belong to tenant, therefore, this evidence was within his knowledge. These documents were neither produced nor ever intended to be produced before the trial Court, despite specific pleadings of petitioner that there is a change of user of shop in question. For non production or non tender of these documents, there was no question of refusal to admit these documents in evidence by the trial Court. Perusal of application filed by tenant before Appellate Authority for leading additional evidence revels that there was not even a single line stating that despite exercise of due diligence, these documents could not be produced before trial Court. Only reason appears to have been mentioned in the said application is inadvertent mistake for not producing these documents in the trial Court and by pleading necessity and importance of these bills to decide the matter in controversy to do complete justice, have been pleaded, with further ground that production of these documents will not cause any injustice or prejudice to landlord. Therefore, in fact, there is nothing stated in application for leading additional evidence to bring it in the ambit and scope of provision of Order 41 Rule 27 C.P.C., so as to allow the tenant to lead additional evidence in Appellate Court. However, Appellate Authority never expressed requirement of production of these documents to enable it to pronounce judgment or for any other substantial cause.

14. The judgments relied upon by learned counsel for tenant in support of his plea to allow the application under Order 41 Rule 27 C.P.C., preferred before Appellate Authority, passed

by the Apex Court in cases ***Shalimar Chemical Works Limited Vs. Surendra Oil and Dal Mills (Refineries) and others, (2010) 8 SCC 423, Union of India Vs. Ibrahim Uddin and Another (2012) 8 SCC 148, Surjit Singh and others Vs. Gurwant Kaur and Others (2015) 1 SCC 665*** and ***Wadi Vs Amilal and Others (2015) 1 SCC 677*** are of no help to the tenant.

15. In *Shalimar Chemical Works* case, additional evidence permitted under Order 41 Rule 27(1) (b) of C.P.C. in the interest of justice was upheld by the Apex Court, by observing that in case the Court considers that in the interest of justice something which remains obscure should be filled up so that it can pronounce its judgment in more satisfactory manner, then additional evidence should be allowed 'for any other substantial cause' under Rule 27(1) (b) of CPC. Whereas in present case Court has not considered proposed evidence necessary for pronouncing judgment and tenant has also failed to make out a case for additional evidence proposed to be led by him, necessitated for any other substantial clause including interest of justice under Rule 27(1) (b) of the Code.

16. In *Ibrahim Uddin case (supra),* it has been held that additional evidence on record at a belated stage cannot be filed as a matter of right and Court can consider such an application with circumspection, provided it is covered under either of the prerequisite condition incorporated in the statutory provision itself. In present case, there is no explanation that for what reason tenant was not capable to lead evidence proposed to be led during pendency of appeal before Appellate Authority. No sufficient grounds, prerequisite for allowing application for additional evidence, have been made out in present case.

17. In *Surjit Singh's* case supra, it has been held by the Apex Court that exercise of power under Order 41 Rule 27 C.P.C. is circumscribed by limitation specified in the language of the Rule and it is duty of the Court to come to a definite conclusion that it is really necessary to accept the document as additional evidence to enable it to pronounce the judgment and in case Appellate Authority is able to pronounce the judgment with material before it without taking in to consideration the additional evidence sought to be adduced, the application for additional evidence is liable to be rejected.

18. Ratio of law laid down by the Apex Court in *Wadi's case* is that in case, such additional evidence is necessary to pronounce an effective judgment, clause (b) of Rule 27 of Order 41 C.P.C. enables that Court to permit additional evidence. However in the given facts and circumstances, tenant had not made out a case that proposed evidence was/is necessary to pronounce an effective judgment and/or admission of such evidence is necessary in the interest of justice. Therefore, application of tenant filed under Order 41 Rule 27 C.P.C. has rightly been dismissed by Appellate Authority.

19. Further there is another aspect of matter, in case the tenant was in possession of documents proposed to be led in evidence, then adverse inference is also to be drawn against him for withholding the documents, which were even according to him material for adjudication of the case.

20. In reply to petition, tenant had denied arrears of rent. However, while appearing as witness as RW-2, in his cross-examination, he admitted that he had neither filed an application in the Court to deposit the rent nor had paid any rent since 25.5.2011 till his deposition in the Court i.e. 12.7.2013. Therefore, for his unambiguous admission, plea against finding on arrears of rent is not sustainable.

21. In para 17 and 18 (ii), (iv), landlord pleaded the change of user by tenant, causing damage and materially impairing the value and utility of shop. In reply to these paras, there is denial simplicitor. There was no specific denial, rebutting claim of landlord specifically on this ground. On this issue also, in his cross-examination tenant, though claimed that he is running business of electronic goods in shop in question but also admitted that he is running business of ladies sandal, garments and purse etc. from the shop in question. However, he also admitted that show room of his son is in front of the shop in question, whereupon sign board of Vinay Vision is there and same sign board of 'Vinay Vision' is also displayed on the shop in

question. He also admitted that sign board of his concern has been displayed at two places. He admitted the photographs of his shop, but expressed his inability to identify something in it. A glance of photographs clearly reflects that there is no electronic item in the shop in question, but there are racks with shoes in the said shop. In light of admission of tenant, Courts below have not committed any error by deciding that there is change of user of the shop in question by tenant.

22. Besides taking a ground for eviction in para 18 (ii) regarding damage to wall and floor of the shop by affixing wooden racks and iron angle, materially impairing the value and utility of shop, landlord in para 4 of his affidavit, filed in evidence, specifically stated that tenant changed the user of shop rented to him for changing business in shop in issue and materially impaired value and utility of the same by damaging wall and floor for affixing wooden racks and iron angle.

23. In reply, there is no averment that there was no change of business or no wooden racks or iron angle were affixed or no damage to wall or floor was caused in such process. In his affidavit filed by tenant in evidence also, not even a single word has been uttered on this issue and further RW-1 Sharukh Ahmed examined by tenant as a witness, who claimed to be worker of tenant in the shop in question, admitted that tenant had replaced the floor and made changes in wall of that shop. However, he explained that this exercise was undertaken to remove dampness. Tenant admitted the photographs of shop in question with racks and shoes in the shop, which again substantiated the plea of landlord which remained un-rebutted. Tenant has also admitted the photographs of showroom situated in front of shop in question allegedly being run by son of tenant having the sign board of 'Vinay Vision'. It is evident from photographs that the said show room is a considerable big shop in size and in business also.

24. Pleadings supported by evidence, not rebutted either in reply or in evidence, are treated to be proved. Therefore, Courts below have committed mistake in holding that landlord has failed to prove that change of user of shop has caused any injury or damage to the shop in question, impairing its value and utility. The findings of Courts below on this point are reversed, as discussed above, from material on record, it stands established that value and utility of shop was materially impaired because of damage to wall and floor in the process of fixing wooden racks and iron angle and therefore, tenant is liable to be evicted on this ground also.

25. This High Court in its pronouncement in case ***Jodha Ram Vs. Rahul Chauhan & others*** reported in ***Latest HLJ 2008 (HP) 1425***, on the basis of un-rebutted plea of landlord, about the fact of making holes in walls to support the loft, raising brick column and walls and wooden partitions, was considered to be amounting to materially impairing value and utility of the building. In present case also there is un-rebutted plea and evidence about damage to wall and flooring for fixing racks. Fixing of racks causing damage to floor and wall is also an activity impairing value and utility of open shop.

26. So far eviction on the ground of bonafide requirement is concerned, it is not substantiated from evidence on record, rather it stands proved on record from photographs placed on record by landlord showing that son of landlord is running a Fast Food Corner, though in small shop, next to the shop in question. In cross-examination a positive suggestion in this regard was put to tenant which was admitted by him that son of landlord is present there, in these photographs, in his shop.

27. As per Section 14(3) (d) of H.P. Urban Rent Control Act, 1987, in case of any residential or non-residential building a landlord may apply to Controller for an order of eviction of tenant if he requires it for use as an office, or consulting room by his son or daughter who intends to start practice as a lawyer, an architect, a dentist, an engineer, a veterinary surgeon or a medical practitioner, including a practitioner of Ayurvedic Unnani or Homeopathic System of Medicine or for the residence of his son or daughter who is married, if

i) his son or daughter as aforesaid is not occupying in the urban area concerned any other building for use as office consulting room or residence, as the case may be; and

ii) his son or daughter as aforesaid has not vacated such a building without sufficient cause, after the commencement of this Act, in the urban area concerned.

In given facts of the case, there is nothing on record to bring landlord's plea of eviction for bonafide requirement, within scope of provisions of H.P. Urban Rent Control Act, 1987. Further landlord in his cross-examination himself admitted that his son along with his family is residing separate from him.

28. There is no necessity to discuss judgment in case ***Jai Karan Vs. Madan Lal*** reported in ***1997 (2) Sim.L.C. 264,*** relied upon by tenant against plea of landlord of bonafide requirement. For his plea for eviction on the basis of bonafide requirement stands rejected by Courts below as well as this Court.

29. In case ***Dashrath Baburao Sangale and others Vs. Kashimath Bhaskar Data*** reported in ***1994 Supp (1) SCC 504***, the Apex Court upholding eviction of tenant for using the premises for selling clothes and readymade clothes rented, as per clause 3 of the Rent Note for sugar cane crushing, has held that change of user of tenanted premises for a purpose other than for which it was rented is a sufficient ground for eviction of tenant. In present case also, though there is no written rent note or deed, but pleadings supported by evidence establishes that shop in question was rented for running business of electronic goods as it was neither disputed in reply nor in affidavit of tenant filed in evidence. Rather by proposing to lead additional evidence of bills in appeal for proving sale of electronic goods only, from rented shop further strengthens the case of landlord that the shop in question was rented out for running shop of electronic goods only.

30. The judgment of the Apex Court in ***M. Arul Jothi and another Vs. Lajja Bal (deceased) and another,*** reported in ***(2000) 3 SCC 723***, may not be strictly applicable in the present case, as it was decided on the basis of specific prohibition clause contained in the rent deed whereas in the present case for want of written rent deed/agreement, no such written prohibition clause is there.

31. Learned counsel for the tenant submits that earlier eviction petition filed by landlord was dismissed in default and application for restoration of the said petition was also dismissed in default and therefore, fresh eviction petition was not maintainable. This plea was neither raised either before Rent Controller or before Appellate Authority, therefore, right to raise such plea at this stage is not available to the tenant. Moreover, as held by this Court in case titled ***Susheela Mohan and others Vs. Lakhbir Singh Sethi,*** reported in ***Latest HLJ 2011 (HP) 329***, for recurring cause of action, landlord is entitled to institute fresh petition despite previous petition as well as application for restoration thereof, having been dismissed in default. Eviction on the ground of arrears of rent is definitely recurring cause of action.

32. In support of plea that change of user from one commercial activity to another is not a ground for eviction of tenant, learned counsel for the tenant has relied upon ***Mohan Lal Vs. Jai Bhagwan (1988) 2 SCC 474*** and ***Gurdial Batra Vs. Raj Kumar Jain (1989) 3 SCC 441.*** There is no dispute with ratio of law laid down by the Apex Court in these judgments, however, change of user coupled with impairing utility or damage to tenanted premises is a valid ground for eviction of tenant. In these judgments relied on behalf of tenant, it has been held that change of user, not causing any mischief or detrimental or impairment of the premises in question, shall not be a ground for eviction of tenant. In present case, there is un-rebutted plea of landlord regarding impairing value and utility of premises in question, which has been duly supported by statement of landlord filed in evidence by way of affidavit.

33. Learned counsel for the tenant has also relied upon judgment of this Court passed in ***Rajinder Kumar Sharma Vs. Smt. Kanta Kumari*** reported in ***Latest HLJ 2007 (HP) 73***, wherein change of karyana shop to tea making and selling business, itself was not found sufficient to prove any injury or prejudice or detrimental to the landlord. Reliance has also put on judgment passed by co-ordinate Bench of this Court in ***Sain Ram Jhingta Vs. Surinder Singh***, reported in ***2016 (1) CCC 743 (HP)***, wherein it was held that change of user from one

commercial activity to another unless cause or have potential of causing any injury or prejudice or detrimental to the interest of landlord, will not be sufficient for eviction of tenant from the rented premises. These judgments are also not applicable in present case, because present case is not change of user simplicitor but change of user coupled with damage to premises, as tenant has not disputed the averments of pleadings as well as affidavit filed in evidence by landlord with respect to causing damage to wall and floor, material impairing value and utility of the shop.

34. Tenant claimed to have paid Rs. 37,600/- to landlord against arrears of rent till 25.5.2011. In cross-examination he stated that he maintained the accounts of his employees and also filed income tax qua sale tax returns, but neither any receipt of Rs. 37,600 /- is there nor the said amount has been accounted for in account books. Therefore, plea of tenant with regard to payment of arrears of rent till 2011 has also rightly been rejected by the Courts below.

35. In view of above discussion, findings of Courts below on Issues No. 1 and 2 are affirmed and findings on Issue No. 3 are reversed, whereas findings on Issue No. 4 warrant no interference. Resultantly, Revision Petition No. 99 of 2014 is dismissed and Revision Petition No. 127 of 2014 is partly allowed. Accordingly, tenant is held liable to be in arrears of rent of the premises w.e.f. April, 2001 till date at the rate of Rs. 400/- per month along with interest at the rate of 9% per annum till full and final payment of arrears of rent and the landlord shall also be entitled for Rs. 2000/- as costs awarded by Rent Controller, for nonpayment of which tenant shall be liable to be evicted for arrears of rent and the tenant is also ordered to be evicted on the ground of change of user of the premises in question, without consent of landlord, for the purpose other than for which it was rented for materially impairing value and utility of the shop by damaging walls and replacing floor of the premises. Record be sent back.

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

Ramesh Chand .....Petitioner.

Vs.

Hon'ble High Court of Himachal Pradesh at Shimla and another .....Respondents.

CWP No.: 9939 of 2014
Reserved on: 27.04.2017
Date of Decision: 31.05.2017

Constitution of India, 1950- Article 226- Respondent No.2 was designated as Principal Private Secretary to Hon'ble the Chief Justice, High Court of H.P. on 6.9.2013- petitioner contended that seniority was not taken into consideration while making the promotion – the petitioner was senior to respondent No.2 and he was ignored in the process – the petitioner made a representation, which was rejected– respondent No.1 stated that the respondent No.2 was discharging higher duties and responsibilities attached to the post satisfactorily – nothing adverse was found against him – respondent No.2 was more qualified and was promoted on adhoc basis – no prejudice was caused to the petitioner – hence, it was prayed that the petition be dismissed- held that the sanction was granted by the Government for the post of a Secretary to the Hon'ble Chief Justice- the post of respondent No.2 was upgraded with a condition that he would draw his own pay, grade pay and special pay etc. and other allowances as admissible under law for discharging the duties and the responsibilities of a higher post- name of respondent No. 2 was figuring in the communications as the incumbent who was to be upgraded by respondent No.1- initial designation of respondent No.2 as a Private Secretary was not challenged by the petitioner – when the original order is not challenged, then the subsequent acts, which are the result of that original order or act cannot be assailed – the candidature of five senior most secretaries, which included the petitioner as well as respondent No.2 was considered for the purpose of promotion on ad hoc basis- respondent No. 2 was found more eligible and was promoted – same exercise

was undertaken before conferring regular promotion upon respondent No. 2 – the person senior to the petitioner have not assailed the promotion of respondent No. 2 and the petitioner does not have the locus standi to challenge the same – petition dismissed.(Para-10 to 31)

Case referred:
Government of Maharashtra and others Vs. Deokar's Distillery (2003) 5 Supreme Court Cases 669

For the petitioner: Mr. Ajay Sharma, Advocate.
For the respondents: Ms. Jyotsna Rewal Dua, Senior Advocate, with Ms. Charu Bhatnagar, Advocate, for respondent No. 1.
Respondent No. 2 is *ex parte.*

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge :

By way of this writ petition (amended writ petition), the petitioner has prayed for the following reliefs:

> *"(a) That the impugned orders, dated 06.09.2013 (Annexure P-3) whereby respondent No. 2 was designated as Principal Private Secretary to Hon'ble the Chief Justice, may kindly be quashed and set aside;*
>
> *(b) That adhoc promotion order of respondent No.2 dated 25.02.2014 (Annexure P-4) may kindly be quashed and set aside;*
>
> *(c) That the impugned promotion order dated 01.10.2014, Annexure P-7 may kindly be quashed and set aside having been passed contrary to all norms of service jurisprudence by giving total goodbye to the merit and also the seniority and further without holding the DPC (subject to correction) secure law and justice with a direction that the matter may be considered again and the petitioner may kindly be promoted being senior to respondent No. 2 herein from the date respondent No. 2 was promoted with all consequential benefits, pay, seniority etc., in the interest of justice.*
>
> *c (c) That Notification dated 21.11.2016 issued by respondent No. 1 qua respondent No. 2 being bad in the eyes of law may very kindly be quashed and set aside with a direction to proceed in the matter afresh after holding DPC (subject to correction), in view of the norms of service jurisprudence following the procedure as laid down in the Rules i.e. merit-cum-seniority and the case of the petitioner be considered sympathetically.*
>
> *(d) That the impugned order Annexure P-6 whereby the representation of the petitioner has been rejected, may very kindly be quashed thereby allowing the representation of the petitioner in the interest of justice equity and fair play.*
>
> *(e) That the entire record of the case may very kindly be summoned from the respondents for the kind perusal of this Hon'ble Court.*
>
> *(f) That writ petition may kindly be allowed with costs.*
>
> *(g) That any other order or direction which this Hon'ble Court may deem just and proper in the facts and circumstances of the present case, may be passed in favour of the petitioner and against the respondents."*

2. Brief facts necessary for the adjudication of the present writ petition are that as per petitioner, he joined as a Steno-Typist on 30.03.1983 in Civil and Sessions Division, Una. In the year 1990, he joined as such in Civil and Sessions Division, Hamirpur and was appointed as a Senior Scale Stenographer in High Court of Himachal Pradesh in the month of April, 1992,

where he joined as such on 26.04.1992. He was promoted as Judgment Writer on 15.07.1995. Thereafter, he was promoted against the post of Private Secretary on 07.07.2001 and as Secretary on 08.01.2009. As per the petitioner, respondent No. 2 was appointed as Senior Scale Stenographer in the High Court of Himachal Pradesh on 23.04.1992 and he was promoted as Personal Assistant on 15.07.1995. He was thereafter promoted as Private Secretary on 07.07.2001 and as Secretary on 08.01.2009. Said respondent was designated as Principal Private Secretary to Hon'ble the Chief Justice, High Court of Himachal Pradesh on 06.09.2013. As per the petitioner, when the private respondent was designated as Principal Private Secretary to Hon'ble the Chief Justice, seniority was not taken into consideration. Further, as per the petitioner, vide Notification dated 21.06.2013 (Annexure P-2), Shri Devinder Chopra, Secretary was promoted and appointed as Deputy Registrar-cum-Special Secretary to Hon'ble the Chief Justice and vide order dated 06.09.2013, said Shri Devinder Chopra was transferred and posted as Deputy Registrar (Accounts), whereas respondent No. 2 was designated as Principal Private Secretary to Hon'ble the Chief Justice. As per the petitioner, for the purpose of designating a Secretary as Principal Private Secretary, seniority was required to be taken into consideration and as he was admittedly senior to respondent No. 2, grave injustice and prejudice was caused to him on account of his being ignored for being designated as Principal Private Secretary to Hon'ble the Chief Justice. It is further the case of the petitioner that this was followed by issuance of Notification dated 25.02.2014 (Annexure P-4) vide which, respondent No. 2 was promoted as Deputy Registrar-cum-Special Private Secretary to Hon'ble the Chief Justice on *adhoc* basis against recently upgraded post of Secretary on his own pay scale, grade pay and special pay etc. and other allowances as admissible under law for discharging the duties and responsibilities of a higher post. Against this, representation was filed by the petitioner, i.e, Annexure P-5 dated 24.04.2014, which was rejected, as conveyed to him vide Annexure P-6. As per the petitioner, thereafter vide Notification dated 01.10.2014, respondent No. 2 was promoted and appointed as Deputy Registrar-cum-Special Private Secretary to Hon'ble the Chief Justice on regular basis against the upgraded post of Secretary with effect from the date respondent No. 2 was promoted as such on *adhoc* basis, i.e. 25th February, 2014. It was further the case of the petitioner that during the pendency of the petition, the post in issue was upgraded by the Government of Himachal Pradesh vide Notification dated 16th November, 2016 as Principal Private Secretary to Hon'ble the Chief Justice and the private respondent was promoted against the said post vide Notification dated 21.11.2016 (Annexure P-9).

3. The designations and promotions so conferred upon the respondent No. 2 have been challenged by way of this writ petition on the grounds that respondent No. 2 was designated as Principal Private Secretary without considering the claim of the petitioner, who admittedly was senior to the private respondent and further promotion conferred upon respondent No. 2 on *adhoc* basis was contrary to the settled norms and law and further conferring regular promotion upon him with all monetary benefits from the date of *adhoc* promotion amounted to arbitrary and colourable exercise of powers. According to the petitioner, the private respondent was not even in the zone of consideration for being considered for promotion and in these circumstances, his superseding incumbents who were in the zone of consideration was highly arbitrary. The representation of the petitioner stood dismissed by a non speaking order. Promotions conferred upon the private respondent were bad as no Rules stood framed in this regard and the promotion so conferred upon respondent No. 2 was with a *malafide* intention or at least with a legal *malafide* intention. On these bases, the petitioner has prayed for the reliefs already quoted hereinabove.

4. In its reply filed by respondent No. 1, all the allegations leveled by the petitioner were refuted. It was mentioned in the preliminary submissions/objections that in the past officers in the rank of Deputy Registrar/Additional Registrar were performing the functions of Principal Private Secretary to Hon'ble the Chief Justice, however, said officers were always overburdened with other administrative works and had to perform other functions also. As per said respondent, as it is the Principal Private Secretary, who is looking after all the affairs in the Secretariat of Hon'ble the Chief Justice, therefore, it had become imperative for respondent No. 1 to have a separate post of Principle Private Secretary to Hon'ble the Chief Justice. It was in this background

that incumbent holding the post of Deputy Registrar-cum-Special Secretary to Hon'ble the Chief Justice was transferred and posted as Deputy Registrar (Accounts).

5. Further, as per respondent No. 1, respondent No. 2 was posted with Hon'ble the Chief Justice and owing to the significance of the work attached with the Secretariat of Hon'ble the Chief Justice, the post of Secretary being held by respondent No. 2 was designated as Principal Private Secretary vide order dated 06.09.2013. Thereafter, simultaneously respondent No. 1 vide letter dated 25.10.2013 took up the matter with the State Government for creation of one post of the status of Deputy Registrar-cum-Principal Private Secretary or to upgrade the post of Secretary to that of Deputy Registrar-cum-Principal Private Secretary. The State Government vide letter dated 22.11.2013 sought information on certain aspects of the matter, which was duly supplied to the State. Thereafter, State Government vide letter dated 22.02.2014 accorded approval for up-gradation of the post of Secretary to Hon'ble the Chief Justice to that of Deputy Registrar-cum-Special Private Secretary in the pay scale of Rs.15600-39100/- +Rs.7600/- (GP) +Rs.2500/- Secretariat Allowance. After up-gradation of the post of Secretary to that of Deputy Registrar-cum-Special Private Secretary to Hon'ble the Chief Justice, the category of Secretary was considered for filling up the said post. Accordingly, five senior most Secretaries, which also included the present petitioner were considered on the basis of merit-cum-seniority. As respondent No. 2 was already designated as Principal Private Secretary to Hon'ble the Chief Justice vide office order dated 06.09.2013 and he was discharging higher duties and responsibilities attached to the said post satisfactorily and nothing averse was found against him which could have rendered him unfit/disqualified for appointment/promotion against the newly upgraded post of Deputy Registrar-cum-Special Private Secretary and as respondent No. 2 was also more qualified as compared to other Secretaries including the petitioner, therefore, he was promoted on *adhoc* basis as Deputy Registrar-cum-Special Private Secretary to Hon'ble the Chief Justice against the newly upgraded post subject to conditions mentioned in the said promotion order. The entire process initiated for promotion was monitored by the Appointing Authority. In the absence of their being any Rules available to fill up the newly upgraded post and as the petitioner was considered for the purpose of promotion but respondent No. 2 was found more meritorious, the petitioner was not having any locus to file and maintain the writ petition as no harm or prejudice had been caused to him. It was further mentioned in the preliminary submissions that representation of the petitioner was duly considered by the replying respondent and his claim was not found sustainable in view of the law laid down by the Hon'ble Supreme Court in Mrs. Rekha Chaturvedi Vs. University of Rajasthan and others, 1993 (1) SLR 544. It was further mentioned in the preliminary objections that subsequently respondent No. 2, who was earlier appointed/promoted on *adhoc* basis, was thereafter appointed/promoted on regular basis against the upgraded post of Deputy Registrar-cum-Special Private Secretary vide Notification dated 01.10.2014. On merits, respondent No. 1 reiterated the stand submitted in preliminary submissions and denied the contentions of the petitioner that the designations/promotions conferred upon respondent No. 2 were by ignoring seniority and by violating the rights of persons like the petitioner or that the designations or promotions were an act of colourable exercise of powers or were a result of *malafides*.

6. By way of rejoinder, the stand so taken by the petitioner was reiterated and the stand taken by respondent No. 1 in the reply was denied.

7. Respondent No. 2, despite service, did not put in appearance, accordingly he was proceeded against ex parte.

8. I have heard the learned counsel for the parties and have also gone through the pleadings as well as the records produced before the Court by respondent No. 1.

9. Undisputed facts as they emerge from the respective pleadings of the parties as well as the records of the case are as under:

10. Records demonstrate that respondent No. 2 was designated as Principal Private Secretary to Hon'ble the Chief Justice vide office order on 06.09.2013 when Shri Devinder Chopra, Deputy Registrar-cum-Special Secretary to Hon'ble the Chief Justice was transferred and posted as Deputy Registrar (Accounts). The designation of respondent No. 2 as such was not assailed by the present petitioner.

11. Records also demonstrate that on 25th October, 2013, a communication was addressed by the Registrar General, High Court of Himachal Pradesh to Additional Chief Secretary (Home), Government of Himachal Pradesh on the subject *"Regarding creation of a post of Deputy Registrar-cum-Principal Private Secretary to Hon'ble the Chief Justice or up-gradation of the post of Secretary as such"*. Contents of this communication are reproduced hereinbelow:

> *".....*
>
> *Sir,*
>
> *I am to say that there is no separate post of Principal Private Secretary in the office of the Hon'ble the Chief Justice. Previously, an officer in the rank of Deputy Registrar/Additional Registrar was performing the functions of Principal Private Secretary to Hon'ble the Chief Justice. However, the said officers are always overburdened with other important administrative work and have to perform other functions also as a result of which the efficiency and work of the office of Chief Justice is adversely affected.*
>
> *Principal Private Secretary to Hon'ble the Chief Justice is to look after the affairs of the prestigious office of the Hon'ble the Chief Justice. There are several matters of confidential and important nature which the office of the Chief Justice has to deal with from time to time and in order to deal effectively with such important, confidential and sensitive matters, a separate post of Principal Private Secretary in the rank of Deputy Registrar or above is imperative. In other High Courts also the post of Principal Private Secretary to Hon'ble the Chief Justice is manned by a senior officer who performs the functions relating to important and confidential matters. The duties and responsibilities are quite peculiar, important and arduous in nature and that being so, no officer who is not conversant with such work can abruptly be asked and deputed to function as Principal Private Secretary as this exercise may prove futile sometimes besides causing inconvenience and hindrance in the smooth functioning of the work of the office of the Chief Justice.*
>
> *The matter was placed before the Hon'ble the Chief Justice and his Lordship has been pleased to direct to take up the matter with the Government of Himachal Pradesh for creation of a post of the status of the Deputy Registrar-cum-Principal Private Secretary or to upgrade the post of Secretary to that of Deputy Registrar-cum-Principal Private Secretary befitting the status and significance of work.*
>
> *I have, therefore, been directed to request you to create a post in the rank of the Deputy Registrar-cum-Principal Private Secretary or to upgrade the post of Secretary to that of Deputy Registrar-cum-Principal Private Secretary in the pay scale of `15600-30100+`7600/-+`2500/-. Financial implication on creation of post of Deputy Registrar-cum-Principal Private Secretary to Hon'ble the Chief Justice is meager as the Officer appointed against such post has already reached over the pay scale of the post. In case, it is not possible to create new post in alternate, the post of Secretary may kindly be upgraded to that of Deputy Registrar-cum-Principal Private Secretary to Hon'ble the Chief Justice.*
>
> *An early action is requested please."*

12. This was followed by communication dated 22.11.2013 from Additional Chief Secretary (Home) to the Government of Himachal Pradesh to Registrar General, High Court of

Himachal Pradesh on the subject "Regarding creation of a post of Deputy Registrar-cum-Principal Private Secretary to Hon'ble the Chief Justice or up-gradation of the post of Secretary as such", which reads as under:

> *"……..*
>
> *Sir,*
>
> *I am directed to refer to your letter HHC/Admn. 1(27)/74-X-81 dated 25th October, 2013 on the subject cited above and to say that the matter was examined in consultation with Finance Department. Before further action is taken in the matter, you are requested on the administrative side, to kindly send the information/data on the following points:-*
>
> *a) Complete service profile of the incumbent to be upgraded on the said post viz. date of his/her first appointment in Government & superannuation, his/her stay on each post he/she remained and now the time left for his/her retirement;*
>
> *b) Number of promotional avenues including ACPS availed by him/her in their entire service so far;*
>
> *c) Full justification/fact(s) for the proposed up-gradation of post;*
>
> *d) Impact of such proposal in other Government Department/PSUs;*
>
> *e) Financial implication involved vis-à-vis corresponding budgetary provisions under relevant HOA/SOE;*
>
> *f) Matching economy in terms of abolition of equal number of vacant or unwanted posts."*

13. In response to the abovementioned communication, Registrar General, High Court of Himachal Pradesh addressed a communication dated 2nd December, 2013 to Additional Chief Secretary to the Government of Himachal Pradesh. In this communication, details of Sh. Prem Chand Verma were given and other queries which were raised by the Government of Himachal Pradesh vide communication dated 22.11.2013, were also addressed. This was followed by a communication dated 06.01.2014 addressed from the Home Department of the Government of Himachal Pradesh to the High Court of Himachal Pradesh on the subject *"Regarding creation of a post of Deputy Registrar-cum-Principal Private Secretary to Hon'ble Chief Justice or up-gradation of the post of Secretary as such"*, which reads as under:

> *"……..*
>
> *Sir,*
>
> *I am directed to refer to your letter No. HHC/ADmn. 1(27)/74-X-104 dated 3rd December, 2013 on the subject cited above and to state that the present incumbent of the post of Secretary to his Lordship the Chief Justice, vide Office Order No. HHC/Admn. 1(18)/78-XII-Loose dated 6.9.2013, has been designated as Principal Private Secretary to Hon'ble Chief Justice. While the change of designation may appear to be a simple change without any other implications, especially when the Office Order does not speak of any revision of payscale, yet it needs to be pointed out that such change of designation could be ill advised. It is quite possible that in the years to come, the official may claim that since his designation was/is Principal Private Secretary, he may be given the payscale of that designation which is considerably higher than that of Secretary. Therefore it is advisable that as a first step, this Office Order dated 6.9.2013 be amended and a clarification added that the change of designation will not entitle the incumbent to higher payscale or higher grade pay.*
>
> *2. As regards creation of a post of Deputy Registrar-cum-Principal Private Secretary to Hon'ble the Chief Justice or upgradation of the post of Secretary as such, it is noted that the Grade Pay of Deputy Registrar is Rs.7600/- while the Grade Pay of the post of Secretary (held by the incumbent but with*

change in designation) is 6600/-. It is also noteworthy that the next promotion of Secretary is Dy. Registrar-cum-Special Secretary having Grade Pay of Rs.7600/-. Thus upgradation of the post of Secretary (re-designated as Principal Private Secretary) to a new post called Dy. Registrar-cum-Principal Private Secretary would mean that the incumbent would get higher Grade Pay without promotion or may so claim at a future date. As per the R&P Rules, the Secretary is promoted to next level of Deputy Registrar-cum-Special Private Secretary after five years service. But in the instant proposal, the incumbent is getting the equivalent of promotion without actual promotion.

3. Accordingly you are requested to re-consider the matter as the Finance Department has expressed its inability to concur in the proposal."

14. In response to this, Registrar General, High Court of Himachal Pradesh addressed a communication dated 09.01.2014 to Additional Chief Secretary to the Government of Himachal Pradesh, which reads as under:

"…….

Sir,

I am to refer to your letter No. Home-B (A) 3-1/2002-67-dated 22/11/2013 on the captioned subject and to say that the novel mode of tilting the matter for up-gradation of posts Deputy Registrar-cum-Principal Private Secretary to Hon'ble the Chief Justice or up-gradation of the post of Secretary was placed before the Hon'ble the Chief Justice. His Lordship has shown displeasure for conveying the negation with harsh and commanding words to Supreme authority of the State Judiciary.

Service conditions of the Officers and officials on the establishment of the Hon'ble High Court of Himachal Pradesh are governed and regulated by its own Rules framed by Hon'ble the Chief Justice under Article 229 of the Constitution of India keeping in view the changes and requirements of posts. The State Government has no locus- standi to impose its dictates on an independent constitutional body like High Court.

The communication for creation/up-gradation of post initially made and thereafter furnishing the desired information was not merely a communication but the "Recommendation" of Hon'ble the Chief Justice of the High Court. As per law laid down in case " State of Himachal Pradesh Vs. P.D. Attri, 1993(3) SCC 217" due deference and utmost consideration have to be given by the State Government to the recommendation of the Hon'ble the Chief Justice of the High Court. In the case Union of India Versus S.B. Vohra & Ors. (2004) 2 SCC 1501 the following was held:

"11. Independence of the High Court is an essential feature for working of the democratic form of government in the country. An absolute control therefore, has been vested in the High Court over its staff which would be free from interference from the Government subject of course to the limitations imposed by the said provision. There cannot be, however, any doubt whatsoever that while exercising such a power the Chief Justice of the High Court would only be bound by the limitation contained in Clause (2) of Article 229 of the Constitution of India and the proviso appended thereto. Approval of the President/Governor of the State is, thus, required to be obtained in relation to the rules containing provisions as regards salary, allowances, leave or promotion. It is trite that such approval should ordinarily be granted as a matter of course.

xxx xxx xxx

Decisions of this Court, as discussed hereinbefore, in no unmistakable terms suggest that it is the primary duty of the Union of India or the State concerned normally to accept the suggestion made by a holder of a high office like a Chief Justice of a High Court and differ with his recommendations only in exceptional cases. The reason for differing with the opinion of the holder of such high office must be cogent and sufficient. Even in case of such difference of opinion, the authorities must discuss amongst themselves and try to iron out differences. The appellant unfortunately did not perform its own duties."

As earlier submitted that the request for up-gradation of post was made on the recommendation of the Hon'ble the Chief Justice and therefore, this request has to be considered in its right perspective.

In the circumstances, I have been directed again to impress upon the Government for reconsideration of the matter for creation of post of Deputy Registrar-cum-Principal Private Secretary or for up-gradation of the post of Secretary to that the Deputy Registrar-cum-Principal Private Secretary to the Hon'ble the Chief Justice in the pay scale of Rs.15600-39100+Rs.7600/-+Rs.2500/-.

Kindly assign TOP PRIORITY to it."

15. Vide communication dated 22.02.2014, addressed by the Department of Home, Government of Himachal Pradesh to High Court of Himachal Pradesh, the High Court was informed by the Government that Governor, Himachal Pradesh had accorded approval for the up-gradation of a post of Secretary to the Hon'ble Chief Justice of Himachal Pradesh High Court, which communication reads as under:

"……

Sir,

I am directed to refer to your letter HHC/Admn.1(27)/74-X-118 dated 9th January, 2014 on the subject cited above and to say that the Governor, Himachal Pradesh is pleased to accord approval for the up-gradation of a post of Secretary to the Hon'ble Chief Justice of Himachal Pradesh High Court to Deputy Registrar-cum-Special Private Secretary in the pay scale of Rs.15600-39100/-+Rs.7600/-(GP)+Rs.2500/- Secretariat Allowance.

This issues with the prior concurrence of Finance Department obtained vide their U.O. No. 52771570-Fin-F/2014, dated 07/02/2014 & 52795792-Fin (PR)-B(7)-15/2009, dated 11/02/2014

You are, therefore, requested to please take necessary action accordingly in this regard."

16. This was followed by issuance of a notification by the High Court of Himachal Pradesh dated 25.02.2014 (appended with the petition as Annexure P-4), vide which, Hon'ble the Acting Chief Justice in exercise of powers vested in him under Article 229 of the Constitution of India read with Rule 4 of the Himachal Pradesh High Court Officers and the Members of the Staff (Recruitment, Conditions of Service, Conduct and Appeal) Rules, 2003 and all other enabling powers in this behalf, promoted Shri Prem Chand Verma, Principal Private Secretary to Hon'ble the Chief Justice as Deputy Registrar-cum-Special Private Secretary to Hon'ble the Chief Justice on *adhoc* basis against the recently upgraded post of Secretary subject to the condition that Shri Verma was to draw his own pay, grade pay and special pay etc. and other allowances as admissible under the law for discharging the duties and responsibilities of a higher post.

17. At this stage, it is pertinent to mention that the communication vide which the Government accorded approval for the up-gradation of post of *Secretary to the Hon'ble Chief Justice of Himachal Pradesh High Court to Deputy Registrar-cum-Special Private Secretary in the*

pay scale of Rs.15600-39100/-+Rs.7600/- (GP)+Rs.2500/- Secretariat Allowance, which was issued with prior concurrence of the Finance Department of Government of Himachal Pradesh, has not been assailed by the petitioner. This factor is important and relevant because the communications which were exchanged between the High Court of Himachal Pradesh and Government of Himachal Pradesh, demonstrate that name of respondent No. 2 Prem Chand Verma was figuring in communications as the incumbent who was sought to be upgraded by respondent No. 1 and this fact was also in the knowledge of the Government of Himachal Pradesh, who incidentally has not been impleaded as a party respondent.

18. As stated above, the Court has taken notice of the fact that the initial designation of respondent No. 2 as Principal Private Secretary to Hon'ble the Chief Justice vide office order dated 06.09.2013 was not challenged by the petitioner. Even representation which was filed by the petitioner, appended with the petition as Annexure P-5 was addressed against the *adhoc* promotion which was conferred upon him and not against the initial designation. Office order dated 06.09.2013 for the first time came to be challenged only by way of the present petition.

19. Records also demonstrate that the representations which were so made by the petitioner were duly considered by respondent No. 1 and the same were rejected. In response to the submissions made by the learned counsel for the petitioner that the order vide which the representation of the petitioner was dismissed was a non-speaking order, this Court had asked learned counsel for the petitioner that would the petitioner be satisfied if the respondent No. 1 is directed to pass a speaking order on representation which was filed by the petitioner, to which it was submitted by the learned counsel for the petitioner that without going into this aspect of the matter, the petition be decided on merit.

20. It is settled law that in case the original order or original act is not challenged, then the subsequent acts which are the result of that original order or original act cannot be assailed. As I have already discussed above, communication dated 21.02.2014, vide which Government accorded approval for up-gradation of post of Secretary to Hon'ble the Chief Justice to Deputy Registrar-cum-Special Private Secretary in the pay scale of Rs.15600-39100/-+Rs.7600/- (GP)+Rs.2500/- Secretariat Allowance has not been assailed by the petitioner. When approval in this regard was accorded by the Government, it was aware of the fact that the incumbent who was sought to be up-graded by respondent No. 1, was respondent No. 2. In other words, the approval for up-gradation of the post of Secretary to that of Deputy Registrar-cum-Special Private Secretary was given by the State in favour of respondent No. 2 and this order has not been assailed by the petitioner. The *adhoc* promotion as well as regular promotion and thereafter up-gradation of the post of Deputy Registrar-cum-Special Private Secretary to Hon'ble the Chief Justice to the post of Principal Private Secretary to Hon'ble the Chief Justice in the pay scale of Additional Registrar are outcome of the said sanction, which was granted by the Government.

21. In my considered view, in the absence of their being any challenge to the original/initial sanction so granted by the Government dated 22.02.2014, the petitioner cannot successfully even otherwise assail the subsequent notifications. This petition is, therefore, liable to fail on this account also.

22. The Hon'ble Supreme Court in **Government of Maharashtra and others** Vs. **Deokar's Distillery** (2003) 5 Supreme Court Cases 669, has held as under:

> *"38. This apart, the High Court was also not right in rejecting the writ petition of the respondents at the threshold. The High Court has failed to notice another important factor that the statutory provision under Article 309, namely, the Notification dated 10.12.1998 and the consequential administrative instructions/orders issued for carrying out the executive function under Section 58A of the Prohibition Act and Article 162 namely, the circular letter dated 30.7.1999 had not been challenged by the respondents herein and, therefore,*

they were not entitled to challenge the demand notice which was merely a consequential communication. The High Court, therefore, is not right in quashing the demand notice issued by appellant No.4, namely, the Sub-Inspector of State Excise, in charge of the manufactory of the respondent, without examining the validity of or quashing the Rules of 1998 and the consequential circular letter dated 30.7.1999 issued by appellant No.2, namely, the Commissioner, since the demand notice was merely a consequential communication issued in furtherance of the Rules of 1998 and the circular letter dated 30.7.1999."

23. Records further demonstrate that after up-gradation of the post of Secretary to Hon'ble the Chief Justice to that of Deputy Registrar-cum-Special Private Secretary to Hon'ble the Chief Justice, candidature of five senior most Secretaries which included the petitioner as well as respondent No. 2 was considered for the purpose of promotion to the said post on *adhoc* basis on the basis of merit-cum-seniority. Relevant notings available on file in this regard are quoted hereinbelow:

"Submitted that Shri Prem Chand Verma was posted as Secretary with the Hon'ble the Chief Justice as none of the other Secretaries or other officer of such status were found suitable for handling the entire work of the Secretariat of Hon'ble the Chief Justice. Owing to the significance of the work attached with the Secretariat of the Hon'ble the Chief Justice, the post of Secretary being held by Shri Prem Chand Verma has been designated as Principal Private Secretary on 6.9.2013 (Flag "A"). Simultaneously Hon'ble the Chief Justice was pleased to order to take up the matter with the Government of Himachal Pradesh for creation of one post of the status of the Deputy Registrar-cum-Principal Private Secretary or to upgrade the post of Secretary to that of Deputy Registrar-cum-Principal Private Secretary so that the holder of the important work can be bestowed with the monetary benefits.

Matter was considered by the Government and repeated communications were made and lastly on the communication of this Registry dated 9.1.2014, the Joint Secretary (Home) to the Government of Himachal Pradesh vide letter dated 20.02.2014 (at page 17-18) has conveyed that the Governor of Himachal Pradesh has been pleased to accord approval for the up-gradation of a post of Secretary to Hon'ble the Chief Justice to that of the Deputy Registrar-cum-Special Private Secretary to Hon'ble the Chief Justice in the pay scale of Rs.15600-39100/- +Rs.7600/- (GP) + Rs.2500/- Secretariat Allowance.

*As the post of Secretary being manned by Shri Prem Chand Verma, has been upgraded to that of the Deputy Registrar-cum-Special Private Secretary and, therefore, being its new up-gradation there are no Rules for its filling up. However, for filling up the post of Deputy Registrar the mode of appointment in the R & P Rules is "**Merit-cum-Senioirity having five years service in the feeder cadre with Graduation".** In the past, the post of Readers were upgraded to that of Court Secretaries and the holders of the posts of Readers were promoted/appointed as such by ignoring even seniority. Not only this, in the year 1995 one post of Electrician and one post of Motor Mechanic were created and filled up by appointing the officials who were performing the duties attached to the post in the absence of R & P Rules.*

In this context it is submitted that the post of Secretary to Hon'ble the Chief Justice has been upgraded to that of Deputy Registrar-cum-Special Private Secretary to Hon'ble the Chief Justice, therefore, the category of Secretaries has to be considered for the post in question. The bio-data of the five senior most Secretaries is as under:

Sr. No.	Name of the Secretary	Qualification	ACRs for the last five years	Eligibility
1.	Shri Tek Ram	B.A. Part-1	i) 2009 Outstanding ii) 2010 Very good iii) 2011 Outstanding iv) 2012 Very Good v) 2013 Very Good	Not eligible
2.	Sh. Manohar Lal Sharma	B.A.	i) 2009 Very Good ii) 2010 Very Good iii) 2011 Very Good iv) 2012 Very Good v) 2013 Outstanding	Eligible
3.	Shri Hem Raj	M.A.	i) 2009 Very Good ii) 2010 Very Good iii) 2011 Very Good iv) 2012 Outstanding v) 2013 Outstanding	Eligible
4.	Sh. Ramesh Chand	B.A. LL.B.	i) 2009 Outstanding ii) 2010 Very Good iii) 2011 Outstanding iv) 2012 Outstanding v) 2013 Outstanding	Eligible
5.	Sh. Prem Chand Verma	M.A., LL.B., B.G.L.	i) 2009 Outstanding ii) 2010 Outstanding iii) 2011 Outstanding iv) 2012 Outstanding v) 2013 Outstanding	Eligible

The Annual Confidential Reports of the aforesaid officers are attached herewith.

Moreover, the post of the Deputy Registrar is being filled up on the basis of merit-cum-seniority, therefore, the service record including the qualification of the Officers has to be considered.

In the instant case, at the first instance owing to significance of the work of the Secretariat of the Hon'ble the Chief Justice, the post of Secretary being manned by Shri Prem Chand Verma has been re-designated as Principal Private Secretary on 6.9.2013 which has now been upgraded to that of Deputy Registrar-cum-Special Private Secretary. As the post of Secretary has been upgraded against which Shri Prem Chand Verma is working, therefore, he is having better claim to be considered for the post because he is discharging the duties attached to the post.

Further after the posting of Shri Prem Chand Verma as Principal Private Secretary there is nothing adverse against him which render him unfit/disqualify for appointment/promotion against the newly up-graded post of Deputy Registrar-cum-Special Private Secretary. The Officer is having preferential

claim to be promoted against the newly up-graded post as he is working as such since long and the post of Secretary being held by him, re-designated as Principal Private Secretary has been upgraded for him. The Officer Shri Prem Chand Verma is highly qualified having his qualification as M.A. LL.B. & BGL amongst all the Secretaries and as far as his service record is concerned the same is "Outstanding".

In view of the above submissions, as Shri Prem Chand Verma is holding the post of Principal Private Secretary and looking after the confidential and other work in the Secretariat of Hon'ble the Chief Justice without any monetary benefits since 6.9.2013 and the process for filling up the post will take some time, if approved, for the time being Shri Prem Chand Verma, Principal Private Secretary may kindly be ordered to be promoted on adhoc basis as Deputy Registrar-cum-Special Private Secretary to Hon'ble the Chief Justice against the upgraded post in his own pay and grade with other allowances as admissible under law.

However, submitted for consideration and orders, please."

24. It was in this background that the private respondent was promoted on *adhoc* basis vide notification dated 25.02.2014. The above categorically demonstrates that it is not as if no other incumbent was considered by respondent No. 1 for promotion to the post in issue on *adhoc* basis, however, as respondent No. 2 was found more eligible for being conferred *adhoc* promotion to the post in issue, therefore, in this background, he was promoted on *adhoc* basis as Deputy Registrar-cum-Special Private Secretary to Hon'ble the Chief Justice vide notification dated 25.02.2014.

25. Similarly, records also demonstrate that before conferring regular promotion upon respondent No. 2 as Deputy Registrar-cum-Special Private Secretary to Hon'ble the Chief Justice, due exercise in this regard was undertaken by respondent No. 1, which included taking into consideration representations made by other incumbents which also included the present petitioner. Relevant notings dated 25.09.2014 in this regard are quoted hereinbelow:

"In obedience with the orders of Hon'ble the Chief Justice dated 16.06.2014 at note 69 ante, it is submitted that Shri Prem Chand Verma, was posted as Secretary with the Hon'ble the Chief Justice as none of the other Secretaries or other Officer of such status were found suitable. He was assigned the confidential and important affairs of the prestigious office of the Hon'ble the Chief Justice and as such he was performing the functions of Principal Private Secretary to Hon'ble the Chief Justice which were being performed by an officer of the rank of Deputy Registrar/Additional Registrar. Owing to suitability of Shri Prem Chand Verma, he was designated/upgraded as Principal Private Secretary to Hon'ble the Chief Justice on 6.9.2013.

After the designation of Shri Prem Chand Verma, Secretary as Principal Private Secretary to Hon'ble the Chief Justice, the matter was taken up with the Government of Himachal Pradesh for creation of a post of the status of the Deputy Registrar-cum-Principal Private Secretary or to upgrade the post of Secretary as such befitting the status, significance and importance of the administrative work of the office of Hon'ble the Chief Justice. When the matter was pending consideration with the Government, clarification was sought by the Government on certain points, as detailed at note 8 ante. While furnishing the clarification, it was specifically mentioned that only a sum of Rs.20,980/- is involved for upgradation of the post and this amount was calculated on the pay being drawn by Shri Prem Chand Verma. As such in nut-shell, the post of Secretary manned by Shri Prem Chand Verma has been upgraded to that of Deputy Registrar-cum-Special Private Secretary to Hon'ble the Chief Justice

solely to bestow benefit as he was/is looking after the work of the higher post without any monetary benefit.

After upgradation of the post of Secretary to Deputy Registrar-cum-Special Private Secretary, the pay scale of Rs.15600-39100/- + Rs.7600/-(GP) + Rs.2500 (Sectt. Allowance), Sh. Prem Chand Verma has been promoted as Deputy Registrar-cum-Special Private Secretary to Hon'ble the Chief Justice on ad hoc basis subject to the condition that he shall draw his own pay, grade pay and special pay etc. and other allowances as admissible under the law for discharging the duties and responsibilities of a higher post.

My predecessor-in-office in his submission has rightly submitted that Shri Prem Chand Verma has very well responded to the job requirements and to the expectations of Hon'ble the Chief Justice. The Officer is having preferential claim to be promoted against the newly up-graded post as he is working as such for the last one year and even after upgradation of the post he has been promoted against the said post. There is nothing adverse against him which render him unfit/disqualify for appointment/promotion against the newly upgraded post of Deputy Registrar-cum-Special Private Secretary. Moreso, the Officer is highly qualified having his qualification of M.A. LL.B. & BGL amongst all the secretaries and as far as his service record is concerned the same is "Outstanding".

Shri Hem Raj and Shri Ramesh Chand Secretaries of this Registry have made representations for the appointment against the upgraded post of Deputy Registrar-cum-Special Private Secretary. Their claim to be post is not sustainable in view of the law laid down by the Hon'ble Apex Court vide ratio laid down in "Mrs. Rekha Chaturvedi Vs. University of Rajasthan and Others (1993) (1) S.L.R. 544)". According to the Hon'ble Apex Court, when a particular post is upgraded the holder of the said post only is entitled to be appointed against such upgraded post. This decision was applied in another case decided by a Division Bench of this Hon'ble High Court in Dr. T.V. Moorthy and another Vs. H.P. KVV and Others (1997) S.L.R. 554). Earlier also the post of Reader on the Establishment of this Registry were upgraded to that of Court Secretaries (Now Court Masters). The holder of the post of Readers were appointed against the upgraded post of Court Secretaries. It being so, there is no force in the representations of Shri Hem Raj and Shri Ramesh Chand and thus deserve to be rejected.

In view of the above submissions, if approved, Sh. Prem Chand Verma, Deputy Registrar-cum-Special Private Secretary to Hon'ble the Chief Justice, on adhoc basis may kindly be ordered to be appointed/promoted on regular basis against the upgraded post of Deputy Registrar-cum-Special Private Secretary in the pay scale of Rs.15600/-39100-+Rs.7600/-(GP) +Rs.2500(Sectt. Allowance).

However, submitted for consideration and orders please."

26. It is in this backdrop that the private respondent was conferred regular promotion against the post of Deputy Registrar-cum-Special Private Secretary to Hon'ble the Chief Justice vide notification dated 01.10.2014 w.e.f. 25.02.2014, i.e. the date since when respondent No. 2 was actually performing the duties of the office of Deputy Registrar-cum-Special Private Secretary to Hon'ble the Chief Justice, though on *adhoc* basis.

27. Vide notification dated 16.11.2016, issued by Principal Secretary (Home) to the Government of Himachal Pradesh, the post of Deputy Registrar-cum-Special Private Secretary to Hon'ble the Chief Justice was upgraded to the post of Principal Private Secretary to Hon'ble the Chief Justice in the pay scale of Additional registrar. After the said up-gradation, the name of

private respondent was considered for being promoted to the newly up-graded post, keeping in view the fact that the post which was up-graded, was being manned by respondent No. 2. Records demonstrate that while considering the case of the private respondent for promotion to the said post, his Annual Confidential Reports for the last five years were perused and as nothing averse was found against him, accordingly his name was recommended for appointment to the up-graded post, pursuant to which, vide notification dated 21.11.2016, respondent No. 2 was promoted and appointed to the post of Principal Private Secretary to Hon'ble the Chief Justice in the pay band of Rs.15600-39100+8400 Grade pay +Rs.2500/- Secretariat Pay. It is further pertinent to mention that respondent No. 2 as per records was the senior most Deputy Registrar in the seniority list of Deputy Registrars when he was considered for promotion from the said post to the up-graded post of Principal Private Secretary to Hon'ble the Chief Justice.

28. Now, in this background, when we peruse the grounds on which the promotion conferred upon respondent No. 2 has been assailed by the petitioner, this Court finds that there is no merit in the same.

29. Though *malafides*/legal *malafides* have been alleged in the petition, however, except a bald assertion that promotions conferred upon respondent No. 2 are act of *malafide*/legal *malafide*, there is no substantiation of this allegation nor it is mentioned in the petition as to against whom these *malafides* were being alleged, i.e. the person who as per the petitioner conferred promotions upon respondent No. 2 with some ulterior motive.

30. Seniority list of Secretaries, which stands appended with the petition as Annexure P-1 demonstrates that the petitioner was not the senior most Secretary and the incumbents who are senior to the petitioner have not assailed the promotions conferred upon the petitioner. Therefore, even if it is hypothetically assumed that the promotions which have been conferred upon respondent No. 2 are not sustainable in law, then also the present petitioner does not has any *locus* to assail the same in view of the fact that incumbents senior to him in the seniority list have not assailed the said promotions and one writ petition which was filed by Shri Hem Raj, i.e. CWP No. 11/2015, who was senior to the petitioner, stood withdrawn by him on 17.08.2015.

31. The contention of the petitioner that seniority was ignored and he was not considered when promotions were conferred upon respondent No. 2 is also not sustainable. This is for the reason that as I have already discussed above, when *adhoc* promotion was conferred upon respondent No. 2 against the post of Deputy Registrar-cum-Special Private Secretary to Hon'ble the Chief Justice, not only the petitioner but other incumbents were also considered alongwith respondent No. 2 by respondent No. 1 and after over all assessment of the merit of each of the candidates who were considered, the selection committee in its wisdom concluded that respondent No. 2 was the most meritorious. Now, the recommendations so made by the selection committee have not been assailed, nor during the course of arguments, it could be demonstrated by the learned counsel for the petitioner that the recommendations so made by the selection committee were either arbitrary or discriminatory or were based on extraneous considerations. Even otherwise, it is settled law that right to promotion is not a fundamental right and an employee only has a right to be considered for promotion. In the present case, records demonstrate that petitioner was considered alongwith other incumbents when *adhoc* promotion was conferred upon respondent No. 2, but respondent No. 2 was found more meritorious.

32. Accordingly, in view of the discussion held above, as there is no merit in the present petition, the same is accordingly dismissed. Miscellaneous applications, if any, also stand disposed of.

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

Smt. Santosh Kumari. .....Petitioner.

Versus

Sanjeev Kumar and another. .....Respondents.

CMPMO No. 46 of 2017.
Date of decision: May 31, 2017.

Code of Civil Procedure, 1908- Order 26 Rule 9- Plaintiff filed a civil suit for seeking an injunction pleading that she is owner in possession of the suit land – she filed an application for appointment of Local Commissioner for conducting demarcation and pin pointing the encroachment made by the defendants- the application was dismissed by the Trial Court on the ground that demarcation had already been conducted and the application was filed after eight years of the institution of the suit – held that the demarcation of the suit land has not been conducted but demarcation of the adjacent land was conducted- further, it was pleaded in the application that encroachment was made during the pendency of the suit and the earlier demarcation will not help in determining the encroachment – the delay cannot be a reason to dismiss the application- hence, the application allowed subject to the payment of the cost of Rs.5,000/-. (Para-4 to 6)

For the petitioner : Mr. Anand Sharma, Advocate.
For the respondents : Mr. Dheeraj K. Vashisht, Advocate.

The following judgment of the Court was delivered:

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

Order dated 5.11.2016 passed by learned Civil Judge (junior Division), Dehra, District Kangra in application filed by the petitioner-plaintiff under Order 26 Rule 9 CPC is under challenged in this petition. The petitioner-plaintiff claims herself to be owner in possession of the suit land bearing Khasra No. 744 situated in Mohal Moin, Mauza Gangot, Tehsil Dhera, District Kangra, H.P. She has filed a suit against the respondents-defendants for the decree of permanent prohibitory and mandatory injunction. The suit presently is at the stage of recording her evidence in rebuttal. It is at that stage she had filed the application under Order 26 Rule 9 CPC on the ground that the respondents-defendants during pendency of the suit, while raising the construction of their house on the adjoining land bearing Khasra No. 745, have encroached upon a portion of the suit land bearing Khasra No. 744. The prayer, as such, was made to appoint some revenue expert as Local commissioner to conduct the demarcation on the spot and pinpoint the encroachment so made by the respondents-defendants.

2. The application has been resisted and contested on the ground, inter-alia, that the respondents-defendants have already obtained the demarcation on the adjoining land bearing Khasra No. 745. The petitioner-plaintiff allegedly was found to have encroached upon a portion of the said land. They, as such, have filed a suit for possession thereof against her. Also that, no fresh demarcation is required. The application being belated having been filed after eight years of the institution of suit has also been sought to be dismissed.

3. Learned trial Judge taking into consideration the demarcation of the adjoining land already conducted and on being influenced with the factum of its institution after a period over eight years has dismissed the same.

4. The demarcation of the suit land i.e. Khasra No. 744 has not been conducted. The respondents-defendants may have obtained the demarcation of their adjoining land bearing Khasra No. 745, however, that report cannot be considered to find out the encroachment if any made by the respondents-defendants over the suit land bearing Khasra No. 744 allegedly during

the pendency of the suit. Learned trial Judge, therefore, has went wrong in considering the demarcation of their own land obtained by the respondents-defendants while dismissing the application vide order under challenge in this petition.

5. True it is, that the application has been filed at a belated stage i.e. after the expiry of eight years of the institution of the suit. However, Rule 9 of Order 26 CPC nowhere prohibits the institution of the application at a belated stage and rather should be filed at a stage when in the interest of justice it is required to do so. True it is, that in the case in hand the evidence of the parties except for the plaintiff's evidence in rebuttal is over. In the event of the demarcation is conducted by the competent Revenue Authority the demarcation report will only be a piece of evidence if proved on record in accordance with law. Therefore, if anything adverse to the interest of the respondents-defendants occurs during the course of demarcation of the land in dispute they shall have an opportunity to challenge the same.

6. On the other hand, since the alleged encroachment has been made during the pendency of the suit, therefore, in order to appreciate the facts and circumstances of the case and also the evidence available on record, local inspection is essentially required to be got conducted. I, therefore, allow this petition subject to payment of `5000/- as costs to be paid by the petitioner-plaintiff in the trial Court and order to appoint Tehsildar, Dehra to visit the spot and conduct demarcation of the land in dispute bearing Khasra No. 744 in the presence of the parties on both sides. The fee of Local Commissioner shall be `10,000/- to be deposited by the petitioner-plaintiff in the Government Treasury at Dehra within a week from today. The demarcation of the land on the spot will be conducted by Tehsildar, Dehra on *24.6.2017* at 11:00 A.M. The parties through learned counsel representing them are directed to remain present on the spot on that day at 11:00 A.M. The Tehsildar after conducting the demarcation on the spot prepare the report and file the same in the Court below within one week thereafter along with Tatima (*Shajra*) if prepared. Learned trial Judge thereafter shall proceed with the matter further in accordance with law. The petition is accordingly disposed of.

7. An authenticated copy of this judgment be sent to learned trial Court and also the Local Commissioner i.e. Tehsildar Dehra for compliance.

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

CMPMO No. 471 of 2016
& FAO No. 284 of 2014
Decided on : 31.5.2017

1.CMPMO No. 471 of 2016

Sunita and others ...Petitioners

Versus

New India Insurance Company Ltd. Divisional Office and another ...Respondents

2. FAO No. 284 of 2014

The New India Assurance Company Limited .. Appellant

Versus

Smt. Sunita and others .. Respondents

Employees Compensation Act, 1923- Section 4- The Commissioner awarded a sum of Rs.8,06,640/- as compensation and directed the insurer to satisfy the liability – he further directed to pay the penalty on failure of deposit of the amount within one month from the award – held that the statutory penalty is to be paid by the employer and not by the insurer- however, the insurer can be directed to pay the penal interest on failure of deposit of the amount – the award passed by the Commissioner modified. (Para- 2 to 5)

For the petitioner : Mr. Pratap Singh Goverdhan, Advocate, for the petitioners in CMPMO No. 471 of 2016

Mr. Praneet Gupta, Advocate, for the appellant in FAO No. 284 of 2014

For the respondent(s) : Mr. Praneet Gupta, Advocate, for respondent No. 1 in CMPMO No. 471 of 2016.

Mr. Karan Singh Kanwar, Advocate, for respondent No. 2 in CMPMO No. 471 of 2016 and for respondent No. 6 in FAO No. 284 of 2014.

Mr. Pratap Singh Goverdhan, Advocate, for respondents No. 1 to 5 in FAO No. 284 of 2014.

The following judgment of the Court was delivered:

Per Sureshwar Thakur, Judge (oral)

FAO No. 289 of 2014

The insurance company is aggrieved by the impugned award of 9.4.2014, recorded by the learned Commissioner Employees' Compensation, Solan in W.C.A. No. 27/2 of 2013, whereby he, in the sums of money as borne in the operative part of the impugned verdict, hence assessed compensation upon the claimants. When this appeal came up for admission on 12.8.2014, this Court had admitted it, on the following substantial questions of law:

1) Whether the insurance company can be fastened with the liability to pay penalty as envisaged under Section 4-A of the Employees' Compensation Act, 1923.

2) Whether the liability to pay interest to the employee by the insurance company is contrary to terms and conditions of the insurance Ex-RX.

3) Whether penalty as imposed is not in consonance with the provisions of the Employees' Compensation Act, 1923.

Substantial Questions of Law No. 1 and 3

2. Though, in the operative part of the impugned verdict, the learned Commissioner has assessed compensation amount in a sum of Rs. 8,06,640/-, liability of defrayment whereof stands fastened upon the insurer, yet the learned Commissioner has also proceeded to, on failure of the insurer to, within one month from the date of recording of the impugned verdict, make deposit of the compensation amount, fasten a further liability upon it qua its also indemnifying the statutory penalty vis-a-vis the claimants besides fastened a liability upon it qua its also indemnifying, the penal interest leviable thereon in accordance with the relevant statute, vis-à-vis the claimants. None of the substantial questions of law, whereon the instant appeal stands admitted, impinge upon the adequacy or the legitimacy of the quantum of compensation determined in the impugned award, hence it is apparently unnecessary to determine the fact whether the quantum of compensation determined in the impugned verdict, suffering from any error of any mis-appreciation or non-appreciation by the learned Commissioner, of any relevant or germane evidence or his committing any error of his mis-applying the relevant statutory provisions.

3. However, the operative part of the impugned verdict, wherein the learned Commissioner has proceeded to, on failure of the insurer "to" within one month since the recording of the verdict, "deposit" the compensation amount, render it liable to defray statutory penalty besides rendered it liable to pay penal interest leviable thereon in accordance with the relevant statute, vis-à-vis claimants, is perse in flagrant transgression, of the relevant provisions of the Employees' Compensation Act. In the learned Commissioner apparently making the aforesaid direction upon the insurer qua its, for the relevant omissions, hence being amenable to pay the statutory penalty besides defray penal interest leviable upon the compensation amount, in consonance with the relevant statutory provisions, vis-à-vis the claimants, he has

obviously misread the relevant provisions occurring in Section 4(A) of the Employees' Compensation Act, provisions whereof stands extracted hereinafter:

> "4.A. Compensation to be paid when due and penalty for default-
>
> (1) Compensation under Section 4 shallbe paid as soon as it falls due.
>
> (2) In cases where the employer does not accept the liability for compensation to the extent claimed,he shall be bound tomake provisional payment based on the extent of liability which he accepts,and, such payment shallbe deposited with the Commissioner or made to the employee, as the case may be, without prejudice to the right of the employee to make any further claim.
>
> (3) Whether any employer is in default in paying the compensation due under this Act within one month from the date it fell due, the Commissioner shall-
>
> (a) direct that the employer shall, in addition to the amount of the arrears, pay simple interest thereon at the rate of twelve per cent per annum or at such higher rate not exceeding the maximum of the lending rates of any scheduled bank as may be specified by the Central Government, by notification in the Official Gazette, on the amount due; and
>
> (b) if, in his opinion, there is no justification for the delay, direct that the employer shall, in addition to the amount of the arrears and interest thereon, pay a further sum not exceeding fifty per cent, of such amount by way of penalty."

Wherein in Sub-Section 3 thereof, there occurs a categorical enunciation qua, on failure of "the employer" to within its ambit, make defrayment of compensation amount to the employee concerned or to his successors-in-interest, his rendering himself amenable qua the apposite ill-liabilities contemplated in clause(a) and (b) of Sub-Section 3 of Section 4(A) of the Act, being fastenable upon him.

4. Consequently, the relevant aforestated statutory provisions in purported compliance wherewith, the learned Commissioner in the operative part of the award, has fastened liability upon the insurer, qua on its failure, to within one month since the occurrence of the apposite pronouncement, make deposit of the compensation amount, qua hence it indemnifying the claimants' vis-a-vis, the statutory penalty besides penal interest borne in clause(b) of Sub-Section 3 of Section 4(A) of the Act, is apparently in gross violation of the mandate occurring therein, conspicuously when its mandate stands attracted on the statutory contemplations preceding thereto being infringed by the employer, comprised in his evident failure, to within one month of occurrence of the relevant mishap "make" deposit of compensation, whereupon the employer concerned is solitarily hence rendered amenable to face the might of the enunciation(s) embodied in clauses (a) and (b) of Sub-Section (3) of Section 4(A) of the Act, whereupon reliance thereupon by the learned Commissioner in making the relevant impugned operative part of the verdict, is rendered mis-founded. Concomitantly hence with the learned Commissioner violating the mandate of the aforesaid relevant provisions of Section 4(A) of the Act also renders the operative part of the impugned verdict, wherein he has fastened upon the insurer the liability of its indemnifying vis-à-vis the claimants' the statutory penalty besides penal interest embodied in clauses (a) and (b) of sub-Section (3) of Section 4(A) of the Act, to hence warrant its being quashed and set aside.

5. Consequently, the award of 9.4.2014, passed by the learned Commissioner, is modified to the extent that its operative potion, whereby on failure of the insurer, to within one month since the pronouncement of the verdict "make deposit" of the compensation amount, it has been directed to indemnify the claimants', the liabilities enjoined in clause (a) and (b) of Sub-Section (3) of Section 4(A) of the Act, is quashed and set aside. Substantial questions of law No. 1 and 3 are answered accordingly.

Substantial question of law No. 2

6. The learned counsel appearing for the insurer, has contended with vigor that the fastening "of" liability of interest levied upon the principal compensation amount, determined under the impugned judgment, "upon" the insurer is not covered by the Insurance policy/cover executed interse the insurer with the employer of the deceased concerned. He submits that a firm, categorical and explicit recital was enjoined to occur in the relevant insurance cover, reflective of the insurer contractually accepting, to indemnify the employer concerned, even the liability of interest levied upon the principal compensation amount, determined under a pronouncement made by the learned Commissioner concerned. He submits that if no firm recital with respect thereto, is embodied in the relevant insurance cover hence the liability fastened upon the insurer to indemnify the insured, the interest levied upon the principal compensation amount, warranting interference, it being beyond the domain of the relevant contract of insurance executed interse the employer of the deceased employee vis-à-vis the insurance company concerned. However, the aforesaid submission is not accepted by this Court, reason whereof is embodied in the trite factum of the insurer accepting the valid execution of the relevant insurance cover, wherein a pronouncement besides a recital occurrs qua its accepting its liability to indemnify the insurer, the compensation amount assessed by the authority concerned while exercising its jurisdiction under the apposite statute, corollary whereof is, hence with the insurer accepting its contractual liability in respect of its indemnifying the insured, the compensation amount determined under the relevant statute besides also, when the apposite statute holds therein a provision with respect to levying of interest on the principal compensation amount, in sequel, the levying of interest, by the adjudicatory authority on the principal compensation amount, when is in consonance with the relevant statute, also when it falls outside the domain of Section 4(A) of the Act in latter provision, whereof the ill-consequences envisaged therein are statutorily encumbered upon the employer concerned "whereas" therein the fastening of liability qua interest levied on the principal compensation amount, is not therein contemplated to be saddled upon the employer, hence the import of the inclusionary indemnifying contractual recital is qua the insurer also accepting its liability to indemnify the insured qua the sums of money levied as interest on the principal compensation amount, besides the apposite verdict, fastening the liability of interest levied on the compensation amount "upon" the insurer being also within the domain of the contract of insurance. Further, in case, the insurer had aspired not to indemnify the employer concerned, sums of money comprising interest levied on the principal compensation amount, it was enjoined to embody in the relevant contract of the insurance, an apposite exclusionary clause. However, a closest reading of the relevant contract of insurance unveils that no specific exclusionary clause is embodied therein, with respect to the insurer exculpating its liability to indemnify, the insurer, the sums of money levied as statutory interest upon the principal compensation amount. In absence of a specific exclusionary clause, in the relevant apposite contract of insurance, it is deemed fit to hold that the liability of interest levied on the principal compensation amount, being hence fastenable upon the insurer especially when on the principal compensation amount, the learned Commissioner is also enjoined to levy thereon interest in consonance with the mandatory statutory provisions. Consequently, substantial question of law No. 2 is answered against the insurer and in favour of the respondents.

7. The appeal is partly allowed. The impugned judgment rendered by the learned Commissioner, Employees Compensation, Solan is modified to the extent that its operative part whereby, on the apposite failure of the insurer to deposit the compensation amount along with interest @ 12% per annum levied thereon since one month elapsing since the accident, it stood saddled with a liability to indemnify the claimants' both with respect to penalty and penal interest in consonance with the provisions of clause (a) and (b) of Sub-Section 3 of Section 4(A), is quashed and set aside.

CMPMO No. 471 of 2016

The present CMPMO is dismissed as withdrawn, with liberty reserved to learned counsel for the petitioner to, in consonance with the verdict pronounced by this Court in FAO No.

284 of 2014, approach the learned Commissioner concerned, for release of compensation amount. The pending application(s), if any, also stand disposed of.

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

Sh. Jogeshwar Prasad ...Petitioner
Versus
Sh. Narender Kumar ...Respondent

CR No. 47 of 2016
Reserved on : 24.5.2017
Decided on : 2nd June, 2017

H.P. Urban Rent Control Act, 1987- Section 14- Petition was filed seeking eviction of the tenant on the ground that tenant had changed the user of the premises without the permission of the landlord and that tenant is in arrears of rent – the petition was allowed by Rent Controller – appeal was dismissed- held in revision that landlord has proved that tenant is in arrears of rent – further the tenant had put the premises to the commercial use without the written consent of the landlord- in these circumstances, the evictionwas rightly ordered- petition dismissed.

(Para-8 to 13)

For the petitioner : Mr. Virender Singh Chauhan, Advocate.
For the respondent : Mr. B.C. Verma, Advocate.

The following judgment of the Court was delivered:

Per Sureshwar Thakur, Judge

The instant civil revision petition is directed against the concurrently recorded pronouncements made by both the learned Courts below, whereby the tenant/petitioner herein was ordered to be evicted from the demised premises, on his provenly falling into the arrears of rent in respect thereto besides his, without the consent of the land lord, putting it to a use, other than the use with respect whereof Ext. PW2/B was executed interse them.

2. The respondent is landlord of four storeyed building known as "Chauhan Niwas", Ward No. 6, Mahaveer,Mohalla, Kasba Bazaar, Rampur Bushar, District Shimla. The said building is situated over the land comprised in Khata Khatauni No. 9 min 13, being Khasra No. 657/202 measuring 143-50 square meters situated in Muhal Kasba Bazaar-II, Rampur Bushahr,District Shimla, H.P. He purchased the building vide registered sale deed No. 422/2011 reference No. 815/11, dated 12.10.2011 from its previous owner Surinder Singh son of Sh. Raja Ram R/o Main Bazaar, Rampur Bushahr, District Shimla. The petitioner is a tenant with respect to two rooms and two kitchens situated in ground floor of the four storeyed building. He was inducted as tenant by the previous owner w.e.f. 1.10.2009 vide rent agreement dated 12.10.2009 on a monthly rent of Rs. 5500/- inclusive of house tax. The petitioner is residing with his family in one room and is running a tea stall/canteen in the second room. He has also changed the user of the premises from residential to commercial without the permission of the landlord.

3. The petitioner/tenant has admitted the factum of tenancy and the relationship of landlord and tenant interse the parties. However, the rate of rent @ 5500/- and the period of its non-payment has been denied and disputed. It is submitted that the petitioner is a tenant over the demised premises since 1992 on a monthly rent of Rs. 3,000/- inducted as tenant by the previous owner and that he has paid up to date rent @ 3,000/- per month. The petitioner has

further denied the change of user of the premises from residential to non-residential/commercial. He has submitted that he is running a canteen since 1992 in one room and is residing in other room and kitchen. The said fact was well within the knowledge of the previous landlord and now the respondent. He has also denied the rent agreement dated 12.10.2009 having been executed between him and the previous landlord. The petitioner with these submissions denied the claim of the respondent/landlord for being in arrears of rent and guilty of the change of user of the demised premised.

4. The petitioner/tenant filed rejoinder reasserting and reaffirming the grounds of eviction by denying of the defence set up by the respondent.

5. Out of pleadings of the parties, the following issues were settled for adjudication and determination by the learned Rent Controller, Rampur Bushahr on 3.12.2012.

1. Whether the petitioner is entitled or eviction of the premises on the ground of non-payment of arrears of rent, as alleged? OPP

2. Whether the petitioner is entitled for the eviction on the ground of change user of the premises? OPP

3. Relief.

6. On an appraisal of the evidence, adduced before the Rent Controller, the learned Rent Controller allowed the petitioner. In the appeal, preferred against the order of the learned Rent Controller by the respondent-landlord before the learned Appellate Authority, the learned Appellate Authority dismissed the appeal and affirmed the findings recorded by the learned Rent Controller.

7. Now the petitioner-tenant has instituted the instant Civil Revision before this Court, assailing the findings, recorded in the impugned judgment, by the learned Appellate Authority

8. Ext.PW2/B is a validly executed agreement interse the parties at contest. Its execution by the respective contestants herebefore remains undisputed, thereunder the demised premises were leased to the petitioner/tenant herein w.e.f. 1.10.2009, on a monthly rent of Rs. 5500/- alongwith all the statutory increases, at the rate(s) stipulated in the H.P. Urban Rent Control Act, 1987. The evidence placed on record is reflective of the fact of the tenant/petitioner herein evidently falling into arrears of rent, in a sum quantified at Rs. 1,78,637/-, sum whereof also includes all statutory increases, being added thereon, in consonance with the statutorily prescribed rates. Evidence with respect to the tenant/petitioner herein falling into arrears of rent in the sum aforesaid with respect to the demised premises, was not concerted to be shred of its efficacy, by the tenant/petitioner herein, by his adducing before the learned Rent Controller concerned, cogent evidence for displacing its probative worth. Consequently, the conclusions concurrently recorded by both the learned Courts below qua the tenant/petitioner herein falling into arrears of rent, in the sums aforesaid, with respect to the demised premises, do not warrant any interference.

9. Be that as it may, the tenant/petitioner herein could escape his liability of his hence being coercively evicted from the demised premises, on his, within a period of one month since the pronouncement recorded by the learned Rent Controller, depositing before it, the aforesaid quantum of arrears of rent, determined by the learned Rent Controller concerned, with respect to the demised premises. However, the tenant/petitioner herein has evidently failed to adduce any evidence with respect to his, within the statutorily enjoined period of one month, since the pronouncement recorded by the learned Rent Controller, hence through a tenable mode liquidating his liability with respect to arrears of rent. Consequently, the failure of the tenant to liquidate his liability with respect to the arrears of rent determined by the learned Rent Controller qua the demised premises, entails the ill consequence of his hence suffering coercive eviction from the demised premises.

10. Both the learned Courts below had, on a appraisal of evidence, adduced with

respect to the tenant/petitioner herein "begetting" without the written consent of the landlord/respondent, a change of user of demised premises, had concluded that the tenant/petitioner herein had unauthorizedly put the demised premises to commercial use. The aforesaid conclusion concurrently recorded by both the Courts below upon the tenant/petitioner herein qua his, without the written consent of the landlord putting the demised premises to commercial use, had anvilled their conclusions upon the omission of the tenant/petitioner herein, to adduce evidence in respect of the respondent/landlord purveying a written consent to him, for his putting the demised premises to commercial use comprised in his operating a canteen therefrom. Since the tenant acquiesces to the factum of his using a part of the demised premises for a commercial purpose, comprised in his operating a canteen therefrom, also with the aforesaid user, of a part of the demised premises by the tenant/petitioner herein, being evidently without the written consent of the respondent/landlord, hence the ensuing sequel therefrom, is that the tenant/petitioner herein hence proceeding to use a part of the demised premises for a purpose other than it was let out to him by the respondent/landlord. However, the impact of the aforesaid inference is concerted by learned counsel for the tenant to stand undermined by the factum of the tenant/petitioner herein, operating from the demised premises, a canteen since the year 1992 up to the date of execution of Ext. PW2/B, hence with the aforesaid factum being in the know of the respondent/landlord, thereupon in his operating a canteen in a part of the demised premises since then up to the date of institution of a petition for his eviction, hence boosting an inference that the landlord/respondent herein tacitly purveying implied consent to him to run or operate a canteen in a part of the demised premises, with a further effect of the aforesaid findings recorded on the relevant ground of eviction, warranting interference by this Court.

11. The aforesaid submission is rejected on the ground that the tenant/petitioner herein has not been able to adduce firm and cogent evidence with respect to the respondent/landlord at the time of execution of Ext.PW2/B holding knowledge with respect to the tenant/petitioner herein using a part of the demised premises for operating a canteen therefrom. In the absence of the aforesaid firm evidence, with respect to the land lord holding knowledge qua the petitioner/tenant herein at the time contemporaneous to the execution of Ext. PW2/B interse them hence using a part of the demised premises for operating a canteen therefrom obviously cannot afford any leverage to the petitioner/tenant herein to hence canvass that the respondent/landlord had, since then up to the date of institution of the apposite petition, tacitly purveyed an implied consent to him with respect to his using a part of the demised premises, for operating a canteen therefrom nor can he contend that hence on the issue apposite thereto warranting findings being returned against the respondent/landlord.

12. Pre-eminently also when the recitals contained in Ext.PW2/B override besides overcome the effect if any of oral evidence in respect of permissive change of user of the demised premises by the tenant/petitioner "whereas" with Ext. PW2/B not containing any recital with respect to the demised premises being let out to the tenant/petitioner herein for his operating a canteen in a part thereof. Consequently, absence of apposite recitals in Ext. PW2/B, whereupon the tenant was permitted to use a part of the demised premises for operating a canteen therefrom also with his admitting the factum of his operating a canteen from a part of the demised premises, despite no written consent in respect thereto standing purveyed to him by the respondent/landlord, naturally begets the inevitable conclusion, that the concurrently recorded findings of both the learned Courts below that the tenant/petitioner had without the written consent of the respondent/landlord, hence altered the user of the demised premises, not warranting any interference.

13. For the reasons which have been recorded hereinabove, this Court holds that both the learned Courts below have 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 Authority does not suffer from any perversity or absurdity of mis-appreciation and non-appreciation of evidence on record, rather it has aptly appreciated the material available on record.

14. In view of the above, I find no merit in this appeal, which is accordingly dismissed. In sequel, the impugned judgments of both the learned Courts below are affirmed and maintained. Record of the learned trial Court be sent back forthwith. Pending application(s), if any, also stand disposed of.

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

Leela Dhar .....Petitioner.
Versus
Labh Singh. .....Respondent.

Cr. Revision No. 232 of 2015
Date of decision: June 02, 2017.

Negotiable Instruments Act, 1881- Section 138, 142 and 147- Accused was convicted by the Trial Court- an appeal was filed, which was dismissed- aggrieved from the order, present revision has been filed- the parties filed application pleading that matter has been compromised between them and the complainant be permitted to compound the offence- application allowed – the accused directed to deposit the cost within three weeks. (Para- 3 to 6)

Cases referred:
Dhiraj Singh and others Vs. M/S Suriti Enterprises, Latest HLJ2013(HP) 1120
Damodar S. Prabhu Vs. Sayed Babal, (2010) 5 SCC 663

For the petitioner : Mr. G.R. Palsra, Advocate with Ms.Leena Guleria, Advocate.
For the respondent : Mr. S.C. Sharma, Advocate.

The following judgment of the Court was delivered:

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

The petitioner-convict herein was tried by learned Judicial Magistrate Ist class, Chachiot at Gohar, District Mandi for the commission of an offence punishable under Section 138 of the Negotiable Instruments Act (hereinafter referred to as the 'Act' in short). After holding the trial he has been convicted and sentenced to undergo simple imprisonment for a period of one month and to pay Rs.5000/- as compensation. In appeal learned Sessions Judge, Mandi has affirmed the findings of conviction and sentence recorded by the trial Court against the petitioner-convict and dismissed the appeal vide judgment under challenge in this petition. He has now invoked the revisional jurisdiction of this Court on the grounds, inter-alia, that the findings of his conviction recorded in contravention of the evidence available on record are perverse, hence not legally sustainable. Anyhow, this Court need not to go into all factual details nor ponder upon the admissibility of the evidence available on record because during the pendency of the appeal the petitioner-convict has settled the matter with the respondent-complainant consequent upon the settlement so arrived at the payment of Rs.10,000/- to the latter.

2. A joint application under Section 142 of the Act has been filed with a prayer to record the compromise and the judgment of conviction passed against the petitioner-convict by both Courts below be quashed and set aside.

3. As a matter of fact consequent upon the compromise having been arrived at between the parties an application under Section 147 of the Act with a prayer to allow the respondent-complainant to compound the offence should have been filed. Anyhow, treating the

present application to be the one under Section 147 of the Act, I allow the compounding of the offence by the respondent-complainant, of course, subject to payment of the costs in the light of the judgment of this Court in ***Dhiraj Singh and others*** Vs. ***M/S Suriti Enterprises, Latest HLJ2013(HP) 1120*** in which while placing reliance on the judgment of the Apex Court in ***Damodar S. Prabhu*** Vs. ***Sayed Babal, (2010) 5 SCC 663***, it has been held that the compounding of the offence though is permissible even in the Appellate Court also, however, subject to payment of costs.

4. As a matter of fact, the Apex Court has formulated a Scheme which find mention in the judgment *supra* and as per the same if the prayer for compounding of offence is made before the Appellate Court, the cost to be borne by the petitioner-convict may be up to 15% of the cheque amount. The Court however may reduce the same keeping in view the facts and circumstances of each case.

5. In the case in hand the cheque amount though was Rs.60,000/-, however, as per the findings recorded by learned trial Court and affirmed by learned lower Appellate Court, out of it a sum of Rs.50,000/- was already paid by the petitioner-convict to the respondent-complainant well before institution of the suit. Therefore, the complaint was filed only with regard to the remaining amount i.e. Rs.10,000/-. In the given facts and circumstances, the levy of costs @ 5% of Rs.10,000/- would serve the ends of justice.

6. Being so, there shall be a direction to the petitioner-convict to deposit the cost @ as aforesaid with the Secretary, District Legal Services Authority, Mandi within three weeks from today. The receipt qua deposit of the cost be produced in this Court on *13.7.2017* and for that, the matter be listed in the Chambers at 4:15 P.M. In the event of the convict-petitioner failed to deposit the amount within the stipulated period, he shall surrender in the trial Court to serve out the sentence.

7. The petition is accordingly disposed of, so also the application Cr.MP No. 576 of 2017 and any other application(s), if any.

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

Prem Lal .....Petitioner.

Versus

Naseera Begam .....Respondent.

CMPMO No. 386 2016
Reserved on 25.5.2017
Decided on : 2.06.2017

Code of Civil Procedure, 1908-Order 21 Rule 32- A petition was filed for the execution of a decree of permanent prohibitory injunction- the execution was dismissed by the Trial Court on the ground that violation of the judgment and decree was not proved- held that an application for appointment of Local Commissioner for demarcation was filed, which was dismissed by the Trial Court- the appointment of Local Commissioner would have established the violation of the judgment by the Judgment Debtor – the Court had wrongly dismissed the application- the application allowed- direction issued to the Trial Court to appoint Local Commissioner and thereafter to decide the matter in accordance with law. (Para-1 to 6)

For the Petitioner: Mr. Ashwani K. Sharma, Sr. Advocate with Mr. Ishan Thakur, Advocate.
For the Respondent: Mr. Ashok Tyagi, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J

The instant petition stands directed against the impugned order, recorded by the learned Civil Judge (Senior Division) Una, District Una, H.P. "upon" execution petition No. 12-10 of 2006, whereunder the DH concerted to seek execution of a conclusively recorded decree of permanent prohibitory injunction, whereupon the JD was restrained to interfere with the suit property comprised in Khata/Khatoni No. 90/96 Khasra No. 320/92 "whereby" he dismissed the execution petition. The reason assigned by the learned Executing Court for dismissing the execution petition aforesaid, is comprised in the factum of the oral evidence adduced by the decree holder "not" making any loud categorical communication with respect to the Judgement Debtor infringing the decree of permanent prohibitory injunction pronounced upon him. Moreover, the learned Executing Court in merely relying upon besides considering the oral evidence adduced by the DH in respect of the JD infringing the mandate of the conclusively recorded decree of injunction hence being unworthy of credence for settling findings on the relevant issue, hence appears to have committed a gross impropriety "whereas" conspicuously its earlier thereto "refusing relief" to the decree holder upon an application preferred by him under the provisions of Order 26 Rule 9 whereby he asked for appointment of a local commissioner, for an apt determination qua the relevant fact of the judgement debtor violating the decree of injunction, significantly when it comprised the best evidence in respect thereof, has obviously precluded emergence of evidence, whereupon probative worth, if any, of oral evidence may have been dispelled. Besides reiteratedly when the report of the demarcating officer comprised the best evidence in respect of the alleged infringement made by the judgement debtor with respect to the decree put to execution before the learned executing Court. In sequel, the reason "assigned" by the learned executing Court in refusing relief upon the apposite application instituted before it by the DH under the provision of Order 26 Rule 9 of the CPC, comprised in its being not maintainable during pendency of the execution petition, is both flimsy also is not within the mandate of law, significantly, with there being no explicit statutory prohibition against the executing Court refusing "relief" upon an application constituted before it, under the provisions of order 26 Rule 9 "upon" hence want of its maintainability before it. Moreover when on a Local Commissioner being appointed, he would have in his report purveyed the best evidence with respect to the alleged infringement(s) made by the JD with respect to the decree of injunction pronounced upon her. In aftermath, refusal of relief by the Executing Court, to the decree holder upon his application preferred before it, under the provision of Order 26 Rule 9 CPC, has smothered eruption of best evidence in respect of the alleged violation made by the JD qua the conclusive decree of injunction pronounced upon her. However, the order of dismissal pronounced by the learned Executing Court upon an application preferred therebefore under the provisions of Order 26 Rule 9 CPC stood pronounced on 17.04.2014 "whereas" the learned Executing Court dismissed the execution petition under its subsequent orders recorded on 8.4.2016. Also with the decree holder not promptly assailing the pronouncement recorded on 17.04.2014 by the learned Executing Court, though estops him to assail it herebefore nor he nowat stands vested with any leverage, to while assailing the orders recorded subsequent thereto by the learned Executing Court upon the apposite execution petition, to also assail the verdict recorded by it, upon his application constituted therebefore under the provisions of order 26 Rule 9 CPC. Besides, an apposite facilitation or a statutory leverage stands bestowed upon a party to the lis, aggrieved, by any pronouncement made by the learned trial Court or the learned first Appellate Court "upon any motion" constituted therebefore during the pendency of a civil suit before it or during the pendency of an appeal before the learned First Appellate Court, to dehors his not making a prompt challenge thereto herebefore, to within the grounds of appeal held in a RSA constituted herebefore against the verdicts recorded by the courts below, to also assail the pronouncements respectively recorded by the learned trial Court and by the learned first Appellate Court "upon application(s)" respectively constituted therebefore during the pendency of the apposite civil suit, ensual whereof, of the aforesaid statutory leverage(s) vis-à-vis

the aggrieved litigant, significantly accrues from the mandate held in the provisions of Section 105 of the Code of Civil Procedure, provisions whereof stand extracted hereinafter.

> "105. Other orders.- (1) Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of the original or appellate jurisdiction, but, where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.
>
> (2) Notwithstanding anything contained in sub-section (1), where any party aggrieved by an order of remand [***] from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness."

2. The bestowing of the aforesaid statutory leverage upon an aggrieved, from an adverse pronouncement recorded upon him qua application(s) instituted before the civil Court concerned or upon applications constituted before the appellate Court, hence visibly ensue qua him on his preferring a second appeal before this Court, "whereas" with the petitioner herein, invoking the supervisory jurisdiction of this Court, thereupon he may stand estopped to assail the decision recorded by the learned executing Court upon his application constituted therebefore under the provisions of Order 26 Rule 9 CPC. However, the baulking of the aforesaid endeavour of the petitioner, would be unjust besides would be for the reason(s) ascribed hereinafter hence judicially inexpedient.

3. The doctrine of merger holds its sway besides clout inter se the orders recorded by the learned executing Court upon the apposite application preferred by the decree holder under the provisions of Order 26 Rule 9 CPC viz-a-viz the order pronounced upon the Execution Petition, sway whereof remains intact, despite the learned executing Court making its apposite pronouncement upon the application constituted therebefore under the provision of Order 26 Rule 9 CPC "prior" to its making its pronouncement upon the earlier therebefore reared execution petition by the DH. Doctrine whereof stands aroused by the factum qua the apposite endeavour or the assay of DH/petitioner stemming from his aspiration, to thereupon facilitate the learned executing Court, to hence by its proceeding to make an order for the appointment of a local commissioner, hence discern the truthfulness of the apposite execution strived by the DH, significantly also when it therewithin obviously holds echoings qua the DH hence concerting to adduce best evidence with respect to the judgement debtor infringing the mandate of the decree of injunction pronounced upon her "whereas" the learned executing Court, has apparently blunted the aforesaid endeavour, though ensuring success thereof, may have enabled the learned executing Court, to, proceed to record an order qua hence the decree of injunction standing hence infringed. Consequently, for forestalling eruption of the ill-eventualities aforesaid, it was rather befitting for the learned executing Court, to record an affirmative pronouncement upon the application constituted therebefore by the JD under the provisions of Order 26 Rule 9 CPC.

4. In summa, the ouster by the learned executing Court, of the aforesaid endeavour of the DH, for hence facilitating it, to pronounce an order vis-à-vis the JD violating the decree of injunction rather it proceeding to, on flimsy reasons dismiss the application preferred by the decree holder, under the provisions of Order 26 Rule 9, has hence unfailingly prejudiced the rights of the decree holder whereupon he despite his "not" prior to his nowat challenging along with the order pronounced upon his execution petition, making a prompt challenge, upon the verdict recorded upon his application constituted before the learned executing Court under the provisions of Order 26 Rule 9 CPC, hence holds a leverage to assail, it, alongwith his assailing the orders rendered upon his execution petition. Conspicuously, when both the orders aforesaid are closely blended also when the orders previously recorded by the learned trial Court upon the application constituted therebefore under the provisions of Order 26 Rule 9 CPC, impinge upon the validity of the subsequently recorded orders by it upon his execution petition. Moreso, when the report of the local commissioner would have purveyed the best evidence in respect of the alleged infringement made by the judgement debtor with respect to the decree put to execution before the learned executing Court. Tritely also with theirs standing inextricably entwined

thereupon with the doctrine of merger holding its fullest sway upon both the orders aforerstated, thereupon, despite no communication(s) occurring within the provisions of Article 227 of the Constitution of India qua the petitioner holding the apposite statutory leverage, to, along with the orders pronounced by the learned executing Court upon his execution petition also assail the previous order recorded by it, upon his application constituted therebefore under the provisions of Order 26 Rule 9 CPC, yet he hence holds a right to cast a composite challenge qua it under the extant CMPMO, in respect whereof he has a tacitly made challenge in ground No.B of the petition. Moreover, he also holds a right to hereat make a composite challenge with respect to the validity of both the orders. In aftermath with both the orders standing closely blended also when the invalidity of the earlier order may ultimately render the subsequent order to also suffer invalidation, thereupon the DH holds the right, to, along with his assailing the subsequently recorded pronouncement made upon his execution petition, to, also constitute an apposite challenge qua the previous order recorded, by it, upon his application constituted therebefore under the provisions of Order 26 Rule 9 CPC, dehors no explicit statutory right qua it occurring within the domain of Article 227 of the Constitution of India.

5. In aftermath, the orders recorded by the learned Executing Court upon the application constituted therebefore by the DH under the provisions of Order 26 Rule 9 CPC are quashed, thereupon the instant petition stands allowed also the orders pronounced upon the execution petition are set-aside.

6. In view of the above, the instant petition is accepted. The order recorded by the learned Executing Court upon the application of the DH constituted under the provisions of Order 26 Rule 9 CPC is also quashed and set aside. The execution petition is remanded to the learned Executing Court for its recording afresh decision thereon. The learned Executing Court is directed to appoint a local commissioner to visit the relevant site of suit property. The local commissioner, shall, within two weeks after his appointment, purvey his report to the learned Executing Court. The report of the local commissioner be borne in mind by the learned Executing Court while its deciding the apposite execution petition. The parties are directed to appear before the learned trial Court on 30.06.2017. The record be also sent back. No costs.

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

Prerna Sharma. ...Petitioner.

Versus

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

Cr.MMO No.350 of 2016
Reserved on : 25.5.2017
Decided on: 2.6.2017

Code of Criminal Procedure, 1973- Section 482- Petition has been filed for the cancellation of bail granted to respondent No.2in FIR No. 235/2015 registered for the commission of offences punishable under Sections 420, 467, 468 and 120-B of I.P.C – High Court had dismissed the earlier bail application filed by the petitioner- however, bail was granted by Learned Magistrate despite the fact that the dismissal of bail application was brought to her notice by the I.O. – held that the Magistrate has violated the judicial discipline – she had granted bail to another accused whose bail application was also dismissed by the High Court– the act of the Magistrate amounts to judicial impropriety and judicial indiscipline – hence, the petition allowed and the order passed by the Magistrate granting bail set aside. (Para-2 to 32)

Cases referred:

State of West Bengal vs. Nebulal Shaw, 1997 (3) RCR (Cr) 39

Shahzad Hasan Khan vs Ishtiaq Hasan Khan and another, (1987) 2 SCC 684
State of Maharashtra vs Captain Buddhikota Subha Rao, 1989 Supp (2) SCC 605
Devidas Raghu Naik vs The State 1989 Crl. L.J. 252
State through Smt. Malti Gaur vs. State of U.P., 1990 Crl. L.J 1894
Padam Chand Jain vs. State of Rajasthan and another, 1991 Crl.L.J. 736
Bimla Devi vs State of Bihar and others, (1994) 2 SCC 8
Prabhu Yadav alias Prabhu Mukhia vs State of Bihar, 1994 (2) East Cr.C. 341
Ajayaraj vs State of Kerala, 2010 Crl. L.J. 534
Manish Pahadia vs Smt. Sanju Bai & Anr., 2010 (2) Crimes 77 (Raj.)

For the Petitioner:	Mr. Vipul Sharda, Advocate.
For the Respondents:	Ms. Meenakshi Sharma, Addl. A.G. with Mr. Neeraj Sharma, Dy. A.G. for respondent No.1. Mr. George, Advocate for respondent No.2.

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, Judge:

This petition under section 482 of the Code of Criminal Procedure seeks cancellation of bail granted to respondent No.2 in FIR No.235/2015 registered on 5.12.2015 in Police Station, Dharamshala, District Kangra under sections 420, 467, 468 and 120 (B) of the Indian Penal Code.

2. It is not disputed that this Court vide order dated 26.8.2016 dismissed the bail application filed by the aforesaid respondent; however, learned Magistrate granted bail on 30.8.2016.

3. It would be noticed that in the application filed by the respondent for bail, this Court on 22.7.2016 had been pleased to grant him bail and the matter was thereafter listed on 5.8.2016, when respondent undertook to remit the fees of all the students for the entire courses run by him over these years, as would be evident from the order passed on that day, which reads thus:

> "The petitioner undertakes to remit the fees of all the students for the entire courses run by him over these years. In view of this undertaking, interim order dated 22.07.2016 is extended upto next date of hearing. List on 26.08.2016. In the meanwhile, petitioner will join investigation on 07.08.2016 by reporting at 10.00 a.m. at Police Station, Dharamshala and shall continue to join investigation as and when directed by the Investigating Agency."

4. However, when the matter came up for consideration on 26.8.2016, respondent No.2 expressed his reluctance to comply with the aforesaid undertaking constraining this Court to reject the bail application by a detailed order, relevant portion whereof reads thus:

> 3. The prosecution story as emerges from the records is that the petitioner was indulging in large scale racketing of issuing various degrees, diplomas and other certificates without having any authority, thereby duping and robbing the innocent students of their hard earned money.
>
> 4. The petitioner is running an institute under the name and style of Interactive Education/Interactive Fashion Designing and issuing various mark sheets, advance degrees and diplomas by obtaining amounts ranging from Rs. 30,000/- to Rs. 2,50,000/-. When confronted with the aforesaid degrees, diplomas etc, the petitioner would bank upon the Empanelment Certificate issued by the Deputy Commissioner, Kangra at Dharamshala in November, 2014, which reads thus:-

"No.-REE/DSL/SDA/EMP-2014/6002

Office of Deputy Commissioner, Kangra at Dharamshala

Dated: Dharamshala, November, 2014

Empanelment Certificate

On the recommendation of spot inspection Team under the Chairmanship of local Sub Divisional Magistrates, following institute is empanelled under SDA Scheme-2013 as per following conditions:

Name of Training Course & Centre/Institutes	Maximum No. of Trainee at one Time	Male/ Female / Both	Period of Training	Batch & Time
Interactive Education Top Floor Above PNB Kachahri Adda Dharamshala. Fashan Designing'	*80*	*Both*	*One Year & Two year*	*One one Batch 10 AM to 2 PM*

You will certify in enrolment certificate of trainees that the applicant is not pursuing any other Higher Education, Training and simultaneously enrolled in a Skill Development Training and maintain & preserve all records viz. attendance register of trainees and faculty, Machinery and equipment, Question papers & Answer Sheets etc.

Sd/-

Deputy Commissioner

For Kangra at Dharamshala"

5. It is on the strength of the aforesaid certificate that the petitioner would vehemently contend that he had been duly authorized to issue the certificates/diplomas, degrees etc. Even if, the aforesaid letter is taken into consideration, then at best the petitioner was entitled to empanel under the SDA Scheme, 2013, only 80 trainees at one time, that too in one batch for training ranging from one to two years.

6. However, the recovery of large number of certificates during the course of investigation is clear indication of the involvement of the petitioner in the case. The recovery reveals that the petitioner has issued certificates/diplomas/degrees for probably every course. available under the sun, for example, Information and Technology, duration six months, Advance Diploma in Information and Technology, duration fifteen months, Certificate Interactive Fashion Designing, duration fourteen days, Certificate of Achievement, ADIT, course duration fourteen months, Certificate of Achievement in ADIT, course duration one year etc.

7. It prima facie appears that the students were made to believe that the certificates/diplomas/degrees are lawful and were thus duped of their money illegally extracted from them, resulting in not only playing with the career of the students, but also cheating them.

8. The unwarranted conduct on the part of the petitioner speaks volume of his greed and to say the least his action is highly deplorable.

9. It is only when the petitioner had no explanation to offer as regards the authority under which the certificates/diplomas/ degrees were being issued, he on 5.8.2016 undertook to refund the fees of all the students, who had been issued such certificates etc. Obviously, the students and parents are entitled to the

refund of the entire amount deposited by them along with interest and would also be entitled to compensation for the same, as the petitioner neither had any legal nor a moral right to play with the academic career of the hapless students.

10. However, when the matter was taken up today, the petitioner changed his counsel, who tried to impress upon this Court for adjournment or for waiving the condition of refund of the fees. To say the least, practice of changing counsel is depreciative of the petitioner's conduct.

11. That apart, the petitioner has been running money minting institution by illegally collecting huge sums of money and duping the poor and innocent students and raising his own business empire. All this was done without any legal sanction or authority and the so called degrees and diplomas etc. issued by the petitioner are nothing, but waste papers. It is but a cruel joke that has been meted out to the poor students, thereby the petitioner has played havoc with their lives and career, so much so, that some of the students have even been compelled to give up their education midway, while other are even unable to pay the debts and loan raised for obtaining these certificates/diplomas/ degrees.

12. To say the least, the petitioner has played havoc with the career of several score of students and jeopardized their future irretrievably. I have no hesitation in saying that the petitioner has started this venture only with a view to make money from gullible individuals anxious to obtain certificates/ diplomas/degrees with a sustained hope of getting job. It was nothing but a daring imposture and scul-duggery.

13. It is high time that the State Authorities wake up from deep slumber and crack down the mushrooming growth of unnumbered educational institutions, who are openly flouting the law and playing havoc with the several scores of students and jeopardizing their future irretrievably. This evil has to be nipped in the bud. There is no gainsaying that the problem of undesirable number of education institutions does have its semblance and is direct result of active connivance of the authorities and the individuals or so called societies running the education intuitions. In such circumstances, the State Authorities are expected to be vigilant enough and get to the other king-pin(s) who are instrumental in running such instructions.

14. This issue regarding the private institution operating like money minting institutions came up for consideration before me in CWP No. 8789 of 2014, titled Business Institute of Management Studies Vs. State of Himachal Pradesh, decided on 27.4.2016, wherein it was observed as under:-

> *"**47**. The private institutions cannot be permitted to operate like money minting institutions, rather it has to be ensured that they comply with all the rules, regulations and norms before they are granted permission to operate within the State of Himachal Pradesh. The innocent people of this State cannot be allowed to be duped any further.*
>
> ***48**. History is witness to the fact that it is education alone, which is the backbone of progress of a country. Imparting education can never be equated with profit oriented business as it is neither commerce nor business and if it is so, then the regulatory controls by those at the helm of affairs have not only to be continued, but are also required to be strengthened.*
>
> ***49**. The term 'education' would mean a process of developing and training the powers and capabilities of human being. Over a period of time, education has become a commodity in India. All the genres of society are so overly obsessed with education that it has devalued the real essence of*

education. Education is no more a noble cause but it has become a business, therefore, the paradigm shift, especially in the higher education from service to business is a matter of concern. The commercialization of education has a dreadful effect that is so subtle that it often goes unnoticed.

50. *Mushroom growth of ill-equipped, understaffed and unrecognized educational institutions was noticed by the Hon'ble Supreme Court in* ***State of Maharashtra*** *versus* ***Vikas Sahebrao Roundale and others (1992) 4 SCC 435*** *and it was observed that the field of education had become a fertile, perennial and profitable business with the least capital outlay in some States and that societies and individuals were establishing such institutions without complying with the statutory requirements.*

51. *The Hon'ble Supreme Court in* ***Morvi Sarvajanik Kelavni Mandal Sanchalit MSKM B.Ed. College*** *versus* ***National Council for Teachers' Education and others (2012) 2 SCC 16*** *while rejecting the prayer of the institutions to permit students to continue in unrecognized institutions, observed that mushroom growth of ill-equipped, understaffed and unrecognized educational institutions has caused serious problems with the students who joined the various courses.*

52. *It is unfortunate that despite repeated pronouncements by the Hon'ble Supreme Court for over the past two decades deprecating the setting up of such institutions, the mushrooming of schools, colleges, universities, technical boards and institutions continues all over the State at times in complicity with the statutory authorities, who fail to check this process by effectively enforcing the statutory provisions.*

53. *Judicial notice can also be taken of the fact that there are various advertisements published day in and day out in print as also visual media offering various courses, whereby 8th fail student can appear in 10th class and similarly a 10th class fail student can appear in 12th class. All this unfortunately is happening right under the nose of the State Government. It is difficult to fathom and believe that the functionaries of the State would have no knowledge of the same or would not come across such misleading advertisements.*

54. *It is not difficult to understand that the education system in India is not only large but is also complex with more than 700 universities (736 as on 30.09.2015-UGCs) and more than 35000 affiliated colleges enrolling more than 20 millions students. In such scenario, the mushrooming of private universities has only led to a cut-throat competition leading to misleading advertisements which can only be termed to be persuasive, manipulative and exploitative to attract the widest possible audience. These institutes trap into their web the innocent, vulnerable and unsuspecting students. Their lucrative and mesmerizing advertisements hypnotize the students only to fall into an unknown world of uncertainties. Some institutes promise hundred percent placement, some claim excellent staff, some claim free wi-fi campus, some promise free transportation etc. But what should really matter is 'education'. This problem is further compounded by the proliferation of coaching institutes which have only made 'education' more dirty and murkier.*

55. *The State and the Central Government have enacted various laws to tackle this wide spread menace of commercialization of education and one such step in this regard was the promulgation of the H.P. Private Education Institutions (Regulation) Act, 1997 (for short 'Regulation Act,*

1997) and thereafter the H.P. Private Educational Institutions (Regulatory Commission) Act, 2010.

***56**. Unfortunately not only the aforesaid statutes are opposed tooth and nail, but the provisions contained therein are implemented more in breach. This would be clearly evident from the fact that though Regulation Act was enacted in the year 1997, but the Rules therein came to be finally published only in the year 2003, that too with the intervention of this Court. Despite these rules in place the private education institutions do not comply with the provisions contained therein. The Private Education Institutions including schools do not have the requisite infrastructure, nor do they maintain the accounts and have further failed to constitute the parent teacher associations and as if that was not enough, would charge exorbitant fees.*

***57.** It is shocking that the private institutions have been raising their assets after illegally collecting funds like building fund, development fund, infrastructure fund etc. It is high time these practices are stopped forthwith and there is a crack down on all these institutions. Every education institution is accountable and no one, therefore, is above the law. It is not to suggest that the private education institutions are not entitled to their due share of autonomy as well as profit, but then it is out of this profit that the private education institutions, including schools are required to create their own assets and other infrastructure. They cannot under the garb of building fund etc. illegally generate funds for their "business expansion" and create "business empires".*

***58**. That apart, it is the responsibility of the institution imparting education to set up proper infrastructure for the students and, therefore, the fee charged towards building fund is both unfair as well as unethical.*

***59**. Thus, there is an urgent need for Government intervention, correcting the systematic anomalies or else if commercialization persists and continues to grow unabated, then anything and everything will only be aimed at exploiting and manipulating for profit insofar as the higher education is concerned. It is, therefore, high time that the respondent-State acts responsibly by conducting a fresh investigation of all these institutions.*

***60**. In these given circumstances, the Chief Secretary to Government of Himachal Pradesh is directed to constitute a committee which shall carry out inspection of all the private education institutions at all levels i.e. schools, colleges, coaching centres, extension centres, (called by whatever name), universities etc. throughout the State of Himachal Pradesh and submit report regarding compliance of the H.P. Private Educational Institutions (Regulation) Act, 1997 within three months. Special emphasis and care shall be taken to indicate in the report as to whether the private institutions have the requisite infrastructure, parents teacher associations, qualified staff, whether these institutions are maintaining the accounts in terms of Rule 6 and are regularly submitting all the information in the forms prescribed under the Rules and are further charging the 'fee' as approved by the Govt.*

***61**. The Committee shall further report regarding violations being carried out by the educational institutions with respect to the guidelines issued by the UGC from time to time as have otherwise been taken note of in this judgment and shall be free to report violation of any Act, Rule,*

statutory provisions, guidelines etc., irrespective of the fact that the same have been issued by the Central or the State Governments.

***62**. The Committee shall also keep in mind the provisions of the UGC Act, UGC (Establishment and Maintenance of Standards in Private Universities) Regulations, 2003, instructions issued by the UGC from time to time, more particularly, the public notices issued on 27.06.2013 and thereafter on 04.06.2015 quoted in extenso hereinabove. It shall specifically report as to whether any University/Deemed University/Institution is offering any programme through open and distance learning (ODL) in gross violation of the policy of the UGC and, at the same time also issuing misleading advertisements by stating that their programmes are recognized.*

***63**. In the meanwhile, the respondent-State is directed to ensure that no private education institution is allowed to charge fee towards building fund, infrastructure fund, development fund etc.*

***64**. In addition to this, the Principal Secretary (Education) is directed to issue mandatory orders to all educational institutions, whether private or government owned, to display the following detailed information on the notice board which shall be placed at the entrance of the campus and on their websites:-*

i) Faculty and staff alongwith their qualifications and job experience (profile).

ii) Details of Infrastructure.

iii) Affiliation alongwith certificate (s) of affiliation.

iv) Details of Internship and placement.

v) Fees with complete breakup and details.

vi) Extra curricular activities with complete details.

vii) PTA-with address and telephone numbers of its members.

viii) Transport facilities with details.

ix) Age of the institute and its achievements (if any).

x) Availability of scholarships with complete details.

xi) List of alumni (s) alongwith complete addresses and telephone numbers.

The aforesaid information shall also be displayed on the website of all private educational institutions and in case any educational institution is currently not having its own website, the same shall be created within one month and immediately thereafter the aforesaid information would be displayed on the website.

***65**. Any violation of these directions shall be viewed seriously and shall constitute contempt of Court order."*

15. The petitioner has duped thousands of innocent students under the garb of promising them a bright future and has played not only with their future, but has even played with their lives. The petitioner has made a quick buck by exploiting these innocent, vulnerable and unsuspecting students. In such circumstances, no case for bail is made out and the petition is accordingly dismissed and the interim bail granted on 22.7.2016 is cancelled."

5. Accordingly, when this petition came up for consideration for the first time on 8.12.2016, this Court directed the Investigating Officer ASI Balam Ram to be present in person alongwith records on the next date of hearing, which was fixed on 15.12.2016. On 15.12.2016,

learned Assistant Advocate General represented that at the time when the bail was granted by the learned Judicial Magistrate 1st Class, Court No.1, Dharamshala, the orders passed by this Court from time to time, more particularly, the orders passed on 5.8.2016 and 26.8.2016 were specifically brought to the notice of the concerned court. On such representation, the Investigating Officer ASI Balam Ram was asked to file his personal affidavit. The case was taken up during the post-lunch session so that the aforesaid undertaking was taken on record and the following order came to be passed:

> "Accordingly, the Registry is directed to send a copy of this order alongwith the affidavit filed by the Investigating Officer through FAX to the concerned Magistrate i.e. Judicial Magistrate 1st Class, Court No.1, Dharamshala, H.P. calling upon her explanation, which shall be submitted by her through FAX, so as to reach this Court before the next date of hearing.
>
> List on 23.12.2016"

6. On 23.12.2016, the explanation offered by the concerned Magistrate was received by this Court and after perusal thereof, this Court proceeded to pass the following order:

> "The explanation offered by the learned Judicial Magistrate 1 st Class, Court No.1, Dharamshala, is not at all satisfactory. However, final action on this reply would be taken at the time of decision of the lis.
>
> For the time being, respondent No.2 is directed to show cause why the bail granted to him by the learned Magistrate on 30.08.2016 be not cancelled.
>
> List for consideration on 30.12.2016."

7. As observed earlier, respondent No.2 on 5.8.2016 during the course of hearing of his bail application had specifically undertaken to remit the fees of all the students for the entire courses run by him from the inception and since he had failed to do so, this Court on 30.12.2016 issued show cause notice against him as to why contempt proceedings be not initiated. The matter was heard on 12.1.2017 and kept for further hearing on 13.1.2013 when the original counsel for respondent No.2 did not appear and adjournment on his behalf was made on the ground that he was indisposed.

8. Notably this happened to be the last working day before the winter vacations and this Court left with no option had to adjourn the matter to 2.3.2017 as the Court reopened only on 27.2.2017. However, when the matter was taken up on 2.3.2017, it was represented that the counsel for respondent had undergone surgery and accordingly the matter was adjourned to 6.4.2017 and thereafter to 7.4.2017. On 7.4.2017 only the vice counsel appeared on behalf of respondent No.2 and the matter was accordingly adjourned to 27.4.2017. Subsequently, when the matter was taken up on 27.4.2017, vice counsel for respondent No.2 again sought adjournment on the ground that the original counsel has gone to Maxx Hospital, Mohali for his check up and the matter was adjourned to 25.5.2017, on which date it was finally heard.

9. Having set out the factual matrix, it would now be necessary to advert to the order passed by the learned Judicial Magistrate 1st Class on 30.8.2016 whereby she granted bail to respondent No.2.

10. It would be noticed that the learned Magistrate has neither cared to go through the orders passed by this Court in Cr.M.P.(M) No. 872/2016 (supra) nor has taken into consideration the final order passed by this Court on 26.8.2016 and has proceeded to grant bail by according the following reasons:

> "It is not the case of police that the accused has been previously convicted or has any past criminal record. Also, sufficient time has been granted to the police for interrogation of the accused to complete their investigation. It is a settled law that bail is a rule and jail is an exception and also an accused should not be punished at a pre-trial stage merely on the basis of suspicion. Accused is resident of VPO Kuther, Tehsil Jawali, District Kangra and has his roots in the

society and, therefore, his chances of fleeing are very rare. Thus, in view of above discussion, bail application moved by accused is allowed and the application of police seeking five days police remand of accused is rejected. Accused is ordered to be release on bail, subject to the following conditions."

11. It is not that the undertaking of respondent No.2 and thereafter order of rejection of his bail were not in her notice because this fact stands duly established in the personal affidavit filed by the Investigating Officer ASI Balam Ram. The relevant portion whereof reads as under:

> "3. That the bail application in FIR No. 235/15 filed by Sh. Chander Kant accused under section 438 Cr.P.C. before this Hon'ble High Court was rejected on 26.8.2016 by this Hon'ble High Court of HP in presence of deponent and accused Chander Kant was taken in the custody and produced before the Ld. JMIC Dharamshala on 27.8.2016 and the police was granted 4 days remand upto 30.8.2016.
>
> 4. That on 30.8.2016 Shri Chander Kant, accused was produced by the deponent alongwith other police officials before the Ld. JMIC Dharamshala. The deponent submitted the status report to oppose the bail application of accused which was prepared and signed by Inspector, Surinder Kumar Incharge, SIU/CIA and police requested the Ld. JMIC Court No.1 Dharamshala for further remand and bail petition filed on behalf of accused under section 437 Cr.P.C. was opposed with the request that recovery is still pending and investigation is going on.
>
> 5. That as per report submitted by the police officials in which it has been specifically mentioned in the operative para of the report at page 7, that the interim bail of the accused Chander Kant has been rejected by the Hon'ble High Court of HP on 26.8.2016.
>
> 6. That the deponent has also mentioned in that report that recovery of amount etc. are still pending from the accused, hence further remand is required. Copy of status report is annexed as Annexure R/A. It is pertinent to mention here that the deponent has separately filed the application for police remand in the same very case. The copy of report is annexed as Annexure R/2."

12. Now, adverting to the explanation offered by the learned Magistrate in compliance to the order passed on 15.12.2016, it could be noticed that only explanation offered by her is as under:

1. Sir, the affidavit filed by I.O. Balam Ram corroborates the application filed for extension of remand by the I.O.
2. In the status report it was requested to extend police remand and grant of more time for the recovery of 2 flat seals and interrogation to find out who had helped him in making forged website.
3. Sir, I was verbally informed by I.O. Balam Ram that other two accused were already interrogated regarding the recovery of these 2 seals and at that time these seals were not recoverable. This was mentioned by I.O. in presence of Adv. Pawan Sharma.
4. Sir, the other two accused in this case Ravi and Rakesh had already been released on bail after their police remand was over and they have also been interrogated regarding recovery of things mentioned above.
5. Sir, while allowing the bail application on 30.8.2016, I have given my reasoning for grant of bail as he had been sufficiently remanded to police custody for 4 days but no recovery has been effected by police in these 4 days.

6. Sir, we have direct or indirect directions to grant bail liberally. Taking into consideration that anticipatory bail has been rejected but now as the accused remanded to custody and opportunity was given to police for custodial interrogation and recovery, I considered it to be a changed circumstance.

7. Sir, I have put in service as JMIC since two and half years, therefore I omitted inadvertently to consider the fact that the anticipatory bail has been rejected by the Hon'ble High Court.

8. Sir, I have always tried to do my duty as Magistrate to the best of my ability and uphold the dignity of the institution. However, if by mistake I have erred in passing any order, that is bonafide. So, taking into consideration the years of service I have put in or due to lack of experience I seek the guidance and protection of Hon'ble High Court.

13. To my mind, the action of the Magistrate is clearly subversive to judicial discipline and amounts to gross impropriety because so long the order passed by this Court was in force, the Magistrate could not have entertained the application for bail much less granted the bail.

14. Judicial discipline requires decorum known to law which warrants that that the appellate directions should be followed in the hierarchical system by the Court which exists in this country. It is necessary for each lower tier to accept loyally the decisions of the higher tier. The judicial system only works if someone is allowed to have the last word and if that last word, once spoken, is loyally accepted.

15. Once the judgment rendered by this Court was absolutely clear and the bail granted to respondent No.2 had been rejected by a detailed order, then judicial comity, discipline, concomitance, pragmatism, poignantly point, per force to observe constitutional propriety and adhere to the decision so rendered by this Court.

16. Even if the explanation offered by the concerned Magistrate, which was called for by this Court, is perused, the learned Magistrate appears to be completely oblivious of her duties like in the present case; she even proceeded to grant bail to another co- accused Ravi Kumar whose bail application had already been rejected by the Coordinate Bench of this Court (Justice Rajiv Sharma, J.) on 7.7.2016 passed in Cr.M.P.(M) No. 526 of 2016, titled as ***Ravi Kumar*** vs. ***State of H.P***. The relevant portion whereof reads thus:

> "3. According to the averments made in the petition, an institute in the name of "***Interactive Fashion Designing***" provides for professional degree and diploma in fashion designing. It was affiliated to ***"Ideal Educare Institute of Management and Technology"*** having affiliation with "***Karnataka State Open University"*** and "***Excelsior Interactive Solutions Private Limited"***. The authorization was given in the name of Rakesh Rana. The petitioner was merely working as Manager with the Institute and has nothing to do with the authorization/running of the institute or other institutions. Petitioner filed earlier an application on 9.3.2016 before the learned Sessions Judge, Kangra at Dharamshala under section 438 of the Code of Criminal Procedure. He passed the following order on 9.3.2016:
>
> > "Office report seen. It be registered. This interim bail application under section 438 Cr.P.C. has been filed by the bail applicant for interim bail in case FIR which is stated to have registered against him in police station, Dharamshala for commission of the offence punishable under section 420 IPC. The FIR number is not known at this stage.
> >
> > The learned P.P. has taken notice of the bail application on behalf of the State and its copy has been supplied to him today in the court. He shall file detailed reply/report concerning the said case FIR if any in this court on 21.3.2016 till then in the event of arrest of the bail

applicant/accused he shall be released on bail on his furnishing personal and surety bonds each in the sum of Rs. 20,000/- each to the satisfaction of SHO police station Dharamshala. However, bail applicant/accused shall join investigation and appear before SHO police station, Dharamshala on 10.3.2016 at 11.00 a.m. and thereafter he shall keep on joining further investigation as per directions of the I.O. of the case. Be now pout up for reply/report of the State on 21.3.2016."

4. Thereafter, the matter was taken on 21.3.2016 and the following order was passed:

"Case file has been produced by SI Des Raj of P.S. Dharamshala. Reply filed. Copy given. The verification of the affiliation has to be made from Gurgaon and from Karnataka for which at least one month time is required. Adjournment prayed is allowed. Now fresh status report be filed on 21.4.2016. Till then interim bail order is extended."

5. The matter again came up before the Sessions Judge on 3.5.2016. He passed the following order on 3.5.2016:

"Reply/status report has been placed on record by SI Nanak Ram. Copy supplied. The perusal of the report shows that the recovery from the bail applicant/accused is yet to be procured and he had joined the investigation only once when he produced some of the record, but thereafter he ahs never reported for investigation. Since the bail application/accused is not present himself and he has not been joining further investigation and the recovery from him is yet to be procured, therefore, for non co-operation in the investigation and for not being present today the bail application is dismissed. Be consigned to the record room."

6. It is evident from the order dated 3.5.2016 that the petitioner has not joined further investigation and the recovery from him was yet to be procured. Thus, the bail application was dismissed.

7. It is evident from the status report that the police has carried out investigation and the Interactive Fashion Designing was neither affiliated with Ideal Educare Institute of Management and Technology having affiliation with Karnataka State Open University nor with Excelsior Interactive Solutions Private Limited.

8. This Court had directed the I.O. to ascertain the bank accounts details wherein the accused and co-accused have deposited the money. It is evident from the status report that the petitioner was maintaining Accounts in PNB bearing No. 3373000101048082, 33730001010262448 and 337300JH00000587. A sum of Rs. 27,31,551/- was deposited in two accounts and Rs. 27,30,057/- were withdrawn from these accounts. Petitioner has also maintained bank accounts in Canara Bank bearing No. 2062201005735 and 2062101010401. A sum of Rs. 24,65,399/- was deposited in these accounts also. Substantial amount was withdrawn from these accounts. Petitioner has also raised loan of Rs. five lakhs. Thus, total sum of Rs. 51,96,950/- was found deposited in the bank accounts of the petitioner and substantial amount was withdrawn by him. It has also come on record that 69 students have deposited money with the "Interactive Fashion Designing" institute towards admission, tuition fee etc. The receipts are still to be taken into possession by the police. Petitioner is not disclosing whereabouts of the money received from the students and he has not accounted for the money withdrawn from the bank accounts, which was received by him for admission, tuition fee etc. from the students for providing degrees and diploma in fashion designing. It has also come on record

that Rakesh Rana is also at the helm of affairs of the ***"Interactive Fashion Designing institute***", as per the record made available during hearing of the petition. According to the averments made in the petition, he was being shielded by the police at the behest of the politicians. Petitioner has also placed on record copy of affidavit sworn in by Rakesh Rana claiming himself to be Managing Director of M/s Interactive Education, Kachehri Adda, Dharamshala.

9. Prima facie case is also made out against Rakesh Rana son of Malkiat Singh. The Court is of the prima facie view that accused as well as Rakesh Rana have defrauded the students by receiving huge money towards admission, tuition fee etc. for providing degrees and diplomas in fashion and designing. It has come on record, as noticed hereinabove, that the Interactive Fashion Designing institute is neither affiliated with Ideal Educare Institute of Management and Technology having affiliation with Karnataka State Open University nor with Excelsior Interactive Solutions Private Limited.

10. Petitioner was granted pre-arrest bail by the learned Sessions Judge, Kangra at Dharamshala, but he has not associated in the investigation. The police has yet to recover receipts and details of the money, therefore, he is not entitled to be enlarged on bail. The petitioner and co-accused are hand in glove and they cannot be permitted to take advantage by confusing the nomenclature of the institutions. They have allured the students to deposit huge amount of admission, tuition fee etc. knowing fully well that the institutions managed by them were not recognized/affiliated.

11. Accordingly, there is no merit in the application and the same is dismissed. It is made clear that the observation made hereinabove above shall have no bearing on the merits of the main case.

12. Before parting with the judgment, it is pertinent to note that the I.O. has failed to discharge his statutory duty by not carrying out investigation in accordance with law. He has failed to collect necessary facts after the registration of FIR on 5.12.2015 till date. The Court can take judicial notice of the fact that if investigation is delayed, material evidence disappears. Thus, the Superintendent of Police, Kangra at Dharamshala is directed to change the I.O. in FIR No. 235/2015 dated 5.12.2015 for offence under section 420 of the Indian Penal Code registered at Police Station, Dharamshala and handover the investigation to the CIA to be carried out by an officer not below the rank of Inspector. The I.O./Inspector shall investigate the FIR registered against petitioner bearing No. 235/2015 and also carry out investigation to ascertain prominent role played by Rakesh Rana son of Malkiat Singh Rana by registering FIR against him also in this episode. The I.O. is directed to attach the bank accounts of the petitioner and Rakesh Rana forthwith. He is further directed to collect the details of the money received by them and where they have invested or deposited the same.

13. The Court can also take judicial notice of the fact of mushrooming private institutions, which are run in shops and are also not affiliated/recognized by the Universities/Boards or the State Government. These institutions allure the gullible students by giving advertisements in the leading Newspapers and collect huge amount of money from them. It is the duty of the State Government to ensure that no fake/bogus intuitions are run throughout the State of Himachal Pradesh and to trace out them and close them down. All the Superintendents of Police throughout the State of Himachal Pradesh are directed to find out fake/bogus institutions run within their respective jurisdiction and register case against them against the relevant provisions of law, seal their premises and also seize their bank accounts in the interest of students

of Himachal Pradesh. The Superintendents of Police shall also ensure that the money illegally collected by these institutions be got refunded to the students."

17. As observed earlier, this Court had already vide order dated 23.12.2016 held the explanation offered by the learned Magistrate to be not at all satisfactory, however, final action on the reply was deferred till the decision of the instant *lis*.

18. The taste of the pudding is in the eating. The propriety of a judicial order or the judgment is, therefore, to be tested in the light of law and fact. It is the judicial seal which makes an order or judgment sacrosanct. Following from the above concept, the application of judicial mind is the pole star to determine its objectivity (Refer ***State of West Bengal*** vs. ***Nebulal Shaw***, 1997 (3) RCR (Cr) 39).

19. In ***Shahzad Hasan Khan*** vs ***Ishtiaq Hasan Khan and another***, (1987) 2 SCC 684, the Hon'ble Supreme Court has considered the longstanding convention and judicial discipline required to be maintained at the court level. It has been held that subsequent bail application should be placed before the same Judge, who may have passed the earlier order, as would be evident from the following relevant observations:

> "[5] Normally this court does not interfere with bail matters and the orders of the High Court are generally accepted to be final relating to grant or rejection of bail. In this case, however, there are some disturbing features which have persuaded us to interfere with the order of the High Court. The matrix of facts detailed above would show that three successive bail applications made on behalf of respondent No. 1 had been rejected and disposed of finally by Justice Kamleshwar Nath. In that view it would have been appropriate and desirable and also in keeping with the prevailing practice in the High Court that the bail application which was filed in June 1986 should have been placed before Justice Kamleshwar Nath for disposal. In fact on June 3, 1986, Justice D. S. Bajpai being conscious of this practice and judicial discipline himself passed order directing the bail application to be placed before Justice Kamleshwar Nath but subsequently on 7th June 1986 he recalled his order. We are of the opinion that Justice D. S. Bajpai should not have recalled his order dated June 3, 1986 keeping in view the judicial discipline and the prevailing practice in the High Court. Justice D. S. Bajpai was persuaded to the view that Justice Kamleshwar Nath had passed orders on March 18, 1986, releasing the bail application the matter was therefore not tied up to him. However, the learned Judge failed to notice that when the bail application was listed before Justice Kamleshwar Nath on March 24, 1986 the respondent No. 1, for reasons known to him only, withdrew his application, as a result of which Justice Kamleshwar Nath dismissed the same as withdrawn. This fact was eloquent enough to indicate that respondent No. 1 was keen that the bail application should not be placed before Justice Kamleshwar Nath. Long standing convention and judicial discipline required that respondent's bail application should have been placed before Justice Kamleshwar Nath who had passed earlier orders, who was available as Vacation Judge. <u>The convention that subsequent bail application should be placed before the same Judge who may have passed earlier orders has its roots in principle. It prevents abuse of process of court inasmuch as an impression is not created that a litigant is shunning or selecting a court depending on whether the court is to his liking or not, and is encouraged to file successive applications without any new factor having cropped up. If successive bail applications on the same subject are permitted to be disposed of by different Judges there would be conflicting orders and a litigant would be pestering every judge till he gets an order to his liking resulting in the creditability of the court and the confidence of the other side being put in issue and there would be wastage of courts time. Judicial discipline requires that such matter must be placed before the same Judge, if he is available for orders</u>. Since

Justice Kamleshwar Nath was sitting in Court on June 23, 1986 the respondent's bail application should have been placed before him for orders. Justice D. S. Bajpai should have respected his own order dated June 3, 1986 and that order ought not to have been recalled, without the confidence of the parties in the judicial process being rudely shaken."

20. Similar reiteration of law can be found in the judgment rendered by the Hon'ble Supreme Court in ***State of Maharashtra*** vs ***Captain Buddhikota Subha Rao***, 1989 Supp (2) SCC 605, wherein it was observed as under:

"7.....In the present case the successive bail applications preferred by the respondent were rejected on merits having regard to the gravity of the offence alleged to have been committed. One such application No. 36 of 1989 was rejected by Suresh, J. himself. Undeterred the respondent went on preferring successive applications for bail. All such pending bail applications were rejected by Puranik, J. by a common order on 6th June, 1989. Unfortunately, Puranik, J. was not aware of the pendency of yet another bail application No. 995/89 otherwise he would have disposed it of by the very same common Order. Before the ink was dry on Puranik, J. order, it was upturned by the impugned order. It is not as if the court passing the impugned order was not aware of the decision of Puranik, J. in fact there is a reference to the same in the impugned order. Could this be done in the", absence of new facts and changed circumstances? What is important to realise is that in Criminal Application No. 375 of 1989, the respondent had made an identical request as is obvious from one of the prayers (extracted earlier) made therein. Once that application was rejected there was no question of granting a similar prayer. That is virtually overruling the earlier decision without there being a change in the fact-situation. And when we speak of change, we mean a substantial one which has a direct impact on the earlier decision and not merely cosmetic changes which are of little or no consequence. 'Between the two orders there was a gap of only two days and it is nobody's case that during these two days drastic changes had taken place necessitating the release of the respondent on bail. Judicial discipline propriety and comity demanded that the 1 impugned order should not have been passed !reversing all earlier orders including the one rendered by Puranik, J. only a couple of days before, in the absence of any substantial change in the fact-situation. In such cases it is necessary to act with restraint and circumspection so that the process of the Court is not abused by a litigant and an impression does not gain ground that the litigant has either successfully avoided one judge or selected another to secure an order which had hitherto eluded him. In such a situation the proper course we think, is to direct that the matter be placed before the same learned judge who disposed of the earlier applications. Such a practice or convention would prevent abuse of the process of court inasmuch as it will prevent an impression being created that a litigant is avoiding or selecting a court to secure an order to his liking. Such a practice would also discourage the filing of successive bail applications without change of circumstances. Such a practice if adopted would be conclusive to judicial discipline and would also save the Court's time as a judge familiar with the facts would be able to dispose of the subsequent application with despatch. It will also result in consistency. In this view that we take we are fortified by the observations of this Court in paragraph 5 of the judgment in Shahzad Hasan Khan v. Ishtiaq Hasan Khan, (1987) 2 SCC 684: (AIR 1987 SC 1613). For the above reasons we are of the view that there was no justification for passing the impugned order in the absence of a substantial change in the fact-situation. That is what prompted Shetty, J. to describe the impugned order as 'a bit out of the ordinary'. Judicial restraint! demands that we say no more."

21. The Bombay High Court in ***Devidas Raghu Naik*** vs ***The State*** 1989 Crl. L.J. 252 while commenting on decorum and hierarchy of the courts observed that though the concurrent jurisdiction is given to the High Court and Sessions Court under section 439 Cr.P.C. and the fact that the Sessions Court had refused the bail under section 439 Cr.P.C. does not operate as a bar for the High Court to entertain similar application under section 439 Cr.P.C. on the same facts and for the same offence. However, if the choice was made by the party to move first the High Court and the High Court has dismissed the application then the decorum and hierarchy of the Courts require that if the Sessions Court is moved with the similar application on the facts, the said application be dismissed.

22. The Allahabad High Court in ***State through Smt. Malti Gaur*** vs. ***State of U.P.,*** 1990 Crl. L.J 1894 held as under:

> "3.....There is no denial of this judicial convention that in order to maintain judicial discipline and consistency subordinate courts used to obtain endorsement on the bail applications that no other bail application of the accused is pending before any other court. The object of this endorsement is that there will be no conflicting orders passed by the subordinate courts and the High Court and this would prevent passing of contrary orders by the subordinate courts to the orders of High Court. In the instant case this question was raised before the Judge concerned who observed that there is no bar in the Code of Criminal Procedure and, therefore, he has a right to pass orders of bail on the third bail application, in spite of the fact that a bail application of the accused is pending and is being heard by the High Court. The Additional Judge did not consider the prevalent practice and the long standing convention on which basis an endorsement was asked for on every bail application that no bail application is pending in any other court. As pointed out above, the long standing convention has also the binding effect in order to maintain judicial discipline and decorum and, therefore, in my opinion these long standing convention and judicial discipline cannot be ignored. The purpose behind this convention is to maintain public faith in judicial system as well as the orders passed by the courts. Whenever there is violation of this convention, litigants in general used to raise their voice and if these conventions will be allowed to be violated then in my opinion it will involve judicial anarchy. If the subordinate courts are permitted to grant bail in cases where bail applications are being heard by this Court and are pending, then conflicting and contrary orders can be passed and it would be very difficult to maintain consistency and in my opinion if there will be inconsistency then it will result in judicial anarchy."

23. The Rajasthan High Court in ***Padam Chand Jain*** vs. ***State of Rajasthan and another***, 1991 Crl.L.J. 736 had observed that wherein bail application was dismissed by the High Court, the Sessions Judge could not allow the subsequent bail application based on similar material.

24. In ***Bimla Devi*** vs ***State of Bihar and others***, (1994) 2 SCC 8, the Magistrate granted provisional bail after the High Court had rejected two earlier bail applications, the conduct of the Magistrate was found to be against judicial discipline and the Chief Justice was asked to take action against the Magistrate on the administrate side. It is apt to reproduce the relevant observations, which read thus:

> "[2] In view of the fact that the Judicial Magistrate at a later stage has himself cancelled the bail, it is not necessary for us to pass any order with regard to the petitioner's prayer for cancellation of bail but the disturbing feature of the case is that though two successive applications of the accused for grant of bail were rejected by the High court yet the learned Magistrate granted provisional bail. The course adopted by the learned Magistrate is not only contrary to settled principles of judicial discipline and propriety but also contrary to the statutory

provisions. (See in this connection Shahzad Hasan khan case.) The manner in which the learned Magistrate dealt with the case can give rise to the apprehensions which were expressed by the complainant in her complaint, which was treated by this court as a writ petition and is being dealt with as such. In the course that we are adopting, we would not like to comment upon the manner in which the learned Magistrate dealt with the case any more at this stage. We, in the facts and circumstances stated above, direct that a copy of this order be sent to the chief justice of the Patna High court for taking such action on the administrative side as may be deemed fit by him."

25. The Patna High Court in ***Prabhu Yadav alias Prabhu Mukhia*** vs ***State of Bihar***, 1994 (2) East Cr.C. 341 observed as under:

"However, the practice of the court below in entertaining the bail application by the same accused after the rejection of his earlier bail application by the High Court is not to be appreciated. The court below cannot sit in the review or revision against the order of the High Court and if this practice is allowed to prevail it will undermine the dignity of the higher court. The judicial discipline must be strictly maintained. If someone has any ground for the grant of bail after the rejection of the order has been passed he must approach the very higher court which had earlier rejected the application. That very court will be well within its jurisdiction to consider the matter again in the light of new and further circumstances and will pass suitable and appropriate order. The trial court should not entertain an application for bail, even provisional bail, after the bail had been rejected by the High Court.

26. The Kerala High Court in ***Ajayaraj*** vs ***State of Kerala***, 2010 Crl. L.J. 534 on matters of judicial discipline and propriety after taking into consideration the ratio laid down by the Hon'ble Supreme Court in ***Shahzad Hasan Khan's*** case (supra) took a firm view that when the superior Court had refused to grant bail to the accused on merits of the case and that order remained in force, then judicial discipline and propriety required the subordinate criminal court not to entertain an application for bail from such accused unless the superior court had either permitted the accused to move again before the subordinate court or, the case was one covered by sub-clause (a) of the proviso to section 167 (2) of the Code. It was further observed that it was only appropriate to avoid unpleasant situation of this nature and violation of judicial discipline and propriety that the Magistrates also ensure that the petitions for bail filed before them, it is clearly stated whether any petition for bail had been filed in that court or in any other court and if so, with the result thereof.

27. Similar question came up before the Rajasthan High Court in ***Manish Pahadia*** vs ***Smt. Sanju Bai & Anr***., 2010 (2) Crimes 77 (Raj.) and it was observed as under:

"[7] The most crucial question, springing for consideration, in the instant case is as to whether, the Sessions Judge, Baran should have granted anticipatory bail under Section 438 of Cr.P.C. when the prayer to seek such bail was denied by the High Court?

[8] It is true that the principles of judicial discipline and propriety demand that the judges, whatever, their own views, must follow the decision of the superior Courts to which they are judicially sub-ordinate. In the case of Samunder Singh v. State of Rajasthan, 1987 AIR(SC) 737, their Lordships of the Apex Court, propounded that when the matter regarding unnatural death of daughter-in-law, in her father-in-law's house, was not investigated, it was not prudent to grant anticipatory bail. In the instant case, albeit, the interim anticipatory bail was granted by the vacation Sessions Judge, Baran for a period of 25 days and hiding this fact, the respondent no. 1 endeavoured to seek anticipatory bail from the High Court, which was denied vide order dated 13th

> January, 2009. Aggrieved with this, the respondent no. 1 filed Special Leave Petition before the Apex Court and the Hon'ble Apex Court also declined to interfere with the order dated 13th January, 2009 passed by the High Court. But, meantime, the period of interim anticipatory bail was extended by the Sessions Court, Baran. It appears that the fact of rejection of anticipatory bail by the High Court and by the Supreme Court was suppressed from the Sessions Judge, Baran and Sessions Judge, Baran finally on 13th February, 2009, granted regular anticipatory bail to her. Learned Sessions Judge, Baran ought to have followed the ratio indicated by the High Court in its rejection order dated 13th January, 2009 and of course, he should have dismissed the bail petition but he did not do so. Such a practice adopted by the sub-ordinate court, which amounts to judicial indiscipline and impropriety has been deprecated by the Hon'ble Apex Court in the case of Bimla Devi v. State of Bihar & ors., 1994 2 SCC 8. It has been held by the Lordships that though two successive applications of the accused for grant of bail were rejected by the High Court yet learned Magistrate granted provisional bail. The course adopted by the learned Magistrate is not only contrary to settled principles of judicial discipline and propriety but also contrary to the statutory provisions.
>
> [9] It is true that the learned Sessions Judge, Baran should not have granted anticipatory bail to the respondents when her bail application filed under Section 438 of Cr.P.C. had been rejected by the High Court and Special Leave Petition against that was dismissed by the Hon'ble Apex Court. However, that Session Judge is no more in service now."

28. In ***Nebulal Shaw's*** case (supra), it was observed that it is a trite saying "*that a person when admitted to bail by the High Court could be committed to custody only by the High Court.*" Therefore, a person who suffered rejection of bail could only agitate his claim to the very Court which rejected the prayer for bail.

29. In view of settled position of law, this Court has no difficulty in concluding that the concerned Magistrate by granting bail to respondent No.2, that too, within four days of the rejection thereof by this Court and further even without making a reference to the orders passed by this Court has committed judicial impropriety and gross indiscipline.

30. Therefore, in light of the judgment rendered by the Hon'ble Supreme Court in ***Bimla Devi's*** case (supra), the matter is required to be placed before Hon'ble the Chief Justice for taking appropriate action against the Magistrate on the administrative side.

Ordered accordingly.

31. Consequently, in view of what has been stated above, the order passed by the learned Magistrate in the given circumstances is clearly not sustainable.

32. Having said so, this Court is left with no other option but to cancel the bail granted to respondent No.2 by the learned Magistrate on 30.8.2016 and the order passed by the learned Magistrate is accordingly quashed and set aside.

33. However, it is made clear that this order shall not debar the respondent No.2 from approaching this Court for grant of regular bail which application need not to state as and when filed shall be considered on its own merits.

The petition is disposed of accordingly.

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

Roop Singh and another ..Appellants/defendants.
Versus
Surat Ram (died) through LRs. ..Respondents/plaintiff.

RSA No.548 of 2005 alongwith
CMP NO. 2518 of 2016.
Reserved on : 26.05.2017
Date of decision: 02/06/2017

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit seeking permanent prohibitory injunction for restraining the defendants from taking possession of the best part of the suit land- it was pleaded that defendants have become the owners after purchasing part of the suit land and they be restrained from interfering in the possession of the plaintiff- the suit was decreed by the Trial Court- an appeal was filed, which was dismissed – held in second appeal that a co-sharer in exclusive possession cannot be dispossessed except in accordance with law – a purchaser of the joint land cannot take forcible possession from another co-owner – the Courts had rightly granted the relief to the plaintiff- appeal dismissed. (Para-7)

For the appellant: Mr. Rajnish K. Lal, Advocate.
For the respondent: Mr. I.S.Chandel, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J:

The instant appeal stands directed against the impugned judgement and decree of the learned District Judge, Shimla H.P., whereby he affirmed the rendition of the learned Civil Judge, Jr. Division, Theog, Himachal Pradesh. The defendants standing aggrieved by the concurrently recorded renditions of both the learned Courts below, hence through the instant appeal constituted before this Court, concert to beget reversal of the judgements and decrees of both the Courts below.

2. The facts necessary for rendering a decision in the instant appeal are that the plaintiff seeks the permanent prohibitory injunction for restraining the defendants from taking forcible possession of the best part of the suit land comprised in Khata No 18, Khatauni No. 30, Kitas 7, measuring 95 bighas and 6 biswas, situated in chak Kachi, pergana Charati, Tehsil Theog, District Shimla. Briefly stated the facts of the case are that the plaintiff is the one of the co-owners of the suit land and other co-sharers Budhi Ram and Marchi had sold their shares to the defendants and defendants have become the co-sharers with the plaintiff. The plaintiff prayed that defendants be restrained from interfering with the land in his possession. Hence, the present suit.

3. The suit was contested by defendants. They filed written statement admitting that the plaintiff is the co-sharer. It was asserted that defendant No.2 has purchased the share of Bhudi Ram and Marchi. The possession was also delivered to the defendants on the spot and defendants developed the land. The plaintiff has not developed any land, hence, they prayed that this suit be dismissed.

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

1. Whether the defendants are in separate possession of a portion of the suit land, as alleged? OPD.

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

3. Relief.

5. On appraisal of the evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the plaintiff besides the learned Additional District Judge, affirmed the findings of the learned trial Court.

6. Now the defendants/appellants herein have instituted before this Court the instant Regular Second Appeal wherein they assail the findings recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission on 21.3.2006, this Court admitted the appeal on the hereinafter extracted substantial question of law:-

"1. Whether the trial Court and the first appellate Court erred in law in granting the relief of injunction against the appellants, who are admittedly co-sharers?"

Substantial question of law.

7. Though in Ext.P-1, exhibit whereof comprises the Jamabandi with respect to the suit property, a communication occurs that the parties at contest hold the suit property as co-owners. Consequently, when the aforesaid reflections occurring in Ext.P-1 enjoy a presumption of truth besides when no cogent evidence is adduced for displacing the presumption of truth enjoyed by the apposite reflections borne in Ext.P-1,in sequel, the reflections occurring in Ext.P-1 qua the parties at contest holding co-ownership with respect to the suit property, hence acquire conclusivity. However, the effect of conclusivity being imputed to the aforesaid fact, would not per se entitle the defendants appellants, to beget reversal of the concurrent decrees recorded upon them whereby they stand restrained from interfering with the exclusive physical possession of the plaintiff, upon the suit land borne in the suit Khasra numbers. Moreover, even though the principle of joint tenancy or the principle of co-ownership is imbued with the salient tenet qua all the recorded co-owners holding unity of title besides community of possession with respect to every inch of the undivided suit property also when on the aforesaid principle being carried forward, it would beget a natural corollary that any exclusive possession by any co-owner of any part of the joint property being construable to be his holding possession thereof for other co-owners as well besides hence any exclusivity of possession of any co-owner of the undivided suit property "not" leveraging in him any entitlement to claim a decree for injuncting other co-owners from interfering in his exclusive possession upon the whole or a part of the undivided suit property. Nonetheless, the aforesaid principle of law, is however not to be rigidly applied rather it holds some exceptions, especially when a part or whole of the suit property is evidently exclusively physically possessed by a co-owner whereas other co-owners evidently do not hold physical possession of any part of the undivided suit property. Furthermore in case evidence emerges that when rights of co-ownership stand acquired in the undivided suit property 'under' a registered deed of conveyance executed by hitherto co-owners upon the apposite vendees/co-owners, it being imperatively established by an alienee/co-owner that the relevant hitherto vendors/co-owners in the undivided suit property evidently "holding" at the time of execution of the relevant deed of conveyance, "exclusive physical" possession of a part of the undivided property, in respect whereof he/they induct(s) his alienee(s) as co-owner(s) therein also evidence is enjoined to emerge in portrayal of the hitherto co-owners/vendors, at the time contemporaneous to the execution of the apposite deed of conveyance "holding" exclusive physical possession of a part of the suit property. In case there is want of evidence with respect to, an alienee/co-owner never holding physical possession of the suit property nor when evidence is wanting with respect to the ailnee/co-owner being put into physical possession of any part of the suit property "whereas" evidence emerging with respect to a co-owner in the undivided suit property "holding" exclusivity of physical possession, thereupon the co-owner holding exclusive physical possession of the undivided suit property "does" have a right, to, till occurrence of dismemberment of the joint estate by metes and bounds hence injunct a recorded co-owner not evidently holding physical possession thereof, against his invading upon his exclusive settled

physical possession over a part of or the entire undivided suit property. In determining whether the aforesaid evidence exists or does not exist on record for hence the Court decreeing or non suiting the plaintiff, the fact of an admission occurring in the testification of defendant Roop Singh, that his vendor(s) Bhudhi Ram and Marchi are residing at a location distant from whereat the suit land is located, admission whereof is in consonance with the testification of the plaintiff witnesses besides when PW-2 has testified qua in 1995-96 his purchasing trees from the plaintiff, testification whereof remains uneroded of its sanctity, hence begets an inference that the aliennors/co-owners of the defendants/appellants herein vis-à-vis the suit property, never holding physical possession of any part thereof nor hence "theirs" at the time contemporaneous to theirs executing a deed of conveyance with the defendants appellants with respect to their share in the suit property "handing" over its physical possession to the defendants/appellants "moreso" when no specific recital in respect thereto is shown to occur in the relevant deed of conveyance especially when it remains un-adduced into the evidence. In aftermath the long standing exclusive settled physical possession of the plaintiff upon the undivided suit property especially when thereon they have made immense developments also improvements, is to be revered. Therefore, in the face of the aforesaid exceptional fact, this Court is constrained to hold that the plaintiff is entitled to protect his physical possession with respect to the undivided suit property 'till' its dismemberment by metes and bounds occurs, by his seeking a decree of injunction being pronounced upon the defendants appellants qua theirs not interfering with his physical possession upon the suit land. Consequently, the concurrent decrees of both the Courts below with respect to the suit land is upheld. Substantial question of law is answered in favour of the plaintiff.

CMP No. 2518 of 2016.

8. During the pendency of the appeal before this Court, the defendants instituted an application under the provisions of Order 41 Rule 27 read with Section 151, seeking therein the leave of the Court, to place on record, certain photographs alongwith copy of Aks Sajra, documents aforesaid are claimed to pertain to the suit property besides they seek leave of this Court to adduce into evidence the certificate issued by the Halka Patwari concerned. The documents as proposed to be adduced into evidence, would enjoin this Court, to grant leave to the defendants appellants, to adduce them into evidence "only" when they made a prima-facie display qua theirs holding physical possession of any part of the undivided suit Khasra numbers. In making a determination, whether the documents for whose adduction into the evidence, the leave of this Court is sought, by the defendants, are hence just and essential for returning findings in respect of the apposite issue pertaining to the defendants appellants holding physical possession of any part of the undivided suit property, enjoined upon the defendants to unveil therefrom qua theirs appertaining to the suit property besides theirs prima facie displaying qua the defendants' appellants holding physical possession of a part of the undivided suit property "unless" the aforesaid bespeakings occur in the documents recited in the application, thereupon this Court would not be inclined to afford any leave to the defendants, to adduce them into evidence. However, in making the aforesaid discernment rather with the photographs, as proposed to be adduced into evidence, with the leave of this Court, not prima facie establishing the fact of land, whereupon the fruit trees are reflected to be growing hence appertaining to the suit khasra number nor also with the photographs prima facie revealing that the defendants' holding actual physical possession with respect "to the land" whereon fruit trees are reflected in the photographs. In sequel, with prima facie the aforesaid communications not standing displayed in the photographs, it is befitting to conclude that the apposite leave for their adduction into evidence "not" warranting its standing afforded to the defendants, as their adduction into evidence is hence neither just nor essential, for pronouncing a decision with respect to their holding physical possession with respect to any part of the undivided suit khasra. Moreover, leave to adduce into evidence, Akas Sajra, document whereof though appertains to the suit land, is also declined, it being insufficient to pronounce a decision with respect to the defendants hence prima facie establishing the factum of theirs holding physical possession of any part of the suit property, whereupon hence with its adduction into evidence also being neither

just nor essential for making a pronouncement upon the apposite issue with respect to the defendants holding actual physical possession upon any part of the undivided suit property, reinforces a conclusion qua the leave sought in respect to its being adduced into evidence, warranting its being declined. Moreover, the certificate issued by the Patwari of the Halqua concerned, with an echoing therein that the hitherto co-owners of the suit property, one Besaru holding possession of the suit property, also qua hers holding possession of fruit trees growing on the suit land, is totally insignificant, for settling findings on the apposite issue, especially when the oral evidence adduced by the plaintiff displaces any iota of truth borne by the reflections made in the certificate issued by the Patwari of the Halqua concerned. Also when Besaru has alienated her share in the suit property vis-à-vis the defendants under an apposite deed of conveyance wherein there occurs no recital that she held physical possession of any part of the undivided Khasra number(s) nor their occurring any recital therein that she at the time of its execution, hence parted with its physical possession vis-à-vis the defendants' appellants. Consequently, non occurrence of an apposite recital in the relevant deed of conveyance estops the defendants appellants to claim that the hitherto co-owner(s) in the undivided suit property, "at the time" when the deed of conveyance was executed by them vis-à-vis the defendants/appellants "had" handed over physical possession, of any part of the undivided suit property to them, rather it appears that the Patwari of the Halqua concerned, has merely for aiding the defendants to espouse a false case also for belittling the worth of the relevant oral evidence, in collusion with the defendants has issued the certificate, predominantly also with the defendants appellants not during the course of the pendency of the suit before the learned trial Court nor before the Appellate Court, producing the certificate issued by the Patwari of the Halqua concerned, with a reflection therein of one Beshru holding possession of the orchard reared upon the undivided suit property, also lends impetus, to the inference that its preparation is a result of collusion inter se the defendants with the Patwari of the Halqua concerned. Accordingly, the instant application stands dismissed.

9. For reasons aforesaid this Court concludes with aplomb that the judgements and decrees of both the Courts below standing sequelled by theirs appraising the entire evidence on record in a wholesome and harmonious manner apart therefrom it is obvious that the analysis of material on record by the learned Courts below not suffering from any perversity or absurdity of mis-appreciation and non appreciation of evidence on record, rather they have aptly appreciated the material available on record. I find no merit in this appeal, which is accordingly dismissed and the concurrently recorded judgments and decrees of both the Courts below are maintained and affirmed. Substantial question of law stands answered against the defendants. Decree sheet be prepared accordingly. All pending applications stand disposed of accordingly. No costs.

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

Yashwant Singh ...Petitioner.

Versus

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

CWP No. 2995 of 2016
Reserved on : 22.5.2017
Decided on: 2.6. 2017

Constitution of India, 1950- Article 226- Petitioner was found to be encroacher and was ordered to be evicted- the petitioner filed the present petition for quashing the order pleading that he has removed the encroachment and had deposited a sum of Rs.20,000/- + Rs.2,000/- as costs imposed upon him – the petition is opposed by pleading that the petitioner was found to be an

encroacher and he has admitted the encroachment – therefore, the petition for quashing the order cannot be allowed- held that the petitioner had contested the election, which was set aside on the ground that petitioner is not qualified to contest the election as he was an encroacher- the purpose of filing the petition is to get over the disqualification already incurred by the petitioner to contest the election for the post of Pardhan – the petitioner has not approached the Court with clean hands – the judicial process should not become an instrument of oppression or abuse to suffer injustice – the petition dismissed with cost of Rs. 20,000/-. (Para- 5 to 24)

For the Petitioner:	Mr. Ajay Sharma, Advocate.
For the Respondents:	Mr. Anup Rattan and Mr. Romesh Verma, Addl. A.Gs. with Mr. Neeraj K. Sharma, Dy. A.G. Mr. R.L. Chaudhary, Advocate for the applicant in CMP No. 1027 of 2017.

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, Judge:

In the proceedings initiated against the petitioner, under section 163 of the H.P. Land Revenue Act, he was found to be an encroacher and accordingly ordered to be evicted from the land measuring 0-3 marlas and has filed this writ petition for quashing the orders so passed.

2. However, at the same time, it is averred that the petitioner has already removed the encroachment and at the same time has also deposited a sum of Rs. 20,000/- + Rs. 2,000/- as costs imposed upon him.

3. The respondents have opposed the petition by filing reply wherein it is stated that not only have the three revenue courts successively confirmed the encroachment, but even the petitioner himself has admitted this fact before the various authorities and has also at the same time deposited the compensation and, therefore, nothing survives for adjudication.

4. We have heard the learned counsel for the parties and have gone through the records carefully.

5. The first question that lurks in our mind and what we otherwise find to be intriguing is the possible reason for filing such a petition because if the petitioner has removed the encroachment and at the same time deposited the compensation together with the costs then why would he file the instant writ petition, that too, for the following relief:

> "That the impugned orders annexure P-1 dated 5.2.2014 passed by AC 1st Grade, Barsar, Annexure P-2 dated 9.1.2015 passed by Collector, Sub Division, Barsar and Annexure P-3 dated 9.9.2016 passed by learned Divisional Commission may kindly be quashed and set aside. In the alternative, after setting aside annexure P-3 to the extent of holding revision petition of the petitioner infructuous and order of dismissal of the same, may kindly be set aside and matter my kindly be remanded to the learned Divisional Commissioner for decision afresh in accordance with."

6. Notably while filing the writ petition, the petitioner had also moved an application for interim orders being CMP No.9742 of 2016 wherein a specific prayer was made that the impugned orders Annexure P-1 dated 5.2.2014 passed by AC 1st Grade, Barsar, Annexure P-2 dated 9.1.2015 passed by Collector, Sub Division, Barsar and Annexure P-3 dated 9.9.2016 passed by learned Divisional Commissioner be stayed.

7. However, during the course of hearing, the petitioner through his counsel stated at the Bar that in compliance to the orders made by the authorities, he had already removed the encroachment and even deposited the compensation and prayed that the orders in other

proceedings may not be passed against him. This prayer appeared to be innocuous and was granted and the application was disposed of vide order dated 5.12.2016, which reads thus:

> "Learned counsel for the petitioner stated at the Bar that in compliance to the orders made by the authorities, the petitioner has removed the encroachment and deposited the fine and prayed that orders in other proceedings may not be passed against him. Prayer granted. The application is disposed of."

8. It is on the grant of interim order that the cat came out of the bag and it is then that the real purpose and intent of the petitioner in filing the writ petition came to fore.

9. It was revealed in the application filed by Ashok Kumar for impleading as a party that the petitioner in fact had contested the election to the post of Pradhan Gram Panchayat, Sour with the aforesaid Ashok Kumar wherein the petitioner came to be elected. This election was successfully challenged by Ashok Kumar and the election of the petitioner was set aside by the competent authority on the ground that petitioner had encroached upon the Government land and the matter was now pending before the Deputy Commissioner-cum-Appellate Authority, Hamirpur. The petitioner armed with the aforesaid order dated 12.5.2016 presented the same before the Appellate Authority and on the basis of the aforesaid order kept the same pending till further orders were passed by this Court.

10. Thus, it is established on record that the purpose of filing of this petition is neither genuine nor bona fide and has been filed only to get over the disqualification already incurred by the petitioner to contest the election to the post of Pradhan as being an encroacher over the Government land.

11. It is settled law that one has to approach the Court with clean hands, clean mind, clean heart and clean objective. A prerogative remedy is not a matter of course. While exercising extraordinary power, writ Court would certainly bear in mind the conduct of the party who invokes the jurisdiction of the Court. If the applicant makes a false statement or suppresses material facts or attempts to mislead the Court, the Court may dismiss the application on that ground alone and may refuse to enter into the merits of the case.

12. In order to sustain and maintain the sanctity and solemnity of the proceedings in law Courts, it is necessary that parties should not make false or knowingly, inaccurate statements or misrepresentation and/or should not conceal material facts with a design to gain some advantage or benefit at the hands of the Court, when a Court is considered as a place where truth and justice are the solemn pursuits. If any party attempts to pollute such a place by adopting recourse to make misrepresentation and is concealing material facts it does so at its risk and cost. Such party must be ready to take the consequences that follow on account of its own making.

13. The Court proceedings are not a game of chess. At no cost can the stream of justice be permitted to be polluted by unscrupulous litigants. The writ Court while exercising the writ jurisdiction exercises equitable jurisdiction. The estoppel stems from equitable doctrine and it requires that he who seeks equity must do equity. Not only this, a person who seeks equity, must act in a fair and equitable manner. The equitable jurisdiction cannot be exercised in case of a person who himself has acted unfairly. Even compassion cannot be shown in such cases. The compassion cannot be allowed to bend the arms of justice in a case where an individual(s) has tried to acquire any right by unscrupulous or forcible methods.

14. Equally, the judicial process should never become an instrument of oppression or abuse or a means in the process of the Court to subvert justice. The legal maxim "*Jure naturae aequum est neminem cum alterius detrimento et injuria fieri locupletiorem*", means that it is a law of nature that one should not be enriched by the loss or injury to another.

15. The law on the subject is well settled and on the basis of various pronouncements of the Hon'ble Supreme court, the following principles can conveniently be culled out:

> "1. A writ remedy is an equitable one. While exercising extraordinary power a Writ Court certainly bear in mind the conduct of the party who invokes the jurisdiction of the Court.
>
> 2. Litigant before the Writ Court must come with clean hands, clean heart, clean mind and clean objective. He should disclose all facts without suppressing anything. Litigant cannot be allowed to play "hide and seek" or to "pick and choose" the facts he likes to disclose and to suppress (keep back)/ conceal other facts.
>
> 3. Suppression or concealment of material facts is not an advocacy. It is a jugglery, manipulation, manoeuvring or mis representation which has no place in equitable and prerogative jurisdiction.
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> 4. If litigant does not disclose all the material facts fairly and truly or states them in a distorted manner and misleads the Court, the Court has inherent power to refuse to proceed further with the examination of the case on merits. If Court does not reject the petition on that ground, the Court would be failing in its duty.
>
> 5. Such a litigant requires to be dealt with for Contempt of Court for abusing the process of the Court.
>
> 6. There is a compelling need to take a serious view in such matters to ensure purity and grace in the administration of justice.
>
> 7. The litigation in the Court of law is not a game of chess. The Court is bound to see the conduct of party who is invoking such jurisdiction."

16. What is more surprising if not shocking is that the petitioner would still rely upon the salutary principles that it is more than settled that justice should not only be done, but it manifestly be seen to be done. He would argue that the revenue authorities have found grave illegality and irregularity in the revenue records and, therefore, no reliance should be placed upon the same. That apart, he would further contend that the petitioner himself had gifted land in favour of the Government of H.P. which is now shown as "***Sareaam Rasta***".

17. In support of such contention, the petitioner has taken us to one of the reports sent by the Settlement Officer to the Principal Secretary-cum-FC (Revenue) wherein it is pointed out that there are various anomalies in these revenue records.

18. In addition to that the petitioner would back upon the representation Annexure P-7 made by villagers to the Hon'ble Revenue Minister alongwith some report prepared by a Patwari to claim that 90% of the numbers allotted during settlement are wrong and representation to this effect already stands submitted.

19. We really fail to understand as to how the aforesaid submissions are in any way relevant for the determination of present *lis*. The petitioner had nowhere disputed the extent, area or even the place of his encroachment and simply in order to get over the bar of contesting the election to the post of Pradhan had immediately surrendered the encroached land and deposited the compensation alongwith costs.

20. At no stage did the petitioner entertain any doubt or misapprehension or misconception of the land over which his encroachment existed. In fact, he admitted not only before the revenue authority but even before this Court that he had encroached over the Government land but had thereafter surrendered the same and had also paid the compensation

and the costs. Now, therefore, it does not lie in his mouth to say that because of discrepancies and various shortcomings in the settlement operation, he was not aware of the encroachment.

21. As regards the contention of the petitioner that he has donated land to the Government; the same has no concern or connection with the adjudication of the instant petition and does not otherwise carry his case any further.

22. In view of the aforesaid discussion, we find no merit in this petition and are of the firm view that the petitioner has abused the process of the Court by filing the instant petition with an oblique motive simply in order to get over the disqualification prescribed under the Panchayati Raj Act which barred the petitioner from contesting the election to the post of Pradhan in case he was found to be an encroacher and, therefore, is liable to be burdened with costs.

23. It is more than settled that Courts have to filter out such petitions and dismiss them with costs so that the message goes in the right direction that petitions filed with oblique motive and illegal designs do not have the approval of the Courts.

24. Accordingly, the writ petition is dismissed with costs of Rs. 20,000/- to be paid by the petitioner to the H.P. High Court Advocates' Welfare Association within a period of four weeks.

CMP No. 1027 of 2017

25. In view of the dismissal of the main writ petition, the present application has become infructuous and the same is accordingly dismissed having become infructuous.

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

Smt. Ajudhya Devi and another. ...Petitioners

Versus

Shri Pramod Kumar Sharma and others ...Respondents

CMPMO No. 256 of 2017
Date of Decision: 6.6.2017

Code of Civil Procedure, 1908- Order 41 Rule 3-A- Partition proceedings were initiated by respondents No.1 to 8- the order passed by Assistant Collector First Grade was assailed before Sub-Divisional Collector by filing an appeal –the appeal was barred by limitation and an application for condonation of delay in filing the appeal was filed- a stay application was also filed, Sub Divisional, Collector stayed the operation of impugned order – an application for recalling the order was filed, which was allowed and Sub Divisional Collector ordered the suspension of ad-interim stay granted by him on the ground that no appeal was pending before him without condoning the delay and no order could have been passed- aggrieved from the order, the present petition has been filed- held that Order 41 Rule 3-A specifically provides that no order for stay shall be granted unless the application for condonation of delay is decided – Sub-Divisional Collector had committed a mistake, which was apparent on the face of the record and the Collector had rightly reviewed the order, when the mistake was pointed out to him- no appeal was pending before the Collector and no stay order could have been granted by him – however, the party can file an application under the inherent powers of the Court – permission granted to file an application for grant of interim stay.(Para-4 to 15)

For the Petitioners: Mr.G.C. Gupta, Senior Advocate with Mr. Vinod Suman, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge (oral)

Partition order dated 21.6.2016, passed by Assistant Collector 1st Grade, in proceedings initiated by respondents No. 1 to 8, was assailed by petitioners herein before Sub Divisional Collector by filing an appeal accompanying stay application under Order 41 Rule 5 C.P.C. read with Section 151 C.P.C. with an application under Section 5 of Limitation Act for condonation of delay in filing the appeal.

2. On 19.1.2017, on application of petitioners, Sub Divisional Collector, pending application under Section 5 of Limitation Act, by referring application filed by petitioners under Order 41 Rule 5 with time barred appeal proposed against order dated 21.6.2016, passed ad interim ex parte injunction order, staying the said order passed by Assistant Collector in partition proceedings, whereupon, after service, an application under Order 41 Rule 3A and Rule 11 C.P.C. read with Order 47 Rule 1 C.P.C. and Section 16 of H.P. Land Revenue Act was preferred by respondents contesting appeal, for review/recalling of order dated 19.1.2017 passed by Sub Divisional Collector in application under Order 41 Rule 5.

3. Petitioners herein filed reply to the application and after considering rival contention of parties, Sub Divisional Collector reviewed his order vide impugned order dated 30.5.017 and suspended ad interim stay granted by him, on the ground that unless application under Section 5 of Limitation Act is decided in favour of petitioners, there is no appeal registered and pending before him, and also, the application for interim stay under Order 41 Rule 5 C.P.C. and before allowing application for condonation of delay, as envisaged in Order 41 Rule 3A (3) C.P.C., no stay of execution of impugned order can be passed in such appeal.

4. Order 41 Rule 3A C.P.C. provides that Court shall proceed to deal with the appeal under Rule 11 only after finally deciding the application for condonation of delay and therefore, an order for stay of execution of decree, in an application preferred under Order 41 Rule 5 C.P.C., against which appeal is proposed to be filed, shall not be made, unless the appeal is not considered under Order 41 Rule 11 C.P.C.

5. It is contended that application under Order 41 Rule 3A (3) C.P.C. read with Order 47 Rule 1 C.P.C and Section 16 of H.P. Land Revenue Act was filed by respondents herein, beyond limitation period of 90 days and delay in making the said application, as required under proviso (b) of Section 16 of H.P. Land Revenue Act, was not explained much less satisfactorily either in the said application or in separate application for condonation of delay and therefore, Sub Divisional Collector has committed an illegality in entertaining the said application and consequently suspending his order dated 19.1.2017 vide impugned order dated 30.5.2017. It is true that unless sufficient cause, satisfying the Court, preventing applicant from preferring review within 90 days, is explained, as required in proviso (b) of Section 16 of H.P. Land Revenue Act, review petition/application is not to be entertained. But this issue is not relevant for the reason that under Section 16 of H.P. Land Revenue Act, Sub Divisional Collector himself also was empowered to review his mistake or error apparent on the face of record and in absence of validly constituted application before him, he had committed a mistake and this error was apparent on face of record. Therefore, irrespective of non-entertainable time barred application for review, Sub Divisional Collector has rightly suspended his order dated 19.1.2017 passed in non-existing application under Order 41 Rule 5 read with Section 151 C.P.C. for want of existence of appeal before decision in application under Section 5 of the Limitation Act.

6. Order 41 Rule 3A (3) C.P.C. prohibits Courts from staying execution of decree under challenge in appeal before deciding to hear the appeal after hearing it under Order 41 Rule 11 C.P.C., but this provision is to be interpreted with reference to entire scheme of this provision.

7. Order 41 Rule 3A (3) C.P.C. relates to a situation where application under Order 41 Rule 3A Sub Rule (1) explaining delay in filing appeal has been allowed under Sub Rule (2) but appeal is yet to be heard for admission under Order 41 Rule 11 C.P.C. In such eventuality Court shall not make an order for the stay of execution of decree against which the appeal is preferred to be filed, so long as the Court does not, after hearing under Rule 11, decide to hear the appeal. Question of passing of interim order in appeal under Order 41 Rule 1 3A (3) shall arise only after deciding the application under Sub Rule (2) preferred under Sub Rule (1). Therefore, Sub Rule (3) will come in to play only after completion of process under Sub Rule (2).

8. Order 41 Rule 3A C.P.C. ensures that filing of time barred appeal must be accompanied by application for condonation of delay explaining sufficient cause which prevented filing of appeal in time and final decision on the said application prior to proceeding to deal with the appeal and also considering the said appeal under Rule 11 C.P.C. before staying execution of impugned decree is mandatory. But it does not deal a situation of application pending adjudication under Section 5 of the Limitation Act and application for interim stay filed therein.

9. Order 41 Rule 3A C.P.C. provides procedure of filing time barred appeal but does not empower the Court for condonation of delay. Substantive provision empowering Court to condone delay is in Section 5 of the Limitation Act. There is no specific provision dealing with grant of interim relief during pendency of application under Section 5 of Limitation Act. Therefore, in separate and distinct proceeding under Section 5 of Limitation Act, independent of appeal, applicant can prefer an application under Section 151 C.P.C. for interim order during pendency of this proceeding and Court is not prohibited from passing any interim order in such application exercising its inherent powers for ends of justice or prevent abuse of the process of the Court, in such proceeding pending application for condonation of delay, for the reason that prohibition under Sub Rule (3) of Order 41 Rule 3A C.P.C, for staying impugned decree, will be operative only at the stage when appeal, before Court, is pending for hearing and that situation will come only in case application, as prescribed under Sub Rule (1), filed under Section 5 of Limitation Act for condonation of delay, has been allowed. Sub Rule (3) prescribes procedure to be followed after allowing application under Sub Rule (2) preferred in compliance of procedure provided in Sub Rule (1).

10. Order 41 Rule 3A C.P.C. does not prohibit Court from passing an interim order staying execution of order in an application under Section 151 C.P.C. filed in application under Section 5 of Limitation Act which in itself provides complete mechanism for condonation of delay in preferring remedy available within prescribed time and in such proceeding a separate application for grant of interim stay under Section 151 C.P.C. is also maintainable and such an application is not to be governed by order 41 Rule 3A C.P.C. and for ends of justice or to prevent abuse of process of law, if Court thinks necessary to stay execution of impugned decree pending hearing of application for condonation of delay, it can certainly stay execution during pendency of application for condonation of delay prior to admission of appeal. There is no prohibition for the Court to pass an interim order in an application independent of appeal filed in distinct proceeding under Section 5 of Limitation Act to do substantial justice.

11. Proceeding under Section 5 of Limitation Act is an independent proceeding and condonation of delay is precondition for registration of time barred appeal and in absence of appeal, application for stay filed with appeal does also not exist. In present case, there was no appeal pending before Sub Divisional Collector, as the appeal was yet to be registered, only after condonation of delay, if any, and as such there was no application for interim stay pending before him. Admittedly, there is no separate application for stay, filed in proceeding under Section 5 of Limitation Act by petitioners, praying for interim stay of impugned order during pendency of the application for condonation of delay. There was no occasion for Sub Divisional Commissioner to pass an order granting interim stay against order dated 21.6.2016. Therefore, interim order dated 19.1.2017 passed by Sub Divisional Collector was without an application pending before him and as such he had no alternative, except to review and suspend the said order vide order dated 30.5.2017.

12. I find no force in another contention raised on behalf of petitioners that Sub Divisional Collector was not competent to review his own order for want of necessary sanction under Section 16 of H.P. Land Revenue Act as the said Section 16 provides that for correction of a mistake or error apparent on face of record, a revenue officer either of his own motion or on the application of any party interested, is empowered to modify, reverse or confirm any order passed by himself or by any of his predecessor in office by reviewing the same. As per proviso (a) to this Section, Commissioner or Collector is not required to obtain sanction of immediately superior Revenue Officer to review any order passed by himself. In present case order has been reviewed by the same officer passed by him as Sub Divisional Collector and there was error apparent on the face of record as without existence of appeal and application for stay, interim order dated 19.1.2017 was passed and the said mistake/error was apparent on face of record. Therefore, I find no material irregularity, illegality or perversity in the impugned order passed by Sub Divisional Collector.

13. At this stage, learned counsel for the petitioner submits that partition order dated 21.6.2016 was passed by Assistant Collector 1st Grade without affording any opportunity to them to file any objection and also without serving them and for that reason petitioners were not having knowledge of the said order and immediately after having knowledge of order passed by Assistant Collector, they approached Sub Divisional Collector by filing an appeal with stay application, accompanied by an application for condonation of delay, but inadvertently no separate application could be filed for grant of ad interim stay against order dated 21.6.2016 passed by Assistant Collector, during pendency of application under Section 5 of Limitation Act and now faced with situation as discussed above, he seeks permission to withdraw present petition with liberty to file an appropriate application for grant of interim stay against execution and implementation of order dated 21.6.2016 passed by Assistant Collector during pendency of application under Section 5 of Limitation Act before Sub Divisional Collector (Rural), Shimla and he further prays for direction to learned Sub Divisional Collector to consider the said stay application, as an application filed along with application under Section 5 of Limitation Act, at the first instance and to hear the same and pass interim order, pending application under Section 5 of Limitation Act, without insisting for service of all respondents.

14. Court exists for doing substantial justice and parties should not suffer merely for technicalities of procedure. Therefore, taking holistic view of facts and circumstances of the case, liberty as prayed for, is granted and petition is disposed of as dismissed as withdrawn with further direction that the petitioners shall approach Sub Divisional Collector by filing appropriate application for grant of interim stay pending application under Section 5 of Limitation Act on 13.6.2017 i.e. next date of hearing fixed by Sub Divisional Collector and in case such application is preferred by petitioners the same shall be taken up by Sub Divisional Collector as an application for grant of ad interim stay filed along with application for condonation of delay and for grant of ad interim stay, he shall not insist service of all respondents, before considering the said application at first instance. Till consideration of the said application, to be filed by petitioners for grant of ad interim stay, partition order dated 21.6.2016 passed by Assistant Collector 1st Grade shall remain kept in abeyance. On failure in filing the said application partition order dated 21.6.2016 shall become operative.

15. Needless to say that on passing of order by Sub Divisional Collector, granting or declining interim stay against order dated 21.6.2016 passed by Assistant Collector 1st Grade, direction of this Court to keep the said order in abeyance shall be inoperative. In case of adverse orders, concerned aggrieved party will definitely have remedy to assail the same in appropriate proceedings.

16. With above observations, petition stands dismissed as withdrawn along with pending applications.

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

Ajnesh Kumar ..... Petitioner

Vs.

State of H.P. & Ors. ..... Respondents

Review Petition No. 17 of 2017
Date of decision: 12.6. 2017.

Code of Civil Procedure, 1908- Section 114- Order 47 Rule 1- The writ petition was dismissed by the Court by concluding that petitioner had indulged in proxy war and the writ petition has been filed with an oblique motive by making frivolous and vexatious allegation that too at the instance of respondent No.5 –a review petition was filed on the ground that the Court had not proceeded to determine the lis on its merits and had wrongly dismissed the same, which is an error apparent on the face of the record- held that if a person has not approached the Court with clean hands, his petition should be dismissed at the threshold – once the Court had concluded that the petitioner had not only misused but abused the process of the Court then it had no option but to dismiss the writ petition at the threshold- the Court was under no obligation to adjudicate the case on merits – there is no error apparent on the face of record- petition dismissed.(Para-3 to 6)

Case referred:
K.D. Sharma versus Steel Authority of India Limited and others (2008) 12 SCC 481

For the petitioner : Mr. B.N. Misra, Advocate.

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, Judge (Oral)

Petitioner by claiming himself to be a *probono publico* had filed Civil Writ Petition before this Court, which was dismissed vide impugned judgment dated 12.7.2016 by concluding that the petitioner had indulged in proxy war and the writ petition had been filed with an oblique motive by making frivolous and vexatious allegations that too at the instance of the neighbours of respondent No. 5. This Court further concluded that the petitioner had used the attractive brand name of public interest litigation for suspicious product of mischief. The petition so filed by him in no manner sought redressal of genuine public wrong or public injury but was founded on personal vendetta. It is apt to reproduce the relevant observations, which read thus:

> *"29. This case is a classical example where the petitioner has indulged in a proxy war and the instant petition has been filed with oblique motive by making frivolous and vexatious allegations that too at the instance of Shri Vinod Kumar and Smt. Vijay Sharma, who are none other than the neighbours of respondent No. 5. The petitioner has used the attractive brand name of public interest litigation for suspicious products of mischief. This petition in no manner seeks redressal of genuine public wrong or public injury but is founded on personal vendetta and to say the least is a proxy litigation.*
>
> *30. It would also be noticed that what the petitioner in fact seeks is fishing and roving inquiry without having placed on record any contemporaneous official records to substantiate the allegations levelled by him, more particularly, against respondents No.3 to 5. It has to be remembered that the Court proceedings are sacrosanct and cannot, therefore, be permitted to be polluted. Judicial system cannot be allowed to be abused and brought to its knees by unscrupulous*

litigants. If the petitioner was really keen in preserving and protection of the natural endowed and dense forests in and around Shimla and had special interest in the heritage monuments/temples situate in Shimla, then he would have at least placed on record some material in support of such contentions. Not only this, if the petitioner was genuinely interested in preserving all that he claims, then why the details of at least one of such similar work undertaken by him is not forthcoming?

31. It would thus be evident from the aforesaid discussion that the petitioner has not approached this Court with clean hands. This Court in exercise of its extraordinary jurisdiction is a Court of equity and any person approaching is expected not only to act with clean hands but also with clean mind, clean heart and with clean objective. He who seeks equity must do equity. The judicial process cannot become an instrument of oppression or abuse or a means in the process of Court to subvert justice for the reasons that the Courts exercise jurisdiction only in furtherance of justice. The interest of justice and public interest coalesce and therefore, they are very often one and the same.

32. In view of the aforesaid discussion not only is there no merit in this petition, but the same is also mischievous and has only resulted in wastage of precious Court's time. Even the respondents have unnecessarily been dragged into an otherwise avoidable litigation.

33. Accordingly, this petition is dismissed with costs of Rs.50,000/- to be paid by the petitioner to respondent No.5 within a period of three months, failing which respondent No.5 shall be at liberty to recover the costs by seeking execution of this order. The petition is disposed of in the aforesaid terms, so also the pending application, if any."

2. The petitioner has sought review of the judgment mainly on the ground that this Court had not proceeded to determine the lis on its merits and had wrongly dismissed the same therefore there is an error apparent on the face of the record.

3. It is more than settled that if a person has not approached the Court with clean hands, the petition should be dismissed at the threshold and reference in this regard can conveniently be made to the judgment of Hon'ble Supreme Court in **K.D.Sharma versus Steel Authority of India Limited and others (2008) 12 SCC 481**, wherein it was observed as under:-

"[34] The jurisdiction of the Supreme Court under Article 32 and of the High Court under Article 226 of the Constitution is extraordinary, equitable and discretionary. Prerogative writs mentioned therein are issued for doing substantial justice. It is, therefore, of utmost necessity that the petitioner approaching the Writ Court must come with clean hands, put forward all the facts before the Court without concealing or suppressing anything and seek an appropriate relief. If there is no candid disclosure of relevant and material facts or the petitioner is guilty of misleading the Court, his petition may be dismissed at the threshold without considering the merits of the claim.

[35] The underlying object has been succinctly stated by Scrutton, L.J., in the leading case of ***R. v. Kensington Income Tax Commissioners (1917) 1 KB 486 : 86 LJ KB 257 : 116 LT 136*** *in the following words:*

…….it has been for many years the rule of the Court, and one which it is of the greatest importance to maintain, that when an applicant comes to the Court to obtain relief on an ex parte statement he should make a full and fair disclosure of all the material facts- it says facts, not law. He must not misstate the law if he can help it; the Court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts; and the penalty by which the Court enforces that

> *obligation is that if it finds out that the facts have not been fully and fairly stated to it the Court will set aside any action which it has taken on the faith of the imperfect statement."*

[36] A prerogative remedy is not a matter of course. While exercising extraordinary power a Writ Court would certainly bear in mind the conduct of the party who invokes the jurisdiction of the Court. If the applicant makes a false statement or suppresses material fact or attempts to mislead the Court, the Court may dismiss the action on that ground alone and may refuse to enter into the merits of the case by stating "We will not listen to your application because of what you have done". The rule has been evolved in larger public interest to deter unscrupulous litigants from abusing the process of Court by deceiving it.

[37] In ***Kensington Income Tax Commissioner, Viscount Reading****, C.J. observed:*

> *"…Where an ex parte application has been made to this Court for a rule nisi or other process, if the Court comes to the conclusion that the affidavit in support of the applicant was not candid and did not fairly state the facts, the Court ought, for its own protection and to prevent an abuse of its process, to refuse to proceed any further with the examination of the merits. This is a power inherent in the Court, but one which should only be used in cases which bring conviction to the mind of the Court that it has been deceived. Before coming to this conclusion a careful examination will be made of the facts as they are and as they have been stated in the applicant s affidavit, and everything will be heard that can be urged to influence the view of the Court when it reads the affidavit and knows the true facts. But if the result of this examination and hearing is to leave no doubt that this Court has been deceived, then it will refuse to hear anything further from the applicant in a proceeding which has only been set in motion by means of a misleading affidavit." (emphasis supplied)*

[38] The above principles have been accepted in our legal system also. As per settled law, the party who invokes the extraordinary jurisdiction of this Court under Article 32 or of a High Court under Article 226 of the Constitution is supposed to be truthful, frank and open. He must disclose all material facts without any reservation even if they are against him. He cannot be allowed to play "hide and seek" or to "pick and choose" the facts he likes to disclose and to suppress (keep back) or not to disclose (conceal) other facts. The very basis of the writ jurisdiction rests in disclosure of true and complete (correct) facts. If material facts are suppressed or distorted, the very functioning of Writ Courts and exercise would become impossible. The petitioner must disclose all the facts having a bearing on the relief sought without any qualification. This is because, "the Court knows law but not facts".

[39] If the primary object as highlighted in Kensington Income Tax Commissioners is kept in mind, an applicant 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 not an advocacy. It is a jugglery, manipulation, maneuvering or misrepresentation, which has no place in equitable and prerogative jurisdiction. If the applicant does not disclose all the material facts fairly and truly but states them in a distorted manner and misleads the Court, the Court has inherent power in order to protect itself and to prevent an abuse of its process to discharge the rule nisi and refuse to proceed further with the examination of the case on merits. If the Court does not reject the petition on that ground, the Court would be failing in its duty. In fact, such an applicant requires to be dealt with for contempt of Court for abusing the process of the Court.

4. Somewhat similar issue was considered by us recently in CWP No. 2995 of 2016, decided on 2.6.2017, titled as Yashwant Singh vs. State of Himachal Pradesh, wherein, it was observed as under:-

> *"11. It is settled law that one has to approach the Court with clean hands, clean mind, clean heart and clean objective. A prerogative remedy is not a matter of course. While exercising extraordinary power, writ Court would certainly bear in mind the conduct of the party who invokes the jurisdiction of the Court. If the applicant makes a false statement or suppresses material facts or attempts to mislead the Court, the Court may dismiss the application on that ground alone and may refuse to enter into the merits of the case.*
>
> *12. In order to sustain and maintain the sanctity and solemnity of the proceedings in law Courts, it is necessary that parties should not make false or knowingly, inaccurate statements or misrepresentation and/or should not conceal material facts with a design to gain some advantage or benefit at the hands of the Court, when a Court is considered as a place where truth and justice are the solemn pursuits. If any party attempts to pollute such a place by adopting recourse to make misrepresentation and is concealing material facts it does so at its risk and cost. Such party must be ready to take the consequences that follow on account of its own making.*
>
> *13. The Court proceedings are not a game of chess. At no cost can the stream of justice be permitted to be polluted by unscrupulous litigants. The writ Court while exercising the writ jurisdiction exercises equitable jurisdiction. The estoppel stems from equitable doctrine and it requires that he who seeks equity must do equity. Not only this, a person who seeks equity, must act in a fair and equitable manner. The equitable jurisdiction cannot be exercised in case of a person who himself has acted unfairly. Even compassion cannot be shown in such cases. The compassion cannot be allowed to bend the arms of justice in a case where individual(s) has tried to acquire any right by unscrupulous or forcible methods.*
>
> *14. Equally, the judicial process should never become an instrument of oppression or abuse or a means in the process of the Court to subvert justice. The legal maxim "Jure naturae equum est neminem cum alterius detrimento et injuria fieri locupletiorem", means that it is a law of nature that one should not be enriched by the loss or injury to another.*
>
> *15. The law on the subject is well settled and on the basis of various pronouncements of the Hon'ble Supreme court, the following principles can conveniently be culled out:*
>
> > *"1. A writ remedy is an equitable one. While exercising extraordinary power a Writ Court certainly bear in mind the conduct of the party who invokes the jurisdiction of the Court.*
> >
> > *2. Litigant before the Writ Court must come with clean hands, clean heart, clean mind and clean objective. He should disclose all facts without suppressing anything. Litigant cannot be allowed to play "hide and seek" or to "pick and choose" the facts he likes to disclose and to suppress (keep back)/ conceal other facts.*
> >
> > *3. Suppression or concealment of material facts is not an advocacy. It is a jugglery, manipulation, manoeuvring or mis representation which has no place in equitable and prerogative jurisdiction.*
> >
> > *4. If litigant does not disclose all the material facts fairly and truly or states them in a distorted manner and misleads the Court, the Court has inherent power to refuse to proceed further with the examination of the*

case on merits. If Court does not reject the petition on that ground, the Court would be failing in its duty.

5. Such a litigant requires to be dealt with for ontempt of Court for abusing the process of the Court.

6. There is a compelling need to take a serious view in such matters to ensure purity and grace in the administration of justice.

7. The litigation in the Court of law is not a game of chess. The Court is bound to see the conduct of party who is invoking such jurisdiction."

5. Coming to the case in hand, the learned counsel for the petitioner has failed to convince this Court that writ petition so filed by him was in the nature of *probono publico* and not a camouflage to foster personal dispute or vendetta at the instance of the neighbours of respondent No. 5.

6. Once this Court had categorically come to the conclusion that the petitioner had not only misused but abused the process of Court, then obviously it had no option to have dismissed the writ petition at the threshold. The petitioner had no right whatsoever to even ask much less insist on an adjudication on the merits of the case and therefore this Court was under no obligation to consider the merits of the claim.

7. Consequently, in view of the aforesaid discussion, there is no error much less error apparent on the face of the record. Accordingly, the review petition is dismissed, so also the pending applications, if any.

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

Dr. Ranvijay Singh ..... Petitioner.

Versus

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

Review Petition No.43 of 2016.
Date of decision: 12.06.2017.

Code of Civil Procedure, 1908- Section 114 read with Order 47 and Section 151- An original application was filed by the petitioner assailing the NOC granting to respondents No.3 to 8, which was allowed and it was held that respondent No. 3 to 8 did not fulfill the eligibility criteria and NOC in their favour was ordered to be quashed- a writ petition was filed assailing the order passed by the Tribunal, which was allowed and it was held that Tribunal had no jurisdiction to entertain the application as the applicant was not a person aggrieved and no public interest litigation is permissible in a service matter – the petitioner filed SLP before the Supreme Court, which was disposed of with a direction that petitioner will file a review petition before the High Court – the petitioner has filed a review petition pleading that he was directly affected by the grant of NOC, therefore, he was an aggrieved party – held that no relief was sought by the applicants for themselves in the original application- a person is an aggrieved, only if he has suffered a legal grievance – a person who is disappointed with the result of a caseis not a person aggrieved – he must be disappointed of a benefit, which he would have received if the order had gone the other way – once no relief was sought by the applicants for themselves, they could not be held to be person aggrieved – the original application was in the nature of public interest litigation and was rightly dismissed by the High Court- petition dismissed.(Para-9 to 15)

For the Petitioner : Mr.Janesh Mahajan, Advocate.

For the Respondents : Mr.Shrawan Dogra, Advocate General with Mr.Romesh Verma, Addl. A.G. and Mr.Kush Sharma, Dy. A.G., for respondents No.1 and 2.
Mr.Satyen Vaidya, Senior Advocate with Mr.Vivek Sharma, Advocate, for respondents No.3 and 5.
Ms.Ritta Goswami, Advocate, for respondent No.12.
Respondents No.4, 7, 9, 10 and 11 already ex parte.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge, *(Oral)*

By medium of this petition under Section 114 readwith Order 47 and Section 151 of the Civil Procedure Code, the petitioner has sought review of the judgment passed by this Court on 08.01.2016 in CWP No.4831 of 2015.

2. The petitioner herein was one of the original applicants in OA No.3854 of 2015 filed before the learned H.P. State Administrative Tribunal (for short 'Tribunal') and had assailed therein the 'NOC' granted to respondents No.3 to 8 herein as being arbitrary, discriminatory and illegal and claimed the following reliefs:-

> *" 1. Quash the impugned order Annexure A-3 bearing No. HFW-H(IV) (12)-4/2006-15 (NOC) qua the respondents No. 3 to 8, being arbitrary, discriminatory and illegal.*
>
> *2. Direct the respondents to withhold sponsorship of respondents No.3 to 8 for pursuing higher course in MD/MCH at AIIMS, New Delhi.*
>
> *3. Direct the respondents to follow the guidelines as laid in Annexure A-1. Besides this directing the respondent to widely circulate list of tentative sponsored candidates which only be finalised after affording due opportunity to candidates to object to same."*

3. The Original Application was allowed vide judgment dated 23.12.2015 and it was held that the private respondents No.3 to 8 did not fulfill the eligibility criteria as laid down in Clause 1.4 of the policy dated 02.04.2013 and accordingly 'NOC' granted in their favour was ordered to be quashed.

4. The order passed by the learned Tribunal came to be assailed by respondents No.3 and 5 before this Court by filing CWP No.4831 of 2015 wherein the main thrust of their arguments was that the learned Tribunal had no jurisdiction to entertain the petition which was in the nature of Public Interest Litigation.

5. Though, this petition was vehemently contested, however, this Court vide judgment dated 08.01.2016 upheld the contention of the private respondents and allowed the petition so filed by them by holding that the learned Tribunal had no jurisdiction to entertain the petition filed by the petitioners as they could not be said to be the "persons aggrieved" and, therefore, the petition filed by them being in the nature of Public Interest Litigation in a "service matter" was not maintainable.

6. The review petitioner laid challenge to the aforesaid judgment by filing SLP No.8982 of 2016 before the Hon'ble Supreme Court and the same was disposed of on the first date of hearing itself in the following terms:-

> *"Upon hearing counsel the Court made the following*
>
> *O R D E R*
>
> *The petitioner submits and points out that the case before the High Court was not a Public Interest Litigation; it was a case where the petitioner, along with some others, was actually affected on account of sponsorship of the contesting*

respondents. The petitioner may point out this aspect before the High Court by way of an application for review of the impugned order.

Subject to the above liberty, the Special Leave Petition is dismissed.

However, we make it clear that in case the application, as aforesaid, is filed by the petitioner in the High Court within 30 days from today, the same may not be dismissed on the ground of delay.

Pending interlocutory applications, if any, are disposed of."
(Underlying supplied by us)

7. It is vehemently argued by Shri Janesh Mahajan, learned counsel for the review petitioner that since the petitioner was directly affected by the grant of 'NOC' to the respondent Preyander Thakur in the same stream against the policy framed by the Government, therefore, he was an aggrieved party. It is further averred that this Court should not have confined the judgment to the jurisdictional aspect of the case and should have decided the case on merits, particularly, when the State Government had flouted its own policy for grant of 'NOC' and granted the same to the ineligible candidates.

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

9. At the outset, it would be noticed that a specific contention was raised before the Hon'ble Supreme Court to point out that the case before this Court was not a Public Interest Litigation and it was a case where the petitioner along with some other was actually affected on account of sponsorship of the contesting respondents (petitioners in CWP No.4831 of 2015). The above was clearly a mis-statement as the proceedings before this Court in CWP No.4831 of 2015 were not original proceedings, but emanated from the judgment passed by the learned Tribunal in OA No.3854 of 2015 which as observed above was held to be not maintainable for the reasons already set out hereinabove.

10. Notably, in the Original Application filed by the petitioner alongwith proforma respondents herein, no relief whatsoever had been claimed by them for themselves as would be evidently clear from the relief which is extracted above.

11. Section 19 of the Administrative Tribunals Act, 1985, reads thus:-

"19. Applications to Tribunals: 1. Subject to the other provisions of this Act, personal aggrieved by any order pertaining to any matter within the jurisdiction of a Tribunal may make an application to the Tribunal for the redressal of his grievance.

Explanation:

For the purposes of this sub-section, order means an order made:

(a) by the Government or a local or other authority, within the territory of Indian or under the control of the Government of India or by any Corporation [or society] owned or controlled by the Government; or

(b) by an officer, committee or other body or agency of the Government or a local or other authority or Corporation [or society] referred to in clause (a).

(2) Every application under sub-section. (1) shall be in such form and be accompanied by such documents or other evidence and by such fee (if any, not exceeding one hundred rupees) [in respect of the filing of such application and by such other fees for the service or execution of processes, as may be prescribed by the Central Government].

[(3) On receipt of an application under sub-section. (1), the Tribunal shall, if satisfied after such inquiry as it may deem necessary, that the application is a fit case for adjudication on trial by it admit such application, but where the Tribunal is not so satisfied, it may summarily reject the application after recording its reasons.]

(4) Where an application has been admitted by a Tribunal under sub-section (3), every proceeding under the relevant service rules as to redressal of grievances in relation to the subject matter of such application pending immediately before such admission shall abate and save as otherwise directed by the Tribunal, no appeal or representation in relation to such matter shall thereafter be entertained under such rules."

12. A person can be said to be aggrieved only if he has suffered a legal grievance in the sense i.e. interest recognized by law, has been directly and prejudicially affected. A person who is disappointed with the result of a case is not a "person aggrieved". He must be disappointed of a benefit which he would have received if the order had gone the other way. The order must cause him a legal grievance by wrongfully depriving him of something or must have a tendency of infringing some interest inhering in him and be violative of his legal right. The "person aggrieved" means a person, who is wrongfully deprived of his entitlement which he is legally entitled to receive and it does not include any kind of disappointment of personal inconvenience. "Person aggrieved" means a person, who is injured or who is adversely affected in a legal sense.

13. Whether a person is injured in strict legal sense, has to be determined by the nature of the injury considering the facts and circumstances involving each case. A fanciful or sentimental grievance may not be sufficient to confer a standi to sue upon the individual. There must be an injuria or a legal grievance, as the law can appreciate and not a stet pro ratione voluntas reasons. The person aggrieved must have a right to maintain the writ which postulates a subsisting personal right in the claim which the petitioner makes and in the protection of which he is personally interested.

14. Once, the petitioner alongwith proforma respondents had not sought any relief for themselves or any of them, then obviously, they could not be held to be the "persons aggrieved" and, therefore, the petition filed by them was in the nature of Public Interest Litigation in the service matters and, therefore, rightly dismissed by this Court.

15. We find no error much less error apparent on the face of the record so as to call for interference by this Court. Accordingly, the petition is dismissed, leaving the parties to bear their own costs.

****

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

Executive Engineer, BSNL Civil Division ....Appellant.

Versus

Krishan Chand and another .....Respondents.

CMP(M) No.660 of 2017 and LPA No.65 of 2017.
Date of decision: 12.06.2017.

Industrial Disputes Act, 1947- Section 25- Workmen K and M filed a claim before Labour Court that they were engaged by the respondent and their services were illegally terminated- respondent pleaded that the services of workmen were engaged through a contractor who had supplied labour for maintenance of work- the services were terminated on the expiry of the contract – respondent did not lead any evidence in the case of K - M was neither cross-examined nor any evidence was led in support of the respondent's claim- Labour Court drew an adverse inference and ordered reinstatement – a writ petition was filed and the Writ Court upheld the findings of the Labour Court- a review petition was filed, which was dismissed- held in appeal that no

evidence was led to prove the plea of the respondent – no application for additional evidence was filed – the finding of Labour Court on facts cannot be questioned – appeal dismissed.

(Para-14 to 18)

Case referred:
Harbans Singh vs. Industrial Tribunal-cum-Labour Court and another 2016(3) SLC 1549

For the Applicant/ Appellant : Mr.Rajiv Jiwan, Advocate.
For the Respondents: Nemo.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge, *(Oral)*

CMP(M) No.660 of 2017.

By medium of this application, the applicant/appellant has sought condonation of 234 days' delay that has crept up in filing of the appeal. For the reasons stated in the application duly supported by an affidavit of the Executive Engineer of the appellant, we find that the applicant/appellant has carved out sufficient cause which prevented it from filing the appeal within the prescribed period of limitation. Accordingly, delay of 234 days' in filing of the appeal is condoned. Application stands disposed of.

Appeal be registered.

LPA No.65 of 2017.

2. By medium of this Letters Patent Appeal, the appellant has assailed the judgment passed by the learned writ Court whereby it affirmed the findings rendered by the learned Industrial Tribunal-cum-Labour Court (for short "Labour Court") and dismissed the writ petition filed by the appellant.

3. It is vehemently argued by the learned counsel for the appellant that the learned Labour Court had passed the impugned award by drawing an adverse inference against it that too without affording an opportunity for filing written and addressing oral arguments. It is further argued that the learned writ Court fell in error in not considering that the respondents were not the employees of the appellant and were the workers supplied on out source basis by 'M/s Jaswant Singh and Sons'. Lastly, it is argued that the services of the respondents stood terminated on the expiry of the term of the contract and, therefore, there was no occasion either for the learned Labour Court or even for the learned writ Court to have directed their reinstatement.

4. We have heard the learned counsel for the appellant and also gone through the material placed on record.

5. The brief facts leading to the filing of the present appeal are that upon an industrial dispute, the following references were made by the Government for adjudication to the learned Labour Court:-

> *"Whether the action of Executive Engineer, Telecom Civil Division, Shimla in terminating the services of Sh.Krishan Chand S/o Sh. Sant Ram is legal and justified? If not, to what relief the workman is entitled?*
>
> *Whether the action of Executive Engineer, Telecom Civil Division, Shimla in terminating the services of Ms.Maya W/o Sh. Nand Lal w.e.f. 11/11/97 is legal and justified? If not, to what relief the workman is entitled?"*

6. The respondents filed their respective claims and as regards, Krishan Chand, it was averred that he was employed as Plumber/Carpenter/Peon with the appellant on

25.04.1996 and continued as such till 15.12.1997 when his services were terminated illegally, whereas, his juniors were retained.

7. Insofar as Maya Devi is concerned, her claim was that she was engaged as Typist-Clerk by the SDO, Telecommunication, Solan Sub Division, in the month of January, 1997 and continued to perform her duties as such till 10.11.1997 when her services came to be illegally terminated.

8. The appellant contested these claims by filing reply wherein it was averred that none of the respondents were directly engaged or employed by it and rather their services were engaged through a Contractor, who had been engaged to supply labour to the appellant for maintenance of work in Telecommunication Department. It was the further case of the appellant that the services of both the workmen/respondents had been terminated on expiry of term of contract and thus there was no relationship of Employer-Employee between the parties and, therefore, the claim petitions be dismissed.

9. It is not in dispute that as regards the claim petition filed by Krishan Chand, the appellant did not lead any evidence and insofar as the claim petition filed by Maya Devi is concerned, she was neither cross-examined by the appellant nor any evidence led in support of their case. This constrained the learned Labour Court to draw an adverse inference against the appellant.

10. Insofar as the evidence led by the respondents is concerned, it was duly proved on record that both of them had completed 240 days in preceding 12 months from the date of illegal termination and in absence of notice the retrenchment was held in violation of Section 25F of the Industrial Disputes Act and, consequently, they were ordered to be reinstated in service.

11. As regards the plea of the Management that there was no relationship of Employer-Employee between the parties, the same was turned down as the appellant failed to lead any evidence in support of such plea.

12. The learned writ Court on the basis of the material placed before it upheld the findings of the learned Labour Court by holding that the averments made in the pleadings of the appellant could not be construed as evidence. Here, it shall be apt to reproduce the relevant observations which read thus:-

> *"12. In my considered view, there is no perversity or infirmity with the findings which have been returned by the learned Labour Court in favour of the claimants. While the claimants duly substantiated their contention of having been terminated from service by the Management in violation of the statutory provision of Section 25 F of the I.D. Act despite their having completed 240 days in preceding 12 months, as from the date of their illegal termination. On the other hand, the Management did not produce any evidence on record to substantiate its contention that the claimants were not engaged by the Management and there was no relationship of employer and employee between the claimant and the Management. No iota of evidence has been placed on record to substantiate that the claimants were engaged through a contractor by way of outsourcing. Even during the course of arguments in this petition, the learned counsel for the petitioner could not draw the attention of this Court towards any material on record from which it could be gathered that the services of the claimants were engaged by way of outsourcing through a contractor and their wages were paid by the contractor and not by the Management.*
>
> *13. In my considered view, simple reliance on the averments made in the pleadings by the Management is not a substitute for cogent evidence from where it could be inferred that the engagements of the claimants was by way of outsourcing through a contractor.*

14. The Management has not placed on record any affidavit etc. of any such contractor to substantiate its plea. Similarly, neither any contract has been placed on record from where it could be inferred that an agreement was entered into by the Management with someone to supply workmen to it against which the claimants were provided to the Management, nor it has placed on record any receipts from which it could be inferred that the wages of the claimants were actually paid by a contractor and not by Management. There is no material placed on record from where it could be inferred that the Management was making payments to the contractor in lieu of his having supplied workmen to the Management by way of outsourcing. Therefore, in view of what has been discussed above, in my considered it can not be said that the findings returned by the learned Labour Court are either perverse or there is any infirmity in the same or they are not substantiated from the material which was produced on record by the claimants.

15. It has been held by this Court in ***LPA No. 4 of 2016*** *titled* ***State of H.P. and another*** *Vs.* ***Shankar Lal and other connected matters****, decided on 02.01.2016, as under:-*

> *"The awards passed by the Labour Court are based on the facts and the evidence led by the parties. It is well settled principle of law that the Writ Court cannot sit as an Appellate Court and set aside the award made by the Labour Court, which is based on evidence and facts."*

16. Thus, it is evident that as far as the award passed by the learned Labour Court is concerned, the finding of fact so recorded by the learned Labour Court should not be interfered until and unless the findings so returned by the learned Labour Court are perverse or not borne out from the material on record."

13. It is not in dispute that against the judgment of the learned writ Court, the appellant had filed a review petition No.98 of 2016 on the ground that no opportunity had been granted by the learned Labour Court to the appellant to lead any evidence. In order to verify the veracity and correctness of such allegations, the learned single Judge called for the records of the case and after perusal thereof came to the conclusion that several opportunities had infact been granted to the appellant to lead its evidence and having failed to do so, the Labour Court had no option but to close the same. It was thereafter that the review petition came to be dismissed on 15.03.2017.

14. It is once again argued by the learned counsel for the appellant that the respondents were not its employees as they had been engaged/employed through a Contractor, who had been engaged to supply labour to the appellant for maintenance of the work in the Telecommunication Department and, therefore, could not have been ordered to be reinstated in service.

15. We find it rather intriguing that though this has been the consistent stand of the appellant in its pleadings, but neither before the learned Labour Court nor before the learned writ Court and more surprisingly even before this Court the appellant had made no endeavour or has rather failed to place on record any document which may even remotely prove this plea. Nothing prevented the appellant from filing an application for leading additional evidence before the learned writ Court or even before this Court and thus the learned writ Court or for that matter even the learned Labour Court committed no error in drawing an adverse inference against the appellant.

16. It is more than settled that the findings of fact recorded by the learned Labour Court as a result of appreciation of pleadings and evidence cannot be questioned in a writ petition and, therefore, obviously cannot be made subject-matter before an appellate Court.

17. At this stage, it shall also be profitable to refer to a recent judgment of this Court in ***Harbans Singh*** *vs.* ***Industrial Tribunal-cum-Labour Court and another 2016(3) SLC 1549*** wherein similar issue came up before this Court and it was held as under:-

> *"12. It is also a moot question – whether the Writ Court in a writ petition or an Appellate Court in an appeal can interfere with the finding of facts, which was made foundation by the Labour Court while making the award? The answer is in the negative for the following reasons:*
>
> *13. The Apex Court in the case titled as* ***Bhuvnesh Kumar Dwivedi versus M/s. Hindalco Industries Ltd.,*** *reported in* ***2014 AIR SCW 3157,*** *held that the findings of fact reached by Tribunal as a result of the appreciation of evidence cannot be questioned in writ proceedings and the Writ Court cannot act as an Appellate Court. It is profitable to reproduce para 18 of the judgment herein:*
>
> > *"18. A careful reading of the judgments reveals that the High Court can interfere with an Order of the Tribunal only on the procedural level and in cases, where the decision of the lower courts has been arrived at in gross violation of the legal principles. The High Court shall interfere with factual aspect placed before the Labour Courts only when it is convinced that the Labour Court has made patent mistakes in admitting evidence illegally or have made grave errors in law in coming to the conclusion on facts. The High Court granting contrary relief under Articles 226 and 227 of the Constitution amounts to exceeding its jurisdiction conferred upon it. Therefore, we accordingly answer the point No. 1 in favour of the appellant."*
>
> *14. This Court has also laid down the same principle in a batch of writ petitions,* ***CWP No. 4622 of 2013,*** *titled as* ***M/s Himachal Futuristic Communications Ltd. versus State of HP and another,*** *being the lead case, decided on 04.08.2014. It is worthwhile to reproduce para 13 of the judgment herein:*
>
> > *"13. Applying the test to the instant case, the question of fact determined by the Tribunal cannot be made subject matter of the writ petition and more so, when the writ petitioner(s) have failed to prove the defence raised, in answer to the references before the Tribunal. "*
>
> *15. This Court in a series of cases, being* ***CWP No. 4622 of 2013 (supra); LPA No. 485 of 2012,*** *titled as* ***Arpana Kumari versus State of H.P. and others,*** *decided on 11th August, 2014;* ***LPA No. 23 of 2006,*** *titled as* ***Ajmer Singh versus State of H.P. and others,*** *decided on 21st August, 2014;* ***LPA No. 125 of 2014,*** *titled as* ***M/s. Delux Enterprises versus H.P. State Electricity Board Ltd. & others,*** *decided on 21st October, 2014;* ***LPA No. 143 of 2015,*** *titled as* ***Gurcharan Singh (deceased) through its LRs versus State of H.P. and others,*** *decided on 15th December, 2015, and* ***LPA No. 207 of 2015,*** *titled as* ***State of H.P. and another versus Gagan Singh,*** *decided on 16th December, 2015, while relying upon the latest decision of the Apex Court in* ***Bhuvnesh Kumar Dwivedi's case (supra),*** *has held that question of fact cannot be interfered with by the Writ Court. However, such findings can be questioned if it is shown that the Tribunal/Court has erroneously refused to admit admissible and material evidence or has erroneously admitted inadmissible evidence, which has influenced the impugned findings."*

18. In view of the aforesaid discussion, no fault can be found with the award passed by the learned Labour Court as affirmed by the learned writ Court. Consequently, there is no merit in this appeal and accordingly the same is dismissed, leaving the parties to bear their own costs. Pending application, if any, also stands disposed of.

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

H.P. State Civil Supplies Corporation Ltd. ....Appellant.
Versus
Presiding Judge and another .....Respondents.

CMP(M) No.645 of 2017 and LPA No. 67 of 2017.
Date of decision: 12.06.2017.

Constitution of India, 1950- Article 226- Workman filed a claim petition which was decided in his favour with a direction to reinstate the workman in service with seniority and continuity without back wages – a writ petition was filed, which was dismissed- held that Writ Court came to a definite conclusion that the workman was appointed as a pharmacist- he was assigned miscellaneous work – inquiry was initiated against him and his services were dispensed with – the plea of abandonment taken by the employer was not proved – Writ Court cannot interfere with the findings of facts recorded by Labour Court unless it is shownthat Tribunal had erroneously refused to admit admissible and material evidence or had erroneously admitted inadmissible evidence which has influenced its findings- appeal dismissed.(Para- 6 to 15)

Case referred:
Harbans Singh vs. Industrial Tribunal-cum-Labour Court and another 2016(3) SLC 1549

For the Applicant/ Appellant: Mr.Navlesh Verma, Advocate.
For the Respondents: Nemo.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge, *(Oral)*

CMP(M) No.645 of 2017.

By medium of this application, the applicant/appellant has sought condonation of 138 days' delay that has crept up in filing of the appeal. For the reasons stated in the application duly supported by an affidavit of the Company Secretary of the appellant, we find that the applicant/appellant has carved out sufficient cause which prevented it from filing the appeal within the prescribed period of limitation. Accordingly, delay of 138 days' in filing of the appeal is condoned. Application stands disposed of.

Appeal be registered.

LPA No.67 of 2017.

2. This Letters Patent Appeal on behalf of the appellant is directed against the judgment passed by the learned writ Court on 30.08.2016 in CWP No.6151 of 2010 whereby it upheld the award passed in favour of the workman by the learned Industrial Tribunal-cum-Labour Court, Shimla (for short "Labour Court").

3. Bereft of any un-necessary details, the facts are that upon a reference, the workman filed his claim petition which was answered in his favour by the learned Labour Court with the direction to reinstate him in service with seniority and continuity with effect from 01.12.1996 without back wages.

4. The award was assailed by the appellant by filing aforesaid CWP before the learned writ Court on the ground of illegality, no relationship of Employee/Employer, the respondent not being a workman etc., however, all these pleas were turned down by the learned writ Court by passing a detailed judgment.

5. Undeterred, the appellant has filed the present appeal on the ground that the learned writ Court had fallen in error in not taking into consideration that the award passed in favour of the workman suffered from illegality and perversity as it was not a case of retrenchment as contemplated under the Industrial Disputes Act (for short "Act") and, therefore, the workman could not have been ordered to be reinstated in service.

6. We have heard the learned counsel for the appellant and find that all these issues have been dealt with in detail by the learned writ Court. The learned writ Court came to a categoric conclusion that the workman was appointed as Pharmacist in Deen Dayal Upadhaya Hospital, (for short "DDU Hospital"), Shimla, on contract basis vide letter dated 22.07.1995, however, since there was no shop at the aforesaid hospital, therefore, the workman was made to join in the Office of the Corporation with the assurance that as and when the construction work of shop at 'DDU' hospital would be completed, he would be engaged therein in terms of the agreement dated 22.07.1995. This work was not even assigned by the appellant and it was infact admitted that the workman had been assigned the job of miscellaneous work which included release of consignment of medicines from Transport Company and handing over of the kits/boxes of medicines to the transporter for dispatching to various destinations. The specific stand of the appellant was that since the workman had failed to work to its satisfaction, disciplinary proceedings were initiated against him and show cause notice to this effect was issued vide Ex.RF calling upon him to explain his conduct. As per the appellant, the workman had submitted his reply Ex.RG, but the same was not found satisfactory and thereafter inquiry was initiated against him wherein one Shri S.L.Bragta was appointed as an Inquiry Officer, who found him to be at fault and ultimately vide order Ex.RM the services of the workman were dispensed with immediate effect.

7. Notably, the only plea put forth by the appellant before the learned Labour Court was that the workman had left the job of his own in November, 1996 and on that basis the learned Labour Court had framed the following issues including the issue of abandonment which was framed as Issue No.1:-

> "1. Whether Shri Ajay Sood left the job, on his own, in November, 1996 as per the statement of respondent? If so, its effect? OPP.
>
> 2. If issue No.1 is not proved in affirmative, whether the petitioner is entitled for any relief? OPP.
>
> 3. Whether the petitioner is not a workman and the petition is not maintainable? OPR."

8. It would be noticed that on the one hand, the specific stand of the appellant was that the workman had of his own abandoned the job, whereas, on the other hand, it was averred that since the work of the workman was not found satisfactory, therefore, disciplinary proceedings were initiated against him in accordance with law and thereafter his services were dispensed with. Reconciling both these positions, the learned writ Court rejected the plea of abandonment.

9. Dealing with the plea of the appellant regarding the services of the workman being terminated in the disciplinary proceedings, the same was turned down on the ground that the appellant had not been able to prove on record that the disciplinary proceedings were allegedly initiated against the workman.

10. It would be noticed from the issues framed that the only plea raised by the appellant was with regard to abandonment which was turned down by the learned writ Court by holding that in teeth of the specific defence raised by the appellant that the services of the workman were terminated on the basis of the disciplinary proceedings.

11. Having heard the learned counsel for the appellant, we do not find any illegality much less any perversity in the judgment passed by the learned Labour Court as upheld by the learned writ Court. In case the issues as reproduced hereinabove are perused, it would be

noticed that the specific stand of the appellant is that the workman on his own abandoned the job, however, when it came down to leading evidence, it insisted that the services of the workman were dispensed with on the basis of the inquiry held against him which was contrary to the plea so raised in the defence before the learned Labour Court.

12. Even if this plea of holding inquiry is examined, it would be noticed that the appellant did not even bother to examine the Inquiry Officer Shri S.L.Bragta, who is alleged to have conducted the inquiry. Not only this, even the inquiry report was not placed before the learned Labour Court so as to gather as to whether the proceedings conducted by the Inquiry Officer were in accordance with law or not.

13. It is more than settled that the findings of fact recorded by the learned Labour Court as a result of appreciation of pleadings and evidence cannot be questioned in a writ petition and, therefore, obviously cannot be made subject-matter before an appellate Court.

14. At this stage, it shall also be profitable to refer to a recent judgment of this Court in ***Harbans Singh*** *vs.* ***Industrial Tribunal-cum-Labour Court and another 2016(3) SLC 1549*** wherein similar issue came up before this Court and it was held as under:-

> *"12. It is also a moot question – whether the Writ Court in a writ petition or an Appellate Court in an appeal can interfere with the finding of facts, which was made foundation by the Labour Court while making the award? The answer is in the negative for the following reasons:*
>
> *13. The Apex Court in the case titled as* ***Bhuvnesh Kumar Dwivedi versus M/s. Hindalco Industries Ltd.,*** *reported in* ***2014 AIR SCW 3157,*** *held that the findings of fact reached by Tribunal as a result of the appreciation of evidence cannot be questioned in writ proceedings and the Writ Court cannot act as an Appellate Court. It is profitable to reproduce para 18 of the judgment herein:*
>
> > *"18. A careful reading of the judgments reveals that the High Court can interfere with an Order of the Tribunal only on the procedural level and in cases, where the decision of the lower courts has been arrived at in gross violation of the legal principles. The High Court shall interfere with factual aspect placed before the Labour Courts only when it is convinced that the Labour Court has made patent mistakes in admitting evidence illegally or have made grave errors in law in coming to the conclusion on facts. The High Court granting contrary relief under Articles 226 and 227 of the Constitution amounts to exceeding its jurisdiction conferred upon it. Therefore, we accordingly answer the point No. 1 in favour of the appellant."*
>
> *14. This Court has also laid down the same principle in a batch of writ petitions,* ***CWP No. 4622 of 2013,*** *titled as* ***M/s Himachal Futuristic Communications Ltd. versus State of HP and another,*** *being the lead case, decided on 04.08.2014. It is worthwhile to reproduce para 13 of the judgment herein:*
>
> > *"13. Applying the test to the instant case, the question of fact determined by the Tribunal cannot be made subject matter of the writ petition and more so, when the writ petitioner(s) have failed to prove the defence raised, in answer to the references before the Tribunal. "*
>
> *15. This Court in a series of cases, being* ***CWP No. 4622 of 2013 (supra); LPA No. 485 of 2012,*** *titled as* ***Arpana Kumari versus State of H.P. and others,*** *decided on 11th August, 2014;* ***LPA No. 23 of 2006,*** *titled as* ***Ajmer Singh versus State of H.P. and others,*** *decided on 21st August, 2014;* ***LPA No. 125 of 2014,*** *titled as* ***M/s. Delux Enterprises versus H.P. State Electricity Board Ltd. & others,*** *decided on 21st October, 2014;* ***LPA No. 143 of 2015,*** *titled as* ***Gurcharan Singh (deceased) through its LRs versus State of H.P. and others,*** *decided on 15th December, 2015, and* ***LPA No. 207 of 2015,*** *titled as*

State of H.P. and another versus Gagan Singh, *decided on 16th December, 2015, while relying upon the latest decision of the Apex Court in* ***Bhuvnesh Kumar Dwivedi's case (supra),*** *has held that question of fact cannot be interfered with by the Writ Court. However, such findings can be questioned if it is shown that the Tribunal/Court has erroneously refused to admit admissible and material evidence or has erroneously admitted inadmissible evidence, which has influenced the impugned findings."*

15. In view of the aforesaid discussion, no fault can be found with the award passed by the learned Labour Court as affirmed by the learned writ Court. Consequently, there is no merit in this appeal and accordingly the same is dismissed, leaving the parties to bear their own costs. Pending application, if any, also stands disposed of.

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

Northern Regional Committee (NRC) & another ..... Petitioners.

Versus

Shimla Education Society Trust & another .....Respondents.

Review Petition No.5 of 2017.
Date of decision: 12.06.2017.

Code of Civil Procedure, 1908- Order 47- Section 114- The petitioner has sought the review of the judgment passed by the Court vide which the respondents were permitted to start the course for the sessions 2015-2017 subject to transfer of land and built up area in the name of educational institution within a period of four weeks- the review is sought on the ground that the Court could not have varied the schedule of admission and the judgment was contrary to the judgment passed by Hon'ble Supreme Court- held that as per the schedule,codal formalities were to be completed by the end of the March, whereas, in the present case the decision was taken in the month of May, much later than the date fixed in the schedule – the grounds sought to be raised in the review petition were not taken before the writ court and cannot be raised for the first time – the petition dismissed. (Para-6 to 10)

Cases referred:

Maa Vaishno Devi Mahila Mahavidyalaya vs. State of U.P. and others (2013) 2 SCC 617

Baba Shiv Nath Singh Shikshan Evam Prashikshan Sansthan vs. National Council for Teacher Education and others 2015(10) Scale 65

Yashpal Singh and others vs. State of H.P. and another, I L R 2016 (IV) HP 2286 (D.B.)

For the Petitioners : Mr.B.Nandan Vasishta, Advocate.

For the Respondents : Mr.Suneet Goel, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge, *(Oral)*

This petition under Article 226(3) of the Constitution of India read with Order 47 and Section 114 of the Code of Civil Procedure seeks review of the judgment passed by this Court on 08.11.2016 in CWP No.1217 of 2016.

2. At the outset, it may be observed that the respondents have once been driven to un-necessary litigation by the petitioners and even while filing CWP No.1217 of 2016, this fact was duly recorded in para Nos. 23 and 24 of the judgment which read as under:-

> *"23. It is unfortunate that the petitioners have repeatedly been compelled to approach this Court and within a span of five years have been constrained to file the seventh petition, earlier ones being:*
>
> *1. CWP No. 5944/2010 decided on 23.4.2012*
>
> *2. CWP No. 1062/2014 decided on 1.5.2014*
>
> *3. CWP No. 3279/2015 decided on 6.8.2015*
>
> *4. CWP No. 3945/2015 decided on 17.9.2015*
>
> *5. CWP No. 4283/2015 decided on 30.11.2015*
>
> *6. CWP No. 4755/2015 decided on 22.3.2016*
>
> *24. That apart, the petitioners have time and again been compelled to approach the appellate authority against the action/inaction of the respondents."*

3. At this stage, it may be relevant to point out that vide impugned judgment of which review is sought, this Court had permitted the respondents to start the course in question i.e. D.EI.Ed Course for the Session 2015-17 subject to their transferring the land and built up area in the name of Educational Institute within a period of four weeks.

4. The only ground taken by the petitioners in the review petition is that this Court could not have varied the schedule of admission and the same was contrary to the judgment rendered by the Hon'ble Supreme Court in ***Maa Vaishno Devi Mahila Mahavidyalaya*** *vs.* ***State of U.P. and others (2013) 2 SCC 617*** as reiterated in a later judgment in ***Baba Shiv Nath Singh Shikshan Evam Prashikshan Sansthan*** *vs.* ***National Council for Teacher Education and others 2015(10) Scale 65.***

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

6. We are constrained to observe that by filing review petition, the petitioners have only sought to take advantage of their own wrong. Indubitably, it was the decision taken by the petitioners in their 252 meeting held on 19.04.2016 to 02.05.2016 that was successfully assailed before this Court whereby the same was quashed and set aside vide the impugned judgment.

7. Now, in case the schedule, as is sought to be relied upon by the petitioners is perused, it would be noticed that in terms thereof all codal formalities were required to be completed by the end of March of the relevant academic year, whereas, in the instant case, respondent No.2 has itself taken a decision only in the 252 meeting held on 19.04.2016 to 02.05.2016 i.e. much later than the date fixed in schedule. Once, this Court has quashed and set aside the said decision, then obviously, the consequences would follow or else it would amount to permitting the petitioners to take advantage of their own wrong.

8. Even otherwise, the parameters with regard to maintainability/non-maintainability of writ petition for review are well settled and reference in this regard can be made to the judgment rendered by this Court in ***Review Petition No.2 of 2016*** titled ***Shri Yashpal Singh and others*** *vs.* ***State of H.P. and another,*** decided on 24.08.2016, wherein this Court after taking into consideration the law on the subject, laid down certain broad principles with regard to maintainability/non-maintainability of a petition for review and the same are as under:-

> ***(A) 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.

(B) 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.

(v) 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.

(x) Review is not maintainable on the basis of a subsequent decision/judgment of a coordinate or larger Bench of the Court or of a superior Court.

(xi) While considering an application for review, court must confine its adjudication with regard to the material which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.

(xii) Mere discovery of a new or important matter or evidence is not sufficient ground for review. The parties seeking review has also to show that such mater or evidence was not within its knowledge and even after exercise of due diligence, the same could not be produced before the Court earlier.

9. Apart from the above, we may also notice that the grounds as are now sought to be raised in this petition were not even taken before the learned writ Court and, therefore, the petitioners cannot be permitted to raise the same for the first time in this review petition.

10. Having said so, we find no merit in this review petition and accordingly the same is dismissed, alongwith all pending applications, if any.

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

Bandana Devi . .....Appellant.
Versus
Surjeet Singh & others. .....Respondents.

Cr. Appeal No. 199 of 2009
Decided on : 13/06/2017

Indian Penal Code, 1860- Section 498-A, 406 and 506-I read with Section 34- Marriage of the complainant was solemnized with accused No.1 on 21.11.2001 and a female child was born – the accused demanded dowry from the complainant – accused No.1 started abusing the complainant and levelled allegations of un-chastity against the complainant – accused No.2 to 5 threatened to beat the complainant if she came without Rs.1 lac- the matter was compromised and accused No.1 brought the complainant to Jhansi at the place of his posting – complainant was ousted from her matrimonial home after 21 days of the birth of the female child – the accused also misappropriated the Stridhan given to the complainant – the accused were tried and acquitted by the Trial Court- held in appeal that no specific incidents of beating and criminal intimidation were mentioned by the complainant and her witnesses – the evidence regarding misappropriation and the details of the articles handed over as Stridhan are not satisfactory –Trial Court had taken a reasonable view while acquitting the accused – appeal dismissed.(Para-9 to 11)

For the Appellant: Mr. N.K.Thakur, Sr. Advocate with Mr. Ramesh Sharma, Advocate.
For the Respondent: Mr. Y.P.S.Dhaulta, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The instant appeal is directed against the impugned verdict pronounced by the learned Judicial Magistrate, 1st Class, Court No.II, Amb, District Una, H.P. whereby he acquitted the accused for the charges framed against them for theirs respectively committing offences punishable under Sections 498-A, 406, and 506-I read with Section 34 I.P.C.

2. The brief facts of the case are that a complaint was filed by the complainant that marriage of complainant was solemnized with accused No.1 on 21.11.2001 at her parental house in village Nakroh, Thesil Amb according to Hindu rites and ceremonies and out of their wed-lock a female child was born on 17.10.2003. Soon after the marriage, the accused persons told the parents of the complainant that they have given less dowry articles. The accused persons also directed to the complainant to convey their message to her parents that her parents should remove the dowry articles of inferior quality and pay them Rs.1,00,000/- in cash. Apart from dowry demand accused No.1 also started abusing the complainant and he also levelled allegations of unchastity against the complainant. She alleged that accused no. 2 to 5 threatened to beat her if she came back without Rs.1,00,000/-. The complainant visited police station, Amb for reporting the incident. The police post Daulatpur called accused No. 2 to 5 and asked the complainant to live at her parental house till the arrival of accused No.1 from Indian Army and assured the complainant for legal action against the accused persons. Thereafter the matter was compromised and accused No.1 brought the complainant to Jhansi at the place of his posting. After the birth of female child accused No.1 said to the complainant that she was a characterless lady and female is born from the illicit relation of complainant with some one else and female child is not born from the relations of complainant and accused No.1. Accused No.1 ousted the complainant and her daughter from the place of his duty after 21 days of the birth of female child. On 21.3.2004 the complainant and her mother went to Jhansi but the accused did not allow them to enter in his house by saying that since the parents of the complainant have not

fulfilled their demand of Rs.1,00,000/- and the complainant was a characterless lady, she cannot be allowed to remain with accused No.1. On 2.6.2004 the complainant alongwith her mother went to the house of the accused at Bhaderkali and saw that accused No. 2 to 5 were using Istridhan, which was in the custody of accused No. 2 to 5 without the consent of the complainant and damaged the dowry articles. Lastly it is prayed that the accused persons may be summoned and punished according to law for alleged offence under Section 406, 498-A and 506 IPC read with Section 34 IPC. After recording of preliminary evidence Court of the Judicial Magistrate 1st Class, Court No.II, Amb, District Una, took cognizance against the accused and charge under Sections 498-A, 406 and 506-I of the Indian Penal Code was put to the accused to which they pleaded not guilty and claimed trial.

3. A charge stood put to the accused persons by the learned trial Court for theirs committing offences punishable under Sections 498-A, 406, and 506-I read with Section 34 I.P.C. to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the complainant examined 3 witnesses. On closure of complainants' evidence, the respective statements of the accused under Section 313 of the Code of Criminal Procedure were recorded in which they pleaded innocence and claimed false implication. They chose to lead evidence in defence and tendered into evidence documents comprised in Ext.DA to Ext.DJ.

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

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

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

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

9. In the complaint lodged by the complainant/appellant , she ventilated therein a grouse, that the respondents'/accused, "since" the inception of hers solemnizing marriage with accused No.1 "taking to" harass her, for bringing insufficient dowry besides taking to harass her, on account of inferiority of quality of dowry articles given to her at the time of hers solemnizing marriage. Also she has ventilated therein, a grouse that she was subjected to physical cruelty on 24.07.2002. Furthermore, she has communicated therein that she was intimidated besides subjected to mental trauma by the accused respondents, mental trauma whereof arose from theirs raising allegations about the chastity of her character. In addition she has echoed in the complaint, that the various articles mentioned in Ext. CW-1/A constituted her "Istridhan", items whereof were locked in an Almirah, Almirah whereof was kept at her matrimonial home, yet "it" on hers alongwith her mother visiting her matrimonial home, a day prior to the lodging of the complaint, "was found open" also the articles reflected in Ext.CW-1/A not finding their existence therein.

10. In proof of the offences constituted against the respondents, in the apposite complaint and in respect whereof the learned trial Court put a charge upon the accused, the complainant examined herself besides led into the witness box her mother who deposed as CW-2 and her relative who deposed as CW-3. However, in the respective depositions of the aforesaid,

there is no ascription with specificity, in timings with respect to occurrence of incident(s) of physical belabourings nor any of the aforesaid witnesses testified with specificity in timings with respect to occurrence of incident(s) of criminal intimidation. More over, the incident of physical belabouring which stands communicated in the complaint, to occur on 24.07.2002 is not supported by any medical evidence. In addition with the aforesaid incident of physical cruelty occurring with gross improximity in timing vis-à-vis the timing of lodging of the complaint, hence warrants dis-imputation of the credence thereto. As aforesaid, with the complainants' witnesses "not" deposing with specificity in timing with respect to the various incident(s) of intimidation besides of mental cruelty arising from theirs alleging that she did not bear a chaste character 'does also' constrain this Court to conclude, that the findings of acquittal recorded by the learned Judicial Magistrate concerned, while anvilling them upon lack of ascription, in timing qua their occurrence, by the complainant and of her witnesses', hence not warranting any interference. At this stage this Court is enjoined to adjudicate upon the effect of the complainant immediately subsequent to 22nd and 23rd March, 2004 whereat she arrived at her parental home, in sequel to hers being ill treated at Jhansi, hence omitting to lodge a complaint rather hers proceeding to belatedly therefrom, lodge a complaint in the first week of June. The evidence which stands adduced on record, in explication of the delay, is constituted in the factum of the complainant accompanied by her mother visiting the matrimonial home of the former on 2.6.2004, hence when the complaint stood lodged, a day subsequent thereto, thereupon its not suffering the ill-fate of its warranting dismissal qua the charges framed under Section 406 IPC, "dehors" no explication with respect to the delay in the ascription vis-à-vis the accused, penal misdemeanors constituted under the provisions of Sections 498-A and 506-I read with Section 34 I.P.C. standing purveyed either by the complainant while testifying in Court nor her witnesses purveying any explication in respect thereto. As aforestated this Court for reasons aforestated, has concluded, that the penal misdemeanors alleged by the complainant against the accused/respondents, arising from theirs physically belabouring her besides intimidating her also theirs raising allegations upon her qua her bearing an unchaste character, whereupon she stood beset with a mental trauma, 'not' standing cogently established. The reason aforesaid acquires galvanized impetus from the trite factum of non purveying of any sound tangible explanation by the complainant in respect of the delay which occurred in respect to the relevant ascription "since" 22/23 March, 2004 upto 3rd June, 2004. Nonetheless, even if the charge(s) framed against the accused for theirs committing offences punishable under Sections 498-A and 506-I read with Section 34 I.P.C. may founder, yet it is also imperative to determine whether the complainant has been able to establish that the accused respondent had committed an offence punishable under Section 406 IPC. The learned counsel for the appellant has alluded to the testimony occurring in the examination in chief of the complainant, wherein she deposed that she had alongwith her mother visited her matrimonial home 'a day prior' to the lodging of the complaint, whereat she noticed that her 'locked Almirah' kept at her matrimonial home, wherein she had stored her Istridhan items and in respect thereof she tendered into evidence Ext.CW-1/A "being unlocked" also the items reflected in the list, not finding their existence therein. The learned counsel for the complainant has with much vigour contended that the complainants' deposition corroborated by her mother qua both visiting the matrimonial home of the former on 2.6.2004, per se begetting a conclusion that the further part of their respective testifications', that thereat they found the locked Almirah kept by the complaint at her matrimonial home, being in an unlocked condition from his hitherto locked condition and also all the items of Istridhan kept therein being removed therefrom, warranting imputation of implicit credence thereto. He also contends that this Court is enjoined, to, also impute implicit sanctity to Ext.CW-1/A, exhibit whereof details the various items of Ishtridhan, which the complainant had kept in the locked Almirah positioned at her matrimonial home, thereupon he contends that the charge under Section 406 IPC standing established, significantly when hence also the effect of delay, if any, with respect to an offence committed under Section 406 IPC, stands effaced. Furthermore, the learned counsel for the complainant has fortified the aforesaid submission by adverting to the lack of cross-examination of the complainant by the learned defence counsel with respect to the aforesaid visit of the complainant alongwith her mother to her matrimonial home, wherefrom an imperative conclusion is drawable, that the

defence hence concedes to the fact of the relevant visit made by the complainant in the company of her mother, to her matrimonial home, with a further concomitant inference that it also concedes to the fact of the relevant Almirah being unlocked from his hitherto locked condition, wherefrom the natural corollary is that the articles of Ishtridhan kept therein when not finding their existence therein, hence theirs standing misappropriated by the accused/respondents. However, the aforesaid submission, does not earn any vigour, as failure, if any, of the defence counsel, to cross examine the complaint with respect to the visit of the complainant accompanied by her mother to her matrimonial home "a day" preceding the lodging of the complaint, is outweighed besides is countervailed, by the learned defence counsel while holding the complainants' mother to cross-examination putting dis-affirmative suggestions to her that when she alongwith her daughter visited the matrimonial home of the latter, on 2.6.2004, theirs noticing that the locked Almirah wherein she had kept items of Ishtridhan being found in an unlocked condition also the items occurring therein not finding theirs existence therein, suggestion whereof evoked a response in the negative. Even though the aforesaid putting of a dis-affirmative suggestion by the learned defence counsel while holding CW-2 to cross-examination, though does earn a conclusion that the defence hence acquiesces to the factum of the complainant accompanied by her mother hence visiting her matrimonial home on 2.6.2004 also hence the delay in the lodging of the complaint with respect to commission of an offence punishable under Section 406 standing sufficiently explained 'nonetheless' the 'fulcrum' for testing the credibility of the aforesaid deposition of the complainant, deposition whereof stood corroborated by her mother, is embedded in Ext.CW-1/A. In case this Court concludes that Ext.CW-1/A, is cogently proven by adduction of best evidence thereupon this Court would proceed to reverse the findings returned with respect to the charge framed under Section 406 IPC. For making the aforesaid determination, an allusion is enjoined to be made to the testimony of the complainant "who" during the course of her examination in chief, tendered Ext.CW-1/A yet the mere tendering of Ext.CW-1/A by the complainant "during" the course of her examination in chief would not per se warrant imputation of implicit sanctity thereto, conspicuously when in her cross-examination 'she' has made a communication that the relevant list was signatured by its author(s). However, she has not been able to name the author(s) of Ext.CW-1/A. She has also feigned ignorance whether her in-laws signatured the relevant list. Moreover, she has made a communication 'that' the relevant list stood prepared in her presence at the time when she entered her matrimonial home and has also echoed that it then held the signatures of its "authors" whereas she omitted to name the author(s) of the apposite list, thereupon she has precluded emergence of best evidence comprised in the author(s) of the apposite list, being led into the witness box, for proving the writings/scribings held therein. The mother of the complainant in her cross-examination has feigned ignorance with respect to the author(s) of the list. However, she has in her cross-examination testified that two original copies of the relevant list stood prepared, one of which was retained by the complainant. Now with the complainant deposing that the relevant list stood signatured by its author(s) besides with the mother deposing that two original copies of the apposite list stood prepared, one of which was retained by them, when construed in conjunction with the complainant, "during" the course of her examination in chief, tendering a photocopy of the apposite list, wherein there is no occurrence of any signatures of its author(s), does inevitably foreclose a conclusion that the original of the apposite list whereon the signatures of its author(s) occurred, was hidden from the view of the Court, for precluding emergence of best evidence, comprised in its author(s) deposing that the items of Ishtridhan mentioned therein, stood prepared, at the time when the complainant stepped into her matrimonial home also when she thereat kept them inside a locked Almirah. Concomitantly also with Ext.CW-1/A while being merely a photo copy, can hence be concluded to be fictitiously prepared besides the items detailed therein purportedly comprising the "Ishtridhan" of the complainant also theirs being kept in a locked Almirah by the complainant at her matrimonial home, "cannot" inspire the confidence of this Court, for its making a firm conclusion that the bald deposition of the complainant, supported by her mother that a day prior to the lodging of the complaint, they, on visiting the matrimonial home of the complainant "noticed" the Almirah in an unlocked condition from his hitherto locked condition also the items of Ishtridhan kept therein

being removed, hence driving home an inference that the relevant Almirah held the items of Ishtridhan or the items she stored therein standing removed therefrom by the accused or is hence creditworthy, conspicuously when the apposite original list, testified by the complainant to be prepared in contemporanity with her stepping into her matrimonial home, wherein stood delineated the items stored in the locked Almirah "stood never" adduced into evidence nor its author(s) were led into the witness box "whereas" they constituted the best evidence in proof of scribing of the relevant recitals in the apposite original list also when it constituted the best evidence in respect of the items detailed therein being kept by the complainant in a locked Almirah, at the time when she entered her matrimonial home also when therefrom alone it was assuredly ascertainable whether the items mentioned therein being or not found in the unlocked Almirah. Hence the charge framed under Section 406 IPC also stands not proven.

11. 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 court below does not suffer from any perversity or absurdity of mis-appreciation and non appreciation of evidence on record, rather it has aptly appreciated the material available on record.

12. In view of the above, I find no merit in this appeal, which is accordingly dismissed. In sequel, the impugned judgement is affirmed and maintained. Record of the learned trial Court be sent back forthwith.

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

Parveen Kumar ....Petitioner.

Versus

State of Himachal Pradesh. ....Respondent.

Cr. MP(M) No. 636 of 2017
Decided on: 13th June, 2017

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commission of offences punishable under Section 12 and 29 of N.D.P.S. Act for the possession of 2 boxes of tablets Lomotil each containing 100 strips and 20 cartons of SpasmoProxyvon, which were allegedly sold by the petitioner- the petitioner filed the bail petition pleading that he is innocent and was falsely implicated- held that commercial quantity was recovered in this case- keeping in view the manner in which the petitioner was apprehended and that the petitioner is likely to temper with prosecution evidence, bail petition dismissed. (Para-6)

For the petitioner: Mr. T.S. Chauhan, Advocate.
For the respondent: Mr. Virender K. Verma, Addl. AG, with Mr. Pushpinder Jaswal, Dy. AG.

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 439 of the Code of Criminal Procedure seeking his release in case FIR No. 351 of 2016, dated 29.12.2016, under Sections 12 and 29 of the Narcotic Drugs & Psychotropic Substances, Act, registered at Police Station Una, District Una, H.P.

2. As per the petitioner, he is innocent and has been falsely implicated in the present case. He is resident of the place and neither in a position to tamper with the prosecution evidence nor in a position to flee from justice, so he may be released on bail.

3. Police report stands filed. As per the prosecution, on 29.12.2016, around 5:20 p.m., when police personnel were on patrol duty near DAV School, Una, they stopped vehicle bearing registration No. HP72-2935. The vehicle was stopped and searched. On search a gunny bag was recovered from the vehicle, which contained two boxes of tablets *Lomotil* and in each of the said box there were 100 strips. Thus, in total 12000 tablets of *Lomotil* were recovered. In addition to 12000 tablets 20 cartons of *Spasmo Proxyvon Plus*, each carton containing six strips and each strip containing 24 capsules, in total 2880 capsules were recovered. The driver of the vehicle divulged his name as Surjeet Kumar and he could not produce any valid document for possessing the narcotics. Police took into possession the recovered contraband and also completed all the codal formalities. During the course of investigation accused Surjeet Kumar disclosed that he purchased the said contraband from the petitioner (Parveen Kumar). Accused Surjeet Kumar further divulged to the police that the petitioner himself, in his vehicle No. HP 72A-3308, delivered the narcotics to him at Rakkar. The petitioner was arrested and his vehicle bearing registration No. HP-72A-3308 was also taken into possession. Personal search of the petitioner was also conducted and Rs.19,000/- were recovered from him and he could not disclose the valid source of the money kept by him. Police also collected the call details of accused Surjeet Kumar and the petitioner, which also points out towards the involvement of Surjeet Kumar and the petitioner. The samples from the recovered narcotics were sent for chemical analysis and the reports were obtained. The overall conspectus of the reports reveals that the recovered contraband is of commercial quantity. The prosecution has prayed for rejection of the bail of the petitioner on the ground that the petitioner is likely to indulge in such kind of activities again and the petitioner is spoiling the society. Lastly, the prosecution has prayed that the bail application of the petitioner may be dismissed.

4. Heard. The learned counsel for the petitioner has argued that the petitioner was not involved in the present case and he is innocent. Moreover, the recovered substance is not a narcotic and he may be released on bail. He has further argued that the petitioner is a resident of the place and is not in a position to flee from justice. The petitioner is a diabetic and requires regular treatment and he may be released on bail. Conversely, the learned Additional Advocate General has argued that taking into consideration the quantity of the recovered contraband, which is a commercial quantity, the fact that the petitioner could not explain about the amount of Rs.19,000/-, which was recovered from him, also the factum that in case the accused is released on bail, he may again indulge in similar offence, he may flee from justice and tamper with the prosecution evidence, the present is a fit case where the bail is required to be dismissed.

5. I have gone through the rival contentions of the parties and the police report in detail.

6. At this stage, taking into consideration the quantity of the recovered contraband, which is precisely 752.22 grams, thus a commercial quantity, and also taking into consideration the manner in which the petitioner was apprehended, as well as after going through the record that the petitioner is likely to tamper with the prosecution evidence and flee from justice, this Court finds that the present is not a fit case where the judicial discretion to admit the petitioner on bail is required to be exercised in his favour. The petition, which sans merits, deserves dismissal and is accordingly disposed of.

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

Sh. Ajay Singh .... Petitioner.

-Versus-

State of Himachal Pradesh .....Respondent.

Cr. MP(M) No. 622 of 2017
Date of decision: 14.06.2017

Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the petitioner for the commission of offences punishable under Sections 420 & 120-B of I.P.C and Section 66-C of I.T. Act- the allegations against the petitioner include misappropriation of public money by fraudulent transaction of Rs.58,50,000/- which is a huge amount – custodial interrogation of the petitioner is required for the purpose of investigation- other accused are to be arrested- hence, bail cannot be granted – the contention of the counsel that if bail is not granted, it will send a wrong message to the society amounts to browbeating the judge as well as playing to the gallery and is to be deprecated. (Para-3 to 5)

For the petitioner: Mr. Naresh Kaul, Advocate.
For the respondents: Mr. Vikram Thakur and Ms. Parul Negi, Deputy Advocate Generals.
ASI Pramesh Kumar, Investigating Officer, Police Station Indora, District Kangra is present.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

By way of this petition filed under Section 438 of the Code of Criminal Procedure, the petitioner has prayed for grant of bail with respect to FIR No. 98/2016, dated 03.06.2016, registered under Sections 420 & 120-B of the Indian Penal Code and Section 66C of the IT Act at Police Station Indora, District Kangra, H.P.

2. I have heard the learned counsel for the parties and have also gone through the status report, which has been filed by the learned Deputy Advocate General as well as records of the case produced by the State.

3. A perusal of the records demonstrate that allegations against the accused in the said FIR, which also includes the present petitioner, is of misappropriation of public money/property of Kangra Central Cooperative Bank Ltd., Nurpur by making illegal transactions in a fraudulent manner with the intention to cause wrongful loss to the bank and wrongful gain to the accused, as a result of a conspiracy hatched in this regard amongst them. The alleged fraudulent transactions are to the tune of Rs.58,50,000/-, which in my considered view, is a huge amount. As per the State, one of accused happens to be an employee of the Kangra Central Cooperative Bank Ltd., who fraudulently withdrew amount from the bank accounts of different account holders of Kangra Central Cooperative Bank of the branch concerned by making fraudulent entries and by operating computer system of Assistant General Manager, Nurpur and the money so withdrawn was deposited in conspiracy with the other co-accused in their bank accounts with the intention to misappropriate the same, which includes the present petitioner also.

4. Taking into consideration the gravity of the charges which have been levelled against the accused, which includes the present petitioner and the contention of the learned Deputy Advocate General that the custodial interrogation of the petitioner is required for the purpose of investigation and further the fact that other co-accused are still to be arrested, who as

per the status report filed, are evading their arrest, I do not find that the petitioner is entitled for the grant of bail in the present case. Petition is accordingly dismissed.

5. Before parting with the judgment, it is pertinent to add that this Court expresses its displeasure on the conduct of learned counsel appearing for the petitioner during the course of arguments. Mr. Naresh Kaul, learned counsel appearing for the petitioner openly stated in the Court, obviously with an intent to browbeat the Court that if bail is not granted to the petitioner by this Court then *'it will send a wrong message to the society'*. This Court takes strong exception to the same. Filing a petition for grant of bail is statutory right of a party. Petitioner, who files such petition, has the legal right to make all submissions to put forth his cause within the four corners of law, however, this does not confer an unfettered right upon the party/learned counsel representing the party to make uncalled for comments if the Court is not finding favour with its submissions. Whether bail is to be granted or not in a particular case is a decision which a Court has to make taking into consideration all aspects of the matter before it. Persuasion to grant bail is the right of the applicant, however, right of persuasion cannot be equated with an arrogant right of submitting in a Court of law whatsoever a learned counsel representing the party feels like, with the intent to both browbeat the Judge as well as to play to the gallery. Court deprecates this kind of practice.

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

Sanjay Kumar .....Petitioner

Versus

State of Himachal Pradesh. .....Respondent.

Cr.MP(M) No. 721 of 2017
Date of decision: June 14, 2017.

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commission of offence punishable under Section 302 of I.P.C.- accused and deceased were first cousins – there was no enmity between them and their families- the incident started when the deceased molested the wife of the accused, which shows that incident had stared at the spur of moment- accused is permanent resident of Ani and there is no likelihood of his jumping over the bail- hence, bail application allowed and the accused ordered to be released on bail of Rs. 50,000/- along with one surety in the like amount. (Para-5 to 7)

For the petitioner Mr. Satyen Vaidya, Senior Advocate with Mr. Vivek Sharma, Advocate.
For the respondent Mr. Pramod Thakur, Addl. AG.

The following judgment of the Court was delivered:

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

Learned Additional Advocate General has placed on record the status report and the I.O. Inspector/SHO Sanjeev Kumar, Police Station, Rampur has produced the record.

2. Heard. The petitioner is one of the accused in FIR No. 21 of 2017 registered under Section 302 read with Section 34 of the Indian Penal Code against him and his co-accused Ram Kumar in Police Station, Rampur on 22.1.2017 with the allegations that during the night intervening 21/22.1.2017 they both picked up quarrel with Ram Krishan, the deceased at a stage when noticed him molesting the wife of the accused-petitioner in his quarter at village Taklech.

3. The deceased is none else but being the son of the real aunt (Mossi) of the accused-petitioner is his first cousin. The accused-petitioner was serving as Constable at the relevant time in Police Post, Taklech. He had been residing there in rented accommodation taken on rent from his co-accused Ram Kumar. On 21.1.2017, his wife namely Durgi had also came to Taklech. The deceased accompanied by one Naresh Kumar also came to Taklech to the quarter of the accused-petitioner. During the night they all including accused Ram Kumar consumed liquor in the quarter of the accused-petitioner. The wife of the accused-petitioner prepared meal for them. They had their meal and as in the quarter of the accused-petitioner sufficient space was not available to accommodate the deceased and Naresh Kumar, therefore he went to the house of his co-accused Ram Kumar for arranging space where they could sleep. After having meal while Naresh Kumar went to another room and slept there, the deceased left behind in the bedroom of the accused-petitioner where the wife of the latter was also present. The deceased allegedly started molesting the wife of the accused-petitioner to which she objected to. On this, hot exchanges had taken place between the deceased and the wife of the accused-petitioner. On hearing of this, the accused-petitioner and his co-accused Ram Kumar came to the room and noticed the deceased misbehaving with his wife. They caught hold the deceased and administered beatings to him with kicks and fisticuffs. The accused-petitioner made Naresh Kumar who was sleeping in another room to awake and thrashed him also and made utterances why they had come there to humiliate him. Said Naresh Kumar on apprehending danger to his life fled away from that place. The deceased allegedly started arguing with accused-petitioner and his co-accused and as such was caught hold by them and administered beating. Later on, he also fled away from the quarter of the accused-petitioner. The accused-petitioner and his co-accused followed him up to a certain distance i.e. road and then returned to the quarter.

4. As per further allegations appeared in the record, the accused-petitioner had made a call through his Cell phone to the father of the deceased and proclaimed that he had beheaded his son Ram Krishan (deceased) and that it is now he who is his son. The father of the deceased and other relatives could not visit village Taklech immediately being odd hours as well as for want of transport facility. They, however, visited village Taklech on the following morning i.e. 22.1.2017 and inquired from the accused-petitioner about the whereabouts of the deceased. Naresh Kumar also came with them to the quarter of the accused-petitioner. He collected the Helmet of the deceased and also his other belongings. They searched the deceased here and there in village Taklech. The accused-petitioner also remained with them at that time. The dead body of deceased was recovered from a nallah at village Taklech. It is thereafter the police of Police Station, Rampur was informed. The police arrived at the spot and started conducting investigation of the case. The investigation is now complete. The challan stands filed against the accused-petitioner and his co-accused which presently is at the stage of consideration of charge.

5. Having heard learned counsel representing the accused-petitioner and learned Additional Advocate General for the respondent-State as well as going through the record of the case, there is no quarrel so as to the accused-petitioner and deceased were first cousin. There was no enmity between them or their family as nothing to this effect could surface on record during the course of investigation conducted by the police. The deceased had come to Taklech along with Naresh Kumar as guests of his cousin, the accused-petitioner. The investigation conducted by the police further reveals that they had consumed liquor. They all had also their dinner in the quarter of the accused-petitioner. Smt. Durgi, the wife of the accused-petitioner was present there. Prima-facie the prosecution case that the deceased had molested the wife of the accused-petitioner also seems to be correct. On this the accused-petitioner and his co-accused administered beating not only to the deceased but to Naresh Kumar aforesaid also seems to be correct. While Naresh Kumar had fled away from that place the deceased left behind in the quarter. Later on when thrashed by the accused the deceased also seems to have run away from the quarter of the accused-petitioner. It is difficult to believe at this stage that he was beaten to death by the accused-petitioner and thereafter his dead body thrown in the nallah. The possibility of he having fallen down while fleeing away from the place of occurrence cannot be ruled out. The nature of injury i.e. head injury noticed by the Medical Officer while conducting

autopsy on the dead body could most probably have been suffered by way of fall. The present also seems to be not a case where it can be said that the accused-petitioner has killed the deceased in a planned manner. On the other hand the scuffle rather seems to have taken place on account of molestation of the wife of the accused-petitioner by the deceased. Therefore, the present is not a case where it can be said that the accused-petitioner had killed the deceased in a planned manner. The incident rather seems to be sparked off at the spur of moment i.e. on seeing the wife of the accused-petitioner was being molested by the deceased.

6. The accused-petitioner was serving as Constable in Police department. He is permanent resident of village Lunalot, Tehsil Anni, District Kullu. There is no likelihood of his jumping over the bail. He was arrested on 23.1.2017 and is still in custody. The investigation in the case is now complete. Challan has also been filed against him.

7. Therefore, having regard to the given facts and circumstances and the evidence collected by the investigating agency at this stage, I find the present a fit case where further detention of the accused-petitioner in custody is not warranted. He, as such, is ordered to be admitted on bail subject to his furnishing personal bond in the sum of Rs. 50,000/- with one surety in the like amount to the satisfaction of learned Chief Judicial Magistrate, Kinnaur at Reckong Peo/Judicial Magistrate at Rampur. He shall further abide by the following conditions;

That he shall:-

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

c. 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;

d. not leave the territory of India without the prior permission of the Court.

8. 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.

9. The observations hereinabove shall remain confined to the disposal of this petition and have no bearing on the merits of the case. The application is accordingly allowed and stands disposed of.

Copy Dasti.

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

State of H.P.. .....Appellant.

Versus

Deep Kumar .....Respondent.

Cr. Appeal No. 178 of 2007
Decided on : 14/06/2017

Indian Penal Code, 1860- Section 279, 337 and 338- Accused was driving a jeep – it rolled down a hill and hit T who sustained injuries- the accused was tried and acquitted by the Trial Court – held in appeal that the alleged eye witness was at a distance of half kilometer from the place of occurrence – Trial Court had properly appreciated the evidence- appeal dismissed.(Para-8 and 9)

For the Appellant: Mr. Vivek Singh Attri, Addl. A.G.
For the Respondent: Mr. G.R.Palsra, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The instant appeal is directed against the impugned verdict pronounced by the learned Sub Divisional Judicial Magistrate, Chachiot, at Gohar, Mandi, H.P. whereby he acquitted the accused for the charges framed against him for his committing offences punishable under Sections 279, 337 and 338 of the Indian Penal Code.

2. The brief facts of the case are that the complainant Devi Singh had gone to place Kyoli Nal for his some domestic task. At about 1.20 p.m he reached at place Kyoli Nal thereat he heard noise of a jeep being rolled down from the road at Kenchimod. On this the complainant alongwith other persons went towards the spot and saw that the jeep had fallen into the nala and Tula Ram son of Almu a deaf and dumb had sustained injury on his head. It is the case of the prosecution that later on the complainant came to know that jeep bearing No. HP-53-2543 was going towards place Bhulah and when the jeep reached at a curve then due to skidding on snow had fallen down in the nala and when the jeep was rolling then it struck against Tula Ram. The matter was reported to the police by the complainant and after completing all codal formalities and on conclusion of the investigation into the offence, allegedly committed by the accused challan was prepared and filed in the Court.

3. A charge stood put to the accused by the learned trial Court for his committing offences punishable under Sections 279, 337 and 338 of the Indian Penal Code, to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 11 witnesses. On closure of prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure was recorded in which he pleaded innocence and claimed false implication. He did not choose to lead evidence in defence. On an appraisal of the evidence on record, the learned trial Court returned findings of acquittal in favour of the accused.

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

6. The learned counsel appearing for the respondent has with considerable force and vigour contended qua the findings of acquittal recorded by the Court below standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating 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. In the site plan comprised in Ext.PW-10/C an observation occurs with respect to the skidding of the offending vehicle driven by the accused/respondent, while its being plied upon snow existing at the site of occurrence. In sequel to the aforesaid skidding of the offending vehicle “it” after striking the victim, rolled into a gorge. For proving the charge the prosecution relied upon the testimony of PW-1, who in his examination in chief testified that the skidding of the offending vehicle being arose on its being driven at a brazen speed. Consequently, the learned Additional Advocate General contends that dehors existence of snow at the relevant site of occurrence, the speed at which the vehicle was plied, begot the sequel of its hitting the person present at the site of occurrence, whereafter it rolled into a deep gorge, whereupon he contends

that the duty of due care and caution enjoined upon the accused, comprised in his driving the offending vehicle at a slow pace upon snow available at the site of occurrence, stood hence breached. Consequently, he submits that the charge against the accused is established. However, the aforesaid submission warrants rejection, as the testification of the purported ocular witness to the occurrence "apparently" looses its vigour, in the light of his, in his cross-examination deposing that he at the relevant time was positioned ½ kilometer away from the site of occurrence, wherefrom it is befitting to conclude that he obviously did not eye witness the occurrence nor also from his deposition comprised in his examination in chief it can be concluded that he had seen the offending vehicle driven by the accused at a brazen pace upon snow available at the site of occurrence nor it can be concluded that the enjoined duty of care and caution stood breached by the accused.

9. 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 court below does not suffer from any perversity or absurdity of mis-appreciation and non appreciation of evidence on record, rather it has aptly appreciated the material available on record.

10. In view of the above, I find no merit in this appeal, which is accordingly dismissed. In sequel, the impugned judgement is affirmed and maintained. Record of the learned trial Court be sent back forthwith.

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

State of Himachal Pradesh ...Appellant

Versus

Rakesh Thakur ...Respondent

Cr. Appeal No. 797 of 2008
Decided on : 14.6.2017

Indian Penal Code, 1860- Section 279, 337, 338 and 304-A- **Motor Vehicles Act, 1988-** Section 187- Accused was driving a truck in a rash and negligent manner – the truck hit a scooter on a wrong side due to which the driver and his daughter sustained grievous injuries- driver succumbed to his injuries at PGI, Chandigarh- the accused was tried and acquitted by the Trial Court – held in appeal that no test identification parade was conducted to prove that the accused was driving the vehicle at the relevant time – there was no other evidence to connect the accused with the incident- the accused was rightly acquitted by the trial Court- appeal dismissed.

(Para-6 to 9)

For the appellant: Mr. Vivek Singh Attri, Additional Advocate General.
For the respondent : Mr. G.D. Verma, Senior Advocate with Mr. B. C. Verma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The instant appeal stands directed by the State of Himachal Pradesh against the judgment of acquittal rendered on 16.9.2008 by learned Judicial Magistrate, 1st Class, Kandaghat, District Solan, H.P. in criminal case No. 12/2 of 2006 embodying therein offences punishable under Sections 279, 337,338, 304-A of the Indian Penal Code and under Section 187 of the Motor Vehicles Act.

2. The facts relevant to decide the instant case are that on 17.4.2006 at about 9:20 a.m. one information has been received in the Police Station, Kandaghat that an accident has taken place near Destination Hotel. On this information ASI Rupender Kumar along with Constable Bali Ram visited the place of occurrence. On enquiry, it was found that the driver of the truck No. HP-51-1256 was driving the truck in rash and negligent manner and was going from Shimla to Solan and scooter No. HP-14-A-2156 which was being driven by Dev Raj was going from Solan to Shimla. Dev Raj was with his daughter Lata Sharma. The scooter was hit by the truck in question from wrong side, due to which Dev Raj Sharma and his daughter Lata Sharma sustained grievous injuries. The injured were taken to hospital at Kandaghat and thereafter they were referred to Zonal Hospital, Solan for further medical aid. From Zonal Hospital, they were referred to PGI, Chandigarh. In the way Dev Raj succumbed to his injuries and he was brought back to Zonal Hospital Solan, where post mortem of his dead body was conducted and police obtained the post mortem report. The accident is claimed to have taken place due to the rash and negligent driving of truck No. HP-51-1256 by the accused. During the investigation, police prepared spot map. MLC of injured Lata Sharma with respect to injuries sustained by her on her person was obtained by the police. The truck and scooter along with their documents were taken into possession in presence of witnesses. The vehicles met with an accident, were subjected to mechanical examination and police procured mechanical reports in this regard. The accused was arrested and later on released after furnishing personal and surety bonds. The statements of witnesses acquainted with the fact of the case were recorded as per their versions. On completion of investigation and being satisfied of the commission of offence punishable under Sections 279, 337, 338, 304-A of IPC and 187 of M.V. Act by the accused, the officer-in-charge of the concerned police station submitted the chargesheet against him.

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

4. The accused stood charged by the learned trial Court, for his committing offences punishable under Sections 279, 337, 338, 304-A IPC and 187 of M.V. Act. In proof of the prosecution case, the prosecution examined 15 witnesses. On conclusion of recording of the prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure was recorded by the learned trial Court, in which the accused claimed innocence and pleaded false implication in the case.

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

6. In sequel to the collision which occurred inter-se the scooter, whereon the victim/deceased was atop, vis-à-vis, the truck purportedly driven by the accused/respondent, the former, as unraveled by the apposite post-mortem report, comprised in Ext. PW11/B, suffered his demise, in sequel to the injuries which he in the aforesaid collision sustained on his person. The learned Additional Advocate General has made a mounted assault upon the efficacy of findings recorded by the learned trial Magistrate, wherein she proceeded to dispel the identity of the accused/respondent, besides his involvement in the ill-fated collision, merely on anvil of the Investigating Officer omitting to ensure the holding of a valid Test Identification Parade, in quick promptitude to the ill-fated collision, whereas on its being conducted, it would have ensured an efficacious identification of the accused. He contends that the efficacy of the aforesaid findings, is sufficiently overcome by PW-1, emphatically voicing in her un-eroded testification, comprised both in her examination –in-chief besides in her cross-examination, that she had overheard one amongst 2-3 persons, available at the site of occurrence, uttering the name of the accused, hence hers leaning to name him in her apposite statement, thereupon concomitantly the prosecution establishing to the hilt, the identity of the accused/respondent, besides its also emphatically proving his involvement in the ill-fated collision. However, the aforesaid submission addressed before this Court by the learned Additional Advocate General, suffers enfeeblement, in the apparent light of the FIR, which stood recorded in immediate sequel to the ill-fated collision,

omitting to detail therein, the name of the accused. Moreover, the recitals occurring in the FIR, wherein solitarily the number of the offending vehicle stands recited, stood hinged upon Ext. PW6/A, exhibit whereof comprises a communication made by an anonymous person, to the Police Station concerned, wherein also the name of the accused/respondent remains un-communicated. The testification of PW-1, wherein she has articulated the name of the accused/respondent, to be the person driving the offending truck, is anchored upon her previous statement recorded in writing by the Investigating Officer concerned. However, for the previous statement recorded in writing of PW-1 by the Investigating Officer, in consonance wherewith, she testified in Court with respect to the identity of the accused/respondent, to hold immense probative formidability she stood enjoined to, in prompt sequel to occurrence, hence reveal to the Investigating Officer concerned, the name of the accused, "unless" there were strong pressing medical constraints operating upon her, whereupon she stood precluded to, at the earliest, to make a statement to the Investigating Officer concerned, with respect to the identity of the accused. Hereat, it is imperative to observe, that there are no reflections in the apposite MLC, that given the injuries, observed by the examining Doctor to be existing on her person, she hence was dis-oriented or was unfit to, in prompt sequel to the ill-fated collision, make an apposite statement to the Investigating Officer concerned. Moreover, with PW-1 also in her deposition comprised in her cross-examination, voicing that immediately subsequent to the ill-fated accident, she was fully conscious, besides with PW-3 also deposing that PW-1 was in a fit and conscious state of mind, cumulatively constrain a conclusion, that PW-1 despite in immediate sequel to the ill-fated accident, hence holding a fit mental condition, hers not revealing the name of the accused to the Investigating Officer concerned, rather hers belatedly revealing his name to the Investigating Officer, that thereupon the identity of the accused is shrouded in an aura of suspicion, benefit whereof ought to be given to the accused. Apart therefrom, dehors the fact that there was a delay on the part of PW-1 to reveal the identity of the accused, to the Investigating Officer concerned, however the fact that she has, in her cross-examination, made a disclosure that she overheard one amongst two or three persons available at the site of accident, uttering the name of accused/respondent, whereupon she was led to make a statement with respect to the involvement of the accused in the ill-fated collision also constrains a conclusion that despite PW-1, immediately subsequent to the ill-fated collision, hence overhearing the uttering of the name of accused/respondent, also hers thereat possessing a fit mental condition, hers withholding his identity up till 21.4.2006, firmly foreclosing an inference that PW-1 in collusion with the Investigating Officer, has conjured the identity of the accused/respondent. Conspicuously, also when one amongst 2-3 persons available at the site of occurrence was not associated by the Investigating Officer, in his holding an incisive investigation for his thereupon unearthing potent evidence with respect to the identity of the accused, whereas it constituted the best evidence for succoring the testification made by PW-1 in the aforesaid regard, also begets an inference that the statement of PW-1, wherein she names the accused to be involved in the accident, is entirely a contrivance, for falsely implicating the accused.

7. The learned trial Magistrate had hence meted appropriate reverence to the omission of the Investigating Officer concerned, to hold a valid Test Identification Parade, for hence firmly establishing the identity of the accused. Consequently, the finding recorded by the learned trial Magistrate, that in the light of the aforesaid relevant omission of the Investigating Officer, the identity of the accused/respondent hence remained not firmly established, whereupon it was coaxed to record findings of acquittal upon the accused, also obviously do not warrant any interference from this Court.

8. At this stage, the learned Additional Advocate General has, on anvil of Exts. PW4/A and PW4/B, made a vigorous attempt for establishing the factum of involvement of the offending vehicle in the relevant accident. Also he has depended upon the testification of the GPA of the owner of the offending vehicle, as occurrs in his cross-examination conducted by the APP concerned, on his being declared hostile, wherein he has deposed that he was well-acquainted with the identity of the accused, given his belonging to his village, thereupon he canvasses that the prosecution has hence efficaciously proven the factum of the accused driving the offending

vehicle at the relevant time. However, the mere factum of the prosecution succeeding to establish the factum of the involvement of the offending vehicle in the relevant accident, also the GPA of the owner of the offending vehicle, in his cross-examination, to which he stood subjected to by the learned APP concerned, on his standing declared hostile, making a statement with respect to the identity of the accused/respondent, also with respect to his driving the offending vehicle at the relevant time, would not relieve the prosecution of its enjoined duty, to firmly establish the identity of the accused/respondent or to also firmly establish the factum of his occupying the steering wheel of the vehicle, at the time when it collided with the scooter, whereon the deceased was atop, conspicuously when the GPA of the owner of the offending vehicle did not produce the relevant documents, with respect to the employment of the accused as a driver in the offending vehicle. The prosecution was hence enjoined to discharge the burden of proving to the hilt the identity of the accused/respondent, burden thereof would stand efficaciously discharged, only when the best evidence with respect to the identity of the accused/respondent stood adduced by the prosecution, best evidence whereof stood comprised in the "log book" seized by the Investigating Officer standing proven to be scribed/authored by the accused/respondent. Pre-dominantly, when the accused had canvassed a defence that he was not, at the relevant time, occupying the steering wheel of the offending vehicle. However, the prosecution has merely tendered in evidence "the log book", obviously it has not solicited the opinion of the handwriting expert concerned, with respect to the authorship of writings occurring in the log book nor obviously it has established that the writings occurring in the log book standing authored by the accused/respondent, whereas it constituted the best evidence with respect to the identity of the accused, besides with respect to his occupying the steering wheel of the offending vehicle at the time when the ill-fated collision occurred. Suppression of best evidence aforesaid, garners an inference that the prosecution has failed to establish the identity of the accused.

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

10. Consequently, there is no merit in the instant appeal which is accordingly dismissed. The Judgment impugned before this Court is maintained and affirmed. Records be sent back forthwith.

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

Durga Devi …Petitioner.

Versus

State of Himachal Pradesh and others …Respondents.

CWP No. 115 of 2017
Reserved on: 02.06.2017.
Decided on: June 15, 2017

Constitution of India, 1950-Article 226- Petitioner was one out of the two contestants to the post of Pardhan, Gram Panchayat- the petitioner secured 471 votes, whereas, respondent No.4, the other contestant, secured 465 votes – respondent No.4 sought re-counting of vote- 8 votes in favour of the petitioner were declared invalid and the number of votes secured by the petitioner fell to 463, whereas, the votes of respondent No.4 remained the same i.e. 465- the petitioner objected to the recount and on recount both the parties secured 465 votes- Assistant Returning Officer went for draw of lots in which respondent No.4 was declared elected- the petitioner filed an

election petition, which was dismissed – the petitioner filed an appeal, which was also dismissed- the petitioner filed a writ petition against the orders – held that the petitioner has sought recounting of votes in the writ petition- an order of recount cannot be granted as a matter of course – there must be proper evidence regarding improper acceptance of valid votes or improper rejection of valid votes- re-counting cannot be ordered because of the fact that there was a very thin margin – petitioner has not pleaded material facts regarding irregularity in the counting – the petitioner is seeking fishing and roving inquiry, which is not permissible – the decision to carry out draw of lots is in accordance with Act- petition dismissed. (Para- 8 to 28)

Cases referred:
Bhabhi vs. Sheo Govind and others AIR 1975 SC 2117
P.K.K. Shamsudeen vs. K.A.M. Mappillai Mohindeen and others AIR 1989 SC 640
Satyanarain Dudhani vs. Uday Kumar Singh and others AIR 1993 SC 367
Vedivelu vs. Sundaram and others AIR 2000 SC 3230
Mahender Pratap vs. Krishan Pal and others (2003) 1 SCC 390
M. Chinnasamy vs. K.C. Palanisamy and others (2004) 6 SCC 341
Chandrika Prasad Yadav vs. State of Bihar and others (2004) 6 SCC 331
Kattinokkula Murali Krishna vs. Veeramalla Koteswara Rao and others (2010) 1 SCC 466
Arikala Narasa Reddy vs. Venkata Ram Reddy Reddygari and another (2014) 5 SCC 312
Nitu Bal vs. State of H.P. through Secretary (Panchayati Raj) 2012 (3) Him. L. R. 1808
Kuldeep Singh Pathania vs. Bikram Singh Jaryal (2017) 1 SCC 249
Arikala Narasa Reddy vs. Venkata Ram Reddy Reddygari and another (2014) 5 SCC 312

For the Petitioner:	Mr. Sanjeev Bhushan, Senior Advocate, with Mr. Maan Singh, Advocate.
For the Respondents:	Mr. Puneet Rajta, Deputy Advocate General, with Mr. J. S. Guleria, Assistant Advocate General, for respondents No. 1 to 3 and 5. Mr. Dilip Sharma, Senior Advocate, with Ms. Shikha Rajta, Advocate, for respondent No.4.

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, Judge:

The petitioner was one out of the two contestants to the post of Pradhan, Gram Panchayat, Baragran, Tehsil Manali, District Kullu H.P. in the elections held on 1.1.2016, the other being respondent No.4.

2. After polling was over, counting started in the Panchayat Ghar and on opening the ballot boxes, the votes polled by each of the candidate was separated and thereafter counted.

3. It is averred that on counting of the votes, the petitioner secured 471 votes, whereas respondent No.4 secured 465 votes. Respondent No.4 sought re-counting of votes and in the recounting so done, 8 votes of the petitioner was declared invalid and thereby she secured 463 votes, whereas the votes polled in favour of respondent No.4 remained the same i.e. 465. This time it was the petitioner, who objected to the re-counting and resultantly, another recount took place and after this recount, both the parties secured 465 votes each. It is averred that the Assistant Returning Officer without obtaining the consent and without going into the authenticity of the votes declared invalid, went for 'draw of lots' in which respondent No. 4 came to be elected.

4. Aggrieved by the election of respondent No.4, the petitioner firstly filed an election petition before the Authorised Officer, however, the same was dismissed and she thereafter assailed the decision by filing an appeal under Section 181 of the Panchayati Raj Act,

1994 (for short 'Act') before the Deputy Commissioner, who too, vide order dated 15.12.2016 dismissed the same.

5. Aggrieved by the decision rendered by both the authorities below, the petitioner has approached this Court by filing instant writ petition claiming therein the following substantive relief:

> *(i) That order dated passed by both the authorities may be quashed and set aside and election petition filed by petitioner may be allowed by ordering recount of votes as well as for rechecking of invalid votes for knowing the intention of the voter, in the interest of law and justice.*

6. The official respondents have contested the petition by filing a joint reply wherein preliminary objections qua maintainability, locus standi etc. have been raised. On merits, it is averred that the entire process of election was conducted by the Assistant Returning Officer in a fair manner as provided by law. It is further averred that the counting and re-counting of the votes had been done in the presence and with the consent of the agents of both the parties and the decision of the Assistant Returning Officer to carry out the draw of lots was as per the mandate of Section 175 (b) of the Act and Chapter 15 of the Handbook of Assistant Returning Officer for which the written consent was neither necessary nor provided for in the aforesaid Act and guidelines.

7. Respondent No.4, who is the elected candidate, has filed a separate reply which in fact is virtually reiteration of the reply filed by the official respondents.

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

8. As would be evident from the prayer clause, the petitioner has primarily sought re-counting of votes and, therefore, the moot question is whether such relief can be granted on the mere asking of the petitioner. The position of law has now been crystallized by the Hon'ble Supreme Court in a large number of decisions, some of which are cited below.

9. In ***Bhabhi*** vs**. *Sheo Govind and others AIR 1975 SC 2117***, the Hon'ble Supreme Court held as under:

> "***15***. *Thus on a close and careful consideration of the various authorities of this Court from time to time it is manifest that the following conditions are imperative before a Court can grant inspection, or for that matter sample inspection, of the ballot papers :*
>
> *(1) That it is important to maintain the secrecy of the ballot which is sacrosanct and should not be allowed to be violated on frivolous, vague and indefinite allegations;*
>
> *(2) That before inspection is allowed, the allocations made against the elected candidate must be clear and specific and must be supported by adequate statements of material facts;*
>
> *(3) The Court must be prima facie satisfied on the materials produced before the Court regarding the truth of the allegations made for a recount;*
>
> *(4) That the Court must come to the conclusion that in order to grant prayer for inspection it is necessary and imperative to do full justice between the parties;*
>
> *(5) That the discretion conferred on the Court should not be exercised in such a way so as to enable the applicant to indulge in a roving inquiry with a view to fish materials for declaring the election to be void; and*

(6) That on the special facts of a given case sample inspection may be ordered to lend further assurance to the prima facie satisfaction of the Court regarding the truth of the allegations made for a recount, and not for the purpose of fishing out materials. If all these circumstances enter into the mind of the Judge and he is satisfied that these conditions are fulfilled in a given case, the exercise of the discretion would undoubtedly be proper."

10. In ***P.K.K. Shamsudeen*** vs. ***K.A.M. Mappillai Mohindeen and others AIR 1989 SC 640***, it was held by the Hon'ble Supreme Court that secrecy of the votes and/or ballot is the salutary principles for ordering the recounting. It was further held that an order of recount of votes must stand or fall on the nature of the averments made and the evidence adduced before the order of recount is made and not from the results emanating from the recount of votes. It is apt to reproduce the relevant observations as contained in paragraphs 13 to 15 of the judgment which reads thus:

"13. Thus the settled position of law is that the justification for an order for examination of ballot papers and recount of votes is not to be derived from high sight and by the result of the recount of votes. On the contrary, the justification for an order of recount of votes should be provided by the material placed by an election petitioner on the threshold before an order for recount of votes is actually made. The reason for this salutary rule is that the preservation of the secrecy of the ballot is a sacrosanct principle which cannot be lightly or hastily broken unless there is prima facie genuine need for it. The right of a defeated candidate to assail the validity of an election result and seek recounting of votes has to be subject to the basic principle that the secrecy of the ballot is sacrosanct in a democracy and hence unless the affected candidate is able to allege and substantiate in acceptable measure by means of evidence that a prima facie case of a high degree of probability existed for the recount of votes being ordered by the Election Tribunal in the interests of justice, a Tribunal or court should not order the recount of votes.

14. Viewed in the light of these well enunciated principles, we find that the petitioner has neither made such averments in the petition nor adduced evidence of such a compulsive nature as could have made the Tribunal reach a prima facie satisfaction that there was adequate justification for the secrecy of ballot being breached in the petitioner's case. Factors urged before us by Mr. Padamanabhan such as that the first respondent had accepted the correctness of the recount. and that he had conceded his defeat and wanted a re-election to be held cannot constitute justifying materials in law for the initial order of recount of votes made by the Tribunal.

15. Mr. Padamanabhan also contended that the purpose and object of the election law is to ensure that only that person should represent the constituency who is chosen by the majority of the electors and that is the essence of PG NO 958 democratic process, and this position has been observed by a Bench of this Court in their order of reference of the case of N. Gopal Reddy v. Bonala Krishnamurty & Ors., CA No. 3730(NCE) of 1986 reported in JT 1987(1) SC-406 and hence it would be a travesty of justice and opposed to all democratic canons to allow the first respondent to continue to hold the post of the President of the Panchayat when the recount disclosed that he had secured 28 votes less than the petitioner. We are unable to sustain this contention because as we have stated earlier an order of recount of votes must stand or fall on the nature of the averments made and the evidence adduced before the order of recount is made and not from the results emanating from the recount of votes."

11. In ***Shri Satyanarain Dudhani*** vs. ***Uday Kumar Singh and others AIR 1993 SC 367***, the Hon'ble Supreme Court observed that secrecy of ballot papers cannot be permitted to be tinkered lightly and an order of recount cannot be granted as a matter of course and only

when the Court is satisfied on the basis of material facts pleaded in the petition and supported by the contemporaneous evidence that the recount can be ordered. It is apt to reproduce the relevant observations contained in paragraph 10 of the judgment, which reads thus:

> *"10. It is thus obvious that neither during the counting nor on the completion of the counting there was any valid ground available for the recount of the ballot papers. A cryptic application claiming recount was made by the petitioner-respondent before the Returning Officer. No details of any kind were given in the said application. Not even a single instance showing any irregularity or illegality in the counting was brought to the notice of the Returning Officer. We are of the view when there was no contemporaneous evidence to show any irregularity or illegality in the counting. Ordinarily, it would not be proper to order recount on the basis of bare allegations in the election petition. We have been taken through the pleadings in the election petition. We are satisfied that the grounds urged in the election petition do not justify for ordering recount and allowing inspection of the ballot papers. It is settled proposition of law that the secrecy of ballot papers cannot be permitted to be tinkered lightly and an order of recount cannot be granted as a matter of course and only when the Court is satisfied on the basis of material facts pleaded in the petition and supported by the contemporaneous evidence that the recount can be ordered."*

12. In ***Vedivelu*** vs. ***Sundaram and others AIR 2000 SC 3230*** the Hon'ble Supreme Court sounded a word of caution in ordering the recounting of votes on the basis of mere allegation without proper evidence with regard to improper acceptance of the valid votes or improper rejection of the valid votes and it was observed as under:

> *"18. From the above pleadings, it is evident that the appellant has not set forth material facts or particulars required for re-count of votes. To justify his contention that there was irregularity or illegality in the counting, except making some general and bald allegations, no other details are given. Though an allegation is made that electoral roll contained the names of dead persons, that the 1st respondent took advantage of the same, and that some persons had impersonated and cast votes in his favour, no details are given as to who committed such irregularity. The appellant has also not mentioned as to how many such votes had been cast in favour of the 1st respondent. So also, the appellant has not alleged the nature of the illegality or irregularity said to have been committed by the counting officers. How and in what manner there was improper acceptance of invalid votes and improper rejection of valid votes also is not explained by the appellant. In short, the Election Petition is bereft of all details and the appellant, while examined as PW 1, could not supplement anything by way of evidence.*

13. In ***Mahender Pratap*** vs***. Krishan Pal and others (2003) 1 SCC 390***, it was held by the Hon'ble Supreme Court that election petitioner must show by leading evidence that there was serious flaw in counting procedure which materially affected the result of the election.

14. In ***M. Chinnasamy*** vs. ***K.C. Palanisamy and others (2004) 6 SCC 341***, a Bench of three Hon'ble Judges of the Hon'ble Supreme Court observed that recounting cannot be ordered on a mere asking or only because the margin of votes between the returned candidate and election petitioner is narrow, material facts and particulars have to be pleaded particularly when the onus of proving the allegation is on the election petitioner. It is apt to reproduce the relevant observations as contained in paras 15, 44, 45 and 46 of the judgment, which reads thus:

> "15. *It is not in dispute that in relation to an election petition, the provisions of the Code of Civil Procedure apply. In terms of Order VI Rule 2 of the Code of Civil Procedure which is in pari materia with clause (a) of sub- section (1) of Section 83 an election petition must contain concise statement of material facts. It is true as contended by Mr. Mani that full particulars are required to be set forth in terms of*

clause (b) of sub-section (1) of Section 83 of the Act which relates to corrupt practice. The question as to what would constitute material facts would, however, depend upon the facts and circumstances of each case. It is trite that an order of recounting of votes can be passed when the following ingredients are satisfied : (1) If there is a prima facie case; (2) material facts therefor are pleaded; (3) the court shall not direct recounting by way of roving or fishing inquiry; and (4) such an objection had been taken recourse to.

Xxx xxx xxx xxx

44. The requirement of laying foundation in the pleadings must also be considered having regard to the fact that the onus to prove the allegations was on the election petitioner. The degree of proof for issuing a direction of recounting of votes must be of a very high standard and is required to be discharged. [See Mahender Pratap vs. Krishan Pal and Others - (2003) 1 SCC 390].

45. In T.H. Mustaffa (supra), this Court held that when the pleadings do not contain the material facts and necessary particulars, any amount of evidence would be insufficient.

46. Even in the recount it was found that the returned candidate has not secured majority of the votes, the result could not have been disturbed, unless prima facie case of high degree of probability existed for recount of votes. [See P.K.K. Shamsudeen vs. K.A.M. Mapillai Mohindeen - (1989) 1 SCC 526 at 530, 531].

15. Notably, the ratio of the aforesaid judgment was reiterated by another three Hon'ble Judges of the Hon'ble Supreme Court in ***Chandrika Prasad Yadav*** vs. ***State of Bihar and others (2004) 6 SCC 331*** in the following terms:

20. It is well-settled that an order of recounting of votes can be passed when the following conditions are fulfilled:

(i) A prima facie case;

(ii) Pleading of material facts stating irregularities in counting of votes;

(iii) A roving and fishing inquiry shall not be made while directing recounting of votes; and

(iv) An objection to the said effect has been taken recourse to.

21. The requirement of maintaining the secrecy of ballot papers must also be kept in view before a recounting can be directed. Narrow margin of votes between the returned candidate and the election petitioner by itself would not be sufficient for issuing a direction for recounting."

16. In ***Kattinokkula Murali Krishna*** vs. ***Veeramalla Koteswara Rao and others (2010) 1 SCC 466***, the Hon'ble Supreme Court held that merely because there was a narrow margin of votes between returned candidate and election petitioner does not per se given rise to a presumption that there had been irregularity or illegality in the counting of votes. It was further held that the Tribunal could not have ordered the recounting only on a bald plea that some irregularities and illegalities had been committed in counting. It is apt to reproduce the relevant observations as contained in paragraphs 15, 16, 23, 24, 25, 26 and 27 of the judgment, which read thus:

" 15. Before examining the merits of the issues raised on behalf of the parties, it would be appropriate to bear in mind the salutary principle laid down in the Election Law that since an order for inspection and re-count of the ballot papers affects the secrecy of ballot, such an order cannot be made as a matter of course. Undoubtedly, in the entire election process, the secrecy of ballot is sacrosanct and

inviolable except where strong prima facie circumstances to suspect the purity, propriety and legality in the counting of votes are made out. The importance of maintenance of secrecy of ballots and the circumstances under which that secrecy can be breached, has been considered by this Court in several cases.

16. It would be trite to state that before an Election Tribunal can permit scrutiny of ballot papers and order re-count, two basic requirements viz. (i) the election petition seeking re-count of the ballot papers must contain an adequate statement of all the material facts on which the allegations of irregularity or illegality in counting are founded, and (ii) on the basis of evidence adduced in support of the allegations, the Tribunal must be, prima facie, satisfied that in order to decide the dispute and to do complete and effectual justice between the parties, making of such an order is imperatively necessary, are satisfied. Broadly stated, material facts are primary or basic facts which have to be pleaded by the election petitioner to prove his cause of action and by the defendant to prove his defence. But, as to what could be said to be material facts would depend upon the facts of each case and no rule of universal application can be laid down.

23. Having viewed the matter in the light of the principles enunciated above, we are constrained to hold that the Election Tribunal as also the High court lost sight of the parameters to be applied while considering the petition seeking re-counting of votes. It is manifest from the afore-extracted paragraph 4 of the election petition, containing the grounds of challenge, the allegations regarding irregularity or illegality in the counting of votes were not only vague, even the basic material facts as could have made the Election Tribunal record a prima facie satisfaction that re-count of ballots was necessary, were missing in the petition. It is pertinent to note that upon consideration of the evidence adduced by the parties, the Election Tribunal had itself observed that the election petitioner had failed to state any material facts regarding the failure of the Election Officer to mention reasons for rejection of votes and further there was no specific allegation as to on which table the votes polled in favour of the election petitioner were mixed with the votes polled in favour of the appellant; and on which table the votes polled in his favour were rejected as invalid. Precisely for this reason, and in our view rightly, the Election Tribunal had declined to take into consideration the evidence adduced by the election petitioner on the point.

24. It is a settled principle of law that evidence beyond the pleadings can neither be permitted to be adduced nor such evidence can be taken into consideration. Moreover, even the two material issues, viz. as to whether the counting of votes by the Election Officer was in accordance with the rules and regulations as also whether the votes polled in favour of the election petitioner were rejected as invalid or there was improper mixing of the votes have been found in favour of the appellant. It is evident from the observations of the Election Tribunal, extracted in Para 7 above, that the sole factor which had weighed with it to order re-count was that no prejudice will be caused to the appellant if the ballot papers are re-counted. Similarly, the factor which weighed with the High Court to affirm the view of the Election Tribunal is that re-counting of votes will reinforce the transparency in the process of election, particularly when the margin of votes was very narrow.

25. It needs to be emphasised that having regard to the consequences emanating from the direction of re-counting, which may even breach the secrecy of ballot, the doctrine of prejudice is an irrelevant factor for ordering re-count. Similarly, a narrow margin of votes between the returned candidate and the election petitioner does not per se give rise to a presumption that there had been an irregularity or illegality in the counting of votes. In the first instance, material facts

in this behalf have to be stated clearly in the election petition and then proved by cogent evidence. Undoubtedly, the onus to prove the allegation of irregularity, impropriety or illegality in the election process on the part of the Election Officer is on the election petitioner and not on the Election Officer, as held by the authorities below. In the present case, both the forums below have found that material facts were lacking in the election petition. Having held so, in our view, the election petition should have been dismissed on this short ground alone. In that view of the matter, the observation of the Election Tribunal, as affirmed by the High Court, that the Election Officer had failed to say anything regarding corrections and over-writings in Form 26, are neither factually nor legally sound.

26. We are of the opinion that in the light of the afore-noted factual scenario and the fact that findings of the Election Tribunal on issues No.1 and 2 were in favour of the appellant, except for a bald plea that some irregularities and illegalities had been committed in counting, there was no material on record on the basis whereof the Election Tribunal could have arrived at a positive finding that a case to order re-count of the ballot papers had been made out. For all these reasons, we are convinced that the order of re-count passed by the Election Tribunal was illegal and the High Court erred in upholding it.

27. In view of the afore-going discussion, the appeal is allowed; the order passed by the Election Tribunal ordering re-count of the ballot papers, and affirmed by the High Court is set aside. The appellant shall be entitled to costs, quantified at Rs.20,000/-."

17. The aforesaid proposition was further reiterated by a Bench of three Hon'ble Judges of the Hon'ble Supreme Court in ***Arikala Narasa Reddy*** vs. ***Venkata Ram Reddy Reddygari and another (2014) 5 SCC 312***, reiterating that the Court cannot go beyond pleadings and allow recounting just to enable election petitioner to indulge in roving inquiry. Material facts and full particulars must be properly pleaded stating particular irregularity in counting votes due to which the election was materially affected and evidence must be led in support thereof, in absence of such pleading evidence cannot be considered.

18. The principles that can be culled out from the law on the subject as expounded by the Hon'ble Supreme Court in the aforesaid decisions are as follows:

(i) A prima-facie case;

(ii) Pleading of material facts stating irregularities in counting of votes;

(iii) A roving and fishing inquiry shall not be made while directing recounting of votes;

(iv) An objection to the said effect has been taken recourse to; and

(v) The Court must be primafacie satisfied on the material placed before it regarding the truth of the allegations made for a recounting.

19. Bearing in mind the aforesaid principles as also the exposition of law laid down by the Hon'ble Supreme Court in the aforesaid cases, now we proceed to determine as to whether the case of the petitioner is covered by any of the principles culled out above.

20. Adverting to the election petition, it would be noticed that the petitioner has not even cared to plead the material facts regarding irregularity in the counting of votes and we are disposed to think that what the petitioner in fact seeks is nothing but a fishing and roving fishing inquiry which is impermissible in law. The petitioner has failed to specify any allegations with respect to the alleged illegality and so called irregularity committed while counting and has further failed to point out much less prove that there was improper acceptance of invalid votes or improper rejection of the valid votes. As observed by the Hon'ble Supreme Court in absence of

proper pleading to this effect coupled with clinching evidence to support such pleading an order of recounting cannot be made as a matter of recourse.

21. Therefore, in absence of any specifications with regard to the ground on which the election of respondent No.4 was being questioned together with the summary of the circumstances to justify the election being questioned on such ground, it was obviously not open for the authority to direct recounting and, therefore, both the authorities below committed no irregularity much less illegality in rejecting the claim put-forth by the petitioner.

22. At this stage, we may also note that during the pendency of this petition, the petitioner had moved an application seeking therein direction to respondent No.2 to provide information as per Rule 83 of the H.P. Panchayati Raj (Election Rules), wherein she expressed her apprehension that some of the votes casted in favour of the Pradhan were likely to be found in the ballot boxes of the Block Development Committee (BDC Ward No.23, Pargna Tehsil Manali, District Kullu) as also in the ballot boxes of Zila Parishad (Ward No.14 Nasogi) for whose elections were held simultaneously with the elections of Pradhan and accordingly this Court vide order dated 12.5.2017 appointed the SDM, Kullu as a Commissioner to undertake this exercise.

23. In compliance to the orders, the SDM, Kullu has submitted his report in a sealed cover which was opened in the presence of the counsels for the parties in the open court during the hearing of the petition on 2.6.2017 wherein he has reported that no vote was found to be casted in favour of the Pradhan, Gram Panchayat, Baragran in any of the two ballot boxes.

24. As a last effort, learned counsel for the petitioner would place strong reliance upon the judgment passed by a learned Division Bench of this Court in ***Nitu Bal*** vs. ***State of H.P. through Secretary (Panchayati Raj) 2012 (3) Him. L. R. 1808***, to contend that it is only the person, who has secured the majority of the votes can be declared as elected. Obviously, there cannot be any quarrel with the proposition as expounded in the aforesaid case, but we are complete at a loss to understand as to how the ratio of the aforesaid judgment is applicable to the facts of the instant case.

25. To be fair to learned counsel for the petitioner, he also referred to a judgment rendered by learned Single Judge of this Court in ***Natwar Singh*** vs. ***State of Himachal Pradesh and others, CWP No. 355 of 2012,*** decided on 30.4.2013 and also placed reliance upon a judgment rendered by the Hon'ble Supreme Court in ***Kuldeep Singh Pathania*** vs. ***Bikram Singh Jaryal (2017) 1 SCC 249.*** But we hardly find any of these judgments to be in any way helpful to the petitioner and rather, in case the judgment in ***Natwar Singh's*** case (supra) is perused, it only reiterates what we have stated above, whereas the judgment in ***Kuldeep Singh Pathania*** case (supra) does not even remotely deal with the proposition posed for consideration before this Court.

26. As regards the orders passed by the authorities below, no fault can be found with the orders passed by them. After all, they were to decide the case on the basis of the pleading of the parties and in absence of any specific pleading, obviously the so called evidence could not have been considered. (Refer: ***Arikala Narasa Reddy*** vs. ***Venkata Ram Reddy Reddygari and another (2014) 5 SCC 312***).

27. Insofar as the decision of respondent No.5 to carry out the draw of lots is concerned, the same is clearly provided for under Section 175 (b) of the Act and Chapter 15 of the Handbook of Assistant Returning Officer.

28. As a result of aforesaid discussion, we find no merit in this petition and the same is accordingly dismissed, leaving the parties to bear their own costs. Pending application(s) if any, stands disposed of.

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

Madal Lal Sharma .....Petitioner
Versus
Pritam Singh and others. .....Respondents

Civil Revision No. 164 of 2016
Decided on: 15th June, 2017

Code of Civil Procedure, 1908- Order 6 Rule 17- An application for amendment was filed on the ground that defendants started raising construction over the suit land in violation of the interim order passed by the Court- application was rejected on the ground that the same was filed after the commencement of the trial- issue regarding mandatory injunction has already been framed and no purpose would be served by allowing the application- held that the issue regarding mandatory injunction has already been framed and, therefore, amendment is not necessary- proper course for the applicant would have been to file the application for violation of the order of the Court under Order 39 Rule 2-A – Trial Court had rightly dismissed the application- petition dismissed. (Para-2 to 4)

For the petitioner: Mr. Sanjeev Kuthiala, Advocate.
For the respondent: Ms. Anjali Soni Verma, Advocate for respondent No.1.
Mr. Pramod Thakur, Addl. A.G for respondent No.3.
Respondent No.2 ex-parte.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)

Order dated 4.8.2016 passed by learned Civil Judge (Junior Division)-I, Dharamshala, District Kangra, in an application under Order 6 Rule 17 read with Section 151 of the Code of Civil Procedure registered as CMA No. 199 of 2013, is under challenge before this Court in the present petition. It is seen that learned trial Court while taking note of the provisions contained under Order 6 Rule 17 CPC and also the factum of the issue regarding mandatory injunction is already framed in the main suit, has dismissed the application.

2. The prayer for amendment in the plaint was sought to be made on the grounds inter alia that the respondents-defendants in violation of the interim order passed by learned trial Court has started raising construction over the suit land comprised in Khewat Khatauni No. 238/341 to 342, Khasra No. 203, 204 and 205, land comprised in Khewat Khatauni No. 110/168, Khasra No. 199 and land comprised in Khewat Khatauni No. 136/210, Khasra No. 202 situated in Mauja Sham Nagar/364/1 Tehsil Dharamshala, District Kangra on and w.e.f. 16.08.2015 and also blocked the existing drain with concrete, sand and cement mixture on 18/20.08.2015. Therefore, in relief clause, sub-para 2(i)(a), which reads as follows, was sought to be added by way of amendment:

> "That in case it is found and proved that during the pendency of the suit the defendant No.1 has changed the nature of and raised any construction on the open drain of the defendant No.1 on suit land (b), in that event the defendant No.1 may kindly be directed by way of mandatory injunction to demolish such construction and to restore the open drain to its original position."

3. The application was resisted and contested on behalf of the defendants as pointed out at the out set. Learned trial Judge after taking note of the provisions contained under Order 6 Rule 17 CPC has concluded that the trial stands commenced and as no case is made out for allowing amendment in the plaint as well as an issue regarding entitlement of the

petitioner-plaintiff to the decree of mandatory injunction is already framed in the main suit, has dismissed the application.

4. True it is that amendment in the pleadings can be permitted at any stage of proceedings, of course, the party seeking the same satisfies the Court ceased of the matter that he/she was prevented by sufficient cause from bringing the facts to be incorporated by way of amendment after having exercised due diligence. The facts on which amendment in the plaint is being sought no doubt if taken as it is have surfaced during the pendency of the suit, however, had the respondents-defendants started raising construction in violation of the interim order passed by learned trial Court, the remedy available to the petitioner-plaintiff would have to initiate contempt proceedings against them by filing an application under Order 39 Rule 2-A CPC and not an application seeking amendment under Order 6 Rule 17 CPC. Otherwise also, when the issue regarding the entitlement of the petitioner-plaintiff to the decree for mandatory injunction is already framed, therefore, the said issue is sufficient to take care of this part of the controversy between the parties. I, therefore, find no illegality or infirmity, serious in nature, in the impugned order, warranting this Court to exercise its revisional jurisdiction, which otherwise is limited one and should be exercised sparingly and in appropriate cases of serious miscarriage of justice caused to the aggrieved party. The petition is accordingly dismissed. The liberty, however, is reserved to the petitioner-plaintiff to file application under Order 39 Rule 2-A CPC, if so advised. Pending application(s), if any, shall also stand disposed of.

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

Naveen Kumar ....Petitioner

Versus

H.P. University and another ....Respondents

Civil Writ Petition 1108 of 2008
Judgment Reserved on 17.05.2017
Date of Decision 15th June, 2017

Constitution of India, 1950- Article 226- Petitioner appeared in MA (Economics) examination in June, 2004 and was shown to be absent in paper-VI – the petitioner represented that he was not absent – his result was conveyed but he was told that he was absent in paper-III and therefore, he should surrender the earlier marks sheet – he again represented that he was present in both the papers - this fact was verified from the attendance sheet but his result was not declared- the respondent stated that marks of paper–VI were wrongly reflected against the marks for paper-III- the petitioner was required to re-appear in paper-III- hence, his result was not declared – held, that conducting examination, declaring results, posting marks, issuing certificate and awarding degrees is a delicate function to be performed by University with due diligence and care – if any, mistake is committed, the same is required to be rectified within reasonable period – however, in the present case the University had behaved in careless, irresponsible and negligent manner – the University stated for the first time in the year 2008that the petitioner had obtained 19 marks in paper-III- hence, direction issued to the University to grant three chances to the petitioner to pass in paper-III – cost of Rs.40,000/- also imposed upon the respondent. (Para-11 to 18)

Case referred:
Satija Rajesh N. vs. State of H.P. and others 2014(Suppl) Him.L.R. (DB) 2422

For the Petitioner: Shri Rajiv Rai, Advocate.
For the Respondents: Mr. J.L. Bhardwaj, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.

By means of this petition, petitioner has prayed for direction to the respondents to issue the consolidated marks sheet for MA (Economics) and to pay Rs.5 lacs compensation for causing mental pain, physical harassment, torture, pecuniary losses and wastage of precious two years of career of petitioner for depriving him from appearing in various examinations and interviews and also from getting the benefit of post graduate degee in various interviews.

2. Brief facts of the case are that petitioner took admission in MA (Economics) in respondent university in the year 2001. In June, 2004, he appeared in Courses I, II, III of first semester and also Courses IV and VI of second semester, result whereof was declared in the month of October, 2004 and petitioner was conveyed to have obtained marks as under:-

M.A. First Semester (June, 2004)

Courses	Marks obtained
I	16
II	21
III	37

M.A. Second Semester (June, 2004)

Courses	Marks obtained
IV	33
VI	Absent

3. Petitioner approached the examination and evaluation Branches of University and lodged his protest for showing him absent in Course VI of second semester. In response to his complaint, his result of Course VI of second semester was settled and was informed to him by respondent university through Controller of Examination vide letter dated 2.11.2004 (Annexure P-3). However, in this communication dated 2.11.2004 (Annexure P-3) petitioner was shown absent in Course III of first semester and was advised to surrender his result card of first semester examination held in June, 2004.

4. In response to letter dated 2.11.2004, Annexure P-3, petitioner again submitted an application dated 14.12.2004 (Annexure P-4) to the Controller of Examination stating therein that he had appeared in Courses III as well as VI in June 2004 but earlier he was shown absent in Course VI, but after settling result of Course VI he was shown absent in Course III. In this application he requested to settle his result by giving correct marks to him. During this period only, it was verified by officials of respondent University that as per attendance sheets of these Courses III and VI, petitioner had appeared in both papers. Thereafter, petitioner was assured that matter shall be settled very soon. According to petitioner, thereafter no communication was received from respondent University despite his regular visits to concerned authorities and officials of respondent university. Respondent University has also not placed any document on record pertaining to subsequent correspondence, if any.

5. In the meantime petitioner passed remaining papers of MA (Economics) in the year 2005 and thereafter applied for consolidated marks sheet on 30.4.2007 by submitting application form, Annexure P5. However, this application was rejected and returned by respondent university with an endorsement "re-appear stands in C-III" and whereupon petitioner had requested for issuing the consolidated marks sheet vide application dated 23.5.2007 (Annexure P-6) stating therein that despite passing Course III paper with 37 marks in June, 2004, he was being shown absent in said Course. It was also stated in application that petitioner had to appear in an interview. This application was returned to petitioner with endorsement that since petitioner had re-appear in Course III, hence consolidated marks card could not be issued to him and referring letter dated 2.11.2004 (Annexure P-3) in which petitioner was stated to be

absent in Course III, petitioner was asked to pass Course III and it was also stated in it that marks of Course VI were wrongly given to petitioner as marks of Course III which which mistake was corrected at later stage and 37 marks were given to him in Course VI.

6. Thereafter, petitioner again submitted an application dated 23.7.2007 (Annexure P-7) for issuance of consolidated marks sheet of MA (Economics) by stating that he had appeared in both Courses i.e. Course III of first semester and Course VI of second semester, but earlier he was shown absent in Course VI and on his application for correction, he was shown absent in Course III despite the fact that he had passed Course III with 37 marks. In this application request was made to respondent university to issue consolidated marks sheet at the earliest as petitioner had to appear in interview on 1.8.2007 for employment in Godrej company.

7. On receiving no response from respondent university for about one year, petitioner preferred present writ petition in July 2008. Respondent university filed reply on 18.8.2008 enclosing one letter dated 5.8.2008, (Annexure R-1) stating therein that as per information received from Evaluation Branch on 30.7.2008, petitioner had obtained 19 marks in Course III of first semester and result of examinations of first semester in June, 2004 was stated to be as under:-

Courses	**Marks obtained**
I	**16**
II	**21**
III	**19**

It was also stated in this letter (Annexure R-1) that petitioner was required to re-appear in all Courses.

8. In reply, it is stated that from record it was evident that petitioner had obtained 19 marks in Course III of MA (Economics) of first semester examination held in June, 2004 and said result was intimated to the petitioner vide letter dated 5.8.2008 (Annexure R-1) and for this reason consolidated marks sheet could not be issued to the petitioner. University has also placed on record the copies of award list (Annexure R-2 and R-3) pertaining to Course VI of MA (Economics) with respect to examination held in June, 2004. As per University, the award list for Course VI (Annexure R-2) was wrongly read as award list of Course III by Examination Branch of University and therefore, marks awarded in Course VI were mentioned against Course III of first semester and as no award was found against Course VI and thus candidate was shown as absent by Examination Branch of University in Course VI. In reply, procedure for preparing result has also been explained. It is stated that for examination held in June, the attendance sheets are normally received by Examination Branch in September/October of said year and result for examination is declared by second week of October and subsequently, Examination Branch prepares the result on tabulation charts and post preparation of tabulation chart, the same is re-checked by fresh set of persons, two in numbers in Examination Branch, and thereafter entries made in tabulation charts are posted in individual History sheet of concerned student/candidate and in present case initially on account of misreading, examination branch had posted award of course VI against Course III and since examination branch had not received any award from evaluation branch for Course VI, petitioner was shown as absent in Course VI. It is denied that petitioner has passed his MA (Economics) in the year 2005 as petitioner has re-appear in Course III and for this reason consolidated marks sheet could not be issued to him.

9. Learned counsel for petitioner submits that pleadings of parties and documents on record are clearly speaking about not only negligence on part of respondent university, but carelss and indifferent attitude of university and its officials in dealing with matters having grave impact on career of students and therefore, he submits that petitioner is entitled for compensation, as prayed for in petition.

10. Per contra, learned counsel for the respondent university submits that petition must fail on account of delay and latches, as petitioner approached the university after three

years for settling his result of examination held in June, 2004 and he referred Clauses 6.72 and 6.73 contained in Chapter VI of Handbook Vol-I of H.P. University Oridinance, wherein it is provided that University has power to rectify its mistake in declaring the result of candidate and submits that university has right to cancel the marks wrongly shown to have obtained by petitioner in Course III in examination held in June, 2004 as on verification, it was found that petitioner had obtained 19 marks in said Course and in fact petitioner had secured 37 marks in Course VI, which on account of mistake, were shown against Course III. Relying upon judgment in ***Satija Rajesh N. vs. State of H.P. and others 2014(Suppl) Him.L.R. (DB) 2422***, he has prayed for dismissal of present petition on account of delay and latches.

11. It is evident from documents placed on record that till filing of reply by respondent University in this petition, petitioner was never conveyed that he has obtained 19 marks in Course III and marks 37 against the said Course were conveyed to him, on account of mistake, rather it was stand of university that petitioner was absent in Course III. Petitioner has filed writ petition on 16.7.2008 and copy of petition was also supplied to learned counsel for respondents on same day. Communication dated 5.8.2008 (Annexure R-1) is subsequent to the said date. It appears that after receiving copy of petition, damage control management was undertaken by respondent university and letter dated 5.8.2008 (Annexure R-1) was prepared. There is no communication prior to said date in which university had ever informed petitioner about obtaining 19 marks in Course III by him in examination held in June, 2004, and for stand of respondent university that petitioner was absent in Course III, petitioner was agitating to prove that he had appeared in Course III in June 2004 and by believing that he has obtained 37 marks in Course III, he did not apply for re-appearing in said course to avail the chance and to qualify the said paper during the prescribed period. Letter dated 5.8.2007 is another glaring example of negligence and also of irresponsible indifferent attitude of officials/officers of respondent university for which definitely respondent university has to pay. Petitioner has passed Course I and II in November 2004 and June 2005 respectively and this fact, mentioned in application form Annexure P-5, has also been endorsed by respondent university as consolidate mark sheet was denied on 30.4.2004 only on the ground that there was re-appear in Course III. But in letter 5.8.2007 (Annexure R-1) petitioner has been directed to re-appear in Courses I, II and III. Despite the fact that there is negligence on the part of respondent university, for the reasons that petitioner has not passed Course III of MA (Economics) till date, direction to issue consolidated marks sheet of MA (Economics) cannot be given to respondent university.

12. Confronted with such a situation, learned counsel for petitioner submits that petitioner has also prayed for any other relief, which is deemed fit and proper in interest of justice and fair play and thus he prays for direction to respondent university to grant three chances to appear in Course III of MA (Economics) in old syllabus as it would be difficult to pass Course III after a long span of discontinuation of studies in the subject concerned. He also prays for awarding reasonable amount of compensation for wasting precious years of career of petitioner and causing mental pain, agony, harassment and also dragging the petitioner in litigation. Learned counsel for respondent university submits that university is not averse to grant two chances for passing Course III to petitioner but he vehemently opposed award of compensation to petitioner on the ground that petitioner himself was negligent in persuing his course and after 2004 he approached the University in the year 2007. According to him, in case petitioner would have acted with due diligence and care in the year 2004, his case would have been settled at that time, there and then.

13. Petitioner was asked to surrender his result card of first semester and he was warned that failing in surrendering the result card of first semester his candidature for next coming examination can be cancelled. Vide letter 2.11.2004 (Annexure P-3) petitioner was informed that his result of Course VI was settled and awards i.e. 37 marks given to him in Course III, were awarded as marks obtained in Course VI and he was declared absent in Course III. Immediately thereafter on 14.12.2004, vide application Annexure P4, petitioner lodged his protest against showing him absent in Course III and asked the respondent university to settle his case and issue result of second semester. Thereafter, no response from university was received nor

candidature of petitioner was cancelled. Rather, petitioner was allowed to appear in examinations in November 2004 and June, 2005 to pass Courses I and II respectively of first semester. He was under impression that he had obtained 37 marks in Course III and by mistake, he was shown absent in that paper during June 2004 as was also shown absent in Course VI, later on, by respondent university, which was found to be wrong and petitioner was found to have obtained 37 marks. It is only for the first time, vide letter dated 5.8.2008 (Annexure R-1), respondent university accepted that petitioner had appeared in Course III by disclosing that he had scored 19 marks in the said Course.

14. Plea of delay and latches raised on behalf of respondent is not sustainable as after filing application dated 14.12.2004 (Annexure P-4), plea of petitioner asserting his presence in examination of Course III held in June 2004, was never responded by respondent university till filing of reply to present petition and petitioner was allowed to appear in subsequent examinations for passing Courses I and II of first semester without insisting for surrender of result card with 37 marks in Course III. The conduct of respondent university was amounting to acceptance of claim of petitioner and therefore, there was no occasion to petitioner to represent again or to approach the Court before 2007 when application filed by petitioner for issuance of consolidation marks sheet was returned by university with endorsement that there was re-appear in Course III and also again rejection of application for issuance of consolidated marks sheet on 23.5.2007. In 2007 also, vide application dated 23.7.2007, Annexure P-7, petitioner has reiterated his claim of appearing and passing Course III in June 2004, but said application was also never responded by respondent university and petitioner was constrained to file present petition and it is only for the first time that in reply, respondent university has come forward with plea that petitioner was not absent in Course III but was unsuccessful by scoring 19 marks in June, 2004. In this set of events, there is no delay on part of petitioner in approaching the Court or respondent university.

15. Conducting examination, declaring results, posting marks, issuing certificates and awarding degrees to students is a delicate function to be performed by respondent university with due diligence and care as it involves not only career of students but faith reposed by students and society upon the concerned university. Respondent university is supposed to perform its responsibility with high degree of carefulness so as to maintain sanctity of examinations. It is true that despite due diligence and care there is always possibility of committing mistake, but such mistakes are also supposed to be rectified within reasonable period by dealing the issue with sensitivity so as to avoid adverse impact of such mistakes on career of students. Present case is a glaring example of not only indifferent attitude but also of careless, irresponsible and negligence behaviour on part of officers/officials of respondent university for which definitely respondent university is liable.

16. Petitioner has not specifically prayed for grant of chances to pass out Course III and rightly so as till filing of reply in petition by respondent university, he was under belief that he had passed Course III by scoring 37 marks. Though during pendency of petition also, no application for amending the relief clause has been filed, however, in any case, Court has always power to mould the relief. Petitioner has also prayed for any other relief which is considered to be fit to be passed in his favour in the interest of justice. Therefore, in view of peculiar facts and circumstances, it is a fit case to issue direction to the university to provide chances to petitioner for completing his Master degree by allowing him to take examination of Course III of MA (Economics).

17. Keeping in view that now syllabus has changed and after a gap of 13 years, it would not be easy to petitioner to prepare for examination and he may not be able to pass Course III in one chance, respondent university is directed to grant at least three chances to petitioner to pass Course III in old syllabus in which he was undertaking his studies of MA (Economics) by giving him reasonable time for preparation. Respondent university immediately after receipt of copy of judgment or production thereof by petitioner, whichever is earlier, shall undertake the

exercise for taking examination, as directed hereinabove, which shall be communicated to the petitioner.

18. In view of above discussion, I am of the opinion that petitioner is also entitled for exemplary amount of compensation from respondent university. However, keeping in view the fact that university has agreed to grant chances to petitioner to pass Course III, it would be reasonable to direct the university to pay Rs.40,000/- as compensation to the petitioner. In aforesaid terms, petition stands disposed of.

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

State of H.P. ...Appellant
Versus
Sunil Kumar ...Respondent/accused

Cr.A. No. 326 of 2011
Judgments reserved on: 19.05.2017
Date of decision: 15th June, 2017

Indian Penal Code, 1860- Section 302- Dead body of R was found hanging from a tree – body had sustained marks of injuries on the face and nose – it was found on investigation that deceased and accused had consumed liquor together – the accused attacked the deceased due to which he fell down – accused took out Rs. 7,000/- from his pocket and assuming him to be dead, hanged him from a tree to give it a colour that the deceased had committed suicide – recoveries were effected at the instance of the accused- the accused was tried and acquitted by the trial Court- held in appeal that case of the prosecution rests upon circumstantial evidence based upon the theory of last seen together – all the circumstances from which inference of guilt is to be drawn must be cogently and firmly established in case of circumstantial evidence - PW-3, PW-6 and PW-16 did not support the prosecution version and were declared hostile – the prosecution version that accused and deceased were last seen together is not established – similarly, the fact that deceased had withdrawn Rs.8,000/- from the bank and the accused was aware of this fact was also not established – the possibility of suicide cannot be ruled out- the prosecution version has not been proved beyond reasonable doubt- the Trial Court had taken a reasonable view while acquitting the accused– appeal dismissed.(Para-10 to 55)

Cases referred:
Lakhbir Singh vs. State of Punjab, 1994 Suppl. (1) SCC 173
Brij Lala Pd. Sinha vs. State of Bihar, 1998 (5) SCC 699
Bodh Raj @ Bodha & others vs. State of J&K 2002 (8) SCC 45
State of Rajasthan vs. Kanshi Ram, 2006 (12) SCC 254
Arvind @ Chottu vs. State ILR (2009) Supp. (Delhi) 704
Kanhaiya Lal vs. State of Rajasthan (2014) 4 SCC 715
Pawan Kumar @ Monu Mittal vs. State of Uttar Pradesh and Ant, 2015 (7) SCC 148
Jahar Lal vs. State of Orissa (1991) 3 SCC 27
Brahm Swarup & Anr. vs. State of U.P., (2011) 6 SCC 288

For the Appellant : Mr. V.S. Chauhan, Addl. A.G. with Mr. Puneet Rajta, Deputy A.G. and Mr. J. S. Guleria, Asstt. A.G.
For the Respondent/ Accused : Mr. Hoshiar Kaushal, Advocate.

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, Judge.

This criminal appeal under Section 378 (3) of the Cr.P.C. has been filed by the State against the judgment of acquittal passed by the learned Additional Sessions Judge, Ghumarwin, District Bilaspur, H.P. (Camp at Bilaspur), on 21.4.2011, in Session Trial No. 25/7 of 2010, wherein the accused was charged and stood tried for an offence under Section 302 of the IPC.

2. The case of the prosecution is that Shri Ramesh Soni, Pradhan, Gram Panchayat Gatwad, lodged a daily diary rapat (DDR) No. 8(A) Ext. PW-22/A, on 26.3.2010, the translated version whereof reads thus:-

> "At this time Sh. Ramesh Soni, Pradhan, Gram Panchayat Gatwad, telephonically informed that Madan Lal of village Lethwin, informed him on telephone that a person is lying near Lethwin and there is no moment in his body. He requested the police to visit the spot for conducting the proceeding. Acting on this information SI/SHO Prem Singh, ASI Ludar Mani, H.C. Amar Singh, No. 91, HHC Ramesh, No. 292, HHG Prittam Singh, HHG Yogesh Kumar and HHG Ashok Kumar left to Lethwin in vehicle No. HP-07A-0371 being driven by C. Brikam Ram, No. 448."

3. Pursuant to such report PW-22 S.I. Prem Singh went to the spot and recorded the statement of PW1 Sanju under Section 154 Cr.P.C. Ext.PW-1/A. The relevant portion whereof as translated reads as follows:-

> "Raj Kumar @ Raju was younger son of his uncle late Sh. Suraj Bhan Chaudhary. Raju was having one elder brother and two sisters and both sisters are married. On 26.3.2010 he was present on the spot where the dead body of Raju was hanging with the tree. Body had sustained marks of injuries on his face and nose and smeared with the blood. He had a suspicion that Raj Kumar had not committed suicide but he was murdered. He made the inquiry on his own level and came to know later on that in the evening on 25.3.2010 that Sunil Kumar @ Jonny, r/o village Muhana, was accompanying Raj Kumar. He had suspicion that the accused Sunil Kumar had done away with the life of the deceased Raj Kumar."

4. The statement Ext.PW-1/A was sent to the Police Station, Bharari through C. Parveen Kumar, No. 311 for registration of FIR and FIR Ext.PW-20/B came to be registered. PW-22 S.I. Prem Singh was entrusted with the investigation and found that the body of the deceased Raj Kumar was hanging from eucalyptus (Safeda) tree. The investigator clicked the photographs Ext.P-14 to Ext.P-30 from his official camera and prepared the inquest paper Ext.PW18/B to Ext.PW-18/D and also prepared the spot map Ext.PW-20/D. The papers for conducting the post-mortem of the dead body of the deceased were prepared and thereafter post-mortem was got conducted at C.H. Ghumarwin. The blood which was found lying at a distance of 50-60 meters from the place where the dead body was found hanging was lifted and put in a plastic container and sealed with seal bearing impression 'D' in a cloth parcel and it was taken into possession vide seizure memo Ext.PW-8/A. At the same time, a passbook of UCO Bank of deceased Raj Kumar, an empty bottle of liquor '*Lalpari*', half filled packet of Sudershan (tobacco), a pair of bathroom chapal, two keys and one lock were also found lying at a distance of 50-60 meters from the dead body and were taken into possession vide memo Ext.PW-18/B.

5. During the course of investigation, it was revealed that, on 25.3.2010, deceased Raj Kumar and the accused joined together at Dhadhol where deceased told the accused that he was going to bring his wife and had already withdrawn Rs.8000/- from the bank. They purchased one bottle of liquor from the liquor vend at Dadhol and proceeded towards Lethwin on foot. At Bhater the accused purchased a packet of Sundershan (Tobacco) from the shop of Asha Mahajan

(PW2) and at that time deceased was also accompanying him. Both of them went on foot towards upper side of the road which leads to Lethwin and on the way they consumed liquor. After consuming liquor, the accused attacked deceased Raj Kumar on his face, as a result whereof, he fell down and became unconscious. Accused then took out Rs.7000/- from his pocket and assuming him to be dead hanged him eucalyptus tree with the piece of cloth to give it a colour that the deceased had committed suicide whereas, in fact, he had been murdered by the accused, after taking out the money as aforesaid.

6. It is the further case of the prosecution that while the accused was in police custody he made a disclosure statement under Section 27 of the Evidence Act Ext.PW-20/K in presence of witnesses Neeraj and Desh Raj to the effect that he had concealed his pant and shirt which he had worn at the time of occurrence having blood stains, which had been washed by him and kept in his bedroom. He also concealed Rs.1410/- in the quilt which he could get recovered and led the police to his bed room and got recovered pant and shirt alongwith currency notes of Rs.1410/- which were taken into possession by the police.

7. On 6.4.2010, the accused further made disclosure statement Ext.PW5/A, this time in the presence of witnesses Narinder Singh and Rajinder Singh to the effect that he had purchased two cell phones, on 26.3.2010, with the money which he had taken out from the pocket of Raj Kumar. One cell phone was purchased for Rs.2000/- from Krish Communication and another cell phone was purchased from Manoj Electronics for Rs.2000/- and he had concealed the cell phones in the almirah of his bed room, which he could get recovered and led the police party and witnesses to his bed room and got recovered both the cell phones alongwith cash memo which were taken into possession.

8. On completion of the investigation, a report under Section 173 Cr.P.C. together with the relevant documents was submitted in the Court and thereafter charges were framed against the accused under Section 302 IPC, to which he pleaded not guilty and claimed trial.

9. The prosecution in support of its claim had examined, as many as, 22 witnesses.

10. At the outset, it may be observed that the case of the prosecution rests entirely on circumstantial evidence based upon the theory of “last seen together”.

11. The last seen theory comes into play where the gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility that any person other than the accused being the author of the crime becomes impossible.

12. The “last seen together” theory is an important link in the chain of circumstances that would point towards the guilt of the accused with some certainty. The “last seen theory” holds the court to shift the burden of proof to the accused and to all a reasonable explanation as to the cause of the death of the deceased. It is well settled that it is not prudent to base the conviction solely on “last seen theory” which should be applied taking into consideration the case of the prosecution in its entirety and keeping in mind the circumstances that preceded and follow the point of being so last seen.

13. It is more than settled that in case of circumstantial evidence, the circumstances from which interference as to the guilt of the accused is drawn, have to be proved beyond reasonable doubt and there be a complete chain of evidence consistent only that the hypothesis of guilt of the accused and totally inconsistent with his innocence and in such a case if the evidence relied upon is capable of two inferences then one which is in favour of the accused must be accepted. It is clearly settled that when a case rests on circumstantial evidence such evidence must satisfy three tests:

i) The circumstance from which an inference of guilt is sought to be drawn must cogently and firmly established.

ii) Those circumstances should be of a definite tendency un-erringly pointing towards the guilt of the accused.

iii) The circumstances taken cumulatively, should form a complete chain so that to come to the conclusion that the crime was committed by the accused.

14. Equally well settled is the proposition that where the entire prosecution case hinges on circumstantial evidence the Court should adopt cautious approach for basing the conviction on circumstantial evidence and unless the prosecution evidence point irresistible to the guilt of the accused, it would not be sound and safe to base the conviction of accused person.

15. In case of circumstantial evidence, each circumstances must be proved beyond reasonable doubt by independent evidence and the circumstances so proved, must form a complete chain without giving room to any other hypothesis and should be consistent that only the guilt of the accused (See: **Lakhbir Singh vs. State of Punjab, 1994 Suppl. (1) SCC 173)**.

16. Factors to be taken into account in adjudication of cases of circumstantial evidence have been laid down by the Hon'ble Supreme Court as under:

(i) The circumstances from which the conclusion of guilt is to be drawn should be fully established;

(ii) The circumstances concerned "must" or "should" and "not" may be established. The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, this should not be explainable on any other hypothesis except with the accused guilt;

(iii) The circumstances should be of conclusive nature and tendency;

(iv) They should exclude every possible hypothesis, except they want to be proved;

(v) There must be a chain of evidence so complete as not to leave any reasonable ground for the reasons consisting that the innocence of the accused and must so that in all humane probability the act must have been done by the accused. (See: **Sharad Birdhichand Sarda vs. State of Maharashtra, (1984) 4 SCC 116, M.G. Agarwal vs. State of Maharashtra (1963) SCC 200**).

17. In **Brij Lala Pd. Sinha vs. State of Bihar**, **1998 (5) SCC 699**, the Hon'ble Supreme Court held as under:-

"9.In a case of circumstantial evidence, the prosecution is bound to establish the circumstances from which the conclusion is drawn must be fully proved; the circumstances should be conclusive in nature; all the circumstances so established should be consistent only with the hypothesis of guilt and inconsistent with innocence; and lastly, the circumstances should to a great certainty exclude the possibility of guilt of any person other than the accused. The circumstances proved should lead to no other inference except that of the guilt of the accused, so that the accused can be convicted of the offences charged. Before the court records conviction on the basis of circumstantial evidence, it must satisfy itself that the circumstances from which inference of guilt could be drawn have been established by unimpeachable evidence and the circumstances unerringly point to the guilt of the accused and further, all the circumstances taken together are incapable of any explanation on any reasonable hypothesis save the guilt of the accused."

18. In **Bodh Raj @ Bodha & others vs. State of J&K 2002 (8) SCC 45, t**he Hon'ble Supreme Court has observed under:

"31.The last-seen theory comes into play where the time-gp between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in

between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases. In this case there is positive evidence that the deceased, A-1 and A-2 were seen together by witnesses i.e. PWs 14, 15 and 18; in addition to the evidence of PWs 1 and 2."

19. Elaborating on the principle of last seen together, the Hon'ble Supreme Court in **State of Rajasthan vs. Kanshi Ram, 2006 (12) SCC 254**, held as under**:**

"23. It is not necessary to multiply with authorities. The principle is well settled. The provisions of Section 106 of the Evidence Act itself are unambiguous and categoric in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the court to be probably and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself proves an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his, innocence, the court can consider his failure to adduce any explanation, as an additional link which completes the chain. The principle has been succinctly stated in ***Naina Mohd., AIR 1960 Nad 2018 : 1960 Cri LJ 620***."

20. The legal position pertaining to appreciation of circumstantial evidence of last seen has been succinctly summarized by a Division Bench of the Hon'ble Delhi High Court in case titled **Arvind @ Chottu vs. State ILR (2009) Supp. (Delhi) 704 in the following words:**

(i) Last seen is a specie of circumstantial evidence and the principles of law applicable to circumstantial evidence are fully applicable while deciding the guilt or otherwise of an accused where the last seen theory has to be applied.

(ii) It is not necessary that in each and every case corroboration by further evidence is required.

(iii) The single circumstance of last seen, if of a kind, where a rational mind is persuaded to reach an irresistible conclusion that either the accused should explain, how and in what circumstances the deceased suffered death, it would be permissible to sustain a conviction on the solitary circumstance of last seen.

(iv) Proximity of time between the deceased being last seen in the company of the accused and the death of the deceased is important and if the time gap is so small that the possibility of a third person being the offender is reasonably ruled out, on the solitary circumstance of last seen, a conviction can be sustained.

(v) Proximity of place i.e. the place where the deceased and the accused were seen alive with the place where the dead body of the deceased was found is an important circumstance and even where the proximity of time of the deceased being last seen with the accused and the dead body being found is broken, depending upon the attendant circumstances, it would be permissible to sustain a conviction on said evidence.

(vi) Circumstances relating to the time and the place have to be kept in mind and play a very important role in evaluation of the weightage to be given to the

circumstance of proximity of time and proximity of place while applying the last seen theory.

(vii) The relationship of the accused and the deceased, the place where they were seen together and the time when they were last seen together are also important circumstances to be kept in mind while applying the last seen theory. For example, the relationship is that of husband and wife and the place of the crime is the matrimonial house and the time the husband and wife were last seen was the early hours of the night would require said three factors to be kept in mind while applying the last seen theory.

21. The circumstances of last seen together cannot by itself form the basis of holding accused guilty of the offence. In **kanhaiya Lal vs. State of Rajasthan (2014) 4 SCC 715**, the Hon'ble Supreme Court held as under:

"12.The circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime. Mere non-explanation on the part of the appellant, in our considered opinion, by itself cannot lead to proof of guilt against the appellant.

15. The theory of last seen-the appellant having gone with the deceased in the manner noticed hereinbefore, is the singular piece of circumstantial evidence available against him. The conviction of the appellant cannot be maintained merely on suspicion, however strong it may be, or on his conduct. These facts assume further importance on account of absence of proof of motive particularly when it is proved that there was cordial relationship between the accused and the deceased for a long time. The fact situation bears great similarity to that in ***Madho Singh v. State of Rajasthan (2010) 15 SCC 588***."

22. The legal position on the subject has been elucidated in a recent judgment of the Hon'ble Supreme Court in **Pawan Kumar @ Monu Mittal vs. State of Uttar Pradesh and Ant, 2015 (7) SCC 148**, wherein it was observed as under:-

"36. In case where the direct evidence is scarce, the burden of proving the case of the prosecution is bestowed upon motive and circumstantial evidence. It is the chain of events that acquires prime importance in such cases. Before analyzing the factual aspects it may be stated that for a crime to be proved it is not necessary that the crime must be seen to have been committed and must, in all circumstances be proved by direct ocular evidence by examining before the court those persons who had seen its commission. The offence can be proved by circumstantial evidence also. The principal fact or factum probandum may be proved indirectly by means of certain inferences drawn from factum probans, that is, the evidentiary facts. To put it differently, circumstantial evidence is not direct to the point in issue but consist of evidence of various other facts which are so closely associated with the fact in issue that taken together they form a chain of circumstances from which the existence of the principal fact can be legally inferred or presumed (see **Bodhraj v. State of J&K**). In the case on hand, the evidence adduced by the prosecution as discussed above, clearly proves the chain of events connecting the accused to the guilt of the commission of the offence. The entire evidence brought on record by the prosecution, is not only convincing, but is also trustworthy. Even if the confession of Accused 4 and 7 made before PW 1 and PW 2, which is barred by Section 25 of the Evidence Act, is not taken into account, the other evidence on record adduced by the prosecution, is sufficient to hold the accused guilty of the offence.

37. This court has been consistently taking the view that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible

with the innocence of the accused or the guilt of any other person. In the present, on scrutiny of evidence on record, we are convinced that the prosecution had established beyond reasonable doubt the complete chain of events which points at the guilt of the accused."

23. Thus, it can be taken well settled that in the absence of proof of other circumstances, the only circumstance of last seen together and absence of satisfactory explanation cannot be made the basis of conviction.

24. Having set out the legal position, we now proceed to determine as to whether the prosecution has been able to prove his case beyond reasonable doubt.

25. Indubitably, there is no direct evidence to connect the accused with the crime alleged to have been committed. The entire prosecution case rests on circumstantial evidence. It is well settled that when dealing with the question of guilt of person charged with a crime, there must be a clear and unequivocally proof of the "*corpus delicti*" and the hypothesis of delinquency should be consistent with all the fact proved.

26. It is vehemently argued by Mr. J.S. Guleria, learned Asstt. Advocate General that the impugned judgment rendered by the learned Additional Sessions Judge suffers vice of perversity, inasmuch as, the statements of witnesses, more particularly, PW2, PW10, PW20 and PW22 have not been appreciated in a right perspective and would it have been so then there was no question of the accused being acquitted.

27. Whereas, Shri Hoshiar Kaushal, learned counsel for the accused would vehemently argue that as the prosecution has failed to prove its case beyond all reasonable doubt, the findings recorded by the learned Court below call for no interference.

We have heard the learned counsel for the parties and have gone through the records of the case. We have also minutely examined the testimonies of the witnesses and other documentary evidence placed on record.

28. According to Mr. J.S. Guleria, learned Asst. Advocate General, two circumstances prove the guilt of the accused beyond reasonable doubt:-

i) The accused was last seen in the company of the deceased.

ii) That the deceased had withdrawn Rs.8000/- on 25.3.2010 to which the accused was well aware and committed the murder and thereafter purchased two cell phones on 26.3.2010.

Circumstance No. 1

29. In order to prove that the accused was last seen in the company of deceased, strong reliance is placed upon the testimonies of PW2 Asha Mahajan and PW3 Anil Kumar. As regards PW2 Asha Mahajan, she in her examination in chief has stated that she was running a Karyana and stationery shop at Bhater. On 25.3.2010 at about 9:15 -9:30 p.m. deceased Raj Kumar came to her STD shop and asked her to allow him to make call to Rohru but she refused as he was drunk. The accused then purchased a packet of Sudershan (Tobacco) from her and thereafter both the accused and the deceased proceeded on foot towards the upper side of the road which leads to Lethwin. In her cross-examination, she clarified that the accused was also known as Jonny and was known to her for last 3-4 years but she was not in a position to state whether five roads lead to the village of the accused from her shop. She admitted that from 100 meters ahead of her shop a road leads to village Gahar. She further stated that she was not in a knowledge whether there was a short cut about 200 meters ahead of shop which lead to the house of the accused. She admitted that it was night, therefore, dark and she is not in a position to state about the colour of the clothes that Raj Kumar was wearing on that date but clarified that he was covered with chadder. According to her the distance to Lethwin from her shop is half kilometer. She lastly stated that the deceased and the accused were not talking with each other.

30. Coming to the testimony of PW3 Anil Kumar, he deposed that he is working as a Class-IV employee at Ayurvedic Dispensary, Ghumarwin and had gone to Shimla on 24.3.2010 as he had been called by his sister. On 25.3.2010, he alongwith his sister and her son came back from Shimla in the Shimla-Chamba bus and alighted at Dadhol at 10:30 p.m. From Dadhol, they boarded another bus Rampur to Katra and alighted from the same at Lethwin. From Lethwin, they started on foot towards their home and at some distance from the Lethwin they saw two persons sitting on the side of the road, whom he could not identify. At this stage, the witness was declared hostile by the prosecution. Therefore, in such circumstances, it could be purely co-incidence that both these persons had come together. It would not be so to Court to jump to conclusion that the deceased and the accused were last seen together, particularly when PW3 Anil Kumar has categorically stated that though he had seen two persons sitting on the side of the road at about 10:30 p.m. at a little distance from Lethwin bridge but he could not identify any one of them.

31. Notably, this witness was cross-examined at length by the Public Prosecutor but he refused to support the case of the prosecution. At the same time this witness was cross-examined by the learned defence counsel and he admitted that on 26.3.2010 he had come to know from the people that Raj Kumar had committed suicide.

32. Now adverting to the testimony of PW6 Desh Raj, this witness admitted that to go to village Mohana from the shop of Asha Mahajan there are 5-6 paths. He further admitted that from 200 meters ahead from her house one path leads towards the house of the accused. Even PW22 SI Prem Singh has admitted that pucca motorable road is also towards village Mohana to the house of the accused from the distance of about 100 meters from the house of PW2 Asha Mahajan. She further stated that accused was accompanying the deceased Raj Kumar but she emphatically stated that deceased and the accused were not talking with each other.

33. That apart PW16 Daulat Ram, the salesman of the liquor vend from the where the liquor was alleged to have been purchased had categorically deposed that on 25.3.2010 Raj Kumar had visited the liquor vend at 4:30 – 5:00 p.m. and purchased one liquor bottle '*Lalpari*' and thereafter left the place. This witness nowhere stated that at that time the accused was accompanying him.

34. In addition to the aforesaid, it would be noticed that as per the statements PW PW1 Sanju, Vinod Kumar r/o village Bhater had disclosed to him that on 25.3.2010 accused was seen with Raj Kumar but the said Vinod Kumar had not at all been associated during the investigation nor his statement under Section 161 Cr.P.C. had been recorded. Not only this PW1 had further deposed that even Tinku had disclosed this factum to him but this person too had not been associated in the investigation nor his statement recorded under Section 161 Cr.P.C.

35. Adverting to the testimony of Desh Raj, who appeared as PW6, it would be noticed that in his entire statement he has no where stated that he disclosed to Sanju that on the date of occurrence he had seen the deceased and accused together. Rather, this witness was declared hostile by the prosecution as he had not supported the case so set up by the prosecution.

36. Adverting to the testimony of PW22 S.I. Prem Singh, it would be noticed that he in his deposition has stated that accused had made a disclosure statement under Section 27 of the Evidence Act Ext. PW20/B , leading to the recovery of his pant and shirt which were worn by him on 25.3.2010 and had further led to the recovery of Rs.1410/-, which was concealed in the quilt. This disclosure statement was allegedly made in presence of witnesses Desh Raj and Neeraj. The clothes and currency notes were taken into possession vide seizure memo Ex.PW17/A and signed by the aforesaid Neeraj and Desh Raj. However, when Neeraj appeared as PW 7 and deposed that accused did not make any statement in his presence and was accordingly declared hostile by the prosecution. During cross-examination by Public Prosecutor, he maintained that the accused did not give any statement in his presence and denied having made statement portions A to A, B to B, C to C and D to D of his statement Mark-G later on exhibited as Ext. PW-

20/H. However, he did admit that the accused had taken the police and witnesses to village Mohana and got recovered one pant and shirt from his bedroom which was already washed, but he denied the recovery of currency notes amounting to Rs.1410/- and stated that he had only seen 500 rupees note only. On being cross-examined by the defence counsel PW-7 maintained that he had not gone inside the room when the currency note was recovered and stayed outside. He further stated that the pant and shirt were brought from inside the room but he could not say from which part of the room the pant and shirt were taken out.

37. Adverting once again to the testimony of PW6 Desh Raj, who was supposed to be another witness of disclosure statement, he in his statement maintained to have accompanied Neeraj to the house of the accused. According to him, the police had reached the house of the accused and prepared the parcel which according to SHO contained the currency notes recovered from the house of the accused and was asked to put his signatures on the memo and papers. Even this witness was declared hostile by the prosecution as he has also not supported its case. He was though cross-examined by the prosecution but nothing material could be elicited there from.

Circumstance No. 2

38. The only other circumstance, which is strongly relied upon by the prosecution is that the deceased has withdrawn Rs.8000/- on 25.3.2010 from his account in UCO Bank which fact the deceased has disclosed to the accused and both of them purchased one bottle of country liquor, consumed it and thereafter accused and deceased reached Lethwin Bridge where the accused attacked Raj Kumar (deceased), who became unconscious, as assuming him to be dead the deceased was hanged by the accused on the Eucalyptus tree and also removed Rs.7000/- from his pocket.

39. The learned Asstt. Advocate General, would vehemently argue that there is ample amount of evidence to establish that after removing of Rs.7000/- from the pocket of deceased, the accused on the very next day purchased two cell phones for Rs.2000/- each and this fact stands established by PW10 Pradeep Kumar and PW20 Sanjeev Kumar.

40. The aforesaid allegations are sought to be substantiated on the basis of testimonies of PW6 Desh Raj and PW7 Neeraj Kumar, the witnesses of the disclosure statement allegedly given by the accused on 3.4.2010 with respect to the blood stained clothes which he was wearing at the time of occurrence and its recovery. Reliance is also placed on the statement of PW10 Pradeep Kumar and PW20 Sanjeev Kumar from whom the accused purchased two cell phones on 26.3.2010.

41. PW9 Parkash Chand, Manager, UCO Bank Dadhol has proved the statement of account Ex.PW9/A, which proves that a sum of Rs.8000/- have been withdrawn from the account by the deceased on 25.3.2010. However, there is no further proof that this amount was personally withdrawn by deceased and this fact stands admitted even by PW22 SI Prem Singh.

42. Much reliance is placed on the testimony of PW22 S.I. Prem Singh, who deposed that on 6.4.2010, the accused had made another disclosure statement under Section 27 of the Evidence Act Ex.PW-5/A that he had purchased two cell phones with the money which he had taken out from the pocket of Raj Kumar (deceased), which portion of the statement was rightly discarded by the learned Court below as not admissible under the Evidence Act. But, that apart, it would be noticed that this fact has not even recorded in the Statement of Ex.PW-5/A. One cell phone was disclosed to have been purchased for Rs.2000/- from Krish Communication and other for Rs.2000/- from Manoj Electronics, Berthin. The accused has further disclosed that he had concealed the cell phones in almirah of his room beside the deck and would get the same recovered. This statement is alleged to have been given by the accused in presence of PWs Narinder Singh and Ravinder Singh witnesses. Thereafter, the accused led the police party and the witnesses to his bedroom and got recovered both the cell phones and thereafter sealed the same into cloth parcel and taken into possession vide memo Ex.PW5/B.

43. PW5 Narender Singh, in his statement has fully supported the version of the investigation to this effect. According to him, the house of the accused is situated in the centre of the village whereas this fact was specifically denied by PW2, who had stated that it is towards the side.

44. The accused is alleged to have purchased two cell phones from PW10 and PW20. To prove that accused has purchased cell phones from them for Rs.2000/- each. However, their testimonies have been discarded by the learned Court below as the same according to it does not inspire confidence or faith to place any reliance on either of them.

45. Adverting to the testimony of PW10, he had deposed that he was running Krish Communication shop at Bus Stand, Ghumarwin and at on 26.3.2016 sold one cell phone of Lemon Duo for Rs.2000/- to Sunil Kumar r/o village Bharari, aged between 20 to 26 years and had issued receipt Ex.PW10/A. The bill book and bill Ex. PW10/A was presented by him to the police on 6.4.2010 and taken into possession vide seizure memo Ex.PW10/B. However, since, he did not identify the person to whom he had sold his cell phone, he was declared hostile by the prosecution and did not thereafter support their case.

46. PW20 Sanjeev Kumar admitted that he had sold one cell phone of Sigma Tel Company to the accused on 26.3.2010 who was present in the Court. During cross-examination he admitted that the accused was not personally known to him. He also did not know his name prior to 26.3.2010 and was not even aware where the accused was residing, however, importantly, this witness clearly admitted that the name of the accused was disclosed to him by the police.

47. Having discussed in detail the statements of witnesses alongwith exhibited documents, it would be apparent that the evidence so led by the prosecution does not prove the guilt of the accused beyond doubt. It has come on record that deceased was having strain relations with his wife and had been consuming excess liquor during the period in question. Moreover, even if the prosecution story assumed to be true for a moment even then the same is totally improbable as it would be impossible for a person to firstly murder the deceased and thereafter carry his body single handedly on a tree and thereafter put a cloth (parna) around his neck so as to give it a colour of suicide.

48. More importantly, PW22 SI Prem Singh had himself moved an application Ex.PW18/A to the Medical Officer for conducting the post-mortem and in this application after narrating the spot position in detail alongwith articles lying near the dead body, the investigator concluded that the spot position revealed that the deceased under influence of liquor had committed suicide and earlier also the deceased always remained drunk.

49. The fact that the deceased being a drunkard has been proved even by PW1 Sanju who in his statement maintained that elder brother of Raj Kumar was mentally retarded. He further admitted that Raj Kumar was not having cordial relations with his wife and always remained disturbed. He also admitted that on the next day it had been published in the newspaper that it was a case of suicide.

50. PW18 Dr. Sunil Verma, conducted the post-mortem of the deceased and proved on record the report issued by him Ex.PW17/A and thereafter gave his final opinion Ex.19/F, which is as under:-

1. After going through the FSL report No. 646A SFSL Chem. (211) 10 dated 18.5.2010, attached with post mortem report. Quantity of ethyl alcohol in blood of said deceased was 43.92 mg%.

   No other poison could be detected in liver, kidney, stomach and blood of the deceased.

2. After performing the post-mortem of said deceased I am of the opinion that the deceased died as a result of pressure on neck leading to cardiac arrest due to vasvogal inhibition mediated through parasympathetic system.

3. The injuries over body of deceased are Ante mortem in nature including ligature mark.

4. Deceased had consumed alcohol before death.

5. Stomach was empty.

51. While being cross-examined PW18 had clearly admitted to be correct that the pressure on neck leading to cardiac arrest due to vasovagal inhibition mediated through parasympathetic system could be due to self hanging. If that be so, then already observed earlier, the entire case of prosecution becomes difficult to believe, as admittedly prior to the cardiac arrest suffered by the deceased as a result of pressure on neck, he was very much alive and therefore, it would be impossible in such circumstances to believe that it was the accused who hanged him from the tree when he was very much alive.

52. It was no more *res integra* that suspicion cannot take the legal proof for some time, unconsciously it may happen to be a short step between merely certainty and legal proof. At times, it can be a case of "may be true" and "must be true", but there is a long mental distance between "may be true" and "must be true" and same devoid conjectures from sure conclusion (See: **Jahar Lal vs. State of Orissa (1991) 3 SCC 27**).

53. Judged in the light of the exposition of law as laid down by Hon'ble Supreme Court, the various judgments referred to hereinabove, we are of the considered view that the prosecution has miserably failed to establish the charge against the accused and on the basis of the evidence so led in the Court, it is impossible to convict him. The circumstances relied upon by the prosecution, are merely conjectural and are capable of being explained on hypothesis other than the guilt of the accused. The evidence as discussed above does not substantiate the charge and suffers very serious infirmity and lack of credibility.

54. It is more than settled that interference with the judgment of acquittal by the trial Court is unwarranted except when it suffers from vice of perversity (See: **Brahm Swarup & Anr. vs. State of U.P., (2011) 6 SCC 288**).

55. We have no hesitation to conclude that the entire prosecution story is based only on suspicion, which in no event can take place of truth. The judgment rendered by the learned courts below neither suffers from illegality or infirmity much less perversity calling for interference by this Court.

56. In view of the detailed aforesaid discussion, we find no merit in this appeal and the same is accordingly dismissed.

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

Dinesh Kumar ...Petitioner.

Versus

Vipan Kumar and others ...Respondents.

CMPMO No. 151 of 2017
Decided on: 19.06.2017

Indian Evidence Act, 1872- Section 138- An application for re-examination of two witnesses was filed on the ground that witnesses had admitted during the course of their cross-examination that no payment was made in their presence and it was necessary to clarify this ambiguity in the cross-examination- the application was dismissed by the trial court- held that counsel was present at the time of cross-examination and the right was to be exercised after the conclusion of

cross-examination- this provision cannot be used for prolonging the trial- Trial Court had rightly rejected the application- petition dismissed. (Para-3 to 8)

For the petitioner: Mr. Sunny Dhatwalia, Advocate.
For the respondents: Mr. Arvind Sharma, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge. *(Oral)*

By way of this petition, the petitioner has challenged order, dated 3rd February, 2017, passed by the learned Civil Judge (Junior Division), Barsar, District Hamirpur (H.P.) in Civil Suit No. 82 of 2012, titled as Dinesh Kumar versus Vipan Kumar and others, vide which the learned Trial Court has rejected the application filed by the present petitioner under Section 138 of the Indian Evidence Act, whereby the petitioner had prayed for re-examination of PW-1, namely Shri Chander Kant, and PW-4, namely Shri Ram Dayal.

2. I have heard learned counsel for the parties.

3. A perusal of the record appended with the petition demonstrates that the application under Section 138 of the Indian Evidence Act was filed by the present petitioner on 20th April, 2016. Further perusal of the record demonstrates that the statement of PW-1, Shri Chander Kant, was recorded before the learned Trial Court on 14th January, 2015, whereas the statement of PW-4, Shri Ram Dayal, was recorded on 13th May, 2015. Their cross-examinations were also conducted on the same dates and apparently, no request was made for the re-examination of these witnesses on the said dates.

4. As I have already mentioned above, the application under Section 138 of the Indian Evidence Act for re-examination of these two witnesses was filed on 20th February, 2016. A perusal of the averments made therein demonstrates that the reason as to why their re-examination has been sought by the petitioner was that as the said witnesses, in the course of their cross-examination, had admitted the fact that no payment pertaining to the agreement in issue was made in their presence, it was necessary to explain the facts qua the payment of consideration amount and to clear and clarify the ambiguity. There is no explanation given in the application as to why these witnesses were not re-examined on the respective dates of their examination itself and further why the application was filed at such a belated stage.

5. Be that as it may, Section 138 of the Indian Evidence Act contemplates that the witnesses shall be first examined-in-chief, then, if the adverse party so desires, cross-examined and then, if the party calling him so desires, re-examined. It is obvious that re-examination has to be directed towards the explanation of those matters, which are referred to in cross-examination.

6. Now, a perusal of the cross-examination of these two witnesses demonstrates that they have stated that no consideration amount was paid in their presence. Records further demonstrate that the learned counsel for the plaintiff, i.e. the present petitioner, was present at the time when both these witnesses were examined and no request was made for the re-examination of the said witnesses. In these circumstances, filing of an application under Section 138 of the Indian Evidence Act with the prayer that PW-1 and PW-4 be permitted to be re-examined, is nothing, but an abuse of the process of law and an attempt not only to delay the matter, but also probably to fill up the lacunae.

7. In my considered view, the intent and content of Section 138 of the Indian Evidence Act is not for the said purpose. This provision cannot be allowed to be used by a party either to prolong the matter or to fill up the lacunae in its case. The right of re-examination conferred upon a party has to be exercised after the cross-examination of a witness takes place and it is not as if after a slumber, once a party realizes that a witness has probably not deposed

what it wanted the witness to depose, that it can move an application under Section 138 of the Indian Evidence Act calling upon the Court to allow it to re-examine the witness in order to fill up the lacunae.

8. Therefore, in view of the above discussion, as there is neither any merit in the present petition nor, in my considered view, there is any infirmity with the order passed by the learned Trial Court, the present petition is dismissed. Miscellaneous applications, if any, are also disposed of accordingly. No order as to costs.

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

Titlu Ram .....Petitioner.
Versus
Darshnu Devi .....Respondent.

Cr. Revision No. 60 of 2015
Reserved on: 22.05.2017
Decided on: 19.06.2017

Code of Criminal Procedure, 1973- Section 127- The wife filed a petition for maintenance for herself and for her minor child – the petition was allowed and maintenance of Rs. 300 and Rs. 200 was granted respectively to them- the maintenance amount was enhanced by Learned Additional Sessions Judge to Rs. 500 and Rs. 300, respectively- wife filed an application for enhancement and maintenance was enhanced to Rs. 3,000/- another application for enhancement was filed, which was allowed and maintenance was enhanced to Rs. 6,000/- per month- a revision was filed and the maintenance was enhanced to Rs. 8,000/- - aggrieved from the order, present revision petition has been filed- held that husband had not challenged the order of granting maintenance @ Rs. 6,000/- per month – the husband is drawing salary of Rs. 46,560/- per month- maintenance of Rs. 6,000/- was awarded in the year 2011 in view of the increase of the prices, age of the wife and the resources of the husband, the enhancement to Rs. 8,000/- cannot be said to be unjustified – petition dismissed.(Para-6 to 9)

For the petitioner: Mr. G.D. Verma, Sr. Advocate, with Mr. B.C. Verma, Advocate.
For the respondent: Mr. B.M. Chauhan and Mr. Amit Himalvi, Advocates.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present criminal revision petition is maintained by the petitioner, who is husband of the respondent, challenging order dated 11.11.2014, passed by the learned Additional Sessions Judge-II, Shimla, in Criminal Revision Petition No. 27-S/10 of 14/12, whereby the order dated 27.12.2011, passed by the learned Judicial Magistrate 1st Class, Court No. VI, Shimla, in Case No. 136-4 of 2010/2009, was modified.

2. Tersely, the facts giving rise to the present petition are that the petitioner and the respondent, herein, are husband and wife. Initially, the wife maintained a petition under Section 125 Cr.P.C. seeking maintenance for herself and for her minor child, which was allowed and they were granted maintenance @ Rs. 300/- and @ Rs. 200/- per month, respectively, vide judgment dated 04.06.1992. The maintenance amount was enhanced by the learned Additional Sessions Judge, Shimla, vide order dated 09.04.1996, and maintenance amount @ Rs. 500/- and Rs. 300/- per month, respectively, was granted to the wife and son. Subsequently, on 14.01.2004,

the wife maintained an application under Section 127 Cr.P.C., seeking further enhancement of maintenance amount, which was also allowed and maintenance allowance @ Rs. 3000/- was granted. The wife again maintained a petition under Section 127 Cr.P.C. seeking enhancement of maintenance amount, which was allowed, vide order dated 27.12.2011, and maintenance of Rs. 3000/- per month was enhanced to Rs. 6000/- per month. The order of the learned Judicial Magistrate 1st Class, Court No. VI, Shimla, was further assailed by the wife, by invoking revisionary jurisdiction of the learned First Revisional Court, wherein she pleaded that the maintenance amount, as awarded by the learned Judicial Magistrate 1st Class, Court No. VI, Shimla, is inadequate. The learned First Revisional Court, vide order dated 11.11.2014, modified the order passed by the learned Judicial Magistrate 1st Class, Court No. VI, Shimla, and enhanced the maintenance allowance from Rs. 6000/- to Rs. 8000/- per month, from the date of filing of the petition. Thus, through the present petition, the husband, by invoking revisionary jurisdiction of this Court, has challenged the order dated 11.11.2014, passed by the learned First Revisional Court.

3. I have heard the learned Senior Counsel for the petitioner and the learned counsel for the respondent.

4. Learned Senior Counsel for the petitioner has argued that the learned Revisional Court without appreciating the facts, which have come on record, has enhanced the maintenance from Rs. 6,000/- to Rs. 8,000/- and that order is required to be set-aside. On the other hand, the learned counsel for the respondent has argued that no revision was filed by the petitioner (husband) against the order passed by the learned Trial Court granting maintenance @ Rs. 6,000/- per month and the present petition is not maintainable. He has further argued that the petitioner is a man of means, he has big chunk of land and money in his account, therefore, he is liable to pay maintenance @ Rs. 8,000/- per month to the petitioner (wife), which was awarded by the learned Revisional Court. In rebuttal, the learned Senior Counsel has argued that the petitioner is not liable to pay such a big amount as now he has retired from service and only drawing meager amount as pension.

5. In order to appreciate the rival contentions of the parties, I have gone through the record carefully.

6. It is emanating from the record that the respondent-wife was not looked after by the petitioner-husband and that is why she was forced to file a petition against him, under Section 125 Cr.P.C., seeking maintenance. Subsequently, the learned Revisional Court has enhanced her maintenance @ Rs. 8,000/- per month.

7. The learned Trial Court granted maintenance to the respondent-wife @ Rs. 6,000/- per month and that order was not challenged by the petitioner-husband, meaning thereby the petitioner-husband was not aggrieved with the order of maintenance whereby maintenance monthly @ of Rs. 6,000/- was granted to the respondent-wife. The aforesaid amount was adjudicated upon by the learned Trail Court on 27.12.2011. Though, as per the petitioner-husband he is not in a position to pay maintenance, but it has come in the statement of the respondent-wife, while appearing in the witness-box before the learned Trail Court, that monthly maintenance amount of Rs. 3,000/- is required to be enhanced as her husband (petitioner) is drawing monthly salary of Rs. 46,560/- and this fact stood proved on record. The only case of the petitioner-husband is that respondent-wife has left his company without any reason and thus she is not entitled for any maintenance.

8. This shows that as far as the grant of maintenance to the wife is concerned, that matter has attained finality as the order of the learned Trial Court , dated 27.12.2011, was never assailed by the petitioner-husband and the only dispute which is pending adjudication is whether the learned Revisional Court was right in enhancing the maintenance from Rs. 6,000/- to Rs. 8,000/- per month. Again, at the cost of repetition, it is made clear that the petitioner-husband never challenged order dated 27.12.2011, before the learned Revisional Court, whereby maintenance @ Rs. 6,000/- per month was granted to the respondent-wife.

9. As observed hereinabove, maintenance amount of Rs. 6,000/- was awarded to the wife in the year 2011 and now taking into consideration the increase in the prices of essential commodities, the age of the respondent-wife and her dependency upon the others, as now at this advance stage she is not in a position to do manual work in the houses of others, which she was doing earlier and the fact that the petitioner-husband is a man of means and he has no-one to support, except the respondent-wife, as the children are now well settled in their lives, this Court findings that the petitioner-husband is liable to maintain the respondent-wife, as he is a man of resources, as he is getting pension, having landed property, has received GPF, gratuity and benefits, which are lying in his deposit, as he has no-one else to support than the petitioner. Thus, this Court finds that there is no illegality committed by the learned Revisional Court in enhancing the maintenance amount from Rs. 6,000/- to Rs. 8,000/- per month. The petition, which sans merits, deserves dismissal and is accordingly dismissed.

10. In view of the above, the petition, as also the pending application(s), if any, stand(s) disposed of.

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

Anand Kumar and others .....Appellants/Plaintiffs.

Versus

State of H.P. through Deputy Commissioner, Bilaspur

.....Respondent/Defendant.

RSA No. 337 of 2006.
Reserved on : 30.05.2017.
Decided on : 21st June, 2017.

Specific Relief Act, 1963- Section 34- Plaintiffs pleaded that the suit land was allotted to father of plaintiff No.4 and husband of plaintiff No.5- the allotment was cancelled by Deputy Commissioner, Bilaspur, which order was upheld by Divisional Commissioner, Mandi- the original allottee expired and plaintiffs succeeded to him – the suit was opposed by the defendant pleading that the plot was allotted in exchange but the exchange was cancelled- an appeal was preferred before Divisional Commissioner but the same was dismissed- it was found that the suit land is adjacent to National Highway and any activity in the same would invite trouble for vehicles and pedestrians – the allotment was properly cancelled – the suit was dismissed by the Trial Court- an appeal was filed, which was also dismissed- held in second appeal that the suit land was an undeveloped/uncreated plot and there is bar in the Rules for the allotment of such plot- therefore, the exchange was rightly cancelled by the authorities – the Courts had properly appreciated the evidence- appeal dismissed.(Para-8 to 10)

For the Appellants: Mr. G.D. Verma, Senior Advocate with Mr. B.C. Verma, Advocate.
For the Respondent: Mr. Ravinder Thakur, Addl. A.G.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiff instituted a suit against the defendants, claiming therein a decree for declaration to the effect that the plaintiffs are lessees(s) in possession and for setting aside the orders of the Deputy Commissioner, Bilaspur and Divisional Commissioner, Mandi dated 15.06.1990 and 16.06.1992 respectively vide which the allotment of the suit land has been cancelled as also for permanent prohibitory injunction. The suit of the plaintiff stood dismissed

by the learned trial Court. In an appeal carried therefrom by the plaintiffs/appellants before the learned First Appellate Court, the latter Court dismissed the appeal, whereupon, it concurred with the verdict recorded by the learned trial Court. In sequel thereto, the plaintiffs/appellants herein, are driven to institute the instant appeal herebefore.

2. Briefly stated the facts of the case are that the plaintiffs filed a suit against the defendant seeking declaration to the effect that the plaintiffs are lessee in possession of the suit land comprised in Khata/Khatoni No.31/488, khasra No.1298/394, measuring 31.54 sq. decimeters, situated in UP Muhal, Main Market, Bilaspur, District Bilaspur, H.P. and for setting aside the orders of the Deputy Commissioner, Bilaspur and Divisional Commissioner, Mandi of 15.06.1990 and 17.06.1992, respectively, vide which the allotment of the suit land has been cancelled and further decree for permanent injunction restraining the defendant from changing the entry in the revenue record and from interfering in any manner whatsoever. It has been averred in the plaint that father of plaintiff No.4 and husband of plaintiff No.5 late Shri Sita Ram son of Kapura was allotted a commercial site against the award of old town, Bilaspur in Sector 6 of the main market under the scheme formulated for the purpose of the resettlement and rehabilitation of the Bhakra Dam Oustees and a lease deed was accordingly executed and Sita Ram has become its lessee and defendant has become lessor. It has been further averred that pursuant to the allotment of the land, the possession of the allotted land was handed over to the predecessor-in-interest of the plaintiffs and mutation thereof has already been sanctioned vide mutation No.162 of 19.6.1989. The Deputy Commissioner has wrongly8 and illegally cancelled the above said allotment vide order dated 15.06.1990 which was challenged before the Divisional Commissioner but the same was also dismissed as having been not maintainable. Sit Ram, the above allottee died on 1.1.1996 and the plaintiffs have succeeded to his estate being the son of the widow. The defendant is stated to have no right, title or interest in the suit land and the plaintiffs are stated to be in possession of the suit land. The cause of action is stated to have arisen to the plaintiffs on 1.9.1998 when the defendant has express his inability to undone the cancellation of allotment. Thus, it has been prayed by the plaintiffs that the orders passed by the Deputy Commissioner and Divisional Commissioner may be declared null and void and they be declared lessee in possession of the suit land and defendant be restrained permanently from changing the nature of the suit land or interfering in the suit land through its agents and servants.

3. The defendant contested the suit and filed written statement. It has been pleaded that Kapura Ram father of Sita Ram was allotted plot No.210-B at Main Market, Bilaspur being Bhakra Dam oustee and he gifted this allotted plot to his son Sita Ram and in the year 1989, Sita Ram applied for exchange of his plot No.210-B with the suit land. However, it is further pleaded that said plot was not allotted as a commercial plot. It was only sanctioned in favour of Sita Ram in exchange but subsequently, the said exchange was cancelled by the Deputy Commissioner. The plaintiffs preferred an appeal against that order before the Divisional Commissioner, Mandi and the same was also dismissed. The orders of the Deputy Commissioner and the Divisional Commissioner are stated to be legal and valid. It is further averred that joint inspection of the site was carried out by the Assistant Town Planner, Mandi, Secretary, Municipal Committee, Bilaspur and Assistant Engineer, PWD, Bilaspur and it was observed by them that it was not feasible to allot any plot in the suit land since the site is abutting the National Highway No.21 and the proposed activities in the shop would invite a trouble for vehicles as well as pedestrians and there was likelihood of choking of nallah during heavy rains and may endanger the adjacent construction. It is also averred that the suit land is not a created plot as per the allotment rules of the plots. As such, the suit land could not have been allotted without creation of the plots. The defendant is stated to have every right to cancel the said exchange and the same was accordingly cancelled after giving opportunity to the plaintiffs by the competent authority and the order of cancellation passed by the Deputy Commissioner and affirmed by the Divisional Commissioner are stated to be legal and binding on the plaintiffs.

4. The plaintiffs/appellants herein filed replication to the written statement of the defendant/respondent, wherein, they denied the contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

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

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

2. Whether the order dated 15.6.1990 passed by Deputy Commissioner, Bilaspur and order dated 17.06.1992 passed by Divisional Commissioner, Mandi are illegal, null and void? OPP

3. Whether this Court has no jurisdiction to hear and decide the suit? OPP

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

5. Whether the plaintiffs are estopped to file the suit by their own act and conduct? OPD

6. Whether the plaintiffs are entitled to the relief of permanent injunction, as prayed for? OPP.

7. Relief.

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

7. Now the plaintiffs/appellants herein, has instituted the instant Regular Second Appeal before this Court, wherein they assail the findings recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission, on 7.11.2006, this Court, admitted the appeal instituted by the appellants against the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial question of law:-

a) whether the order of Deputy Commissioner canceling the lease grated vide deed Ex.P-1, is illegal and in violation of the terms and conditions stated in the lease deed?

Substantial question of Law No.1:

8. Under Ex. D-2, exhibit whereof comprises a perpetual lease deed executed inter se the predecessor-in-interest of deceased Sita Ram, namely, one Kapura Ram, with the lessor concerned, plot bearing No. 210-B, situated in Section 6, New Bilaspur Township stood allotted to the lessee, for construction of a shop/residence thereon. Subsequently, under Ex. P-1, exhibit whereof also comprises a perpetual lease deed executed inter se the predecessor-in-interest of the plaintiffs, namely, one Sita Ram with the lesser concerned, bestowment of rights as a perpetual lessee with respect to khasra No. 394/1 stood conferred upon the aforesaid deceased Sita Ram. Ex. P-1 stood executed on May 29, 1989. However, as visible from a perusal of Ex. P-13, the allotment of plot borne on khasra No. 394/1 vis-a-vis Sita Ram, the predecessor-in-interest of the plaintiffs, in pursuance whereof perpetual lease deed comprised in Ex. P-1, stood executed inter se him and the lessor concerned, was sequelled by the authority concerned ordering for its exchange with plot No.210-B, in respect whereof, as manifest from Ex. D-2, a perpetual lease deed stood prior thereto executed inter se the predecessor-in-interest of deceased Sita Ram, with the lessee concerned, namely, one Kapura Ram. The plaintiffs did not contest the fact that the allotment of khasra No.394/1 under Ex.P-13, to their predecessor-in-interest one Sita Ram being sequelled by the hitherto allotment of plot No. 210-B to one Kapura Ram, the predecessor-in-interest of deceased Sita Ram, standing exchanged therewith also, they did not contest the cancellation of allotment of plot No.210-B vis-a-vis one Kapura Ram. Subsequently, on the

apposite objections preferred by the objectors concerned before the learned Deputy Commissioner, Bilaspur, the latter under his orders comprised in Ex. P-3, proceeded to cancel the allotment of khasra No.394/1 vis-a-vis the predecessor-in-interest of the plaintiffs, namely, one Sita Ram, also, he cancelled the perpetual lease deed executed inter se the lessee concerned with the lessor concerned, lease deed whereof is comprised in Ex. P-1. The order(s) recorded by the learned Deputy Commissioner under Ex.P-4, stood affirmed by the learned Divisional Commissioner, Mandi.

9. The learned counsel appearing for the plaintiffs/appellants has contended with much vigour, that with a perpetual lease deed with respect to khasra No.394/1 standing executed inter se the predecessor-in-interest of the plaintiffs, namley, one Sita Ram with the competent executing lessor concerned, hence, disabled the learned Deputy Commissioner to order for its cancellation, especially when no recital exists in Ex. P-1 with respect to operation thereon or sway of clout thereon of rules 11 to 16 and 20 of the Rules appertaining to allotment of plots in the New Bilaspur Township. Consequently, he submits that the vigour of Ex.P-1, constituting the perpetual lease deed executed with respect to khasra No.394/1 inter se the predecessor-in-interest of the plaintiffs, namely, one Sita Ram, with the competent executing lessor concerned, "was unamenable" to dilution of its binding effect or force, by his purportedly invoking the play thereon of rules 11 to 16 and 20, of the Rules appertaining to allotment of plots in the New Bilaspur Township nor also any bar contemplated in the apposite rules against the exchange of the hitherto allotted plot No.210-B under Ex. D-2 to the predecessor-in-interest of deceased Sita Ram, "could dilute" the effect of Ex. P-1, especially when no recital is embodied therein with respect to play thereon of the aforesaid rules. However, the aforesaid submission addressed by the learned counsel appearing for the plaintiffs/appellants, cannot be accepted, as non communication, if any, of the aforesaid rules in Ex. P-1 would not per se deprive them from theirs holding there clout thereon, imperatively also when the letter of allotment comprised in Ex.P-13, makes a vivid display in paragraph No.6 thereof, with respect to rules 11 to 16 and 20 of the Rules appertaining to allotment of plots in the New Bilaspur Township, warranting their incorporation in the apposite deed of conveyance executed inter se the executants, in respect thereof. Since, the incorporation of the apposite rules in the apposite deed of conveyance executed with respect to khasra No.394/1 was a sine qua none or a condition precedent for the allotment of the aforesaid khasra number hence taking a legal effect, in sequel, even if, the aforesaid rules remained not incorporated in Ex. P-1, thereupon, no argument can be addressed by the learned counsel for the appellant that hence there was ouster of play thereon of the aforesaid rules nor can he espouse that given the perpetuity or longevity of the relevant deed of conveyance executed inter se deceased Sita Ram, the predecessor-in-interest of the plaintiffs, with the competent executing lessor, qua nowat the play thereon of the aforesaid rules standing ousted. Predominantly, also with the allotment of khasra No.394/1 made under Ex. P-1 vis-a-vis one Sita Ram, the predecessor-in-interest of the plaintiffs, standing anvilled upon the rules appertaining to allotment of plots in New Bilaspur Township, corollary whereof is that the operation and clout of the apposite rules embodied in the Rules drafted/framed for allotment of plots in New Bilaspur Township "cannot" obviously be whittled down, merely, on the anvil of theirs not finding, their incorporation in Ex.P-1. Obviously, thereupon, also it is imperative for this Court to ascertain, on a reading of the aforesaid rules, as stand evaluated by the learned District Judge, that whether they contemplate a bar against exchange besides contemplate a bar against allotment of undeveloped or uncreated plots. The learned District Judge had in the impugned judgment and decree, concluded that in the apposite rules drafted for allotment of plots in the New Bilaspur, Township, a bar exists against the allotment of plot(s) by way of exchange with the hitherto allotted plot(s) to the predecessor-in-interest of the plaintiffs, one Kapura Ram also it had made an allusion to the bar contemplated in the apposite rules against the allotment of undeveloped plots or uncreated plots. The learned counsel appearing for the appellant has been unable to make any vigorous display before this Court, that the rules as stand alluded to by the learned District Judge "not" holding the aforesaid contemplation nor he has been able to erode the vigour of the findings recorded by the Deputy Commissioner, Bialspur in Ex. P-3, that khasra No.394/1 was unamenable for allotment, it being an undeveloped plot,

hence, infringing the mandate of the apposite rules wherein there exists a bar against allotment of an undeveloped or an uncreated plot, conspicuously, when no evidence in rebuttal thereof stands adduced. It appears that one Sita Ram "despite" a perpetual lease deed standing executed inter se his predecessor-in-interest one Kapura Ram with the lessor concerned has concerted to blunt the vigour of the aforesaid prior perpetual lease deed, by his in gross derogation of the relevant rules, obtaining allotment of the suit property, corollary whereof is that his untenable act "cannot" be validated by this Court.

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

11. In view of above discussion, the present Regular Second Appeal is dismissed. In sequel, the judgments and decrees rendered by both the learned Courts below are maintained and affirmed. However, it is made clear that the appellants/plaintiffs shall not be evicted from the suit land except in due course of law. The respondent concerned is also directed to, if now permissible, re-allot and put the plaintiffs in possession of the earlier plot bearing No. 210-B. All pending applications also stand disposed of. No order as to costs.

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

FAO No. 324 of 2012 along
with FAO No. 307 of 2012.
Reserved on : 12th May, 2017.
Decided on : 21st June, 2017.

1. **FAO No. 324 of 2012.**

Bajaj Allianz General Insurance Company Limited ...Appellant.
Versus
Pankaj Sharma and others ...Respondents.

2. FAO No. 307 of 2012

Pankaj Sharma ...Appellant/Claimant.
Versus
S.N. Sharma and others ...Respondents.

Motor Vehicles Act, 1988- Section 166- Petitioner was travelling in a vehicle which met with an accident due to the rash and negligent driving of his driver – the petitioner sustained multiple injuries- the Tribunal awarded compensation of Rs. 2,95,000/- along with interest at the rate of 8% per annum – held in appeal that an amount of Rs. 1 lac was rightly awarded by the Tribunal for the loss of studies of two years does not warrant any interference – amount of Rs.10,000/- on account of services of an attendant cannot be denied even if the claimant was attended by his family members- the licence was valid till 22.1.2015 and the driver had a valid licence at the time of the accident – Tribunal had awarded Rs.1,50,000/- for the removal of injured spleen which includes loss of future income as well- the Tribunal had assessed the compensation properly- appeal dismissed. (Para-11 to 16)

For the Appellant(s): Mr. Aman Sood, Advocate for the appellant in FAO No. 324 of 2012 and Mr. Neeraj Gupta, Advocate, for the appellant in FAO No. 307 of 2012.

For the Respondents : Mr. Neeraj Gupta, Advocate for respondent No.1 in FAO No. 324 of 2012.
Mr. Deepak Bhasin, Advocate, for respndent No.2 in FAO No. 307 of 2012 and for respondent No.3 in FAO No. 324 of 2012.
Mr. Aman Sood, Advocate, for respondent No.3 in FAO No. 307 of 2012.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

Since, both these appeals arise out of an award pronounced by the learned Motor Accident Claims Tribunal, Shimla, H.P., (hereinafter referred as the learned Tribunal) upon M.A.C. Petition No. 38-S/2 of 2008, hence, both are liable to be disposed off by a common verdict.

2. Under the impugned award, pronounced by the learned Tribunal, it, assessed compensation in favour of the claimant, compensation whereof is constituted in a sum of Rs.2,95,000/- along with interest at the rate of 8% per annum w.e.f. 05.03.2011 till payment, alongwith costs quantified at Rs.5000/-, liability of indemnification whereof, stood fastened upon the insurer of the offending vehicle.

3. On standing aggrieved by the verdict of the learned tribunal, both the claimant as well as M/s Bajaj Allianz General Insurance Company, concert to assail it by preferring the instant appeals therefrom.

4. The brief facts of the case are that petitioner/claimant in April, 2008, had been 16 years of age. The petitioner had been a student and had also been helping his parents in attending to their household and holding. The petitioner had been in receipt of income of Rs.5000/- per month from all sources. On 21.04.2008, the petitioner had been on way from Nandla to Massali in vehicle No. HP-10B-0175. Respondent No.2(A), Sh. Mangat Ram had been on the wheel of the vehicle. Respondent No.2(A) had been driving rashly and negligently the offending vehicle as a result of which the vehicle had gone down the highway in the area of Khilocha at about 11.30 a.m. The petitioner/claimant had suffered multip[le injuries of serious nature. He had been taken to Civil Hospital, Rohru for immediate medical aid, from wherein, on 21.04.2008, he was referred to IGMC, Shimla, whereat, he remained admitted till 30.04.2008. On 30.04.2008 he was discharged with the advice of necessary medical follow up. The petitioner had suffered multiple fractures of chest and his spleen stood removed. The petitioner had paid a sum of Rs.1,00,000/- for his treatment. Even after medical treatment of months together, the petitioner had not keeping good health. The petitioner had suffered permanent injury. He could not opt for career in police, army and para military forces. The petitioner had claimed compensation of Rs.10,00,000/- for the injuries suffered by him in the accident.

5. The respondents No.1, 2 and 2(A) resisted the claim petition. They admitted the ownership and possession of respondent No.1 qua the offending vehicle. Taking place of accident stood admitted by replying respondents. However, they have denied that ill fated accident took place on account of rash and negligent driving of the offending vehicle by its driver. They pleaded that the claimant is not entitled to any compensation. However, it is averred that, compensation, if any, assessed, it was to be paid by the insurance company.

6. Respondent No.3, the insurance company admitted qua its having provided insurance cover to the offending vehicle at the time of the accident. However, it has been averred that respondent No.1 had contravened the terms and conditions of the insurance policy and the Act. Respondent No.2(A) has been alleged to not holding valid and effective driving licence. It expressed ignorance about the age, income and occupation of the petitioner. The petitioner had not suffered any injury in the accident, nor had paid Rs. One lac for his medical treatment. The petitioner was not entitled to compensation from respondent No.3.

7. On the pleadings of the parties, the learned tribunal struck the following issues inter-se the parties at contest:-

1. Whether the petitioner had suffered injuries due to rash and negligent driving of Mahindra Bolero Camper No.HP-10B-0175 being driven by the respondent No.2(A)? OPP

2. If issue No.(1) is proved, to what amount of compensation the petitioner is entitled and from which of the respondents? OPP

3. Whether the claim petition is not maintainable, as alleged? OPR

4. Whether the vehicle in question was being driven in contravention of the terms and conditions of the Insurance Policy? OPR-3

5. Whether the respondent No.2(A) was not having a valid and effective driving licence to drive the vehicle at the relevant time? OPR-1

6. Whether the petition is bad for misjoinder and non joinder of parties? OPR-3

7. Relief.

8. On an appraisal of evidence adduced before the learned tribunal, the latter allowed the apposite petition and assessed compensation in favour of the claimant, constituted in a sum of Rs.2,95,000/- along with interest at the rate of 8% per annum w.e.f. 05.03.2011 till payment alongwith costs quantified Rs.5000/-, liability qua indemnification whereof stood fastened upon the insurer concerned.

FAO No.324 of 2012.

9. Mr. Aman Sood, Advocate appearing for the insurance company has assailed the award rendered by the learned tribunal, on the ground that the assessment of compensation made therein with respect to the expenses incurred towards the medical treatment of the claimant, expenses whereof are borne on Exts. PW5/A-1 to Ex.PW5/A-40, warranting reversal, given the fact that the father of the claimant was evidently a government employee, hence, was entitled to claim reimbursement of amount(s) borne in the aforesaid exhibits. However, the mere fact that the father of the claimant was a government employee and was hence entitled to seek reimbursement from his employer, the amount(s) borne in Ex.PW5/A-1 to Ex.PW5/A-40, comprising the expenses incurred by him towards the medical treatment of the claimant, yet the best evidence in respect of the father of the claimant availing the benefit of reimbursement of medical expenses comprised in the aforesaid exhibits, "stood comprised" in the counsel for the insurance company requisitioning the relevant record from the department concerned, wherein personifications occurred with respect to the father of the claimant making a claim for reimbursement of the medical expenses incurred by him for the treatment of the claimant also stood comprised in the relevant record making reflections that his claim for reimbursement of medical expenses detailed in Ex.PW5/A-1 to Ex.PW5/A-40 standing approved and money(s) standing disbursed to him. However, the aforesaid best evidence remains unadduced. Consequently, a sum of Rs.20,000/- assessed in favour of the claimant, on account of costs of medical treatment, "past and prospective", in sequel to his suffering the apposite injuries in pursuance to the motor vehicle accident involving the offending vehicle, does not warrant any interference also when PW-1 has deposed that he had removed the injured spleen of the claimant besides when he has further testified that thereupon the claimant is perennially prone to gather certain infections, entailing hence, incurring of expenses for their mitigation.

10. The learned counsel appearing for the insurance company has also contended that a sum of Rs. one lac awarded to the claimant, on account of loss of his valuable two academic years, is not borne by the evidence on record, especially, when there is no iota of any echoings in the respective depositions of the claimant, his father or in the deposition of PW-3, in respect of the claimant, in sequel to the relevant injuries sustained on his person, being hence disabled to attend school for two years. However, the aforesaid submission is not acceptable, as the claimant while testifying as PW-5, has in his examination-in-chief made a communication

that in sequel to the ill-fated accident, whereupon, he stood entailed with the relevant injuries, he stood disabled to attend school. The aforesaid testification occurring in his examination-in-chief remains unshred of its efficacy, during the ordeal of a rigorous cross-examination to which he stood subjected to by the learned counsels appearing for the respondents, thereupon it acquires a halo of sanctity. Consequently, it is to be concluded that a sum of Rs. One lac computed as compensation by the learned tribunal, on account of loss of studies entailed upon the claimant, in sequel to the injuries which befell upon him in pursuance to the ill-fated accident also does not warrant any interference.

11. Furthermore, the learned counsel appearing for the insurance company has contended, that a sum of Rs.10,000/- awarded as compensation on account of services of attendant, warrants reversal, as there is evident bespeaking by the relevant evidence, of the claimant being attended upon by the members of his family, hence, with the latter gratuitously serving the claimant during the period of his ailment, a sum of Rs.10,000/- assessed as compensation, on account of services of an attendant, is, as such grossly inappropriate. However, the aforesaid submission is not acceptable, as PW-5, the claimant in his examination-in-chief "through" has articulated that he during his ailment was attended upon by his mother and grand-mother, yet he has also deposed that on theirs being detained to attend upon him "resulted" in theirs being precluded to engage themselves in agricultural pursuits, for performance whereof they were enjoined to engage labourers, wheretowhom wages were defrayed. The aforesaid deposition occurring in the examination-in-chief of the claimant is not concerted to be shred of its efficacy, by any counsel appearing for the respondents, comprised in theirs in respect thereof during their respective cross-examination putting apposite suggestion to them. Consequently, even if, the claimant during the period of his ailment was attended upon by his mother and grand-mother, hence, even if they performed gratuitous services, nonetheless, when they were evidently forbidden to perform their agricultural pursuits, for performance whereof, they engaged labourers, wheretowhom, they defrayed expenses, thus, constrains this Court to conclude that a sum of Rs.10,000/- assessed as compensation, on account of services of an attendant also not warranting any interference.

12. RW-1 Shri Parkash Panta, Licence Clerk in the Office of RLA/SDM, Rohru has testified that the driver concerned one Mangat Ram had been on 1.7.2003 issued a licence to drive a light motor vehicle. He has also testified that the driving licence of Mangat Ram had been endorsed for light transport vehicle w.e.f. 23.01.2009 and the aforesaid licence of Mangat Ram, whereupon he stood authorised to drive a light transport vehicle remained valid upto 22.01.2015 "whereas" his licence for driving a non transport vehicle is valid upto 30.06.2023. The accident involving the offending vehicle, vehicle whereof stood driven by respondent No.2(A), occurred on 21.04.2008, whereat the driver concerned was authorised to drive a light motor vehicle, consequently, it is submitted that the driver concerned of the offending vehicle, was not authorised to drive a light motor vehicle "for" commercial purpose, thereupon, it is contended that the fastening of liability upon the insurance company to pay the compensation amount, warrants interference. However, the aforesaid submission also falters in the face of the clerk concerned of the Licencing Authority concerned, testifying in his cross-examination that when the gross unladen weight of a vehicle is upto 7500 kgs or less, thereupon, unless the RC of the relevant vehicle characterises it to be a commercial vehicle, thereupon, dehors want of any endorsement in the relevant licence comprised in Ex.RW1/B qua its holder being authorised to drive a transport vehicle, would yet empower the holder to drive a light motor vehicle. Since, the Insurance company has not placed on record the R.C. of the relevant vehicle with reflections therein that the relevant vehicle stood classified therein as a commercial vehicle nor also when any evidence stands adduced qua the unladen weight of the offending vehicle being not upto 7500 kg or its unladen weight exceeding 7500 kg, in sequel, it has to be concluded that the driver concerned stood authorised by his licence, comprised in Ex.RW1/B, to drive the offending vehicle, especially when the offending vehicle hence falls within the aforesaid category, wherefrom it is befitting to derive an inference that in his driving the offending vehicle, he has not breached any term and

condition of the insurance policy. Consequently, the fastening of the apposite liability upon the insurance company by the learned tribunal, is not wanting in any legality.

FAO No. 307 of 2012.

13. Mr. Neeraj Gupta, the learned counsel appearing for the claimant, has claimed enhancement of compensation vis-a-vis the claimant upto a sum of Rs.ten lacs. The anchor for his claim rests upon the learned tribunal "not" considering the monetary value of services rendered at his house by the claimant "both" during the period of his undergoing treatment nor its considering the value of rendition by him "of" services in future, especially when in sequel to the removal of his injured spleen, he would be deterred to assist his family members in domestic chores or in agricultural pursuits. However, the aforesaid submission is rejected, as the expert concerned has not pronounced that the removal of the injured spleen of the claimant, would forbid him throughout his life, to engage in domestic chores or in agricultural pursuits. Consequently, the monetary value(s) thereof in future does not warrant any assessment also since the learned tribunal has assessed compensation upon the claimant for loss of two academic years, for span whereof he stood evidently dissuaded to engage himself in academic pursuits also constrains this Court, to not assess compensation vis-a-vis the claimant in respect of loss of his assisting services to his family members in theirs performing the domestic chores, alongwith him or in his performing conjointly with them any agricultural pursuits.

14. The learned counsel appearing for the petitioner has, highlighted upon testimonials, comprised in Mark -A and Mark-B, to contend that given the excellence in sports of the claimant, his standing entailed with the ill consequence of removal of his injured spleen, would mar his career in sports also would mar his prospects for employment in armed forces. He, hence, contends that compensation be assessed upon the claimant for the loss of his future prospect in sports and for loss of future prospects of employment in the armed forces. However, any assessment of compensation on anvil aforesaid would be an extremely hazardous surmisal exercise also would remain unrested upon hard evidentiary strata, especially when there is no evidence of the expert concerned that the removal of the injured spleen would bar the claimant to perform either agricultural pursuits or would deprive him from government or private employment, hence, when it is open to the claimant to seek employment either in the government or in the private sector, by his applying in the relevant quota meant for handicaps, if the claimant falls within the aforesaid category, thereupon this Court is constrained to hence upon anvil of his career in sports or his prospects in his seeking employment in the armed forces being purportedly diminished by the injuries entailed upon him in the ill-fated accident, "not" assess compensation upon him.

15. The learned counsel appearing for the claimant has placed reliance upon decisions of various High Courts reported in Ravichandaran versus Managing Director, Pallavan Transport Corporation Ltd, 2004 (2) ACC 10, Netram versus Vijay Kumar and others, 2006 (2) MPHT 94, Arvinder Singh versus Kajodmal and others, 2005(2) DNJ 1073, Usman versus Afroz Khan and others, 2009 (4) AICJ 506 and Ku. Kavita Shama versus Ashwani Kumar, 2008 (1) MPHT 280, to contend that the removal of the injured spleen begets acute critical consequences upon the sufferer, whereupon, the impugned award warranting assessment of compensation "solitarily" on its account also "whereas" no compensation "solitarily" on account of removal of injured spleen standing assessed by the learned tribunal, hence, to this extent the impugned award warrants modification. However, none of the aforesaid decisions of the various High Courts relied upon for the relevant purposes by the learned counsel appearing for the claimant, make any communication therein that per se for removal of the injured spleen "compensation" is to be awarded, rather, the decisions as relied upon by the learned counsel appearing for the claimants make a cumulative computation of compensation, arising from the removal of the injured spleen including therein the heads appertaining to the loss of earning capacity, pain and suffering, medical expenses, special diet and conveyance, expenditure on attendant etc.. In sequel, the learned tribunal concerned has likewise computed compensation in a sum of Rs.1,50,000/- arising from the removal of the injured spleen, figure whereof comprises compensation assessed on account of loss of future income, loss of amenities of life, loss of

expectation of life, inconvenience, hardship, mental stress, dejection frustration etc. In aftermath, it is apt to conclude that all the relevant facets have been taken into consideration by the learned tribunal while assessing compensation upon the claimant arising from removal of the injured spleen. Preeminently, also hence, when within the aforesaid figure is comprised the loss of future income being hence entailed upon the claimant, corollary whereof is that the preceding submission addressed by the learned counsel for the claimant that the removal of the injured spleen warrants assessment of compensation upon the claimant for loss of future income, suffers aggravated enfeeblement.

16. The above discussion unfolds the fact that the conclusions as arrived by the learned tribunal are based upon a proper and mature appreciation of the relevant evidence on record. While rendering the findings, the learned tribunal has not excluded germane and apposite material from consideration.

17. For the foregoing reasons, there is no merit in the instant appeals which are accordingly dismissed. The impugned award is maintained and affirmed. All pending applications also stand disposed of. Records be sent back forthwith.

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

General Manager, NHPC ....Appellants.

Versus

Kiran Rekha Sood ....Respondents

Regular First Appeal No. 415 of 2010
Judgment reserved on 15.06.2017
Date of Decision 21st June, 2017

Land Acquisition Act, 1894- Section 18- The Reference Court relied upon the report prepared by PW-2 – it was contended that he had valued the house twice and there was a difference of Rs.25,000/- in two valuations; hence, the report should have been rejected- held that the witness has explained that the assessment charges were added which led to the difference in the valuation- this was not challenged in the cross-examination – Executive Engineer, PWD was not examined to prove the report and the Court had rightly rejected the report – there is no infirmity in the award announced by the Reference Court – appeal dismissed. (Para- 4 to 9)

Cases referred:

Manager, Reserve Bank of India, Bangalore vs. S. Mani and others (2005)5 SCC 100
Anvar P.V. vs. P.K.Basheer and others (2014)10 SCC 473
Laxmi Bai vs. Bhagwant Bua (2013)4 SCC 97
Gian Chand and others vs. State of Haryana(2013)14 SCC 420

For the Appellant: Shri Rajnish Maniktala, Advocate.

For the Respondents: Mr.Sunil Mohan Goel, Advocate for respondent No.1 and Mr.Pankaj Negi, Deputy Advocate General, for respondent No.2.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.

Appellants have assailed award dated 6.8.2010 passed in reference petition No. 93 of 2008 by learned Additional District Judge, Fast Track Court, Kullu whereby awarded

amount of compensation vide award No. 21-A dated 28.2.2007 passed by Land Acquisition Collector, NHPC, PHEP, Kullu, for acquiring the house of respondent, has been enhanced.

2. Appellants have questioned impugned award on the ground that enhancement of compensation by learned Additional District Judge is based upon PW2 Kuldeep Singh Assistant Engineer, DRDA, who was not reliable witness for the reason that valuation of house by same witness on two occasions has variance of Rs.25000/- as at first instance, he calculated the value of house as Rs.9,90,430/- and on subsequent evaluation, he calculated the value of house as Rs.10,15,190/-. Further also on the ground that valuation carried out by Executive Engineer, PWD has been wrongly discarded by learned Additional District Judge, whereas Land Acquisition Collector had rightly relied upon the valuation of Executive Engineer PWD, who, as also admitted by PW2 Kuldeep Singh in his cross examination, was authorised evaluator of NHPC, whereas PW2 Kuldeep Singh was not an employee of the Government but was serving as Assistant Engineer with an autonomous authority i.e. DRDA.

3. Learned counsel for respondent has supported the impugned award on the ground that learned Additional District Judge has committed no mistake in discarding the evaluation of Executive Engineer, PWD for the reason that said evaluation has not been proved on record in accordance with law and there was only one duly proved evaluation of house of respondent on record which has been rightly relied upon by learned Additional District Judge for enhancing the amount of compensation in favour of respondent.

4. Perusal of award passed by Land Acquisition Collector reflects that assessment of houses by Executive Engineer, PWD was also carried twice. At first instance, value of house of respondent was calculated by him as Rs.5,63,135/- and on objection of some of house owners, under directions of Deputy Commissioner, Kullu, PW2 Kuldeep Singh Assistant Engineer, DRDA was directed to re-assess the value of house including the house of respondent. As per valuation carried out by PW2, value of house was found 9,90,430/-. In the meanwhile, re-assessment of extra cost of the houses on prevailing market rates on the date of notification under Section 4 of Land Acquisiton Act 1894 was also carried out by Executive Engineer(PWD), Kullu and in this re-asseement value of house of respondent was determined as 7,63,535/-. Land Acqusition Collector did not consider the value carried out by PW2 Assistant Engineer, DRDA but relying upon only on second assessment carried out by Executive Engineer PWD, he awarded Rs.7,63,535/- for acquisition of house of respondent.

5. There is variance, with a difference of about two lacs in two assessment of same house carried out by Executive Engineer PWD. Second assessment of the said Executive Engineer, though relied upon by appellants, but not proved by examining him as a witness. Appellants have examined only one witness i.e. RW1 Gomati Nandan Junior Engineer, PWD who placed on record map of house of respondent Ext.RW1/A and details of measurement Ext.RW1/B. But neither map nor details were prepared by him nor he stated that he was ever associated with Executive Engineer or otherwise in carrying out assessment, preparation of map Ext.RW1/A or details of measurement Ext.RW1/B. The assessment carried out by Executive Engineer PWD has not been proved on record.

6. Stand/case of a party to lis constructed by pleadings. But pleadings are no substitute of proof and pleadings are to be proved by leading relevant and admissible evidence. In absence of evidence pleading cannot be said to be proved. ***(See para 19 of Manager, Reserve Bank of India, Bangalore vs. S. Mani and others (2005)5 SCC 100 and para 1 of Anvar P.V. vs. P.K.Basheer and others (2014)10 SCC 473)***

7. Respondent has examined Assistant Engineer DRDA Kuldeep Singh as PW2 who proved assessment, carried out by him, of house of respondent placing the same on record as Ext.PW2/A. In his examination in chief, he has explained the variance in his two reports by stating that value of house of respondent was 9,90,430/- but including assessment charges value of house was 10,15,190/- and the said clarification has not been disputed in his cross

examination by appellants. Therefore, clarification of PW2 stands admitted and plea of appellants that there was variance in two assessments of PW2 is not sustainable as non-cross examination on a point deposed by witness amounts to admission/acceptance of that version. ***(See para 40 of Laxmi Bai vs. Bhagwant Bua (2013)4 SCC 97, para 14 of Gian Chand and others vs. State of Haryana(2013)14 SCC 420)***.

8. Executive Engineer PWD was not examined and assessment prepared by him was also not duly proved on record and on the contrary, PW2 Kuldeep Singh has been examined as a witness and in his cross examination or otherwise nothing has been brought on record to impeach his veracity who has duly proved assessment carried out by him on record. It is also noticeable that PW2 had not carried out assessment of house on his own or at instance of respondent but he had assessed the value of house of respondent under the directions of Deputy Commissioner. Variance in value of house in assessment made by his stands duly explained, whereas variance in value of house in assessment carried out by Executive Engineer remained unexplained.

9. No other point urged or issue raised. From the above discussion, it is apparent that learned Additional District Judge has completely and correctly appreciated the evidence on record and has not committed any illegality or irregularity by relying upon the assessment carried out by PW2 Kuldeep Singh and discarding the evaluation carried out by Executive Engineer PWD. There is no perversity in impugned award and therefore, I find no merit in plea raised by appellants and no ground for interference in impugned award has been made out. Accordingly appeal is dismissed. Record of the Court below be sent back forthwith. Interim order(s) also stand vacated in above terms. No order as to costs.

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

Janki Dass Thakur ....Petitioner

Versus

State of Himachal Pradesh ....Respondent

Cr. Revision No. 134 of 2009
Judgment reserved on 10th April 2017.
Date of Decision 21st June, 2017

Indian Penal Code, 1860- Section 279, 337, 338 and 201- **Motor Vehicles Act, 1988-** Section 187- Accused was driving a car in a rash and negligent manner- the car hit a motorcycle - driver and pillion rider suffered injuries – the accused was tried and convicted by the Trial Court – an appeal was preferred, which was dismissed – held in revision that the mechanical reports corroborated the prosecution version – minor discrepancy in the registration number of the car will not make the prosecution case doubtful – the accused was found under the influence of alcohol – the Courts had rightly appreciated the evidence- however, considering the time lapsed since the time of incident, the sentence of imprisonment modified .(Para- 12 to 26)

Cases referred:

Rakesh Kumar vs. State of Himachal Pradesh 2013(2) Shim.L.C. 985
Raja and others vs. State of Karnataka (2016)10 SCC 506
Jitender Singh vs. State 2012(2) Criminal Court Cases 169 (Delhi)
Ashwani Kumar vs. State of Punjab reported in (2015)6 SCC 308
Karnail Singh vs. State of H.P. 2012(4) Criminal Court Cases 736 (H.P.)
Suresh Kumar vs. State of H.P. 2014(2) Shim.L.C. 1093

For the Petitioner: Shri O.C. Sharma, Advocate
For the Respondent: Shri Pankaj Negi, Deputy Advocate General.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.

In instant petition, petitioner (hereinafter referred to as the accused) has assailed his conviction and sentence under Sections 279, 337, 338 and 201 of Indian Penal Code and also under Section 187 of Motor Vehicles Act, imposed upon him vide judgment dated 12.1.2009 passed by learned Judicial Magistrate 1st Class, Kasuali in criminal case No. 136/2 of 2007/2001, title State vs. Janki Dass Thakur and affirmed by learned Additional Sessions Judge, Solan vide judgment dated 25.6.2009 passed in criminal appeal No. 6-S/10 of 2009.

2. Prosecution case is that on 7.12.2000 at about 6.30 PM accused drove a car bearing No. DL-3CB-7513 in rash and negligent manner near main bazar, Kasuali so as endangering human life and personal safety and fled from spot after hitting motor cycle being driven by Gian Singh (PW1), causing injuries to motor cycle driver Gian Singh and pillion rider Virender Kumar (PW3) and also damaging motor cycle. Defence of accused is denial simplicitor.

3. I have heard learned counsel for parties and have also gone through entire record of case.

4. In a revisional jurisdiction, this Court can evaluate the record for the purpose of satisfying as to the correctness, legality or propriety of finding, sentence or order recorded or passed and also as to the regularity of any proceedings of inferior Court situated in its local jurisdiction. This Court can also interfere in case there is violation of justice or misuse of judicial mechanism or procedure and can also look into correctness of sentence and definitely the power can be exercised to prevent the abuse of process or miscarriage of justice or to correct irregularities and illegalities committed by inferior criminal Court in its judicial process.

5. On 7.12.2000 PW8 Narveer Singh Rathor the then SHO, P.S. Kasauli, present on bus stop, received information about occurrence of accident at some distance from bus stand, whereupon he rushed to spot and recorded statement of PW3 Virender Kumar Ext.PW8/A under Section 154 Cr.P.C. The said statement was sent to police station as Ruka through C. Sudhir Kumar in pursuance to which FIR Ext.PW6/A was recorded at 7.10 PM. In his statement, PW3 Virender stated that at about 6.30 PM he was coming to home along with his co-employee Gian Singh on his motor cycle No. HYE-601 and on reaching near bus stand, Kasuali they noticed a Fiat NE car No. DL-3CB-7513 coming from opposite side with high speed. Gian Singh slowed down his speed and took his motor cycle towards left side almost in stationery position, but car, coming in high speed, hit the motor cycle, as a result of which he and motor cyclist Gian Singh fell down and driver of car fled away from spot and there were two occupants in the car. Driver was a young person and he and motor cyclist Gian Singh suffered injuries on various parts of body in this accident.

6. Investigating Officer prepared spot map Ext.PW8/B, took motor cycle along with documents in possession vide memo Ext.PW8/C and also car No. DL-3CB-7513 vide memo Ext.PW5/A. He also prepared spot map Ext.PW5/D from where car was taken in possession. Documents of vehicle were also produced by PW5 J.S. Dass, owner of car, which were also taken in possession vide memo Ext.PW5/B. Driving licence of driver of car/accused Janki Ram Ext.PX was also taken in possession vide memo Ext.PW2/A. Injured Gian Singh and Virender as well as driver Janki Dass were medically examined by PW7 Dr.Arun Kumar at 7.45 PM and 9 PM respectively and their MLCs Ext.PW7/A to Ext.PW7/C were received by Investigating Officer. Vehicles were also mechanically examined and mechanical report of motor cycle Ext.PY and car Ext.PZ were taken on record. PW4 Nanak Chand was found to be another person sitting in car at the time of accident. Car was taken in possession in his presence and his statement Ext.PA was also recorded. Photographs Ext.P1 to Ext.P5 of car involved in accident were developed from

negatives Ext.P6 to Ext.P10 and photographs and negatives were placed on record. After completion of investigation, challan was presented in Court and notice of accusation under Sections 279, 337 and 338 and also under Section 201 of Indian Penal Code read with Sections 185 and 187 of Motor Vehicles Act was put to accused. On pleading not guilty, trial was commenced.

7. Prosecution examined as many as eight witnesses to prove its case. After recording statement under Section 313 Cr.P.C., accused preferred not to lead any defence evidence. On conclusion of trial, accused was convicted under Sections 279, 337 and 338 of Indian Penal Code and under Section 187 of Motor Vehicles Act by learned Judicial Magistrate 1st Class, Kasauli, details of which are as under:-

Section 279 IPC	The convict is awarded simple imprisonment for a period of six months and is fined in the sum of Rs.1000/-. In case of non-payment of fine, the convict will undergo default imprisonment for a period of one month.
Section 337 IPC	The accused is awarded simple imprisonment for a period of six months and is fined in the sum of Rs.500/-. In case of non-payment of fine, the convict will further undergo default imprisonment for a period of one month.
Section 338 IPC	The convict is awarded simple imprisonment for a period of one year and is also fined in the sum of Rs.1000/-. In case of non-payment of fine, the convict will further undergo default imprisonment for a period of two months.
Section 187 of M.V.Act	The convict is awarded simple imprisonment for a period of six months and is also fined in the sum of Rs.1000/-. In case of non-payment of fine, the convict will undergo default imprisonment for a period of one month.

8. Appeal preferred by accused, against his conviction and sentence passed by learned Judicial Magistrate 1st Class, was dismissed by learned Additional Sessions Judge, Solan. Hence present petition under Section 397 read with Section 401 of Code of Criminal Procedure.

9. It is argued on behalf of petitioner that there is no conclusive evidence on record so as to prove involvement of petitioner as well as vehicle No. DL-3CB-7513, as PW1 no where alleged that he had seen and identified the driver, whereas PW3 though stated that he had identified accused in front of police as driver of car in question, but in cross examination, he has stated that police had informed about vehicle and driver and also that PW3 had not stated complete number of vehicle, but only DL-7513 as a number of vehicle involved and there might be so many vehicles bearing No. DL-7513 and it has not come in evidence that it was only vehicle bearing No. 7513 in the area in question. It is also contended that PW4 Nanak Chand desisted from supporting prosecution case and despite cross examining him by learned Assistant Public Prosecutor, nothing could be extracted proving the guilt of accused. It is further argued that PW5 J.S. Dass, owner of vehicle, had categorically stated that vehicle No.DL-7513 was being driven by himself only and none else. It is also pointed out that in his cross examination, PW3 Virender Kumar stated that he did not know that police had come on spot or not, which demolished the case of prosecution, according to which police had reached at the spot and after recording statement of PW3 under Section 154 Cr.P.C., had taken injured to the hospital. Learned defence counsel has relied upon judgment of Coordinate Bench of this Court in ***Rakesh Kumar vs. State of Himachal Pradesh 2013(2) Shim.L.C. 985*** stating that in similar circumstances, accused was acquitted by this Court. Therefore, it is submitted that in this case findings of learned trial Court and affirmed by learned Appellate Court are perverse and deserve to be interferred with and accused is entitled to be acquitted.

10. On contrary, learned Deputy Advocate General has supported the impugned judgments and stated that PW1 and PW3 duly corroborated case of prosecution and accused

himself handed over his driving licence immediately after the accident to the police and further the driving of vehicle is not disputed in cross examination and accused was also medically examined on the same day and he was found under the influence of alcohol but not intoxicated. It is further submitted by learned Deputy Advocate General that in accident grievous injuries caused to PW1 and hitting the wrong side motor cycle by car, mentioned in spot map, is also not questioned in cross examination of Investigating Officer and therefore, there is no irregularity or illegality so as to call for interference by this Court in the impugned judgments as the prosecution has proved its case beyond reasonable doubt.

11. PW3 in his statement under Section 154 Cr.P.C. Ext.PW8/A, recorded immediately after the accident, has clearly mentioned description of car involved in accident as Fiat NE Car No. DL-3CB-7513. At the time of examining in Court PW1 has also mentioned description of car as cherry coloured car bearing No. DL-3CB-7513, which hit his motor cycle. From photographs Ext.P1 to Ext.P5 which were not disputed as to of some other car, it is evident that car bearing No. DL-3CB-7513 is of cherry colour and is of Fiat NE model. PW5 J.S. Dass owner of vehicle also stated that he came to know from police about accident of his vehicle in the evening of day of incident. He also admitted taking of his car in possession vide memo Ext.PW5/A on the same day.

12. Vehicles involved in accident were also subjected to mechanical examination and mechanical reports of motor cycle and car were also placed on record as Ext.PY and Ext.PZ respectively which were also not disputed by accused as there is not even a word in cross examination to the Investigating Officer with respect to these reports.

13. As per report Ext.PY, front mudguard, head light, long guard and foot rest of motor cycle No. HYE-601 were found damaged, whereas as per report Ext.PZ, front show, bumper, mudguard and head light of driver side of car were found damaged. These reports corroborate case of prosecution as according to prosecution case car driver hit motor cycle after coming to its extreme right side and driver seat of vehicle is on right side and same side of car was found to be damaged immediately after accident.

14. No doubt, at the time of examination in Court, PW3 mentioned the number of car as DL-7513, but he was examined in Court after seven years and such a minor discrepancy was bound to occur and it is a fact that he has mentioned the number of vehicle as 7513 which also corrobroates the statement of PW1 as well as his own statement Ext.PW8/A recorded under Sectiion 154 Cr.P.C. Therefore, contention of accused that identity of vehicle involved in accident has not been proved is not sustainable.

15. PW1, in his deposition in Court, stated that later on he came to know that police had arrested accused Janaki Dass. There is no suggestion in his cross examination that accused was not driving the car or accused was not seen by him driving the car. PW3, in Court, categorically stated that at the time of accident he had seen and identified the driver of car and later on, when he was asked to identify the driver in front of police then he had clearly identified the accused Janki Dass as a person who was driving the car. In cross examination he denied that accused was not driving the vehicle on that day. PW2 Naginder Thakur stated that accused Janki Dass had handed over his driving licence to police vide memo Ext.PW2/A. Ext.PW2/A is dated 7.12.2000 and it proves that immediately after the accident accused Janki Dass handed over his driving licence to police. Despite opportunity, no cross examination was preferred to PW2 on behalf of accused. Further no question to Investigating Officer PW8 was put disputing Ext.PW2/A.

16. So far as statement of hostile witness is concerned, Hon'ble Supreme Court in ***Raja and others vs. State of Karnataka (2016)10 SCC 506*** has held as under:-

> ***"32. That the evidence of a hostile witness in all eventualities ought not stand effaced altogether and that the same can be accepted to the extent found dependable on a careful scrutiny was reiterated by this Court in Himanshu vs. State (NCT of Delhi), (2011)2 SCC 36, by drawing sustenance***

of the proposition amongst others from Khujii vs. State of M.P.(1991)3 SCC 637, and Koli Lakhmanbhai Chanabhai vs. State of Gujarat (1999)8 SCC 624. It was enounced that the evidence of a hostile witness remains admissible and is open for a court to rely on the dependable part thereof as found acceptable and duly corroborated by other reliable evidence available on record." (at page 516)

17. PW4 was declared hostile for resiling from his earlier statement recorded under Section 161 Cr.P.C., but he in cross examination by learned Public Prosecutor admitted that he had made his statement to police that his house was adjacent to PW5 J.S. Dass, owner of cherry coloured vehicle bearing No. DL-3CB-7513 who drove it himself and sometimes it was driven by his truck driver Janki Dass i.e. accused. In cross examination to this witness this version of his statement was not disputed. It falsifies the stand of PW5 that he only used to drive his vehicle and none-else. Therefore, there is sufficient evidence on record to hold that it was accused who was driving car No. DL-3CB-7513 at the time of accident.

18. MLCs of injured Ext.PW7/A and Ext.PW7/B and also that of accused Ext.PW7/C were proved by examining Dr.Arun Kumar as PW7. Despite opportunity, these MLCs have not been disputed as there is no cross examination on behalf of accused to this witness. As per MLC Ext.PW7/A, driver-cum-owner of motor cycle Gian Singh had suffered grievous injuries whereas Virender Kumar PW3 had sustained simple injuries. There was no injury to accused Janki Dass but he was found under influence of alcohol and smell of alcohol was present on breathing and he was conscious and well oriented to time and place but his pupil was found dilated with slow response to light. Accused was examined at 9 PM on the day of incident i.e. within 2/3 hours of accident.

19. In ***Rakesh Kumar's case supra,*** facts are different and distinct to the present case. In that case, only eye witness had not supported the prosecution case at all and he had categorically deposed that he did not see the accused driving the vehicle at the time of occurrence of accident and even in his statement recorded by police it was mentioned that one Rakesh Kumar was driving the vehicle, but for want of identification of accused by said witness, the accused could not be connected with offence as it was also not on record that wherefrom name of accused came to know to that witness. Whereas, in present case complainant, injured and accused are from same locality knowing each other and not only the witnesses had identified the accused but as discussed supra, there is sufficient material on record to connect the accused with commission of offence in question. In these given facts and circumstances, decision referred on behalf of accused is not applicable in present case.

20. Learned counsel for the accused has relied upon judgment passed by Delhi High Court in case ***Jitender Singh vs. State 2012(2) Criminal Court Cases 169 (Delhi)*** wherein driver of offending vehicle was acquitted for want of proper identification by eye witness. The facts and circumstances of that case are not identical to the present case. In that case, eye witness had seen the driver of offending vehicle from back side when he fled after jumping from the truck and he was not even able to tell in which direction driver ran away and therefore it was held that eye witness admittedly had no occasion to see the accused driving the vehicle. Whereas in instant case, PW3 categorically stated that he had seen the accused driving the offending car at the time of accident and statement of PW3 is duly corroborated by other evidence on record, as discussed supra.

21. Failure to conduct test identification parade is also always not fatal because Hon'ble Apex Court in case ***Ashwani Kumar vs. State of Punjab*** reported in ***(2015)6 SCC 308*** has held that failure to conduct test identification parade of accused is irrelevant in case witness is trustworthy and reliable and identified the accused in Court. In present case, nothing has been brought on record to discredit the statements of PW1 and PW3, wherein they categorically identified the accused, as driver of offending vehicle.

22. Therefore, in view of above discussion involvement of vehicle No. DL-3CB-7513 in accident, complicity of accused in said accident and also driving of vehicle No.DL-3CB-7513 under influence of alcohol in rash and negligent manner stand proved on record beyond all reasonable doubts. Therefore, there is no material irregularity, illegality in judgments passed by learned Courts below warranting interference of this Court under revisional jurisdiction. Learned Courts below have completely and correctly appreciated the evidence on record and have rightly convicted accused under Sections 279, 337 and 338 IPC and under Section 187 of Motor Vehicles Act.

23. Mr.O.C. Sharma, learned counsel for the petitioner, also submits that accident took place in the year 2000 and accused has been undergoing the agony of long drawn litigation for the last more than 16 years as he is a convict since the year 2007, he is also facing trauma as a convict since last 10 years. It is also submitted on behalf of petitioner that at the time of accident he was 35 years old and during the intervening period his family responsibilities have also increased. Therefore, he alternatively submits that keeping in view the facts of present case and also the fact that accused is first offender and except present incident there is no other record of involvement of accused in committing the offence, benefit of Probation of Offenders Act be extended to him or at least taking a lenient view in the matter in the interest of justice sentence imposed upon the petitioner be reduced. Reliance has been put on judgment passed by this Court in case ***Karnail Singh vs. State of H.P. 2012(4) Criminal Court Cases 736 (H.P.)*** wherein sentence was reduced till rising of Court but fine was enhanced. In offence under Section 304-A IPC, involved in that case, there was no maximum limit for imposition of fine whereas in present case maximum five which can be imposed has already been imposed.

24. Accused has also put reliance on another judgment of this Court in case ***Suresh Kumar vs. State of H.P. 2014(2) Shim.L.C. 1093*** wherein benefit of Probation of Offenders Act 1958 was extended to the accused. In that case accused was convicted only under Section 279 IPC, whereas in present case petitioner has been convicted under Sections 279, 337 and 338 IPC and under Section 185 of Motor Vehicles Act and also at the time of driving of vehicle accused was found under the influence of alcohol and had fled from spot without stopping his vehicle even for a while. It is not a case where because of fear of mob, accused fled but it is case where accused did not care for person hit by his vehicle. Therefore, in my opinion it is not a fit case to release the accused on probation. However, keeping in view the inordinate long span between occurrence and disposal of present petition, a lenient view deserves to be taken in the matter by reducing sentence imposed upon him and in my opinion, it would be appropriate to reduce the sentence as under:-

Section 279 IPC	The convict is awarded simple imprisonment for a period of fifteen days with fine in the sum of Rs.1000/-. In case of non-payment of fine, the convict will undergo default imprisonment for a period of five days.
Section 337 IPC	The accused is awarded simple imprisonment for a period of fifteen days with fine in the sum of Rs.500/-. In case of non-payment of fine, the convict will further undergo default imprisonment for a period of five days.
Section 338 IPC	The convict is awarded simple imprisonment for a period of one month with fine in the sum of Rs.1000/-. In case of non-payment of fine, the convict will further undergo default imprisonment for a period of fifteen days.
Section 187 of M.V.Act	The convict is awarded simple imprisonment for a period of fifteen days with fine in the sum of Rs.1000/-. In case of non-payment of fine, the convict will undergo default imprisonment for a period of five days.

25. The petition is accordingly partly allowed. Conviction of accused is upheld with the above-mentioned sentence, as modified in this judgment. Learned trial Court is also directed to execute the sentence so passed by this Court forthwith. Personal and surety bonds furnished by accused stand cancelled. Record of learned Courts below be sent back along with a copy of this judgment forthwith. Petition stands disposed of accordingly including all pending miscellaneous application(s), if any.

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

Kamal Kant (since deceased) through his LRs and others .....Appellants/Plaintiffs.

Versus

Chint Ram & others ....Respondents/Defendants.

RSA No. 514 of 2005.
Reserved on : 01.06.2017.
Decided on : 21st June, 2017.

Specific Relief Act, 1963- Section 38- Plaintiffs pleaded that they are owners in possession of the suit land- the name of the T, predecessor-in-interest of defendants No. 1 (i) to 1(v) is wrongly recorded in cultivating possession of the suit land – defendants No.2 and 3 filed written statement pleading that suit land was owned and possessed by Deity- one J was its Kardar- Kardar wrongly recorded himself as tenant of the suit land- he was not competent to do so- defendant No.1 was inducted as a tenant joined the Army and relinquished the possession and T was inducted as a tenant- defendants inherited his estate- T had become the owner on the commencement of H.P. Tenancy and Land Reforms Act- the suit was dismissed by the Trial Court- an appeal was filed, which was also dismissed- held in second appeal that an additional plaint was filed and the Court had framed issues on the basis of same- hence, plea that amended plaint was ignored by the Trial Court is not acceptable- T is recorded to be the tenant at Will- no evidence was led to rebut the presumption of correctness- proprietary rights were also conferred upon his successors- Courts had properly appreciated the evidence- appeal dismissed. (Para-9 to 12)

For the Appellants: Mr. Rajnish K. Lal, Advocate
For the Respondents: Mr. Raman Sethi, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiffs instituted a suit against the defendants for declaration and for permanent prohibitory injunction. The suit of the plaintiffs stood dismissed by the learned trial Court. In an appeal carried therefrom by the aggrieved plaintiffs before the learned First Appellate Court, the latter Court dismissed the appeal, whereupon, it concurred with the verdict recorded by the learned trial Court. In sequel thereto, the plaintiffs/appellants herein are driven to institute the instant appeal herebefore.

2. Briefly stated the facts of the case are that plaintiffs are owners in possession of suit land, as mentioned in para No.1 of the plaint. In the relevant record, name of Tej Ram (predecessor-in-interest of defendants No.1(i) to 1(v)) is wrongly shown in cultivating possession of the suit land, as "Tabe Marzi", through Rewat Ram-co-sharer. He was never inducted into possession, either by the plaintiffs, or their predecessors-in-interest. In the jamabandi for the year 1991-92, certain entries have been made in the remarks column against the facts and behind the back of the plaintiffs, which are wrong and incorrect and are not binding upon the

plaintiffs. The said wrong revenue entries came to their knowledge in the month of June, 1995, when they wanted to have family partition of the suit land and obtained a copy of jamabandi. The defendants No.2 and 3 have started interfering in the suit land. They got their names and of Sh. Tule Ram-deceased, entered in the revenue record against law and rules during the pendency of this suit. The said entry is not binding upon them., Hence, the suit for declaration with consequential relief of permanent injunction.

3. The defendants contested the suit and filed written statement. Defendant No.1 has filed separate written statement, wherein, he has taken preliminary objections qua limitation, cause of action, estoppel, and valuation of the suit. However, on merits, he has admitted the claim of the plaintiffs.

4. Defendants No.2 and 3 have filed separate written statement, wherein, they have taken, preliminary objections qua the suit being bad for non joining of necessary parties, maintainability etc. On merits, it is denied that the plaintiffs are owners in possession of the suit land and they are only intermeddler and have started interference during the pendency of the suit. It is contended that suit land was owned and possessed by Deity Thakur Ram Chander ji, and one Girdhari Lal was its Kardar. However, said Kardar had wrongly recorded himself as tenant of the suit land under the Deity. He was not competent to get himself recorded as tenant in possession of the suit land under Deity. After the death of Girdhari Lal, his son Rewat Ram and Smt. Janki widow of Saran Dass became Kardar of Deity. It is further contended that in the year 1940, defendant No.1 was inducted as tenant on the suit land by Deity through its Kardar. In the year 1943, defendant No.1 joined Army and relinquished his tenancy rights, and deity through its Kardar, inducted Sh. Tule Ram as tenant of the suit land. After the death of said Tule Ram, defendants have inherited his estate, including the suit land. Sh Tule Ram became its owner in possession under Section 4 of the H.P. Tenancy and Land Reforms Act, on appointed day and now, they are its owner in possession. It is further pleaded that name of Tule Ram was deleted from the column of possession by the Revenue Authorities by mistake and said mistake was corrected accordingly. It is further averred that in case it is held that Tule Ram was not tenant and after his death, defendants were not tenant, then Tule Ram had encroached suit land in October, 1943 and became its owner by way of adverse possession. The other averments made in the plaint denied and prayed to dismissed the suit, with costs.

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

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

1. Whether the plaintiffs are owners in possession of the land in suit, as prayed for? OPP
2. Whether the plaintiffs are entitled to the relief of permanent injunction, as prayed for? OPP
3. Whether the suit is within limitation? OPP.
4. Whether the suit is not maintainable, as alleged? OPD
5. Whether the plaintiffs have no locus standi to file the suit? OPD
6. Whether the suit is not properly valued for the purpose of court fees and jurisdiction? OPD
7. Whether the suit is bad for non joinder of necessary parties? OPD
8. Whether the suit is collusive with the defendant No.1 as alleged? OPD.

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

10. Whether the defendants have become owners of the land in suit by way of adverse possession, as alleged? OPD

11. Relief.

7. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court dismissed the suit of the plaintiffs/appellants herein. In an appeal, preferred therefrom by the plaintiffs/appellants 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 plaintiffs/appellants herein, have instituted the instant Regular Second Appeal before this Court wherein they assail the findings recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission on 03.04.2006, this Court, admitted the appeal instituted by the plaintiffs/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 Courts below are dehors the evidence on record and against the documentary evidence?

b) Whether the findings of the Courts below are result of ignoring the additional written statement inspite of the judgment of this Court in FAO No.190 of 2003, decided on 14th November, 2003?

Substantial questions of Law 2.

9. In the original plaint, the plaintiffs had arrayed therein one Tej Ram as a sole defendant. However, during the pendency of Civil Suit No. 130 of 1995, an application was instituted before the learned trial Court under the provisions of Order 1, Rule 10 CPC "by" Madho Ram and Ashok Kumar, wherein they sought their impleadment as co-defendants in the array of defendants, on anvil of theirs deriving an interest in the suit land "through" co-defendant No.1. The manner of derivation by them of an interest in the suit property, stood espoused to be embodied in the factum of one Tej Ram, initially impleaded in the original suit as a sole defendant, whereinwhom a preceding interest as a tenant upon the suit land stood bestowed by the Kardar of the Devta concerned (owner of the suit property), taking to join the army in the year 1943, thereupon, his being incapacitated to comply with the condition(s) of the apposite grant, condition whereof stood comprised in his personally cultivating the suit land also his personally performing the ritual(s) of making offerings of flowers to the Devta concerned, hence his meteing consent to the Kardar of Thakur Shri Ram Chander ji, for delivering possession of the suit land vis-a-vis the aforesaid also thereon tenancy rights hitherto bestowed upon the sole defendant standing subsequently consensually bestowed upon them. The application was allowed by the learned trial Court. In sequel, under its affirmative orders pronounced thereon, on 28.07.1999, the impleadment of the aforesaid in the suit, hence occurred. Thereupon, the plaintiffs proceeded to institute an additional plaint, wherein, he cast a challenge with respect to the validity of attestation of mutation under Ex. DA, mutation whereof stood recorded with respect to the suit land in the year 1995. The trial Court under its decision recorded on 31.10.2001, had dismissed the suit of the plaintiff. The aforesaid judgment and decree of dismissal of the suit of the plaintiffs, stood assailed by the plaintiffs by theirs carrying an appeal therefrom before the learned District Judge, Kullu. The learned District Judge, Kullu on 19.02.2003 allowed the appeal with a direction of its remand to the learned trial Court, for enabling the latter Court to make a decision afresh upon Civil Suit No. 130 of 1995 also in the decision recorded on 19.2.2003 by the learned first Appellate Court, the appellants/plaintiffs were directed to, in consonance with the orders rendered by the learned trial Court on 28.07.1999, on an application preferred before it by the litigants concerned under the provisions of Order 1, Rule, 10 of the CPC, application whereof stood allowed by the learned trial Court,

hence file a fresh amended plaint before the learned trial Court. The aforesaid decision recorded by the learned District Judge, Kullu stood assailed before this Court by the aggrieved litigant(s). This Court allowed the apposite appeal. The significant portion of the order pronounced by this Court in FAO No. 190 of 2003, whereby it set aside the order recorded by the learned District Judge, Kullu whereby, it remanded the apposite Civil Suit to the learned trial Court, for its recording a decision afresh thereon, is embedded in the factum of the learned District Judge "not" correctly construing the additional plaint instituted by the plaintiffs before the learned trial Court in pursuance to the affirmative orders pronounced by the learned trial Court upon an application preferred before it, by the litigants concerned "seeking" their impleadment in the civil suit, given theres' being a necessary party thereto, "to not fall" within the statutory parlance of "an amended plaint", whereas, the mere factum of its standing described as "an additional plaint" did not hence render it to not fall within the statutory signification of an amended plaint nor it stood stripped of its statutory label of it being an amended plaint. Also this Court had made a direction upon the learned District Judge for his deciding the civil appeal afresh in accordance with law.

10. The judgments and decrees pronounced by the learned Courts below, would stand infected with a vice on theirs ignoring the additional plaint "despite" the judgment of this Court rendered in FAO No. 190 of 2003 "only" when an incisive traversing of the relevant record makes a display that both the learned Courts below had not meted the appropriate reverence "to" the additional plaint instituted by the plaintiff "after" the order(s) pronounced by the learned trial Court on 28.07.1999, whereby, it ordered for the impleadment in the "apposite suit" of Madho Ram and Ashok Kumar, as co-defendants No.2 and 3 therein. The test for determining, whether irreverence is meted to the aforesaid order, is comprised in the factum of the learned trial Court not proceeding to strike issues upon the completed pleadings with which it stood beset. The moot pivotal evidentiary anvil for gauging whether the learned trial Court had proceeded to hence mete deference to the completed pleadings with which it was beset, is embodied in the fact of its striking issues on 14.12.2000, subsequent to the institution of an additional plaint before it, by the plaintiffs on 23.08.1999. A perusal of the orders recorded on 14.12.2000 by the learned trial Court, whereby, it proceeded to strike the hereinafter extracted issues, "does" hence satiate the test that the learned trial Court had meted the apposite deference to the "completed" pleading with which it was thereat beset, completed pleadings whereof stood comprised in the additional plaint instituted therebefore by the plaintiffs, wherein, defendants No.2 and 3 stood arrayed as co-defendants in the suit, wherein also compatible pleadings in respect thereto stood also cast. Moreover, with the aforesaid added co-defendants also instituting a joint written statement to the additional plaint rendered hence the relevant pleadings to be completed in all respects, thereupon, facilitating the learned trial Court to validly strike issues. Issues struck by the learned trial Court read as under:-

> "1. Whether the plaintiffs are owners in possession of the land in suit, as prayed for? OPP
>
> 2. Whether the plaintiffs are entitled to the relief of permanent injunction, as prayed for? OPP
>
> 3. Whether the suit is within limitation? OPP.
>
> 4. Whether the suit is not maintainable, as alleged? OPD
>
> 5. Whether the plaintiffs have no locus standi to file the suit? OPD
>
> 6. Whether the suit is not properly valued for the purpose of court fees and jurisdiction? OPD
>
> 7. Whether the suit is bad for non joinder of necessary parties? OPD
>
> 8. Whether the suit is collusive with the defendant No.1 as alleged? OPD.
>
> 9. Whether the plaintiffs are estopped from filing the suit by their act and conduct? OPD

10. Whether the defendants have become owners of the land in suit by way of adverse possession, as alleged? OPD

11. Relief."

Moreover, when evidence on the aforesaid issue(s) stood adduced, it is difficult to accept the contention raised by the counsel plaintiffs/appellants, that a critical disregard was made by both the learned Courts below to the additional plaint also the learned counsel for the plaintiff/appellant is disabled to contend that for want of reverence by them, to the additional plaint and also to the written statement instituted thereto, therebefore by the newly impleaded co-defendants, comprised in issues in consonance therewith being not struck, nor evidence thereupon standing not adduced, hence, the judgments and decrees assailed before this Court standing vitiated. Preeminently, also when the learned first Appellate Court "had", while being seized of Civil Appeal No. 3 of 2002 on its being remanded to it, for its recording a decision afresh thereupon, had on anvil of evidence adduced on issues struck on the completed pleadings with which the learned trial Court was beset, proceeded to hence record findings thereupon, hence, its verdict cannot be faulted on any ground that hence it infringed the mandate of this Court recorded in FAO No.190 of 2003. Accordingly, substantial question of law No.2 is answered in favour of the respondents and against the appellants.

Substantial question of law No.1.

11. Both the learned Courts below had imputed sanctity to the jamabandi borne on Ex.P-10, jamabandi whereof pertains to the year 1952-53, wherein, in the ownership column, reflections occur with respect to Thakur Ram Chander Ji, being owner of the suit land and also with respect to one Smt. Janki wd/o Saran Dass and one Rewat Ram son of Girdhari being the Kardar of the Devta concerned. In column of possession thereof, Smt. Janki widow Saran Dass and Rewat Ram stood recorded as "maurusi" "through" Tej Ram son of Tule Ram as also through Tule Ram son of Dila Ram, latter whereof however stand reflected therein to be holding actual possession thereof as "tenants at Will". The aforesaid reflection(s) occurring in Ex.P-10 enjoy a presumption of truth,yet no evidence stands adduced for dislodging the aforesaid presumption of truth enjoyed by them, hence, sequelling, an inference that they acquire conclusivity. In the jamabandi for the year 1971-72, jamabandi whereof is comprised in Ex.DC, Smt. Janki Devi wd/o Saran Dass and Rewat Ram son of Girdari stand recorded therein as owners of the suit land and in the possessory column thereof Tej Ram son of Tule Ram and Tule Ram son of Dila Ram "through" Rewat Ram stand recorded therein to be in actual physical possession of the suit land, in the capacity of tenants at Will. Further more in the jamabandi for the year 1986-87, jamabandi whereof is comprised in Ex. DE, the name of Kamal Kant, Tushar, Susheel Kant, Sudhir Kant sons of Rewat Ram as also of Rewat Ram stand recorded as owners of the suit land and in possessory column whereof, Tej Ram son of Tule Ram and Tule Ram son of Dila Ram stand recorded "through" Rewat Ram to be in actual physical possession of the suit land, as tenants at will. In the jamabandi for the year 1991-92 (Ex.P-7), reflections occur with respect to the name of Rewat Ram "through" Tej Ram son of Tule Ram, holding possession of the suit land "as a tenant at will", whereupon, the name of Tule Ram son of Dila Ram, who was the predecessor-in-interest of Madho Ram, hence, remained omitted to be reflected therein qua his holding possession of the suit land as a "tenant at will", yet no capital can be derived therefrom by the plaintiffs, significantly when Ex. DF, exhibit whereof comprises a report of the Patwari Halqua concerned makes a pronouncement qua omission of reflection therein of Tej Ram son of Dila Ram, hence, holding possession of the suit land in the appropriate capacity, being occasioned by inadvertence, hence order in respect thereof being recorded therein, order whereof remained unassailed, whereupon it acquires conclusivity. In sequel to Ex. DF, proprietary rights qua the suit land stood conferred upon Madho Ram and Ashok Kumar vide mutation comprised in Ex.DA, whereupon, it being inconsonance with the aforesaid reflections borne in the relevant jamabandi, renders it to, if permissble under law, hence, enjoy a binding valid force.

12. An incisive perusal of the aforesaid revenue records makes a vivid display that earlier Thakur Ram Chander ji stood recorded as owner of the suit land and Smt. Janki Devi and Rewat Ram stood recorded as Kardars of the Devta, as also, they stood recorded as Maurusi in the column of possession "through" Tej Ram son of Tule Ram and Tule Ram son of Dila Ram, latter whereof however stood recorded to be holding its physical possession as "tenants at will". Since, the actual physical possession of the suit land in the capacity of "tenant at will" was held by the predecessors-in-interest of defendants No.2 and 3, hence, they alone stood entitled for title as owners, if permissible under law, qua the suit land being conferred upon them. Contrarily, with the predecessors-in-interest of the plaintiffs nor co-defendant No.1 standing depicted in the apposite possessory column of the jamabandi(s) to hold actual physical possession of the suit land, rendered them defacilitated to stake a claim qua conferment of proprietary rights thereto. Also when co-defendant No.1 is averred by the newly impleaded co-defendants Madho Ram and Ashok to be incapacitated to comply with the conditions of the grant, whereunder he was bestowed with the capacity of a tenant at will upon the suit land, incapacity whereof is comprised in his being personally incapacitated to personally serve the deity concerned, personal incapacity whereof arose on his taking to join the Army in the year 1943, factum whereof remains uneroded of its vigour for want of evidence in rebuttal thereto being adduced. Thereupon, with evidently co defendant No.1 infracting the condition(s) of the relevant grant made upon him with respect to the suit land, also begets an inference that the entries in the column of possession "of" jamabandi(s) with respect to the suit land, wherein the predecessors-in-interest of co-defendants Ashok Kumar and Madho Ram is shown to be holding actual physical possession of the suit land, hence, acquire absolute sanctity. However, no documentary evidence stands adduced on behalf of the plaintiffs to prove that the subsequent revenue records/jamabandi(s), wherein entries occur with respect to their apposite ownership or with respect to the apposite ownership of their predecessor-in-interest hence acquiring any validation , more so, when no valid order in suppression of previous entries, for hence imputing validation thereto stands adduced,. Consequently, for the reason aforesaid, the entries with respect to the ownership of the plaintiffs "hold no vigour", in sequel, the plaintiffs cannot be held owners of the suit land. Contrarily, with reflections occurring in the revenue records of Tej Ram and Tule Ram son of Dila Ram (predecessors-in-interest of the Madho Ram and Ashok Kumar) holding physical possession of the suit land as "tenants at will" remaining unimpeached by adduction of evidence, for hence dispelling their probative worth, corollary whereof is that they acquire conclusivity. Consequently, the claim of the plaintiffs qua theirs holding possession of the suit land, as owners, is bereft of any sanctified vigour, especially when no documentary evidence in support thereof stands adduced. In aftermath, when documentary evidence aforesaid, for eroding the worth of their espousal, holds conclusivity, resultantly, the plaintiffs/appellants do not on the purported ground of theirs holding possession of the suit land in the espoused capacity "of" theirs standing inducted thereon as "tenants at will" by the lawful owner, hence hold any right to stake any claim with respect to the suit property. Accordingly, substantial question of law No.2 is answered in favour of the respondents and against the appellants.

13. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court as well as by the learned trial Court are based upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court as well as the learned trial Court have not excluded germane and apposite material from consideration.

14. In view of the above discussion, there is no merit in the instant appeal, which is accordingly dismissed. The impugned judgments and decrees are maintained and affirmed. All pending applications also stand disposed of. No order as to costs. Records be sent back.

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

Kapil Dev .....Appellant.
Versus
State of H.P. .....Respondent.

Cr. Appeal No. 4053 of 2013.
Reserved on : 31st May, 2017.
Date of Decision: 21st June, 2017.

Indian Penal Code, 1860- Section 376 and 366- **Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989**- Section 3(xii)- Accused raped the prosecutrix on the pretext of marrying her – he disclosed subsequently that he was married and had children – he expressed his inability to marry the prosecutrix – FIR was registered at the instance of the prosecutrix – the accused was tried and convicted by the Trial Court- held in appeal that the prosecutrix is major and capable of giving consent –there was a delay in reporting the matter to the police, which was not explained - the prosecutrix had permitted repeated sexual intercourse, which shows her consent – the Trial Court had not properly appreciated the evidence – appeal allowed and judgment of Trial Court set aside. (Para-9 to 13)

For the Appellant: Ms. Anjali Soni Verma, Advocate.
For the Respondent: Mr. Vivek Singh Attri, Deputy Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal stands directed against the judgment rendered on 12.07.2013 by the learned Special Judge, Mandi, H.P. in Sessions trial No.45/2009, whereby, the learned trial Court acquitted the accused/appellant herein for his committing an offence punishable under Section 3(xii) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, however, he convicted the accused /appellant herein for his committing offences punishable under Sections 376 and 366 of the IPC and sentenced him as under:-

Sections	Imprisonment imposed
376, IPC	To undergo rigorous imprisonment for seven years and to pay a fine of Rs.30,000/- and in default of payment of fine to undergo further imprisonment for a period of one year.
366, IPC	To undergo rigorous imprisonment for two years and to pay fine of Rs.20,000/- and in default of payment of fine amount to undergo further imprisonment for a period of one year.

All the sentences were ordered to run concurrently.

2. The facts relevant to decide the instant case are that the prosecutrix belongs to schedule caste and the accused met the prosecutrix while travelling in a bus and requested the prosecutrix to give her telephone number, to which the prosecutrix refused. The accused had given his mobile number on a piece of paper to the prosecutrix. On 27.08.2008, at about 7.30 a.m., the accused tried to contact the prosecutrix on telephone number of her uncle, which phone

was attended by Rukamni Devi, the cousin sister of the prosecutrix and the accused had told said Rukmani Devi that he was having some urgent work with the prosecutrix and he wanted to talk her, at which the prosecutrix attended the call of the accused at about 7.30 a.m. The accused requested the prosecutrix to come to Bali Chowki, at which the prosecutrix went to Bali Chowki where the accused met her at about 12 O'clock in the noon. The accused expressed his intention to marry the prosecutrix to which the prosecutrix refused on the ground that she was belonging to scheduled caste, but the accused pretended to of her caste and insisted upon to marry her on the same date and took the prosecutrix to Aut, where during the night he committed rape upon the prosecutrix twice and thrice on the pretext of marrying her. However, on the next date the accused disclosed that he was already married and he was having wife and children and he told the prosecutrix to go to her parental aunt's house as he has to arrange money and the accused assured the prosecutrix to take her with him after bringing the money. Consequently, she went to her aunt's house at Shamsi. Mani Ram, the father of the prosecutrix, on finding that the prosecutrix has not returned to her house on 27.08.2008, carried out search for her, but could not succeed and on 29.8.2008 he came to know that the prosecutrix was in the house of his sister at Shamsi, at which he along with his wife and daughter Indira went to the house of his sister at Shamsi, where the prosecutrix met them. The prosecutrix kept on waiting for the accused till 29.08.2008, but the accused did not turn and on 29.08.2008, the prosecutrix made a telephone call to the accused and asked him to marry her, at which the accused disclosed that he would get her married with some suitable boy. The prosecutrix thereafter disclosed about occurrence to her father Mani Ram and they kept on waiting for the accused, but the accused did not turn up. Thereafter, the prosecutrix alongwith her father approached Tek Singh, the then Pradhan Gram Panchayat, Devdhar and told him that the prosecutrix was enticed away by the accused on the pretext of marrying her and the accused committed sexual intercourse with the prosecutrix on such pretext. Tek Singh, thereafter also talked with the accused and tried to settle the matter, but the accused expressed his inability to solemnise the marriage with the prosecutrix, at which the prosecutrix was advised by said Tek Singh to report the matter with the police. On 30.08.2008, the prosecutrix along with her parents went to Police Post Bali Chowki from where they were taken to Police Station, Aut, where FIR Ex.PW1/A was lodged by the prosecutrix. Thereafter police completed all the codel formalities.

3. On conclusion of investigation(s), into the offence, allegedly committed by the accused, a report under Section 173 of the Code of Criminal Procedure was prepared and filed before the competent Court.

4. The accused stood charged by the learned trial Court for his committing offences punishable under Section 3(xii) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act and under Sections 376 and 366 of the IPC. In proof of the prosecution case, the prosecution examined 14 witnesses. On conclusion of recording of the prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure was recorded by the learned trial Court in which the accused claimed innocence and pleaded false implication in the case.

5. On an appraisal of the evidence on record, the learned trial Court, recorded findings of conviction against the accused/appellant herein.

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

7. On the other hand, the learned Deputy Advocate General has with considerable force and vigour, contended qua the findings of conviction recorded by the learned trial Court

standing based on a mature and balanced appreciation by it of the evidence on record and theirs not necessitating any interference, rather theirs meriting vindication.

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

9. The prosecutrix is a major, hence, was empowered to purvey a valid consent to the accused for his holding her to coitus. However, the sexual encounter which occurred inter se the accused and the prosecutrix, is alleged to stand aroused by the accused making an allurement of marrying her. The testification, of the prosecutrix in respect of the accused obtaining her consent for subjecting her to sexual intercourse under a pretext or an allurement of marrying her, as comprised, in her examination-in-chief when remains unshred of its efficacy "during" the ordeal of an exacting cross-examination to which she stood subjected to by the learned defence counsel, thereupon it is rendered both creditworthy besides inspiring. Even though, in the testification of the prosecutrix, occurring in her cross-examination, she has made visible disclosures with respect to hers having a love affair with the accused, nonetheless, it will be unbefitting to therefrom conclude that the relevant sexual encounter which occurred inter se both, hence not emanating under a pretext of or an allurement of marriage meted to her by the accused. Also the testification of the prosecution, is supported by her father Mani Ram, who deposed as PW-2 besides, is supported by Tek Chand, PW-13, to whom the incident was initially reported both by the prosecutrix and her father. Moreover, with echoings occurring in Ex.PW4/C, proven by Dr. Yamini (PW-4), with respect to the factum of the prosecutrix being exposed to sexual intercourse "does" constrain this Court to return findings of conviction upon the accused.

10. Be that as it may, dehors the aforesaid inspiring testimonies existing on record in depiction of the charge being hence proven, this Court is yet enjoined to not remain oblivious qua the factum of their occurring a delay in lodging of the FIR, whereupon, the testifications of the aforesaid prosecution witnesses also the testification of PW-4 may stand eroded. The relevant incident occurred on 27.08.2008, whereas, the FIR borne on Ex.PW1/A, stood lodged on 30.08.2008. However, the delay in the lodging of the FIR has remained unexplained. The omission of the prosecutrix to explain the delay in the lodging of the FIR, "does" constrain an inference that the version(s) testified by the prosecution witnesses concerned qua the relevant penal misdemeanor, losing their respective vigour. Aggravated momentum to the aforesaid blemish imbuing the prosecution case' is acquired by the testification of PW-2, who in his testification articulated that the whereabouts of his daughter were unknown upto 29.08.2008, whereat, the prosecutrix was located at the house of her aunt at Samshi. PW-2 testifies that on 29.08.2008, he had located the prosecutrix at the house of his sister, at Samshi, upon his visiting the homestead of his sister while his being accompanied by his wife and his daughter. However, both the wife of PW-2 and his daughter, who accompanied him to the house of his sister at Samshi "stood" never examined by the prosecution, whereas, they constituted the best evidence in respect of the prosecutrix being located, on 28.08.2008, by PW-2 at latter's sister's house at Samshi. The effect of suppression of the aforesaid best evidence, in support of the aforesaid fact, is that it casts a grave spell of doubt upon the factum of the prosecutrix "since" 27.08.2008 upto 29.08.2008 residing at her aunt's house at Samshi, "more so", when the sister of PW-2, at whose house the prosecutrix stayed from 27.08.2008 upto 29.08.2008 also remained unexamined. The further effect of suppression of the aforesaid evidence, dehors the factum of PW-3 deposing that both, the accused and the prosecutrix stayed in his guest house on 27.08.2008, is that thereafter also the accused and the prosecutrix stayed together elsewhere. The erection of the aforesaid inference has the further concomitant effect, of the prosecutrix prevaricating the factum of hers under the pretext of marriage being subjected to a singular sexual encounter "at Aut" by the accused. Corollary whereof, is that it is to be construed that she meted a valid consent to the accused, for the latter repeatedly holding to sexual intercourses.

11. In aftermath, when the accused subjected the prosecutrix to repeated sexual intercourses, thereupon, the prosecutrix, who is a major also when she is not demonstrated to be not fit to purvey a valid consent to the accused for the latter sexually accessing her, renders hers holding repeated sexual engagements with the accused, to be bereft of any stain or element of theirs standing engendered by any pretext or allurement of marriage purportedly meted to her by the accused. Conspicuously, with the accused while holding her to an initial sexual encounter under a purported pretext of marrying her, his refusing to marry her, hence, his resiling from his promise, "constituted" a sufficient reason for the prosecutrix to refuse to thereafter mete consent to the accused to subject her to further sexual intercourses. Contrarily, with the prosecutrix repeatedly permitting the accused to sexually access her "when" construed in conjunction with the delay in the lodging of the FIR, hence, unfolds the graphic evident fact of the accused in holding the prosecutrix to repeated sexual intercourses being bereft of any stain of any pretext or allurement of marriage purveyed by one to the other rather it appears that the prosecutrix consensually bereft of any allurement "engaging" in repeated sexual intercourses with the accused, whereupon the charge stands belied.

12. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court has not 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 suffers from a gross perversity or absurdity of mis-appreciation and non appreciation of evidence on record.

13. Consequently, the instant appeal is allowed and the impugned judgment rendered by the learned trial Court in Sessions Trial No. 45/2009 on 12.07.2013 is set aside. The accused/appellant is ordered to be released from judicial custody forthwith, if, he is not required in any other process of law. Fine amount, if any, deposited by the accused/appellant be refunded to him. Records be sent back forthwith.

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

Kishori Lal .....Appellant/Plaintiff.
Versus
Roshan Lal & others .....Respondents/Defendants.

RSA No. 363 of 2007
Reserved on : 24.05.2017
Decided on : 21st June, 2017

Specific Relief Act, 1963- Section 38- Plaintiff is owner in possession of the suit land - the defendants threatened to divert the natural flow of water from original course to the land of the plaintiff- the defendants also threatened to cut the tree of Sheesham, Simbal and Banana without any right to do so – the defendants pleaded that land has been demarcated and the plaintiff wants to cut the trees from the adjacent land – the suit was decreed by the Trial Court – an appeal was filed, which was allowed and the judgment passed by the Trial Court was set aside- held in second appeal that the land of the defendant is located above the land of the plaintiffs- the report of demarcation was rejected by the Appellate Court on the ground that Local Commissioner had not demarcated the suit land, which was proper- the Trial Court had wrongly placed reliance on the report of the Local Commissioner- appeal dismissed. (Para-7 to 9)

For the Appellant: Mr. N.K. Thakur, Senior Advocate with Mr. Divya Raj Singh, Advocate.
For the Respondents: Mr. Chander Sekhar Shama, Advocate, for respondents No.1 to 3.
Nemo of respondents No.4 to 8.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiff instituted a suit against the defendants, claiming therein that a decree for permanent prohibitory injunction being pronounced against the defendants. The suit of the plaintiff stood decreed by the learned trial Court. In an appeal carried therefrom by the defendants before the learned First Appellate Court, the latter Court allowed the appeal, whereupon, it dis-concurred with the verdict recorded by the learned trial Court. In sequel thereto, the plaintiff/appellant herein is driven to institute the instant appeal herebefore.

2. Briefly stated the facts of the case are that the plaintiff is owner in possession of the land comprising khewat No.20 min, Khatauni No.22, khasra No.347,measuring 1 kanal 14 marlas as entered in the jambandi for the year 1984-85 situated in Mahal Dohgi Chikli, Mauja Kotla, Tehsil Bangana, District Una, H.P. The defendants are alleged to have threatened the plaintiff to divert the natural flow of water from its original course towards the land of the plaintiff comprising in khasra No.347. The defendants are also alleged to have threatened to cut the trees of sheesham, Simbal and Banana which are in possession of the plaintiff to which they have no right, title or interest. Hence, the suit.

3. The defendants contested the suit and filed written statement. In their written statement, the defendants have taken preliminary objections inter alia cause of action, estoppel, maintainability and locus standi. On merits, the defendants have alleged that they have procured the demarcation of the suit land by the revenue authorities for sanctification of the plaintiff but the plaintiff under the garb of this stay order wants to cut trees from khasra No.343 which is adjacent to khasra No.347 and wants to divert the natural flow of water towards khasra No.343 which is highly objectionable. The present suit has been filed by the plaintiff in order to harass the defendants.

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

1. Whether the plaintiff is entitled for the the relief of permanent and mandatory injunction, as alleged? OPP

2. Whether the plaintiff has no cause of action, locus standi and suit is not maintainable, as alleged? OPD.

3. Whether the plaintiff is estopped from filing the present suit by his act and conduct? OPD.

4. Relief.

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

6. Now the plaintiff/appellant herein, has instituted the instant Regular Second Appeal before this Court, wherein he assails the findings recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission, on 29.05.2009, this Court, admitted the appeal instituted by the plaintiff/appellant against the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

1. Whether the impugned judgment and decree of the learned lower appellate Court is wrong, illegal, vitiated on account of misconstruction, mis reading of Ex. P-2 and Ex. PW2/A.

2. Whether the report of the Local Commissioner, more particularly, when the Local Commissioner withstood that test of cross-examination, can be set aside simply on the ground that the Local Commissioner has no personal knowledge of the suit land?

Substantial questions of Law No.1 and 2:

7. Khasra No.347 is the suit khasra number. Uncontrovertedly, the land of the defendants is located above the land of the plaintiff. In proof of the defendants' encroaching upon the suit khasra number also in proof of theirs diverting the natural flow of water from its original course hence begetting its flowing onto the suit land, thereupon, truncating besides encroaching upon it, the plaintiff had depended upon a report of the Local Commissioner, report whereof is comprised in Ex.PW2/A. The learned trial Court imputed sanctity to the report of the Local Commissioner, on anvil of "it" being in consonance with Ex.P-2, exhibit whereof is a copy of the musabi appertaining to the suit property, thereupon, it decreed the suit of the plaintiff. Contrarily, the learned First Appellate court disimputed credence to Ex. PW2/A also it had concluded that it being not in consonance with Ex. P-2, conclusion whereof stood anchored upon an admission existing in the cross-examination of the Local Commissioner concerned with respect to his not possessing at the relevant time "a" copy of the relevant musabi also upon his making an admission therein that he did not in his relevant exercise "solicit" the assistance of any revenue officer. Moreover, the learned First Appellate Court had proceeded to not impute sanctity to Ex.PW2/A, on the score of his admitting in his cross-examination that he did not hold any personal knowledge about the suit property, whereupon, it concluded that hence his standing disabled to hold any knowledge with respect to the location of the suit khasra number rendered him also obviously disabled to possess the requisite knowledge in respect of its condition prior to his visiting the relevant khasra number or at the time of his visiting it, with a concomitant effect of his being defacilitated to make any echoings therein with respect to any alteration occurring in the status/position of the suit khasra number from its hitherto condition.

8. Be that as it may, the learned counsel appearing for the appellant, has continued to with much vigour contend before this Court that with the Local Commissioner concerned standing subjected to a rigorous cross-examination by the learned counsel for the defendants, "solitarily", thereupon, it was untenable for the learned First Appellate Court to rip apart the sanctity of his report comprised in Ex.PW2/A. The aforesaid contention addressed before this Court by the learned counsel appearing for the appellant "cannot" be construed to be holding any vigour, given the Local Commissioner, as aptly concluded by the learned First Appellate Court admitting in his cross-examination that he did not at the relevant time of his conducting the relevant exercise with respect to the suit khasra number(s), hold the "musabi" borne on Ex.P-2, besides his also admitting therein that he "did not" hold any personal knowledge with respect to the suit land. In addition with his admitting that he did not in the relevant exercise conducted by him solicit the services of the Revenue Officer, hence, constrained it to conclude that his report did not hold any efficacy, for rendering affirmative findings on the relevant issue. Consequently, the mere factum of the counsel for the defendants subjecting the Local Commissioner, to a rigorous cross-examination, would not per se render Ex.PW2/A to hold any validity, for rendering affirmative findings on the apposite issues, significantly, when for his report comprised in Ex.PW2/A, to acquire sanctity, it was enjoined to be prepared by the Local Commissioner concerned, with the latter at the relevant time possessing the relevant musabi, musabi whereof, he admits in his cross-examination to be not held by him at the relevant time of his conducting the apposite exercise. In aftermath, with Ex.PW2/A being surmisally prepared besides it obviously being prepared with a mere estimation with respect to the location of the suit khasra number, being made by the Local Commissioner concerned, it hence cannot be fastened with any legitimacy, for settling findings on the relevant issue. Corollary of the aforesaid inference, is that it was inappropriate for the learned trial Court to collate or draw compatibility inter se Ex.PW2/A with the relevant enunciation(s) occurring in the musabi borne on Ex.P-2, predominantly, when the Local Commissioner concerned did not at the relevant time hold its possession, thereupon, reiteratedly, any compatibility inter se both as stand drawn by the learned trial Court is grossly

erroneous, rendering hence its verdict, whereby it decreed the suit of the plaintiff, to be grossly flawed, whereupon, the reversal of its verdict by the learned First Appellate Court does not suffer from any perversity.

9. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court are based upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court has not excluded germane and apposite material from consideration. Accordingly, both the substantial questions of law are answered in favour of the respondents and against the appellant.

10. In view of above discussion, there is no merit in the instant appeal, which is accordingly dismissed. Consequently, the impugned judgment and decree rendered by the learned First Appellate Court in Civil Appeal No. 141 of 2001 on 3.12.2005 is maintained and affirmed. All pending applications also stand disposed of. No order as to costs. Records be sent back.

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

Prashant Kapoor .....Appellant.

Vs.

Tulesh Kumar and others .....Respondents.

FAO No.: 244 of 2017
Date of Decision: 21.06.2017

Motor Vehicles Act, 1988- Section 149- The Tribunal held the owner liable to pay compensation on the ground that the driver was not possessing a valid licence on the date of accident – held in appeal that the insurance policy is a private car/liability only policy and not a comprehensive policy – the insurance company cannot be asked to indemnify the insured for the components which are not covered under the policy – Act only policy will not cover the risk of an occupant of a car and the risk can only be covered, if the policy is comprehensive/package policy – appeal dismissed.(Para-8 to 12)

Case referred:
National Insurance Co. Ltd. Vs. Balakrishnan and another, 2013 ACJ 199

For the petitioner: Mr. G.R. Palsra, Advocate.
For the respondents: Mr. Neel Kamal Sharma, Advocate, for respondents No. 1 and 2.
Mr. Ashwani K. Sharma, Senior Advocate, with Mr. Jeevan Kumar, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

By way of this appeal, the appellant has challenged the award passed by the learned Motor Accident Claims Tribunal II, Mandi in MACT No. 70 of 2008 dated 16.01.2012, vide which, learned Tribunal while allowing the claim petition of the claimants before it, further held that the liability to pay the compensation to the petitioners before it shall be that of respondent No. 1 therein, i.e. the present appellant.

2. A perusal of the award under challenge demonstrates that learned Tribunal below awarded an amount of Rs. 17,07,760/- in favour of the claimants alongwith interest @ 7.5% per annum from the date of filing of the petition till the date of award. It further held that the policy which was taken out by the present appellant with regard to the vehicle in question with the respondent-Company was an 'Act Only Policy', which policy covers the risk of only third person, i.e. the person other than those trevelling in the vehicle and, therefore, Insurance Company could not be held liable to pay compensation to the passengers travelling in the vehicle unless extra premium stood paid to the Insurance Company for covering the said risk. While arriving at the said conclusion, learned Tribunal relied upon various judgments, which find mention in the impugned award. Besides this, it further fastened the liability upon respondent No. 1 on the ground also that driver of the vehicle was not possessing a valid driving licence on the date of accident. During the pendency of appeal, as far as the factum of the driver having a valid licence has attained quietus, as on an application so filed by the applicant/appellant under Order 41 Rule 27 of the Code of Civil Procedure and on report in this regard being sought by this Court from Motor Registering & Licensing Authority, Mandi, it stands proved that the driver was having a valid driving licence as on the date when the accident took place.

3. Now, the moot issue which has to be adjudicated by this Court is only as to whether the findings returned by the learned Tribunal to the effect that the liability to pay the award amount was upon the owner is sustainable in law or not.

4. Mr. G.R. Palsra, learned counsel for the appellant has vehemently argued that the findings so returned by the learned Tribunal are perverse, as learned Tribunal erred in not appreciating the terms of the Insurance Policy in totality. According to him, the terms of the policy have been totally misread and misconstrued by the learned Tribunal.

5. On the other hand, Mr. Ashwani K. Sharma, learned Senior Counsel appearing for the Insurance Company has submitted that there is no merit in the present appeal as the findings returned by the learned Tribunal were duly borne out from the records of the case and there was neither any mis-reading nor any mis-appreciation of the terms of the Insurance Policy, as alleged. It was submitted by Mr. Sharma that the policy in issue was 'Private Car Liability Policy' only and the same did not cover the passengers who were travelling in the car and therefore, findings returned to this effect by the learned Tribunal that the compensation amount had to be paid by the owner, could not be faulted with. In support of his contention, Mr. Sharma has also relied upon a judgment passed by this Court in **Oriental Insurance Company Ltd.** Vs. **Sudershna Devi and others**, FAO (MVA) No. 403 of 2010, dated 8th September, 2016.

6. Mr. Neel Kamal Sharma, learned counsel appearing for the claimants/respondents has also supported the judgment passed by the learned Tribunal.

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

8. Insurance Policy is on record as Ex.-RX. A perusal of the same demonstrates that it is a 'Private Car Liability Only Policy'. The contention of Mr. G.R. Palsra that the conditions contemplated in the same under heading 'Limitations as to use' permitting the owner of the vehicle to ply the vehicle for any purpose other than those mentioned in this clause have not been taken into consideration by the learned Tribunal while arriving at its finding, in my considered view, is totally misplaced. This particular clause has nothing to do with the adjudication which has been done by the learned Tribunal as to upon whom the onus was to indemnify the claimants. Further, it is not the case of any of the parties that the vehicle at the time when the accident took place was being driven in violation of the terms of the Insurance Policy. The contention of the Insurance Company to this effect that the driver was not having a valid driving licence also stands negated. The findings in issue now which have been returned by the learned Tribunal are to this effect that because it was a 'Private Car Liability Only Policy', therefore,

Insurance Company was not bound to indemnify the claimants as premium in this regard was not paid to the Insurance Company as it was not a comprehensive policy.

9. The factum of the policy not being a comprehensive policy is duly borne out from the terms of the policy. According to Mr. Palsra, because premium stood paid by the owner, therefore, liability, if any, affixed upon the owner has to be indemnified by the Insurance Company. In my considered view, the contention of Mr. Palsra to this effect cannot be accepted because the policy in issue is not a comprehensive policy and the Insurance Company has not covered the risk which now Mr. Palsra wants Insurance Company to pay and in this view of the matter, findings to the contrary returned by the learned Tribunal cannot be faulted with.

10. This Court in **Oriental Insurance Company Ltd.** Vs. **Sudershna Devi and others**, FAO (MVA) No. 403 of 2010, decided on 8th September, 2016, while dealing with a similar situation has held that where policy is a 'Liability Only Policy' and is not a 'Comprehensive/Package Policy' pertaining to a private car, then the Insurance Company cannot be asked to indemnify the insured for those components which are not covered under the policy.

11. While arriving at the said conclusion, this Court has relied upon a judgment of the Hon'ble Supreme Court in **National Insurance Co. Ltd.** Vs. **Balakrishnan and another,** 2013 ACJ 199. Para-21 of the judgment of the Hon'ble Supreme Court which was relied upon by this Court in the judgment *(supra)* is quoted hereinbelow:

> "*21. In view of the aforesaid factual position, there is no scintilla of doubt that a "comprehensive/package policy" would cover the liability of the insurer for payment of compensation for the occupant in a car. There is no cavil that an "Act Policy" stands on a different footing from a "Comprehensive/Package Policy". As the circulars have made the position very clear and the IRDA, which is presently the statutory authority, has commanded the insurance companies stating that a "Comprehensive/ Package Policy" covers the liability, there cannot be any dispute in that regard. We may hasten to clarify that the earlier pronouncements were rendered in respect of the "Act Policy" which admittedly cannot cover a third party risk of an occupant in a car. But, if the policy is a "Comprehensive/Package Policy", the liability would be covered. These aspects were not noticed in the case of Bhagyalakshmi (supra) and, therefore, the matter was referred to a larger Bench. We are disposed to think that there is no necessity to refer the present matter to a larger Bench as the IRDA, which is presently the statutory authority, has clarified the position by issuing circulars which have been reproduced in the judgment by the Delhi High Court and we have also reproduced the same."*

12. Therefore also, there is no merit in the contention of Mr. Palsra because it has been categorically held by the Hon'ble Supreme Court of India that where the policy is an 'Act Policy', the same admittedly cannot cover risk of an occupant of a Car and said risk can only be covered if the policy is comprehensive/package policy.

13. Accordingly, in view of the discussion held above as well as the judgments cited above, as there is no merit in the present appeal, the same is accordingly dismissed. Miscellaneous application(s), if any, also stand disposed of.

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

Rajinder Kumar ....Petitioner.
Versus
Hon'ble High Court of H.P. and others ....Respondents.

CWP No. 17 of 2012.
Reserved on : 26.05.2017.
Decided on : 21st June, 2017.

Constitution of India, 1950- Article 226- An advertisement was issued for filling the post in Himachal Pradesh Judicial Services – the petitioner and respondent No.3 appeared in the examination- the petitioner is shown senior to the respondent No.3 in the gradation list – respondent No. 3 made a representation to the Registrar General, High Court of H.P. for correction of the seniority list on the ground that she was shown higher in the merit list prepared by H.P. Public Service Commission- the representation was accepted and the respondent No.3 was shown senior to the petitioner and S, another judicial officer - aggrieved from the order, the present writ petition has been filed- held that the respondent No.3 was shown higher in merit list to the petitioner and S – the Government could not have picked up the petitioner and S for appointment prior to respondent No.3 – the seniority fixed by the Commission was to be maintained – petition dismissed.(Para-4 to 7)

Cases referred:
Dr. H. Mukherjee versus Union of India, AIR 1994 SC, 495
Jatinder Kumar versus State of Punjab, AIR 1984, S.C., 1850
State of M.P. versus Syed Qamarali 1967 SLR 228
P.L.Shah versus Union of India, & Anr, 1989, AIR, SC 985
M.R. Gupta versus Union of India and others 1996 AIR, S.C., 669

For the Petitioner:	Mr. Ramakant Sharma, Senior Advocate with Mr. T. S. Chauhan, Advocate.
For Respondent No.1:	Mr. Malay Kaushal, Advocate.
For Respondent No.2:	Mr. Vivek Singh Attri, Dy. A.G.
For Respondent No.3:	Mr. K.D. Sood, Senior Advocate with Mr. Sanjeev Sood, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

Under an advertisement issued by the Public Service Commission, advertisement whereof is comprised in Annexure P-1, 7 vacancies were notified to be filled up by competitive examination(s), amongst vacancies whereof, two stood reserved for aspirants, belonging to the Scheduled Caste and one stood reserved for aspirants, belonging to other backward classes. The petitioner, as well as respondent No.3 did uncontrovertedly appear in the H.P. Judicial Service Competitive Examination, 2003, examination whereof was conducted under the aegis of the H.P. State Public Service Commission. The petitioner qualified the H.P. Judicial Service Written Examination. Consequently, he under Annexure P-3 was summoned to appear in viva voce test. In sequel to his success therein, the petitioner under Annexure P-4 was appointed to the H.P. Judicial Services. The name of the petitioner continued to be reflected above the name of respondent No.3 in the gradation list(s) circulated by the High Court of Himachal Pradesh. The relevant gradation list(s) comprised in Annexures P-9 to P-11, reveal therein the occurrence of name of the petitioner, above the name of respondent No.3. The factum of revelation of the name of petitioner above the name of respondent No.3, especially in the gradation list(s) from 1.1.2006

to 1.1.2010, remained unprotested by respondent No.3 upto 29.09.2010, whereat she made a representation to the Registrar General of High Court of H.P., Shimla, wherein she sought rectification(s) with respect to the inappropriate revelation of her name therein, rectification whereof stood concerted "in" her name therein being shown/to be occurring above the name of the petitioner. She along with her representation appended, annexure-B, annexure whereof comprises the apposite merit list published by the Secretary, Himachal Pradesh Public Service Commissioner, wherein, the name of respondent No.3 occurs higher in merit vis-a-vis the name of the petitioner.

2. The representation made by the petitioner was placed on 8.11.2010 before the Hon'ble Full Court, wherein, it was resolved that the matter be referred to a Committee of Hon'ble Judges to be constituted by Hon'ble the Chief Justice, for hence a decision being rendered upon the representation of respondent No.3. However, when the matter was placed on 2.6.2011 before the Committee of Hon'ble Judges, the committee concerned recorded the hereinafter extracted resolution:-

> "If on consideration, representation of Dr. Abira Basu, is found to have some merit, that will affect the seniority of S/Sh. Sachin Raghu and Rajinder Shiman, because she has claimed seniority above them, on account of her higher merit in the competitive examination. Therefore, before any decision is taken on the representation, it is desirable that S/Sh. Sachin Raghu and Rajinder Dhiman are afforded an opportunity to file their response to the representation of Dr. Abira Basu. We recommend accordingly."

3. In pursuance thereto, the judicial officers concerned, filed their respective response(s) to the representation made by respondent No.3, wherein, each espoused that the representation made by respondent No.3 is hit by delay and latches and hence is liable to be rejected. Also both the judicial officers in their respective responses furnished to the representation preferred by respondent No.3, voiced therein that since two posts "stood" under the apposite advertisement hence reserved for candidates belonging to the schedule caste category also when they evidently belonged to the aforesaid reserved category, besides when the relevant roster point allotted to the aforesaid category of candidates "fell above" the post(s) reserved for candidates belonging to the general category, hence, the occurrence of their names in the select list published by the Public Service Commission, being in consonance with the roster point falling to their category, whereupon, their letters of appointment acquired validation. Preeminently also they voiced that since the name of respondent No.3 did not figure in the initial select list drawn with respect to four posts reserved for candidates belonging to the general category, to category whereof respondent No.3 evidently belongs, hence, her representation warranted dismissal, imperatively when their respective inter se seniority is to be reckoned from the date of issuance of appointment letters, appointment letter(s) whereof with respect to the petitioner standing issued "prior to" issuance of appointment letter in respect of respondent No.3, concomitantly, rendered the petitioner to stand entitled to hold seniority above respondent No.3. The Committee of Hon'ble Judges, "on" considering the propagation(s) made in the representation also "on" considering the espousals made by the objecting judicial officers concerned, recorded a decision, wherein, it accepted the representation made by respondent No.3. The reason assigned by the Committee of the Hon'ble Judges of this Court, while accepting the representation made by respondent No.3 "stood" anvilled upon the factum "of" prevalence at the apposite stage when the process for recruiting judicial officers stood initiated, "of" the relevant attractable rules, rules whereof stand christened as the Himachal Pradesh Judicial Service Rules, 1973, thereupon, with the proviso to Rule 7(2)(ii), Part V, pertaining to the reckoning of the relevant inter se seniority, graphically mandating that for determining the inter se seniority of judicial officers, who stand recruited to judicial services, in pursuance to a competitive examination held in any year, the order of merit obtained by them in the relevant examination, constituting the predominant mandated parameter for the relevant purpose also the Committee of the Hon'ble Judges had while accepting the representation made by respondent No.3 "alluded" to the latest Rules, which came into force on 20.03.2004, rules whereof stand nomenclatured as Himachal Pradesh Judicial

Service Rules, 2004, wherein, the apposite Rule 13(3) holds an alike therewith mandate "with respect" to determination of the relevant inter se seniority.. The report of the Committee of Hon'ble Judges was accepted by the Hon'ble Full Court under a resolution passed in its meeting held on 29th September, 2011. The acceptance by the Hon'ble Full Court "of" the recommendations of the Committee of Hon'ble Judges, sequelled issuance of an order comprised in Annexure P-17, whereby, respondent No.3 was assigned seniority above one Sachin Raghu and Rajinder Kumar Dhiman. The petitioner is aggrieved by the aforesaid order, hence, is constrained to assail it, by preferring the instant writ petition before this Court.

4. The grounds as espoused by the learned counsel appearing for the petitioner for quashing Annexure P-17, "rests" upon the factum of the vigour of the reason(s) assigned by the Committee of Hon'ble Judges, for its hence accepting the representation of respondent No.3, suffering denudation, with respect to the facts at hand, especially when (a) the representation made by respondent No.3 is hit by delay and laches; (b) non occurrence of the name of respondent No.3 in Annexure P-4 holding the concomitant effect "of" assignment of seniority to respondent No.3 above one Sachin Raghu and one Rajinder Kumar Dhiman being afflicted with an enhanced malady of "its" being in derogation of the number of posts "advertised" under Annexure P-1, "to be filled" up from amongst candidates belonging to the general category, to category whereof respondent No.3, evidently belongs, especially when the issuance of appointment letters upon the aforesaid "preceded" issuance of appointment letters upon the representationist, wherefrom alone their inter se seniority is computable. Though the learned counsel appearing for the petitioner in anvilling the aforesaid submission has hence attempted "to except" the application hereat of the mandate of the proviso to Rule 7(2)(ii) of the Himachal Pradesh Higher Judicial Service Rules, 1973, proviso whereof stands extracted hereinafter, yet his concert to scuttle the application hereat of the clout of the proviso to the apposite Rule(s) aforesaid, carries "no" sustainable force in the apparent face of their occurring a vivid depiction in Annexure P-14, with respect to respondent No.3 "in" the apposite competitive examination "securing" a merit higher than the petitioner and also a merit higher than one Sachin Raghu, besides when the reflections with respect to the aforesaid fact borne in Annexure P-14 "acquire conclusivity", given theirs not being concerted to be ripped of their tenacity, thereupon, the ensuing sequel is that with the apposite proviso holding a firm mandate with respect to the determination of inter se seniority of judicial officers, who conjointly appear in the apposite test, "enjoining reverence" being meted to their respective merit "acquired" in the relevant test, also with the proviso hence not meteing any deference to assignment(s) of roster point(s) to the category (ies) within whose domain, the objectors to the representation of respondent No.3 fell, nor hence, theirs being the reckonable parameter for determining the relevant inter se seniority. In aftermath, rather the proviso to Rule 7 of the Himachal Pradesh Higher Judicial Service Rules, 1973 making a striking communication qua the relevant determination being made from the published order of merit in which "they" stood placed in the relevant competitive examination(s), in the published order of merit whereof, the name of the respondent No.3 occurs above the name of the petitioner, renders the reliance placed upon the apposite rules by the Committee of the Hon'ble Judges "to be" both, appropriate as well as tenable especialy when it falls in consonance with Annexure P-14. The relevant proviso to Rule 7 of the Himachal Pradesh Higher Judicial Service Rules, 1973 reads as under:-

> "7. (1) The High Court shall prepare and maintain a list of members of service appointed in order of seniority.
>
> (2) The High Court shall prepare a list of members of Service, arranged in order of seniority as determined in the manner specified below:
>
> (i) The persons appointed to the service Rule 7 (Part IV) of these rules shall be senior to all others appointed under Rule 5 (Part III) and their inter se seniority shall be the same as determined under Himachal Pradesh Subordinate Judicial Service.
>
> (ii) In case of persons appointed under rule 5 (Part III) seniority in the service shall be determined by the order in which appointments are made to the service.

Provided that persons recruited on the results of the competitive examination in any year shall be ranked inter se in the order of merit in which they are placed at the competitive examination on the results of which they are recruited, those recruited on the basis of an earlier examination being ranked senior to those recruited on the basis of the later examination."

5. The effect of the aforesaid conclusion is that even if, the roster point prescribed for the category to which the objectors to the representation of respondent No.3 "fell" occurs higher vis-a-vis the roster point prescribed for candidate(s) falling in the general category, the prescriptions in the apposite roster point(s) "not" holding any relevance, given their effect standing effaced by the proviso to Rule 7 of the Himachal Pradesh Higher Judicial Service Rules, 1973, "predominantly", when no challenge stands cast to the vigour/vires of the prevalent apposite Rules. Nowat, with conclusivity standing acquired by Annexure P-14, also with hence this Court determining that the proviso to the apposite Rules holds its fullest command and clout "with respect to" the determination of inter se seniority of judicial officers, who stand recruited through a common competitive examination, thereupon, for facilitating that the play/might of the proviso is efficaciously carried forward, it would be unbefitting to attract thereon the purported malady of delay and laches, also it would be concomitantly unbefitting to conclude that, hence, the instant petition also stands infected with the aforesaid malady, conspicuously, when on its invocation, this Court would proceed to concomitantly conclude that there is room for workability hereat "of the principle of estopple", "for" correcting even a palpably void continuing erroneous apposite reflection with respect to the relevant inter se seniority, whereupon the vigour of the relevant prevailing proviso would also stand untenably denuded. Moreover, when hence the objectors concerned "would" despite their seniority standing determined in stark transgression of the relevant proviso "to" the apposite Rules, "continue to" untenably hold seniority above respondent No.3. Since, the appointment letters issued with respect to one Sachin Raghu and with respect to the petitioner, though do not unravel therein the name of respondent No.3, yet they appear to be issued "in" infraction of Annexure P-14, wherein, the name of respondent No.3 "occurs" above the names of the objectors concerned. It appears, that hence the appointment letters issued to one Sachin Raghu and to the petitioner, "stood" hence issued in gross derogation of Annexure P-14 also in gross derogation of the mandate of the apposite Rules. Obviously, hence, the mandate of the appointment letter(s) though issued prior in time with respect to the petitioner and with respect to one Sachin Raghu vis-a-vis their issuance with respect to respondent No.3, "is irreverable" for the relevant purpose. The Registry of this Court in/on their anvill, also appears to have drawn up the gradation list(s) wherein there was a concomitant erroneous reflection qua the name of the petitioner and of one Sachin Raghu occurring above the name of respondent No.3 "despite" her(s) in consonance with the apposite Rules standing entitled to be ranked therein "above" the petitioner as well as above one Sachin Raghu, gross error whereof stood ordered to be rectified by a committee of Hon'ble Judges of this Court. The Hon'ble Apex Court in **Dr. H. Mukherjee versus Union of India, AIR 1994 SC, 495 has** held that the merit/seniority list prepared by the Public Service Commission concerned, on the basis of the respective inter se merit of competing contestants "attains finality". The aforesaid mandate recorded by the Hon'ble Apex Court also holds its fullest sway hereat. Consequently, the merit/select list comprised in Annexure P-14, as stands "drawn" by the H.P. Public Service Commission has to be meted its apposite deference. However, despite no challenge being thrown against the aforesaid order of merit of candidates prepared by the H.P. Public Service Commission, it appears that Government concerned had untenably issued appointment letters upon the objectors concerned, "prior to" issuance(s) thereof vis-a-vis respondent No.3, issuance(s) whereof is in derogation of the mandate of the Hon'ble Apex Court comprised in a decision reported in **Jatinder Kumar versus State of Punjab, AIR 1984, S.C., 1850** wherein it is propounded that the government "cannot" make any picking and choosing from the "merit list". Hereat, it appears that the government has arbitrarily chosen the petitioner and one Sachin Raghu for appointment also hence, it has arbitrarily ignored to issue an appointment letter to respondent No.3 despite "hers", for reasons aforesaid, being along with the aforesaid standing entitled to be appointed to the post to which she stood selected, given hers holding a higher

ranking vis-a-vis them, in the competitive examination(s) wherein all participated. The aforesaid judgment also propounds the proposition that the relevant inter se seniority amongst contestants, is determinable on the anvil of the order of merit acquired by each, in the competitive examination(s), rather than on anvil of the date of appointment/confirmation, wherefrom, the inevitable ensuing corollary "is" that with the merit list prepared by the H.P. Public Service Commission, in sequel, to the participation, in the relevant examination, "of" the petitioner along with respondent No.3, hence holding preponderance also when therein the name of respondent No.3 "occurs" above the name of the petitioner, renders it to enjoy force in the matter of determination of seniority inter se the petitioner and respondent No.3, despite the precedingly issued appointment letter(s) upon the petitioner vis-a-vis respondent No.3.

6. Lastly, with this Court for all reasons aforestated concluding, that the order appointing the petitioner comprised in Annexure P-4, wherein, the name of respondent No.3 "does not" occur being in stark transgression of the order of merit comprised in Annexure P-14, wherein, the name of respondent No.3 occurs above the petitioner, on anvil thereof the petitioner cannot disturb the efficacy of the apposite proviso existing in the relevant Rules. More so, when on its might/play standing attracted, it "cannot" oust the claim of respondent No.3 "to secure" in the apposite seniority list "a" rank higher than him. Also when the relevant orders/gradation lists are legally void and when there is no limitation for challenging in valid orders/gradation lists, as mandated in ***State of M.P. versus Syed Qamarali 1967 SLR 228, P.L.Shah versus Union of India, & Anr, 1989, AIR, SC 985 and M.R. Gupta versus Union of India and others 1996 AIR, S.C., 669,*** also when unless the apposite corrections are made in the seniority lists/gradation lists with respect to their inter se respective seniority, it would result in perpetration of a continuing wrong upon the aggrieved besides when there is no limitation prescribed for correcting a continuing wrong rather it being rectifiable upon its standing noticed, also begets a firm inference that the representation of respondent No.3, is not hit by delay and laches nor also the petitioner can contend that the impugned decisions are lacking in legal potency.

7. For the foregoing reasons, there is no merit in the instant petition which is accordingly dismissed. All pending applications also stand disposed of. Records be sent back forthwith.

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

Lal Chand ...Petitioner.
Versus
Union Bank of India ...Respondent.

Cr.MMO No. 84 of 2017
Decided on: 13.6.2017

Code of Criminal Procedure, 1973- Section 482- Petitioner was summoned for the commission of offence punishable under Section 138read with Section 142 of N.I. Act – he challenged the summoning order contending that Magistrate was bound to follow the procedure under Section 200 of Cr.P.C by examining the complainant and recording preliminary evidence – held that the complaint was accompanied by an affidavit – there is no requirement of examination of the complainant on solemn affirmation – petition dismissed.(Para-3 to 7)

Cases referred:
Mandvi Cooperative Bank Limited vs. Nimesh B. Thakore (2010) 2 Supreme Court 83
K.S. Joseph vs. Philips Carbon Black Limited and another (2016) 11 SCC 105

For the petitioner: Mr. R.L. Chaudhary, Advocate.
For the respondent: Mr. Rajesh Mandhotra, Advocate.

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, Judge (Oral)

This petition under Article 227 of the Constitution of India read with Section 482 Cr.P.C. takes exception to the procedure adopted by the learned Magistrate whereby the petitioner has been summoned in a complaint filed against him under Section 138 read with Section 142 of the Negotiable Instruments Act (for short the '**Act**').

2. It is averred that while summoning the petitioner, the learned Magistrate was under legal obligation to follow the procedure as envisaged under Section 200 Cr.P.C. and it was only after examining the complainant and recording the preliminary evidence, that the learned Magistrate could have issued the summoning order that too after satisfying itself that prima facie an offence had been committed by the petitioner.

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

3. At the outset, it needs to be observed that this petition has probably been filed without taking into consideration the amendment brought out in the Negotiable Instruments Act. Chapter XVII comprising of Section 138 to 142 was inserted to inculcate faith in the efficacy of banking operation and credibility in transacting business on negotiable instruments. Despite civil remedy Section 138 intended to prevent dishonesty on the part of the drawer of negotiable instrument to draw a cheque without sufficient funds in his account maintained by him in a book and induce the payee or holder in due course to act upon it. Section 138 draws presumption that one commits the offence if he issues the cheque dishonestly. It is seen that once the cheque has been drawn and issued to the payee and the payee has presented cheque and thereafter, if any instructions are issued to the bank for non-payment and the cheque is returned to the payee with such an endorsement, it amount to dishonor of cheque and it comes within the meaning of Section 138.

4. However, even the introduction of aforesaid Sections had not achieved the desired result for dealing with dishonour cheques, hence, the legislator inserted new Sections 143 to 147 in the Act for speedy disposal of the cases relating to dishonor of cheque, therefore, summary trial as well as making the offence compoundable.

5. It is not in dispute that the complaint filed by respondent was accompanied by an affidavit by way of evidence and it is after examining these documents that the learned Magistrate proceeded to summon the petitioner as would be evident from the order dated 1.8.2014, which reads thus:-

> "1.8.2014 Present: Sh. Mahesh Chopra, Advocate, for complainant.
>
> Office report seen. Be registered. From perusal of case file and documents I am of the opinion that accused be summoned. Let notice be issued to accused for 20.8.2014."

6. Now as regards the compliance of Section 200 Cr.P.C., before summoning the accused/petitioner, this issue is no longer *res integra* in view of the judgment rendered by the Hon'ble Supreme Court in **Mandvi Cooperative Bank Limited vs. Nimesh B. Thakore (2010) 2 Supreme Court 83**, as reiterated by the Hon'ble Supreme Court in a recent judgment of **K.S. Joseph vs. Philips Carbon Black Limited and another (2016) 11 SCC 105**, wherein the Hon'ble Supreme Court has categorically held that the Non obstante clause in Section 145 of the Act is self-explanatory and over-rules the requirement of examination of complainant on solemn

affirmation under Section 200 Cr.P.C. and now complainant is entitled in cheque dishonor cases to give his evidence on affidavit and subject to all just exceptions, in any inquiry, trial or other proceeding under Cr.P.C. It shall be apt to reproduce the relevant observations made in para 3 to 5 of the judgment which reads thus:-

> "3. So far as the issue of examination of complainant on solemn affirmation under Section 200 of the Cr.P.C. is concerned, the submissions are misconceived on account of Section 145 of the Act which was inserted along with some other Sections through an amendment in the year 2002 w.e.f. 06.02.2003. Section 145 of the Act is as follows :
>
> "**145. Evidence on affidavit**.-(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the evidence of the complainant may be given by him on affidavit and may, subject to all just exceptions be read in evidence in any enquiry, trial or other proceeding under the said Code.
>
> (2) The Court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any person giving evidence on affidavit as to the facts contained therein."
>
> 4. The non obstante clause in sub-section (1) of Section 145 is self-explanatory and over-rules the requirement of examination of the complainant on solemn affirmation under Section 200 of the Cr.P.C. Now the complainant is entitled to give his evidence on affidavit and subject to all just exceptions, the same has to be read in evidence in any enquiry, trial or other proceeding under the Cr.P.C. This view is also supported by the judgment of this Court in the case of Mandavi Cooperative Bank Ltd. v. Nimesh B. Thakore, 2010 3 SCC 83. No doubt this judgment was in a different factual scenario but this Court went into details of the amendment of 2002 including Section 145 and in paragraph 18 it also noted the Statement of Objects and Reasons appended to the Amendment Bill. Inter alia, the objects included "to prescribe procedure for dispensing with preliminary evidence of the complainant".
>
> 5. In view of discussion made above, the plea based on Section 200 of the Cr.P.C. is rejected as untenable. The other plea relating to delay of 62 days and taking of cognizance without issuing notice to dispense with such delay is however found to have substance. The relevant provision under Section 142 of the Act requires making of the complaint within one month of cause of action arising on account of non-compliance with the demand in the notice to make payment within 15 days. According to appellant the notice was dated 03.02.2006 alleging non-payment of two cheques each for Rs.1,80,000/-. Allegedly the appellant had sent a reply denying his liability through a reply dated 20.02.2006. The complaint was filed on 24.05.2006. Prima facie, in view of aforesaid dates the complaint was beyond the permissible period. No doubt the court has been empowered to take cognizance even after the prescribed period but only if the complainant satisfies the court that he had sufficient cause for not making complaint within the prescribed period.

7. In view of the aforesaid discussion, I find no merit in this petition and the same is dismissed accordingly, so also the pending applications, if any.

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

M/s R. K. Trading Company .....Petitioner.

Versus

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

Cr.MMO No. 208 of 2016

Date of decision: 25th May, 2017.

Prevention of Food Adulteration Act, 1954- Section 16(1)(a)(i)- A complaint was filed for selling adulterated food articles – the accused filed an application for impleading the seller – the seller filed an application for impleading the manufacturer – the seller died in the meantime – the Court allowed the application and impleaded the manufacturer – held that once the seller has died without leading any evidence, the Court could not have allowed the application- petition allowed and order passed by the Court quashed and set aside.(Para-8 to 16)

Case referred:

Hardip Singh & Ors vs. State of Punjab and others (2014) 3 SCC 92

For the Petitioner : Mr. G.C. Gupta, Sr. Advocate with Mr. Deepak Gupta, Advocate.

For the Respondents : Ms. Meenakshi Sharma, Additional Advocate General, with Mr. Neeraj K. Sharma, Advocate, for respondent No. 1.

The following judgment of the Court was delivered:

***Justice Tarlok Singh Chauhan, Judge* (Oral).**

This petition under Section 482 of the Code of Criminal Procedure seeks quashing of the order dated 16.11.2015, passed by the learned Chief Judicial Magistrate, Chamba, whereby the petitioner has been ordered to be arraigned as accused No. 3.

2. The case in brief is that respondent No.1-complainant filed a complaint under Section 16(1)(a)(i) of the Prevention of Food Adulteration Act, 1954 (for short the '**Act**') against respondent No. 2 Shri Prem Kumar for commission of offence under the Act in the Court of learned Chief Judicial Magistrate, Chamba. It was alleged that on 28.4.2008, Food Inspector inspected the shop of respondent No. 2 and found in his possession 16 packets of 'Rishi Vanaspati' for sale to the general public for consumption with other food articles in a carton box in his shop. The Food Inspector expressed his intention to take the sample of 'Rishi Vanaspati' for analysis and accordingly purchased three packets thereof weighing one litre each against the cash payment of Rs.195/- and obtained the receipt duly signed by the accused and the witnesses. It was alleged that after completion of the formalities, the sample was sealed and send to Public Analyst, Kandaghat, whereas the remaining two packets of the samples were deposited with the Local (Health) Authority in a safe manner. On analysis, the sample was found to be adulterated by the Public Analyst, Kandaghat and on these allegations after obtaining the consent of the C.M.O. Chamba, the complaint was filed against respondent No. 2 in the aforesaid Court.

3. However, during the pendency of the petition respondent No. 2 filed an application under Section 20-A of the Act for impleadment of M/s Karam Chand Mehgna Ram, Damtal on the allegations that the 'Rishi Vanaspati' in question had been purchased from the said firm against Bill No. 114, dated 12.04.2008 and after purchase, the same was stored in a safe place and sold to the Food Inspector in a sealed packet, which was kept in the same condition.

4. The learned Magistrate vide order dated 28.9.2012 impleaded the aforesaid firm as accused No. 2 through its proprietor Ramesh Kumar. Accordingly, notices were sent to Ramesh Kumar, who put in his appearance and charges were framed against him.

5. However, thereafter, Ramesh Kumar, in turn, filed an application under Section 20-A of the Act on 6.8.2013 for impleading the petitioner as an accused on the allegations that he had purchased the articles, of which the sample had been taken, from the petitioner's firm and that the same was sold to respondent No. 2 in the same condition, in which it had been purchased by the firm. The application moved by accused No. 2 was taken by the Court for consideration on different dates and ultimately it was reported by the counsel appearing for the aforesaid firm reported that on 8.5.2014 the accused No. 2 Ramesh Kumar proprietor of M/s Karam Chand Mehgna Ram had expired. The Court directed the counsel to produce death certificate, which was accordingly filed on 11.9.2014 and the proceedings against accused No. 2 Ramesh Kumar were dropped on the said date.

6. However, the learned Magistrate abruptly on 27.3.2015 again took up the case for proper orders and heard arguments on the application, which had been filed by the deceased Ramesh Kumar and vide impugned order dated 16.11.2015 ordered the petitioner to be arraigned as accused No.3.

7. Aggrieved by the said order of impleadment, petitioner has filed the instant petition assailing the said order on various grounds as taken in the petition.

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

8. At the outset it may be observed that it is not in dispute even by the respondents that Ramesh Kumar, proprietor of M/s Karam Chand Mehgna Ram had died during the pendency of the proceedings and such proceedings has already been dropped against him vide order dated 11.9.2014, as having been abated. It is further not in dispute that his death had occurred prior to there being any effective order or evidence having been led in the application filed by him for impleadment of the present petitioner under Section 20-A of the Act.

9. In such circumstances, the moot question that arises for consideration is as to who was prosecuting the application preferred by deceased Ramesh Kumar and what was the evidence led in support thereof.

10. Section 20-A of the Act reads as under:

> "20-A. Power of Court to implead manufacturer, etc.- Where at any time during the trial of any offence under this Act alleged to have been committed by any person, not being the manufacturer, distributor or dealer of any article of food, the Court is satisfied, on the evidence adduced before it, that such manufacturer, distributor or dealer is also concerned with that offence, then, the Court may, notwithstanding anything contained in [sub-section (3) of section 319 of the Code of Criminal Procedure, 1973 (2 of 1974) or in section 20 proceed against him as though a prosecution had been instituted against him under section 20."

11. The operative portion of the order reads thus:

> "Accused No. 2 has placed on record bill No. 70 dated 11.4.2008 of M/s R.K. Trading Company, Gagret, Distt. Una, H.P. and perusal of the same reveals that at Sl. No. 2 quantity 50 i.e. Vanaspati appears to have been sold by M/s R.K. Trading Company, Gagret, Distt. Una, H.P. to accused No. 2. Hence application under Section 16(1)(a)(i) of PFA Act is allowed and M/s R.K. Trading Company, Gagret, Distt. Una, H.P. through its proprietor Sh. Gautam Nayar is arrayed as accused No. 3 in the present case. Application stands disposed of. It be tagged with main case file. Let notice be issued to accused No. 3 for 19-12-2015."

12. It would be noticed from a perusal of the Section 20-A that power of the Court to implead the manufacturer can be resorted to only once the Court is satisfied, on the evidence adduced before it, that such manufacturer, distributor or dealer is also concerned with the offence.

13. Now what would be the meaning of the 'evidence' has been elucidated by Hon'ble Constitutional Bench of Hon'ble Supreme Court in **Hardip Singh & Ors vs. State of Punjab and others (2014) 3 SCC 92**, wherein it was held as under:-

> "59. Before we answer this issue, let us examine the meaning of the word 'evidence'. According to Section 3 of the Evidence Act, 'evidence' means and includes:
>
> > (1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence;
> >
> > (2) all documents including electronic records produced for the inspection of the Court, such statements are called documentary evidence;
>
> 60. According to Tomlin's Law Dictionary, Evidence is "the means from which an inference may logically be drawn as to the existence of a fact. It consists of proof by testimony of witnesses, on oath; or by writing or records."
>
> 61. Bentham defines 'evidence' as "any matter of fact, the effect, tendency or design of which presented to mind, is to produce in the mind a persuasion concerning the existence of some other matter of fact- a persuasion either affirmative or disaffirmative of its existence. Of the two facts so connected, the latter may be distinguished as the principal fact, and the former as the evidentiary fact."
>
> 62. According to Wigmore on Evidence, evidence represents "any knowable fact or group of facts, not a legal or a logical principle, considered with a view to its being offered before a legal tribunal for the purpose of producing a persuasion, positive or negative, on the part of the tribunal, as to the truth of a proposition, not of law, or of logic, on which the determination of the tribunal is to be asked."
>
> 63. The provision and the above-mentioned definitions clearly suggest that it is an exhaustive definition. Wherever the words "means and include" are used, it is an indication of the fact that the definition 'is a hard and fast definition', and no other meaning can be assigned to the expression that is put down in the definition. It indicates an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expression. (Vide: **M/s. Mahalakshmi Oil Mills v. State of A.P., AIR 1989 SC 335; Punjab Land Development and Reclamation Corporation Ltd., Chandigarh v. Presiding Officer, Labour Court, Chandigarh & Ors., (1990) 3 SCC 682; P. Kasilingam & Ors. v. P.S.G. College of Technology & Ors., AIR 1995 SC 1395; Hamdard (Wakf) Laboratories v. Dy. Labour Commissioner & Ors., AIR 2008 SC 968; and Ponds India Ltd. (merged with H.L. Limited) v. Commissioner of Trade Tax, Lucknow, (2008) 8 SCC 369**).
>
> 64. In **Feroze N. Dotivala v. P.M. Wadhwani & Ors., (2003) 1 SCC 433**, dealing with a similar issue, this Court observed as under:
>
> > "Generally, ordinary meaning is to be assigned to any word or phrase used or defined in a statute. Therefore, unless there is any vagueness or ambiguity, no occasion will arise to interpret the term in a manner which may add something to the meaning of the word which ordinarily does not so mean by the definition itself, more particularly, where it is a restrictive definition. Unless there are compelling reasons to do so, meaning of a

> restrictive and exhaustive definition would not be expanded or made extensive to embrace things which are strictly not within the meaning of the word as defined."

65. We, therefore proceed to examine the matter further on the premise that the definition of word "evidence" under the Evidence Act is exhaustive.

66. In **Kalyan Kumar Gogoi v. Ashutosh Agnihotri & Anr., AIR 2011 SC 760**, while dealing with the issue this Court held :

> "33. The word "evidence" is used in common parlance in three different senses: (a) as equivalent to relevant, (b) as equivalent to proof, and (c) as equivalent to the material, on the basis of which courts come to a conclusion about the existence or non-existence of disputed facts. Though, in the definition of the word "evidence" given in Section 3 of the Evidence Act one finds only oral and documentary evidence, this word is also used in phrases such as best evidence, circumstantial evidence, corroborative evidence, derivative evidence, direct evidence, documentary evidence, hearsay evidence, indirect evidence, oral evidence, original evidence, presumptive evidence, primary evidence, real evidence, secondary evidence, substantive evidence, testimonial evidence, etc."

67. In relation to a Civil Case, this court in **Ameer Trading Corporation Ltd. v. Shapoorji Data Processing Ltd., AIR 2004 SC 355**, held that the examination of a witness would include evidence-in- chief, cross-examination or re-examination. In **Omkar Namdeo Jadhao & Ors v. Second Additional Sessions Judge Buldana & Anr., AIR 1997 SC 331;** and **Ram Swaroop & Ors. v. State of Rajasthan, AIR 2004 SC 2943**, this Court held that statements recorded under Section 161 Cr.P.C. during the investigation are not evidence. Such statements can be used at the trial only for contradictions or omissions when the witness is examined in the court. (See also: **Podda Narayana & Ors. v. State of A.P., AIR 1975 SC 1252; Sat Paul v. Delhi Administration, AIR 1976 SC 294; and State (Delhi Administration) v. Laxman Kumar & Ors., AIR 1986 SC 250**).

68. In **Lok Ram v. Nihal Singh & Anr., AIR 2006 SC 1892**, it was held that it is evident that a person, even though had initially been named in the FIR as an accused, but not charge-sheeted, can also be added as an accused to face the trial. The trial court can take such a step to add such persons as accused only on the basis of evidence adduced before it and not on the basis of materials available in the charge- sheet or the case diary, because such materials contained in the charge-sheet or the case diary do not constitute evidence.

69. The majority view of the Constitution Bench in **Ramnarayan Mor & Anr. v. The State of Maharashtra, AIR 1964 SC 949** has been as under:

> "9. It was urged in the alternative by counsel for the appellants that even if the expression "evidence" may include documents, such documents would only be those which are duly proved at the enquiry for commitment, because what may be used in a trial, civil or criminal, to support the judgment of a Court is evidence duly proved according to law. But by the Evidence Act which applies to the trial of all criminal cases, the expression "evidence" is defined in Section 3 as meaning and including all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under enquiry and documents produced for the inspection of the Court. There is no restriction in this definition to documents which are duly proved by evidence."
>
> (Emphasis added)

70. Similarly, this Court in **Sunil Mehta & Anr. v. State of Gujarat & Anr., JT 2013 (3) SC 328**, held that

> "It is trite that evidence within the meaning of the Evidence Act and so also within the meaning of Section 244 of the Cr.P.C. is what is recorded in the manner stipulated under Section 138 in the case of oral evidence. Documentary evidence would similarly be evidence only if the documents are proved in the manner recognised and provided for under the Evidence Act unless of course a statutory provision makes the document admissible as evidence without any formal proof thereof."

77. With respect to documentary evidence, it is sufficient, as can be seen from a bare perusal of Section 3 of the Evidence Act as well as the decision of the Constitution Bench, that a document is required to be produced and proved according to law to be called evidence. Whether such evidence is relevant, irrelevant, admissible or inadmissible, is a matter of trial. "

14. Thus, it would be clear from the aforesaid exposition of law that 'evidence' within the meaning of the Evidence Act, with regard to documentary evidence would be evidence only if the documents is proved in the manner recognized and provided for under the Evidence Act and it is only when the document produced according to law, then it can be called 'evidence'.

15. Admittedly, in this case, Ramesh Kumar, the sole proprietor of M/s Karam Chand Mehgna Ram had already died as reported to the Court on 8.5.2014 and proceedings against him were dropped on 11.9.2014 as having been abated and, therefore, there was none to prosecute the application, much less, lead evidence in support thereof, more particularly, the Bill No. 70, dated 11.4.2008 alleged to have been issued by the petitioner and to further prove as to whether it was the petitioner alone who had issued the bill or sold the goods mentioned therein or that the goods were the ones, which, in fact, had been sold to M/s Karam Chand Mehgna Ram, who, in turn, sold it to the petitioner. Various other questions have been left un-answered on account of death of Ramesh Kumar and therefore in absence of any evidence having been led on the application filed on behalf of M/s Karam Chand Mehgna Ram to implead the petitioner as an accused and further there being no one to prosecute such application, the trial Court erred in arraigning him as accused.

16. In view of the above, I find merit in this petition and the same is allowed and the order passed by the learned Chief Judicial Magistrate on 16.11.2015, arraigning the petitioner as accused No. 3 in the proceedings is quashed and set aside. Pending application(s), if any, stands disposed of.

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

State of Himachal Pradesh .....Petitioner.

Versus

Singhi Ram & others .....Respondent.

Cr. Revision No. 68 of 2015
Reserved on: 21.06.2017
Decided on: 28.06. 2017

Code of Criminal Procedure, 1973- Section 321- An application for withdrawal from prosecution was filed before the Special Judge, which was dismissed – aggrieved from the order, present revision has been filed –held that the original mark sheet stated to have been forged was not produced on record- expert has not given any opinion on the photocopy of the mark sheet – the Public Prosecutor acted in a bona fide manner while seeking withdrawal from prosecution- the

permission was wrongly refused by the Trial Court – revision allowed – order passed by Trial Court set aside- prosecutor permitted to withdraw from the prosecution.(Para-9 to 20)

Cases referred:

Mohd. Mumtaz vs. Nandini Satpathy and others (I), (1987) 1 Supreme Court Cases 269
Ghanshyam vs. State of M.P. & others, (2006) 10 Supreme Court Cases 473
Sheonandan Paswan vs. State of Bihar & others, (1987) 1 Supreme Court Cases 288
Sheonandan Paswan vs. State of Bihar & others, (1983) 1 Supreme Court Cases 438
State of Orissa vs. Chandrika Mohapatra and others, (1976) 4 Supreme Court Cases 250
State of Punjab, vs. Union of India and others, (1986(4 Supreme Court Cases 335
Pushpa Devi M. Jatia vs. M.L. Wadhavan, Additional Secretary, Government of India and others, 1986 (Supp.) Supreme Court Cases 535
Sheonandan Paswan vs. State of Bihar and others, (1987) 1 Supreme Court Cases 288

For the petitioner:	Mr. R.M. Bisht, Addl. AG, with Mr. Pushpinder Jaswal, Dy. AG, and Mr. Rajat Chauhan, Law Officer.
For respondents No. 1& 2:	Mr. B.C. Negi, Sr. Advocate, with Mr. B.N. Sharma, Advocate.
For respondent No. 3:	Mr. Lovneesh Kanwar, Advocate.
For respondent No. 4:	Mr. Neeraj Gupta, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present criminal revision petition is maintained by the petitioner/State, laying challenge against order dated 21.11.2014, passed by the learned Special Judge, Kangra at Dharamshala, District Kangra, H.P., in Criminal M.A. No. 130 of 2014, whereby the application moved under Section 321 of the Code of Criminal Procedure, 1973 (hereinafter, for the sake of convenience, to be referred to as "Cr.P.C.") for withdrawal from prosecution, against the accused/respondents, in case FIR No. 2 of 2008, dated 11.03.2008, registered under Sections 420, 468, 471, 120-B IPC and Section 13(2) of P.C. Act, Police Station State Vigilance and Anti Corruption Bureau, Shimla, was dismissed.

2. Succinctly, the facts giving rise to the present petition are that the petitioner/State lodged FIR No. 2 of 2008, dated 11.03.2008, under Sections 420, 468, 471, 120-B of IPC and Section 13(2) P.C. Act, in Police Station State Vigilance and Anti Corruption Bureau, Shimla, against the respondents/accused. As per the allegations, State Vigilance and Anti Corruption Bureau, Shimla received a source report qua tampering of mark sheet, which was issued in favour of respondent No. 2 (daughter of respondent No. 1). In the year 2005, respondent No. 2 managed to procure a mark sheet, bearing Sr. No. 0203303, form Himachal Pradesh Board of School Education, Dharamshala, whereby she was awarded 446 marks out of 500 marks. On the basis of said mark sheet, respondent No. 2 got admission in Lady Siri Ram College, New Delhi. It was also unearthed during the enquiry that in the year 2006 respondent No. 2 withdrew her documents from Lady Siri Ram College, New Delhi. In 2007, respondent No. 2 again appeared in 10+2 examination from National Open School and in the same year she got admission in Jesus and Marry College, New Delhi. Precisely, as per the prosecution, H.P. Board of School Education issued a forged mark sheet to respondent No. 2 only on the behest of respondent No. 1 (father of respondent No. 2), who was Ex Food & Civil Supplies Minister in Himachal Pradesh Government. The mark sheet was prepared by one Rakesh Bhardwaj, who was Personal Assistant to Chairman, Himachal Pradesh Board of School Education, Dharamshala, and respondent No. 4, who was Deputy Secretary, Education Board, at the instance of respondent No. 3, who was the then Chairman of the Education Board. It came to light during the enquiry that a blank mark sheet was given by the Secrecy Branch to the Personal

Assistant of respondent No. 3 and he alongwith respondent No. 4 forged the mark sheet. It has further come in the enquiry that in the year 2006 respondent No. 3 constituted a committee for destroying 15 sample mark sheets. The documents/proceedings qua constitution of the said committed are back dated, i.e., 06.09.2005. The said committee, despite the directions of the Chairman, retained photocopies of 14 mark sheets, however, the photocopy of the mark sheet issued in favour of respondent No. 2 was not retained.

3. After conclusion of the investigation, FIR was registered against the respondents. Respondent No. 2, during the trial, maintained an application under Section 227 Cr.P.C. for discharging/dropping the proceedings against her, however, the learned Special Judge, dismissed the same.

4. The Public Prosecutor, on an application moved by respondent No. 2, again thoroughly examined the case. As per the petitioner, respondent No. 2 in the year 2007 again appeared in 10+2 examination, through National Open School and after clearing the same she got admission in Jesus & Marry College, Delhi, and she did not complete her studies on the basis of alleged forged mark sheet. Respondent No. 2 has now got Masters Degree in Arts without any prejudice to anyone. The petitioner further contented that the forged mark sheet had not been recovered, which shakes the very basis of the case. As per the petitioner, no direct or circumstantial evidence, demonstrating the involvement of respondents No. 1, 3 and 4, was available. Thus, on the basis of the above grounds and on instructions received from the State Government, vide letter No. Home(Vig)A(5)-64/2008 (Minister) dated 13.05.2014, the petitioner/State maintained an application under Section 321 Cr.P.C. for withdrawing from prosecution against the respondents/accused, in the learned Trial Court. However, the learned Trial Court, vide its order dated 21.11.2014, dismissed the same, hence the present revision petition.

5. I have heard the learned Additional Advocate General for the petitioner/State and the learned Counsel for the respective respondents.

6. Learned Additional Advocate General has argued that the opinion given by the Public Prosecutor qua withdrawal from prosecution against the respondents was *bona fide* and independent, as the same is based upon the material available before him. He has further argued that the learned Trial Judge did not appreciate the contents of the application for withdrawal from prosecution in its right and true perspective, therefore, the impugned order is not only perverse, but also against the law. In case the prosecution is allowed to continue against the respondents, the same will not serve any fruitful purpose, as nothing is emanating from the investigation that someone has destroyed the alleged forged mark sheet. The prosecution investigation does not reveal anything against the respondents that they had a prior concert or meeting of minds in forging the alleged mark sheet. The alleged forged mark sheet has not seen the light of the day, thus there is no material on record to establish the offence of conspiracy. Keeping in view all the above facts in mind, the opinion, as given by the Public Prosecutor, was *bona fide.* The learned Additional Advocate General has further argued that the powers of the learned Trail Judge was only supervisory in nature and he had to see whether the action of the learned Public Prosecutor was *bona fide* or not, however, he, merely suspected the action of the Public Prosecutor, and exceeded his jurisdiction. The learned Trial Judge passed the impugned order only on the basis of suspicion on the action of the Public Prosecutor and no *mala fides* had been attributable against the Public Prosecutor. It has also been brought to the notice of this Court that one of the co-accused (Rakesh Bhardwaj) is no more in this world. Lastly, it has been argued that the order of the learned Trial Judge is perverse and against the law, thus the same may be set aside.

7. Mr. B.C. Negi, Senior Advocate, has argued that the learned Trial Court has failed to consider that there is no case made out against respondents No. 1 and 2, as there is nothing on record to suggest that these respondents have committed any offence and the application made by the learned Public Prosecutor should have been allowed by the learned Trial Court. Mr. Lovneesh Kanwar, Advocate, appearing for respondent No. 3 has argued that respondent No. 3 is

not at all involved in the prosecution case, as there is no iota of evidence in the police file connecting him with the alleged offence. Lastly, Mr. Neeraj Gupta, Advocate, appearing for respondent No. 4 has argued that in the entire police *challan* there is nothing against respondent No. 4 and the Public Prosecutor had moved the application for withdrawal from prosecution *bona fidely,* which should have been allowed.

8. In order to appreciate the respective contentions of the parties, I have gone through the record carefully.

9. At the very outset, I would like to extract Section 321 of the Code of Criminal Procedure, 1973, in *extenso*, which is as under:

> ***"321. Withdrawal from prosecution.-*** *The Public Prosecutor or Assistant Public Prosecutor in charge of a case may, with the consent of the Court, at any time before the judgment is pronounced, withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried; and, upon such withdrawal,-*
>
> *(a) if it is made before a charge has been framed, the accused shall be discharged in respect of such offence or offences;*
>
> *(b) if it is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted in respect of such offence or offences:*
>
> *Provided that where such offence-*
>
> *(i) was against any law relating to a matter to which the executive power of the Union extends, or*
>
> *(ii) was investigated by the Delhi Special Police Establishment under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or*
>
> *(iii) involved the misappropriation or destruction of, or damage to, any property belonging to the Central government, or*
>
> *(iv) was committed by a person in the service of the Central Government while acting or purporting to act in the discharge of his official duty,and the Prosecutor in charge of the case has not been appointed by the Central Government, he shall not, unless he has been permitted by the Central Government to do so, move the Court for its consent to withdraw from the prosecution and the Court shall, before according consent, direct the Prosecutor to produce before it the permission granted by the Central Government to withdraw from the prosecution."*

10. Manifestly, the record, which is collected by the prosecution, is in the shape of documents and the statements of the witnesses. As far as the documents are concerned, the alleged forged mark sheet has not been recovered by the prosecution and the whole edifice of the prosecution case rests on this alleged forged mark sheet. Thus, the original alleged forged mark sheet has not seen the light of the day. Even, for want of original mark sheet, the expert has not given any specific opinion on the photocopy of the alleged forged mark sheet, as mentioned in Column No. 6, the report of the expert. It is further case of the prosecution that the original mark sheet could not be traced, as the same was destroyed. This stand of the prosecution also seems hypothetical and suspicious, especially when Shri Sohan Singh, a witness, has made a statement before the police, which is on record, that a blank certificate with the same serial No., on which the duplicate is shown, has been destroyed alongwith other blank certificates, after following the proper procedure. The other material witness, whose statement has been recorded by the prosecution, is Shri Ashwani Kumar. He has appended a note while signing page 48 of the file of the learned Trial Court, about the constitution of the committee, but there is no note in the report. Smt. Chander Kanta, another prosecution witness, has stated that a blank certificate was issued and as per the record the same had been issued on 12.08.2005, but as per the prosecution, the filled in certificate was used in June, 2005. Thus, the statement of Smt. Chander Kanta, even if taken proved in toto, will be of no help to the prosecution.

11. Statement of Shri Pritam Chand, which is at page 133**,** is very material. He has also stated that a blank certificate was issued on 12.08.2005 to one Rajesh Bhardwaj. Rajesh Bhardwaj was made as accused by the prosecution and now he is no more in this world. As per the prosecution, the alleged forged and filled in certificate was used in June, 2005. The statement of Shri Sohan Singh, which is at page 136 of the *challan* file, demonstrates that proper procedure was followed for destroying the blank certificates. The prosecution has tried to bring on record that respondents No. 1 and 3 have met in the month of October, 2006, however, after going through the entire record, there is nothing to suggest that these accused met at any point of time.

12. Now, coming to the fact whether the offence of cheating or forgery could be proved on the basis of the material, which is placed before the learned Trial Court, the answer is that it is suspicious and doubtful. It emanates from the record that as per the prosecution story, even respondent No. 2 had not taken any benefit out of the said alleged forged mark sheet and she had cleared her 10+2 from National Open School. Thereafter, respondent No. 2 did B.A., M.A., M. Phil. and Ph.D. from Delhi University.

13. In case the proceedings are allowed to continue, the ultimate result which seems is acquittal of the respondents. In these circumstances, whether to continue with the proceedings against respondent No. 2, who has not fetched any benefit from the alleged forged mark sheet, and against the other respondents, against whom there is no evidence, or not is the question which needs to be examined on the touchstone of Section 321 Cr.P.C. After going through the entire available material on record, this Court finds that the Public Prosecutor, while making reference to the State Government for permission to allow him to move an application before the learned Trial Court for withdrawal from prosecution under Section 321 Cr.P.C., acted *bona fidely* and this fact is also evident from the discussion made hereinabove. In a similar set of circumstances, the Hon'ble Supreme Court in ***Mohd. Mumtaz vs. Nandini Satpathy and others (I), (1987) 1 Supreme Court Cases 269,*** has held as under vide paras 19 and 20:

> "19. In this case the Special Public Prosecutor had set out in paras 5 and 6 of his application the relevant materials which had prevailed upon him to seek withdrawal of prosecution of the case, after obtaining the consent of the Court, to subserve the interests of justice better. There is no material in the case to show that the Special Public Prosecutor was influenced by any improper motives for filing the application for withdrawal of the prosecution or that he had acted against his will at the behest of anyone else.
>
> 20. The learned Additional Chief Judicial Magistrate has bestowed judicial consideration over the matter and has thereafter passed a reasoned order. While giving his consent for the withdrawal of the prosecution the learned Magistrate has borne in mind the Principles laid down by this Court in Rajender Kumar Jain v. State which has followed the earlier decision of this Court in State of Bihar v. Ram Naresh Pandey. Before passing the order, the learned Magistrate has been fully alive to the responsibility of the court before it grants consent to an application made under Section 321 CrPC. The portion extracted below from the order of the learned Additional Chief Judicial Magistrate fully reveals this position:
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> > While mentioning the facts in the petition, I have already indicated the reasons for which the prosecutor does not want to prosecute. Now the Court has to consider whether consent should be given or not. The discretion as to whether consent should be given to withdraw is with the court but it should be exercised judiciously and on correct legal principles. It is not to be given as a matter of course nor the court shall surrender its own independence of judgment.
>
> After making an objective assessment of the merits of the application, the learned Additional Chief Judicial Magistrate held that the withdrawal of the

prosecution "would in no way affect any public interest or improve any public confidence" and concluded as follows:

> Considering all these circumstances if the public prosecutor most judiciously thought it proper to withdraw from the case in my opinion, the court should be not a stumbling block by disallowing its consent. I feel it just and proper to allow the petition."

14. The Hon'ble Supreme Court in ***Ghanshyam vs. State of M.P. & others, (2006) 10 Supreme Court Cases 473,*** has held as under vide para 14:

> "14. The discretion to withdraw from the prosecution is that of the Public Prosecutor and none else, and so, he cannot surrender that discretion to any one. The Public Prosecutor may withdraw from the prosecution not merely on the ground of paucity of evidence but on other relevant factors as well in order to further the broad ends of justice, public order, peace and tranquility. The High Court while deciding the revision petition clearly observed that the material already available on record was insufficient to warrant conviction. The flow of facts and the possible result thereof as noticed by the Public Prosecutor and appreciated by the Courts below, constituted the public interest in the withdrawal of the said prosecution. The High Court clearly came to the conclusion that the application for withdrawal of the prosecution and grant of consent were not based on extraneous considerations."

15. The Hon'ble Supreme Court in ***Sheonandan Paswan vs. State of Bihar & others, (1987) 1 Supreme Court Cases 288,*** has held as under:

> *"69. Section 321 needs three requisites to make an order under it valid; (1) The application should be filed by a Public Prosecutor or Assistant Public Prosecutor who is competent to make an application for withdrawal, (2) He must be in charge of the case, (3) The application should get the consent of the court before which the case is pending.*
>
> *70. I find that all the three requisites are satisfied here. The question is whether the functions by the Public Prosecutor and the court were properly performed. At no stage was a case put forward by anyone that the application made by the Public Prosecutor was either mala fide or that it was not in good faith. There is no allegation of bias against the Special Judge. The application filed by the Public Prosecutor discloses the fact that he had gone through the case diary and the relevant materials connected with the case and that he came to the conclusion that in the circumstances prevailing at the time of institution of the case and investigation thereof, the case was instituted on the ground of political vendetta and only to defame the fair image of Jagannath Mishra. This statement of the Public Prosecutor has not been challenged as borne out of any unwholesome motive. It has not been made out or suggested that the Public Prosecutor was motivated by improper considerations. The only contention raised is that the reasons are not sufficient or relevant.*
>
> *71. The Public Prosecutor should normally be credited with fairness in exercise of his power under S. 321, when there is no attack against him of having acted in an improper manner. He had before him the State government's communication of the policy taken by it. He had before him the case diary statements and other materials. He perused them before filing the application. Thus his part under Section 321 in this case has been performed strictly in conformity with this section. The question that remains then is whether the grounds urged by him in support of withdrawal were sufficient in law. The application clearly shows that Shri Sinha applied his mind to the facts of the case. One would normally not expect a more detailed statement in an application for withdrawal than the one contained in the application in question, when one keeps in view the scope of S. 321 and the wide*

language it uses. The plea that there was lack of application of mind by the Public Prosecutor has only to be rejected in this case.

… … … …

73. Section 321 gives the Public Prosecutor the power for withdrawal of any case at any stage before judgment is pronounced. This presupposes the fact that the entire evidence may have been adduced in the case, before the application is made. When an application under Section 321 Criminal Procedure Code is made, it is not necessary for the court to assess the evidence to discover whether the case would end in conviction or acquittal. To contend that the court when it exercises its limited power of giving consent under Section 321 has to assess the evidence and find out whether the case would end in acquittal or conviction, would be to rewrite Section 321 Criminal Procedure Code and would be to concede to the court a power which the scheme of Section 321 does not contemplate. The acquittal or discharge order under Section 321 are not the same as the normal final orders in criminal cases. The conclusion will not be backed by a detailed discussion of the evidence in the case of acquittal or absence of prima facie case or groundlessness in the case of discharge. All that the court has to see is whether the application is made in good faith, in the interest of public policy and justice and not to thwart or stifle the process of law. The court after considering these facets of the case, will have to see whether the application suffers from such improprieties or illegalities as to cause manifest injustice if consent is given. In this case, on a reading of the application for withdrawal, the order of consent and the other attendant circumstances, I have no hesitation to hold that the application for withdrawal and the order giving consent were proper and strictly within the confines of Section 321 Criminal Procedure Code.

… … .., …

78. The section gives no indication as to the grounds on which the Public Prosecutor may make the application, or the considerations on which the court is to grant its consent. The initiative is that of the Public Prosecutor and what the court has to do is only to give its consent and not to determine any matter judicially. The judicial function implicit in the exercise of the judicial discretion for granting the consent would normally mean that the court has to satisfy itself that the executive function of the Public Prosecutor has not been improperly exercised, or that it is not an attempt to interfere with the normal course of justice for illegitimate reasons or purposes.

… … … …

86. These two sub-sections use the expression "with the permission of the court" and "with the consent of the Court" which are more or less ejusdem generis. On a fair reading of the above-mentioned sub-sections it can be safely presumed that the sections confer only a supervisory power on the court in the matter of compounding of offences in the manner indicated therein, with this safeguard that the accused does not by unfair or deceitful means, secure a composition of the offence. Viewed thus I do not think that a plea can be successfully put forward that granting permission or giving consent under sub-section (4)(a) or (4)(b) for compounding of an offence, the court is enjoined to make a serious detailed evaluation of the evidence or assessment of the case to be satisfied that the case would result in acquittal or conviction. It is necessary to bear in mind that an application for compounding of an offence can be made at any stage. Since Section 321 finds a place in this chapter immediately after Section 320, one will be justified in saying that it should take its colour from the immediately preceding section and in holding that this section, which is a kindred to Section 320, contemplates consent by the court only in a supervisory manner and not

essentially in an adjudicatory manner, the grant of consent not depending upon a detailed assessment of the weight or volume of evidence to see the degree of success at the end of the trial. All what is necessary for the court to see is to ensure that the application for withdrawal has been properly made, after independent consideration, by the Public Prosecutor and in furtherance of public interest.

87. *I referred to these sections only by way of illustration to emphasize the distinction between Section 321 and other sections of the Code dealing with orders withdrawing criminal cases or discharging or stopping proceedings. My purpose in referring to the above sections is only to show that Section 321, in view of the wide language it uses, enables the Public Prosecutor to withdraw from the prosecution any accused, the discretion exercisable under which is fettered only by a consent from court on a consideration of the materials before it and that at any stage of the case. The section does not insist upon a reasoned order by the Magistrate while giving consent. All that is necessary to satisfy the section is to see that the Public Prosecutor acts in good faith and that the Magistrate is satisfied that the exercise of discretion by the Public Prosecutor is proper.*

88. *There is no appeal provided by the Act against an order giving consent under Section 321. But the order is revisable under Section 397 of the Criminal Procedure Code. Section 397 gives the High Court of the Sessions Judge jurisdiction to consider the correctness, legality or propriety of any finding, sentence or order and as to the regularity of the proceedings of any inferior court. While considering the legality, propriety or the correctness of a finding or a conclusion, normally, the revising court does not dwell at length upon the facts and evidence of the case. The court in revision considers the materials only to satisfy itself about the correctness, legality and propriety of the findings, sentence or order and refrains from substituting its own conclusion on an elaborate consideration of evidence.*

… … … …

91. *Since Section 321 does not give any guidelines regarding the grounds on which a withdrawal application can be made, such guidelines have to be ascertained with reference to decided cases under this Section as well as its predecessor Section 494. I do not propose to consider all the authorities cited before me for the reason that this court had occasion to consider the question in all its aspects in some of its decisions. Suffice it to say that in the judgments rendered by various High courts, public policy, interests of the administration, inexpediency to proceed with the prosecution for reasons of State and paucity of evidence were considered good grounds for withdrawal in many cases and not good grounds for withdrawal in certain other cases depending upon the peculiar facts and circumstances of the cases in those decisions. Giribala Dasi v. Mader Gazi, Emperor v. Milanmal Hardasmal, Harihar Sinha v. Emperor. King v. Moule Bux, A. N. Mathur v. State of Rajasthan and Bawa Faqir Singh v. Emperor are some of the cases which were brought to our notice.*

92. *Ram Naresh Pandey case is a landmark case which has laid down the law on the point with precision and certainty. In this decision the functions of the court and the Public Prosecutor have been correctly outlined. While discussing the role of the court, this court observed: His discretion in such matters has necessarily to be exercised with reference to such material as is by then available and it is not a prima facie judicial determination of any specific issue. The Magistrate's functions in these matters are not only supplementary, at a higher level, to those of the executive but are intended to prevent abuse. Section 494 requiring the consent of the court for withdrawal by the Public Prosecutor is more in line with this scheme, than with the provisions of the Code relating to inquiries and trials by*

court. It cannot be taken to place on the court the responsibility for a prima facie determination of a triable issue. For instance the discharge that results therefrom need not always conform to the standard of "no prima facie case" under Sections 209 (1) and 253 (1) or of 'groundlessness' under Sections 209 (2) and 253 (2). This is not to say that a consent is to be lightly given on the application of the Public Prosecutor, without a careful and proper scrutiny of the grounds on which the application for consent is made. This decision was approved by this court in M. N. Sankarayarayanan Nair v. P. V. Balakrishnan, (1972) 1 SCC 318, as is seen at page 606:

In the State of Bihar v. Ram Naresh Pandey it was pointed out by this court that though the Section does not give any indication as to the ground on which the Public Prosecutor may make an application on the consideration of which the court is to grant its consent, it must nonetheless satisfy itself that the executive function of the Public Prosecutor has not been improperly exercised and that it is not an attempt to interfere with the normal course of justice for illegitimate reasons or purposes.

… … … …

95. In State of Orissa v. Chandrika Mohapatra the application for withdrawal was made on two grounds: (i) that it was considered inexpedient to proceed with the case; (ii) that the evidence collected during investigation was meagre and no useful purpose would be served by proceeding with the case against the accused. The Magistrate gave consent holding that compelling the State to go on with the prosecution would involve unnecessary expenditure and waste of public time. This court upheld the consent and held that meagre evidence was a legitimate ground for withdrawal. The following observation at page 338 of the reports is useful for our purpose on an important aspect. In that case, as in this case, the Magistrate had clearly stated in his order that he was giving consent after going through the materials placed before him. This is how the court summed up its finding:

It is difficult for us to understand how the High court could possibly observe in its order that the Magistrate had not perused the case diary when in terms the learned Magistrate has stated in his order that he had read the case diary and it was after reading it that he was of the opinion that the averment of the prosecution that the evidence was not sufficient was not ill-founded. Then again it is difficult to comprehend how the High court could possibly say that the learned Magistrate accorded consent to the withdrawal of the prosecution on the ground that it was inexpedient to proceed with the case, when, in so many terms, the learned Magistrate rejected that ground and granted consent only on the second ground based on inadequacy of evidence. When the Magistrate states in his order that he has considered the materials, it is not proper for this court not to accept that statement. The proper thing to do is to hold that the Magistrate gave consent on objective consideration of the relevant aspects of the case. It would be acting against the mandate of Section 321 to find fault with the Magistrate in such cases, unless the order discloses that the Magistrate has failed to consider whether the application is made in good faith, in the interest of public policy and justice and not to thwart or stifle the process of law."

16. The Hon'ble Supreme Court in ***Sheonandan Paswan vs. State of Bihar & others, (1983) 1 Supreme Court Cases 438,*** has held as under vide para 91:

"91. An order under S. 321 of the Code, in our opinion, does not have the same status as an order of conviction or acquittal recorded by a trial or appellate court in a criminal prosecution, inasmuch as the former has not been made appealable. An order under S. 321 of the Code has a narrower scope. As an order under S. 321 of the Code recorded by the trial court is judicial. what the trial court is expected to do

is to give reasons for according or refusing its consent to the withdrawal. As stated above, the duty of the court is to see that the grounds of withdrawal are legally valid and the application made by the Public Prosecutor is bona fide and is not collusive. In revision of an order under S. 321 of the Code. the duty of the High court is to see that the consideration by the trial court of the application under S. 321 was not misdirected ; and that the grounds of withdrawal are legally valid. In this case. the trial court elaborately considered the grounds of withdrawal and found them to be valid and accordingly accorded its consent for withdrawal. In revision the High court affirmed the findings of the trial court."

17. The Hon'ble Supreme Court in ***State of Orissa vs. Chandrika Mohapatra and others, (1976) 4 Supreme Court Cases 250,*** has held as under vide paras 6 and 7:

"6. It will, therefore, be seen that it is not sufficient for the Public Prosecutor merely to say that it is not expedient to proceed with the prosecution. He has to make out some ground which would show that the prosecution is sought to be withdrawn because inter alia the prosecution may not be able to produce sufficient evidence to sustain the charge or that the prosecution does not appear to be well founded or that there are other circumstances which clearly show that the object of administration of justice would not be advanced or furthered by going on with the prosecution. The ultimate guiding consideration must always be the interest of administration of justice and that is the touchstone on which the question must be determined whether the prosecution should be allowed to be withdrawn.

7. Now in the present case it is clear that according to the prosecution, the evidence collected during investigation was not sufficient to sustain the charge against the respondent and the learned Magistrate was satisfied in regard to the truth of this averment made by the Court Sub-Inspector. It is difficult for us to understand how the High Court could possibly observe in its order that the Magistrate had not perused the case diary when in terms the learned Magistrate has stated in his order that he had read the case diary and it was after reading it that he was of the opinion that the averment of the prosecution that the evidence was not sufficient was not ill-founded. Then again it is difficult to comprehend how the High Court could possibly say that the learned Magistrate accorded consent to the withdrawal of the prosecution on the ground that it was inexpedient to proceed with the case, when, in so many terms, the learned Magistrate rejected that ground and granted consent only on the second ground based on inadequacy of evidence. There is no doubt that the learned Magistrate was right in granting consent and the High Court committed a manifest error in setting aside the order of the learned Magistrate. We accordingly allow Criminal Appeal No. 308 of 1975, set aside the order of High Court and restore that of the learned Magistrate."

18. The Hon'ble Supreme Court in ***State of Punjab, vs. Union of India and others, (1986(4 Supreme Court Cases 335,*** has held as under vide para 1:

"1. We are satisfied on hearing learned counsel for the parties that .the judgment of the High Court cannot be sustained. It is the duty of the Court while granting permission to the Public Prosecutor to withdraw from the prosecution under S. 494 Criminal P.C. 1898, to satisfy itself that the executive function of the Public Prosecutor has not been improperly exercised or that it is not an attempt to interfere with the normal course of justice for illegitimate reasons or purposes. The ultimate guiding consideration while granting a permission to withdraw from the prosecution must always be the interest of administration of justice and that is the touchstone on which the question must be determined whether the prosecution should be allowed to withdraw. The Public Prosecutor may withdraw from the prosecution of a case not merely on the ground of paucity of evidence but also in

order to further the broad ends of public justice, and such broad ends of public justice may well include appropriate social, economic and political purposes."

19. The Hon'ble Supreme Court in ***Pushpa Devi M. Jatia vs. M.L. Wadhavan, Additional Secretary, Government of India and others, 1986 (Supp.) Supreme Court Cases 535,*** has held as under vide para 6:

> *"6. A Commission was set up after the emergency had ended and holding fresh elections, a different political party had come to power. Following the report of the Commission this prosecution had been launched. The petitioner's learned Counsel did not dispute the position that the finding of the Commission is not evidenced and no conviction can lie on the conclusion either. In these circumstances, chances of conviction are too far-fetched and bleak. We do not think it is in public interest that the prosecution should proceed. We may add that in a report under S. 173(8) of the Code, the investigating agency has also indicated that adequate evidence has not been forthcoming to support the prosecution. It is thus not necessary to examine the legal aspect canvassed in the special leave petitions and argued during hearing. Both the petitions are dismissed."*

20. The present case is squarely covered with the above cited cases, At the same point of time, the Hon'ble Supreme Court in ***Sheonandan Paswan vs. State of Bihar and others, (1987) 1 Supreme Court Cases 288,*** has taken a majority view, which has been reproduced hereinabove. Now, applying the law to the facts of the present case, it is clear that the application moved by the Public Prosecutor before the learned Trail Court was without any extraneous considerations and the same had been moved upon the material which has come on record. Therefore, the order of the learned Trial Court refusing to give consent for withdrawal from proceedings is without application of mind, wrong, not sustainable in the eyes of law and the same is against the well settled principles of law. Resultantly, the present petition is allowed and the order, dated 21.11.2014, passed by the learned Trial Court, on application moved under Section 321 Cr.P.C., quashed and set aside. Accordingly, the petitioner/State/Public Prosecutor is permitted to withdraw from prosecution against the respondents.

21. In view of the above, the petition, as also the pending application(s), if any, stand(s) disposed of.

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

Naresh Kumar and Ors. .....Appellants.

Versus

State of H.P. and Anr. .....Respondents.

LPA No. 524 of 2011
Reserved on: 1.6.2017
Date of decision : 29.6.2017

Constitution of India, 1950- Article 226- Principal Secretary (Elementary Education) to the Government of Himachal Pradesh directed the Director (Elementary Education) to initiate the proceeding for conducting common entrance test for admission for two years J.B.T. Course - it was specifically mentioned in the advertisement that J.B.T. training did not guarantee government service after the completion of the course – the petitioners claimed regular appointment after the completion of the course – the writ petition was dismissed by the Court, but directions were issued to offer jobs on contract basis keeping in view the availability of the vacancies – held that it was specifically made clear that completion of the course will not

guarantee the appointment – the appointment is to be made in accordance with Recruitment and Promotion Rules, which provided appointment on contract basis – simply because the trainees of earlier batches were offered appointment on regular basis will not entitle the petitioner to regular appointment – Court cannot question a policy decision unless the same is unconstitutional dehors the provision of the Act, beyond the delegated authority or contrary to statutory or legal policy – the writ Court had rightly dismissed the writ petition – appeal dismissed.(Para- 4 to 14)

Cases referred:

Ekta Shakti Foundation v. Govt. of NCT of Delhi, (2006) 10 SCC 337

Delhi Development Authority and another v. Joint Action Committee Allottee of SFS Flats and other, (2008) 2 SCC 672

Shimnit Utsche India Private Limited and Anr. v. West Bengal Transport Infrastructure Development Corporation Limited and other (2010) 6 SCC 303

P.U. Joshi v. Accountant General, (2003) 2 SCC 632

K. Samantaray v. National Insurance Co. Ltd. (2004) 9 SCC 286

Census Commr. v. R. Krishnamurthy, (2015) 2 SCC 796

For the Appellants:	Ms. Ranjana Parmar, Senior Advocate, with Mr. Karan Parmar, Advocate.
For the Respondents:	Mr. Shrawan Dogra, Advocate General with Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals and Mr. J.K. Verma & Mr. Kush Sharma, Deputy Advocate Generals.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

Instant Letters patent appeal having been filed by the appellants is directed against the judgment dated 19.8.2011, passed by the learned Single Judge in CWP No. 7188 of 2010, whereby learned Single Judge has held that the J.B.T. course is the only academic course and mere passing of J.B.T. course successfully, does not confer any vested or accrued right to the candidate(s) to be appointed in the Government job. Learned Single Judge has further held that the appointments in the State are to be made strictly as per the Recruitment and Promotion Rules and State cannot take any policy decision contrary to Constitution or the Recruitment and Promotion Rules framed under Article 309 of the Constitution of India and the Courts cannot direct the functionaries of the State to act in contravention of the validly enacted Recruitment and Promotion Rules. Learned Single Judge has further concluded that public employment by the State cannot be restricted to a particular batch or candidates belonging to a particular institution, rather, all the posts should be advertised enabling all the candidates, who are in possession of J.B.T. qualification to participate in the selection process because restricting the public employment to a particular batch or institution would be violative of Articles 14 and 16 of the Constitution of India. Learned Single Judge while dismissing the petition having been filed by the appellants-petitioner has directed the respondents to fill up the posts of J.B.T. teachers strictly as per the Recruitment and Promotion Rules.

2. Briefly stated facts as emerge from the record are that vide communication dated 13.6.2008, Principal Secretary (Elementary Education) to the Government of Himachal Pradesh directed the Director (Elementary Education), Himachal Pradesh, to initiate process for conducting common entrance test for admission for two years J.B.T. course (2008-2010). Pursuant to the aforesaid directions having been issued by the state of HP, H.P. Board of School Education issued advertisement (Annexure P-4), for holding common entrance test for admission for two years J.B.T. course. It would be apt to reproduce herein below condition No.5 of the advertisement as under:-

> *"5. Neither the appearance in the test shall ipso facto entitle a candidate to get admission in this course nor the J.B.T. training guarantees Govt. service after the completion of training."*

Pursuant to aforesaid test conducted by the respondent department, petitioner qualified the same and started pursuing two years' J.B.T. course. Subsequently, vide CWP No. 7188 of 2010 i.e. subject matter of the instant appeal, appellants- petitioners claimed that their case is also required to be considered for regular appointment at par with earlier batches since condition for considering the candidates for appointment on contract basis, came to be only incorporated for the admissions, which were made during the year, 2010, and same cannot be applied retrospectively. Appellants/petitioners further claimed that direction may be issued to the respondents to give relaxation to appoint them on regular basis instead of contract basis. Appellants/petitioners also placed on record admission notice (Annexure P-2), issued in the year, 2003, wherein condition No. 5 (referred supra) was also existing. Appellants/petitioners also made available on record copy of the advertisement for J.B.T. Common Entrance Test for the year, 2010, wherein conditions No. 6 and 7 were incorporated, which is being reproduced herein below:-

> *"6. Since contractual appointment will be considered after passing of JBT course and subject to permission to fill up vacancies, hence, no bond will be executed to serve in the Education Department.*
>
> *7. After successful completion of JBT course as above conditions, the candidates are eligible for employment against vacant pots of JBT teacher in Elementary Education Department. Actual appointment will be based on vacancies and necessary approvals to fill the posts. As per present policy fresh appointments are made on contract."*

3. Respondents while refuting the aforesaid claim of the appellants-petitioners stated that the Govt. vide letter dated 26.9.1997, had taken a conscious policy decision to execute bond only with the JBT Trainees of Batch 2006-08 for providing regular jobs against the vacant post of J.B.T. teachers in the State and accordingly, all pass out candidates of batch 2006-08 (except J.B.T. trainees of Trisha College of Education, Rangas District Hamirpur, HP) stand appointed on regular basis as J.B.T. teachers against the available vacancies. Respondents further contended that govt. took policy decision during February, 2008 that all further appointments made on the contract basis and as such, J.B.T. students of petitioners' batch 2008-10 could not be considered for the appointment on regular job and all the appointments were to be made on contract basis, which was further subject to availability of vacancies of teachers in the State. Respondents while specifically referring to the condition contained at Sr. No. 5 (i.e. General Rules/Guidelines for JBT Common Entrance Test) contended that neither the appearance in the test would ipso-facto entitle a candidate to get admission in the course nor the J.B.T. training guarantees Govt. service after the completion of the training. Respondents further claimed that completion of two years JBT training course by any candidate does not entitle him or her to claim regular appointment against the J.B.T. post in Government Primary Schools in the State. Apart from above, respondents also claimed before learned Single Judge that since all the trainees have completed two years of J.B.T. training and the examination has also been conducted, there is no question of executing bond. Trainees of Sessions 2008-2010, who have successfully passed out the examination of two years JBT training, shall be considered for the job on contract basis that too keeping in view the availability of vacancies as per the decision taken by the Govt. from time to time. On the basis of aforesaid pleadings, learned Single judge dismissed the writ petition issuing therein directions as referred herein above.

4. This Court after having carefully perused condition No. 5 contained in the advertisement (Annexure-P4), sees no force in the arguments having been made by the learned counsel for the appellants-petitioners that the petitioners-appellants ought to have been offered regular appointment at par with earlier batches since condition for considering the candidate for

appointment on contract basis was only incorporated in the admission proposed to be made during the year, 2010.

5. This Court is in agreement with the arguments having been made by learned Advocate General that applications, if any, were filed/submitted by the appellants-petitioners pursuant to the advertisement (Annexure P-4), wherein it was specifically provided that mere appearance in the test will not make any candidate ipso-facto entitled to get admission in the course, nor the J.B.T. training guarantees govt. service after the completion of training. Perusal of advertisement issued for filling up vacancies suggests that similar condition was also incorporated (Annexure P-2) where petitioners were put to caveat before hand that mere sitting in the examination will not entitle them to get admission in the course and subsequently, govt. service after completion of training. Aforesaid advertisement containing therein condition No.5, came to be issued in the year, 2008 and the last date of receipt of the application was 21.7.2008 but petitioners-appellants instead of laying challenge, if any, to the condition as stated above, appeared in the examination and chose to remain silent for approximately two years. Petition only came to be filed on 16.11.2010, i.e. after the examination of J.B.T. course was over.

6. We after having carefully gone through the judgment passed by the learned Single Judge vis-à-vis material placed on record by the respective parties, see no infirmity and illegality in the findings returned by the learned Single Judge that appointment to the post is required to be made strictly as per Recruitment and Promotion Rules and admittedly, in the instant case, State government has already framed Recruitment and Promotion Rules under Article 309 of the Constitution of India for filling up of the post of the J.B.T. teachers on contract basis.

7. True it is, that earlier respondents-State taking into consideration the availability of posts appointed the candidates, who had completed J.B.T. course, on regular basis as J.B.T. teachers, but subsequently took policy decision to give appointment to the candidates on contract basis. Careful perusal of communication dated 24.2.2009 (Annexure P-8) clearly suggests that all principals, DIETs, H.P., were apprised that government has taken policy decision in the month of August, 2007 that in future, appointment of J.B.T. teachers would be made on contract basis and as such, while advertising these posts, condition may be incorporated in the advertisement so that candidates applying for the same are put to the caveat. Vide aforesaid communication, principals were directed to bring it to the notice of all the trainees that they will be considered for the posts against the available vacancies once they qualify the J.B.T. course that too on contract basis only.

8. Since the petitioners were put to caveat by way of advertisement wherein condition Nos. 6 and 7 (as have been reproduced herein above) were incorporated, appellants/petitioners cannot be allowed to claim that they ought to have been appointed on regular post immediately after completion of J.B.T. course like other batches. Since respondent-State took policy decision not to fill up posts on regular basis of the candidates 2008-2010 batch, no fault, if any, can be found with action of the State. Apart from above, since decision to offer appointment on contract basis after completion of J.B.T. course was taken in the year, 2007, as has been discussed supra, plea of the petitioners that decision has been made applicable retrospectively, was rightly rejected by the Learned Single Judge because admittedly advertisement was issued in the year, 2008 to appoint the candidates on contract basis, who had successfully completed the J.B.T. course. Petitioners cannot claim that after completion of J.B.T. course, they be appointed on regular basis, especially when they were made aware before hand at the time of issuance of advertisement. Since State govt. took policy decision to appoint the petitioners and similarly situated persons on contract basis as per Recruitment and Promotion Rules, court had no authority to direct the respondents to relax the Recruitment and Promotion Rules and as such, there is no illegality and infirmity in the judgment passed by the learned Single Judge.

9. It has been repeatedly held by the Hon'ble Apex Court that it is beyond the scope of judicial review to ascertain the correctness of the reasons for adopting certain policies by the

executive save and except breach of fundamental right, if any, is shown. In this regard, reliance, is placed on the judgment rendered by the Hon'ble Apex Court in case titled ***Ekta Shakti Foundation v. Govt. of NCT of Delhi***, (2006) 10 SCC 337, relevant paras whereof have been reproduced herein below:-

> *"11. 5.While exercising the power of judicial review of administrative action, the Court is not the appellate authority and the Constitution does not permit the Court to direct or advise the executive in matter of policy or to sermonize any matter which under the Constitution lies within the sphere of the Legislature or the executive, provided these authorities do not transgress their constitutional limits or statutory power. (See Ashif Hamid v. State of J. & K. (AIR 1989 SC 1899), Shri Sitaram Sugar Co. v. Union of India (AIR 1990 SC 1277).*
>
> *The scope of judicial enquiry is confined to the question whether the decision taken by the Government is against any statutory provisions or is violative of the fundamental rights of the citizens or is opposed to the provisions of the Constitution. Thus, the position is that even if the decision taken by the Government does not appear to be agreeable to the Court it cannot interfere.*
>
> *6.The correctness of the reasons which prompted the Government in decision making, taking one course of action instead of another is not a matter of concern in judicial review and the Court is not the appropriate forum for such investigation.*
>
> *7.The policy decision must be left to the Government as it alone can adopt which policy should be adopted after considering all the points from different angles. In matter of policy decisions or exercise of discretion by the Government so long as the infringement of fundamental right is not shown Courts will have no occasion to interfere and the Court will not and should not substitute its own judgment for the judgment of the executive in such matters. In assessing the propriety of a decision of the Government the Court cannot interfere even if a second view is possible from that of the Government.*
>
> *8.The Court should constantly remind itself of what the Supreme Court of the United States said in Metropolis Theatre Company v. City of Chicago (1912) 57 L Ed 730.*
>
> > *"The problems of Government are practical ones and may justify, if they do not require, rough accommodations, illogical it may be, and unscientific. But even such criticism should not be hastily expressed. What is the best is not always discernible, the wisdom of any choice may be disputed or condemned. Mere errors of government are not subject to our judicial review. [See: State of Orissa and others v. Gopinath Dash and Others (2005) 13 SCC 495].*

10. Hon'ble Apex Court in ***Delhi Development Authority and another v. Joint Action Committee Allottee of SFS Flats and other***, (2008) 2 SCC 672, which has also been taken note of by the learned Single Judge, has specifically held that policy decision is subject to judicial review on following grounds:-

> *"a. if it is unconstitutional;*
>
> *b. if it is dehors the provisions of the Act and the Regulations;*
>
> *c. if the delegate has acted beyond its power of delegation;*
>
> *d. if the executive policy is contrary to the statutory or a large policy."*

In the instant case, no material, if any, has been placed on record by the appellants/petitioners suggestive of the fact that decision taken by the respondents in offering appointment to the petitioners on contract basis is unconstitutional and same is dehors the provision of the act and regulation. Similarly, there is no material on record to demonstrate that policy decision taken by the Government is contrary to the statutory or legal policy. Hon'ble Apex Court has further held

in case titled ***Shimnit Utsche India Private Limited and Anr. v. West Bengal Transport Infrastructure Development Corporation Limited and other*** (2010) 6 SCC 303, that Govt. policy can be changed with changing circumstances and merely on the ground of change, such policy will not be vitiated:-

> *"52. We have no justifiable reason to take a view different from the High Court insofar as correctness of these reasons is concerned. The courts have repeatedly held that government policy can be changed with changing circumstances and only on the ground of change, such policy will not be vitiated. The government has a discretion to adopt a different policy or alter or change its policy calculated to serve public interest and make it more effective. Choice in the balancing of the pros and cons relevant to the change in policy lies with the authority. But like any discretion exercisable by the government or public authority, change in policy must be in conformity with Wednesbury reasonableness and free from arbitrariness, irrationality, bias and malice.*
>
> *53. In Association of Registration Plates1, this Court while dealing with the challenge to the conditions with regard to experience in foreign countries and prescribed minimum turnover from that business observed that these conditions have been framed in the NIT to ensure that the manufacturer selected would be technically and financially competent to fulfill the contractual obligations and to eliminate fly-by-night operators and that the insistence of the State to search for an experienced manufacturer with sound financial and technical capacity cannot be misunderstood. While maintaining the State Government's right to get the right and most competent person, it was held that in the matter of formulating conditions of a tender document and awarding a contract of the nature of ensuring supply of HSRP, greater latitude is required to be conceded to the State authorities and unless the action of tendering authority is found to be malicious and a misuse of statutory powers, tender conditions are unassailable.*
>
> *54.On the contentions advanced, this Court examined the impugned conditions and did not find any fault and overruled all objections raised by the petitioners therein in challenge to these conditions. This Court has neither laid down as an absolute proposition that manufacturer of HSRP must have the foreign experience and a particular financial capacity to fulfill the contractual obligations nor it has been held that these conditions must necessarily be insisted upon in the NIT.*
>
> *55.The judgment of this Court in Association of Registration Plates1 cannot be read as prescribing the conditions in NIT for manufacture and supply of HSRP. Rather this Court examined legality and justification of the impugned conditions within the permissible parameters of judicial review and recognized the right of the States in formulating tender conditions. In our opinion, there is no justification in denying the State authorities latitude for departure from the conditions of the NIT that came up for consideration before this Court in larger public interest to broaden the base of competitive bidding due to lapse of time and substantial increase in the number of persons having TAC from the approved institutes without compromising on the quality and specifications of HSRP as set out in Rule 50, Order 2001 and Amendment Order, 2001.*
>
> *66. As regards the State of Orissa, it is an admitted position that it issued NIT for the first time on April 11, 2007 inviting bids for the manufacture and supply of HSRP in respect of the existing motor vehicles and vehicles to be registered in the State of Orissa. The said NIT was not taken to logical conclusion and a fresh NIT was issued on July 6, 2009 on BOO 2008 (1) GLT 1020 basis. In that NIT, inter alia, eligibility criteria has been provided that bidder should have experience of working in the field of HSRP having used the security features as mentioned in Rule 50 of 1989 Rules. However, NIT does not insist on conditions like experience in the foreign countries and minimum prescribed turnover from the said business.*

In what we have already discussed above, no case for judicial review or intervention in the said NIT is made out."

In the aforesaid judgment Hon'ble Apex Court has held that govt. has discretion to adopt policy or alter or change its policy to serve public interest and make it more effective but change in policy should be free from arbitrariness and irrationality.

11. Hon'ble Apex Court in **P.U. Joshi v. Accountant General**, (2003) 2 SCC 632 has held that questions relating to the constitution, pattern, nomenclature of posts, cadres, categories, their creation/abolition, prescription of qualifications and other conditions of service including avenues of promotions and criteria to be fulfilled for such promotions pertain to the field of Policy and within the exclusive discretion and jurisdiction of the State. The Apex Court has held as under:

"10. We have carefully considered the submissions made on behalf of both parties. Questions relating to the constitution, pattern, nomenclature of posts, cadres, categories, their creation/abolition, prescription of qualifications and other conditions of service including avenues of promotions and criteria to be fulfilled for such promotions pertain to the field of Policy and within the exclusive discretion and jurisdiction of the State, subject, of course, to the limitations or restrictions envisaged in the Constitution of India and it is not for the Statutory Tribunals, at any rate, to direct the Government to have a particular method of recruitment or eligibility criteria or avenues of promotion or impose itself by substituting its views for that of the State. Similarly, it is well open and within the competency of the State to change the rules relating to a service and alter or amend and vary by addition/substruction the qualifications, eligibility criteria and other conditions of service including avenues of promotion, from time to time, as the administrative exigencies may need or necessitate. Likewise, the State by appropriate rules is entitled to amalgamate departments or bifurcate departments into more and constitute different categories of posts or cadres by undertaking further classification, bifurcation or amalgamation as well as reconstitute and restructure the pattern and cadres/categories of service, as may be required from time to time by abolishing existing cadres/posts and creating new cadres/posts. There is no right in any employee of the State to claim that rules governing conditions of his service should be forever the same as the one when he entered service for all purposes and except for ensuring or safeguarding rights or benefits already earned, acquired or accrued at a particular point of time, a Government servant has no right to challenge the authority of the State to amend, alter and bring into force new rules relating to even an existing service."

12. Hon'ble Apex Court in **K. Samantaray v. National Insurance Co. Ltd.** (2004) 9 SCC 286**,** has held that no one has a right to be promoted but only a right to be considered for promotion. The Apex Court has held as under:

"6. In all services, whether public or private there is invariably a hierarchy of posts comprising of higher posts and lower posts. Promotion, as understood under the Service Law Jurisprudence, is advancement in rank, grade or both and no employee has right to be promoted, but has a right to be considered for promotion. The following observations in Sant Ram Sharma v. State of Rajasthan and Ors., AIR (1967) SC 1910 are significant :

"The question of a proper promotion policy depends on various conflicting factors. It is obvious that the only method in which absolute objectivity can be ensured is for all promotions to be made entirely on grounds of seniority. That means that if a post falls vacant it is filled by the person who has served longest in the post immediately below. But the trouble with the seniority system is that it is so objective that it fails to take any account of personal merit. As a system it is fair to every official except the best ones; an official has nothing to win or lose provided he

does not actually become so inefficient that disciplinary action has to be taken against him. But, though the system is fair to the officials concerned, it is a heavy burden on the public and a great strain on the efficient handling of public business. The problem, therefore, is how to ensure reasonable prospect of advancement to all officials and at the same time to protect the public interest in having posts filled by the most able man? In other words, the question is how to find a correct balance between seniority and merit in a proper promotion-policy."" "

13. Hon'ble Apex Court in **Census Commr. v. R. Krishnamurthy,** (2015) 2 SCC 796**,** has held that the courts are not to plunge into policy making by adding something to the policy by way of issuing a writ of mandamus. The Apex Court has held as under:

"23. The centripodal question that emanates for consideration is whether the High Court could have issued such a mandamus commanding the appellant to carry out a census in a particular manner.

24. The High Court has tried to inject the concept of social justice to fructify its direction. It is evincible that the said direction has been issued without any deliberation and being oblivious of the principle that the courts on very rare occasion, in exercise of powers of judicial review, would interfere with a policy decision. Interference with the policy decision and issue of a mandamus to frame a policy in a particular manner are absolutely different. The Act has conferred power on the Central Government to issue Notification regarding the manner in which the census has to be carried out and the Central Government has issued Notifications, and the competent authority has issued directions. It is not within the domain of the Court to legislate. The courts do interpret the law and in such interpretation certain creative process is involved. The courts have the jurisdiction to declare the law as unconstitutional. That too, where it is called for. The court may also fill up the gaps in certain spheres applying the doctrine of constitutional silence or abeyance. But, the courts are not to plunge into policy making by adding something to the policy by way of issuing a writ of mandamus. There the judicial restraint is called for remembering what we have stated in the beginning. The courts are required to understand the policy decisions framed by the Executive. If a policy decision or a Notification is arbitrary, it may invite the frown of Article 14 of the Constitution. But when the Notification was not under assail and the same is in consonance with the Act, it is really unfathomable how the High Court could issue directions as to the manner in which a census would be carried out by adding certain aspects. It is, in fact, issuance of a direction for framing a policy in a specific manner.

25. In this context, we may refer to a three-Judge Bench decision in Suresh Seth V. Commr., Indore Municipal Corporation[9] wherein a prayer was made before this Court to issue directions for appropriate amendment in the M.P. Municipal Corporation Act, 1956 so that a person may be debarred from simultaneously holding two elected offices, namely, that of a Member of the Legislative Assembly and also of a Mayor of a Municipal Corporation. Repelling the said submission, the Court held:

> *"In our opinion, this is a matter of policy for the elected representatives of people to decide and no direction in this regard can be issued by the Court. That apart this Court cannot issue any direction to the legislature to make any particular kind of enactment. Under out constitutional scheme Parliament and Legislative Assemblies exercise sovereign power to enact laws and no outside power or authority can issue a direction to enact a particular piece of legislation. In Supreme Court Employees' Welfare Assn. v. Union of India[10] (SCC para 51) it has been held that no court can direct a legislature to enact a particular law. Similarly, when an executive*

authority exercises a legislative power by way of a subordinate legislation pursuant to the delegated authority of a legislature, such executive authority cannot be asked to enact a law which it has been empowered to do under the delegated legislative authority. This view has been reiterated in state of J & K v A.R. Zakki[11]. In A.K. Roy v. Union of India[12] it was held that no mandamus can be issued to enforce an Act which has been passed by the legislature."

14. Consequently in view of the detailed discussion made herein above, as well as law laid down by the Hon'ble Supreme Court, this Court sees no illegality and infirmity in the impugned judgment passed by the learned Single Judge, rather this Court is of the view that impugned judgment is based upon correct appreciation of law laid down by the Hon'ble Apex Court with regard to scope of judicial review qua the policy decision, if any, taken by the State and as such, same deserves to be upheld. Accordingly, present appeal is dismissed.

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

National Insurance Company Limited ....Appellant.
Versus
Darshana Devi & others ....Respondents

FAO (MVA) No. 472 of 2012
Judgment reserved on 21st June 2017
Date of Decision 29th June, 2017

Motor Vehicles Act, 1988- Section 166- The monthly income of the deceased was Rs.3600/- per month- 50% is to be added towards future income and the income of the deceased would be Rs.5400/- - 50% is to be deducted towards personal expenses and the loss of dependency has to be taken as Rs.2700/- per month- the age of the deceased was 30 years and multiplier of 18 will be applicable – therefore, compensation for loss of dependency will be Rs.5,83,200/- (2700 x 12 x 18) – an amount of Rs. 50,000/- awarded as compensation for love and affection, Rs. 10,000/- towards funeral expenses, Rs.5,000/- towards transportation of dead body and total compensation of Rs.6,48,200/- awarded along with interest @ 9% per annum. (Para- 10 to 14)

Cases referred:
Sarla Verma & others vs. Delhi Transport Corporation and another (2009)6 SCC 121
U.P. SRTC vs. Trilok Chandra (1996)4 SCC 362
Amrit Bhanu Shali vs. National Insurance Company Limited (2012)11 SCC 738
Reshma Kumari and others vs. Madan Mohan and another (2013)9 SCC 65
Munna Lal Jain and another vs. Vipin Kumar Sharma and others (2015)6 SCC 347
National Insurance Company Limited vs. Sukhiya Bail and others 2010 ACJ 2001
Puttamma and others vs. K.L. Narayana Reddy and another 2014 ACJ 526
Neerupam Mohan Mathur vs. New India Assurance Co. Ltd. 2013 ACJ 2122 (SC)
Jiju Kuruvila and others vs. Kunjujamma Mohan and others 2013 ACJ 2141 (SC)
Puttamma and others vs. K.L. Narayana Reddy and another 2014 ACJ 526 (SC)
V. Mekala vs. M. Malathi and another reported in 2014 ACJ 1441
Anjani Singh and others vs. Salauddin and others reported in 2014 ACJ 1565
Ratna Devi vs. Rajwanti Devi and others and other connected matters Latest HLJ 2016 (HP) 198
United India Insurance Company Ltd. vs. Smt. Kulwant Kaur, Latest HLJ 2014 (HP) 174
A.P.S.R.T.C. and another vs. M. Ramadevi and others (2008)3 SCC 379

Jiju Kuruvila and others vs. Kunjujamma Mohan and others 2013 ACJ 2141

For the Appellant:	Shri Lalit K. Sharma, Advocate.
For the Respondents:	Mr.Ramakant Sharma, Sr. Advocate with Mr.Basant Thakur, Advocate, for respondents No. 1 and 2, Mr.Anil Kumar, Advocate, vice Mr.Anup Rattan, Advocate, for respondent No.3 and Mr.Ashish Verma, Advocate vice Mr.B.S.Attri, Advocate, for respondent No.4.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.

Assailing award dated 30.6.2012 passed in Motor Accident Claims Petition No. 9-N/II of 2009 titled Darshana Devi and another vs. Rohit Sharma and others by the Motor Accident Claims Tribunal (I), Kangra at Dharamshala, appellant Insurance Company has preferred present appeal.

2. On account of death of 26 years old son of respondents No. 1 and 2/claimants in a motor accident occurred on 7.12.2008, the MACT has awarded compensation in favour of claimants to the tune of Rs.4,03,800/- along with interest at the rate of 9% per annum from the date of institution of petition till deposit of the award amount with cost of petition to the tune of Rs.2000/-. Details of awarded compensation are as under:-

i) Compensation for loss of dependency awarded	:	388800-00
ii) Just and reasonable funeral compensation awarded	:	10000-00
iii) Just and reasonable transportation of dead compensation awarded:		5000-00
iv) Medical compensation awarded (As no medical bills placed on record)		NIL
Total compensation awarded:		**Rs.403800-00**

3. I have heard learned counsel for parties and have gone through the material placed on the record.

4. Learned counsel for appellant company has referred para 38 of judgment passed by the Apex Court in ***Sarla Verma & others vs. Delhi Transport Corporation and another (2009)6 SCC 121*** wherein para 18 of judgment of the Apex Court passed in ***U.P. SRTC vs. Trilok Chandra (1996)4 SCC 362*** has been quoted stating therein that selection of multiplier in all cases cannot be solely dependent upon age of deceased and where a bechelor dies at the age of 45 years and dependants are his parents then age of parents would also be relevant in choice of multiplier and thus he submitted that in present case also, deceased was 26 years of age at the time of accident, whereas his parents Darshana Devi and Prem Singh were of 55 and 60 years of age at that time and therefore learned MACT wrongly applied multiplier on the basis of age of deceased who was bachelor rather multiplier on the basis of age of his dependant parents is to be applied.

5. Aforesaid plea of appellant Insurance Company is misconceived and is contrary to the law of land. It is now settled that selection of multiplier for determining the amount of compensation to be awarded to dependants is to be based on age of deceased and not at the age of dependant ***(See para 15 of Amrit Bhanu Shali vs. National Insurance Company Limited (2012)11 SCC 738).*** Three Judges Bench of the Apex Court in case ***Reshma Kumari and others vs. Madan Mohan and another (2013)9 SCC 65 ,*** after considering ***Sarla Verma's case*** cited supra, has held that multiplier is to be applied with reference to the age of deceased. The said ratio of law has been reiterated by another three Judges Bench of the Apex Court in ***Munna Lal Jain and another vs. Vipin Kumar Sharma and others (2015)6 SCC 347.***

6. In view of pronouncement of the Apex Court in cases cited supra, plea of appellant Insurance Company is not sustainable. The Motor Accident Claims Tribunal has rightly applied multiplier of 18 on the basis of age of the deceased.

7. Learned counsel for appellant has also contended that interest at the rate of 9% per annum awarded by the MACT is on higher side and it should have been according to prevailing rate of interest in the Nationalised Banks which at the time of filing of petition was not more than 6% and therefore, he pleaded that rate of interest deserves to be decreased from 9% to 6% in present case. He has also relied upon judgment of the High Court of Madhya Pradesh in ***National Insurance Company Limited vs. Sukhiya Bail and others 2010 ACJ 2001*** wherein interest at the rate of 8% from the date of filing of petition was awarded.

8. Learned counsel for claimants has referred judgment of the Apex court in case ***Puttamma and others vs. K.L. Narayana Reddy and another 2014 ACJ 526,*** wherein it has been held that awarding of rate of interest is option for Tribunals and Courts after taking into consideration the rate of interest allowed by the Apex Court in similar cases and other factors such as inflation, change in economy, policy adopted by Reserve Bank of India from time to time and period since when the case is pending and thus, it is contended that rate of interest in banks is not sole criteria for determining the rate of interest to be awarded by the MACT. Learned counsel has also referred the judgments of the Apex Court rendered in ***Neerupam Mohan Mathur vs. New India Assurance Co. Ltd. 2013 ACJ 2122 (SC), Jiju Kuruvila and others vs. Kunjujamma Mohan and others 2013 ACJ 2141 (SC) and Puttamma and others vs. K.L. Narayana Reddy and another 2014 ACJ 526 (SC)*** wherein interest at the rate of 12% for accidents occurred in 1987, 1990 and 1999 has been awarded. Based on these pronouncements, grant of interest at the rate of 12% per annum has been pleaded. The Apex Court in ***V. Mekala vs. M. Malathi and another*** reported in ***2014 ACJ 1441*** and ***Anjani Singh and others vs. Salauddin and others*** reported in ***2014 ACJ 1565*** has awarded interest at the rate of 9% from the date of filing of petition. In present case accident had occurred in the year 2008. Petition was filed in the year 2009 and was decided on 30.6.2012. Whereafter present appeal has been preferred by appellant Insurance Company and now we are in 2017. Keeping in view submissions of learned counsel for parties and case law referred by them and also the time span from date of accident till date, I am of considered view that rate of interest awarded by the MACT does not warrant any interference.

9. Learned counsel for claimants submitted that though respondents/claimants have not questioned adequacy of compensation either by filing independent appeal or by filing cross objections in present appeal, however, this Court is competent to enhance the compensation awarded by the MACT so as to ensure award of just compensation in favour of respondents/claimants. He has referred paras 15 and 19 of judgment passed by this Court in ***Ratna Devi vs. Rajwanti Devi and others*** and other connected matters reported in ***Latest HLJ 2016 (HP) 198*** wherein referring judgment of this Court in case ***United India Insurance Company Ltd. vs. Smt. Kulwant Kaur, Latest HLJ 2014 (HP) 174*** as well as the Apex Court in case ***A.P.S.R.T.C. and another vs. M. Ramadevi and others (2008)3 SCC 379*** it has been reiterated that Tribunal as well as Appellate Court is within the jurisdiction to enhance the compensation and grant more than what is claimed and the Appellate Court has jurisdiction and power in enhancing the compensation despite the fact that claimants had not questioned the adequacy of compensation.

10. Relying upon ***Munna Lal Jain's case*** learned counsel for claimants/respondents has submitted that future prospects of deceased has not been considered and added at the time of assessing the amount of compensation in present case as the Apex Court has held that in case of self employed persons also, if deceased victim is below 40 years, there must be addition of 50% to the actual income of deceased while computing future prospects. In ***Munna Lal Jain's case,*** age of deceased was 30 years and 50% of his income was added as future prospects for the culculation of amount of compensation. In present case, deceased was self employed person and his monthly income by Motor Accident Claims Tribunal

has been considered as Rs.3600/- per month. By adding 50% of it, it would become Rs.5400/-. After deducting 50% of said amount towards personal expenses, dependency for the purpose of calculation of compensation would be Rs.2700/-. As per Schedule appended, multiplier from the age 25 to 30 years would be 18. Therefore, compensation for loss of dependency will be Rs. 5,83,200/- (2700 X 12 X 18).

11. In view of aforesaid settled position, I am of the opinion that MACT has erred by not adding future prospects while determining amount of compensation as required on the basis of principles settled by the Apex Court and this Court has power of enhance the compensation in order to award just compensation to the respondents/claimants in present appeal.

12. It is submitted on behalf of respondents/claimants that no compensation for loss of love and affection has been awarded and in present case parents have lost their 26 years old young son and though such a big loss cannot be compensated in terms of money, however, it would be in the interest of justice to award Rs. 1 lac to claimants for loss of love and affection as has been awarded/upheld by the Apex Court in numerous cases including ***Jiju Kuruvila and others vs. Kunjujamma Mohan and others 2013 ACJ 2141 (wife, children and mother Rs.1,00,000/-), M. Mansoor and another vs. United India Insurance Co. Ltd and another 2013 ACJ 2849 (parents Rs.1,00,000/-) and Anjani Singh and others vs. Salauddin and others 2014 ACJ 1565 (wife, three children and parents Rs.1,00,000/-).***

13. So far as awarding compensation on account of loss of love and affection is concerned, neither in claim petition nor in evidence placed on record, it has been pleaded that deceased was only son of claimants, rather it has come in evidence of PW2 Darshana Devi claimant (mother of deceased) that couple was blessed with two sons and three daughters. Though respondents/claimants are still entitled for compensation on account of loss of love and affection and however keeping in view the facts and circumstances of the present case, it would be just to award an amount of Rs.50,000/- for loss of love and affection of son.

14. In view of above discussion, respondents/claimants shall be entitled for compensation as under:-

i)Compensation for loss of dependency awarded (2700X12X18)	:	583,200/-
ii)Compensation for loss of love and affection	:	50,000/-
iii)Just and reasonable funeral compensation awarded	:	10,000/-
iv)Just & reasonable transportation of dead body compensation	:	5,000/-
v) Medical compensation awarded: (As no medical bills placed on record)		NIL
Total compensation awarded		Rs. 6,48,200/-

(Rupees six lacs forty eight thousand two hundred only)

In addition respondents/claimants shall also be entitled for interest on amount of compensation @ 9% per annum w.e.f. filing of petition till full and final payment with costs Rs. 2000/- as awarded by the MACT.

15. No other point raised or urged. In view of above discussion, present appeal is disposed of, in above terms. Appellant Insurance Company is directed to deposit difference of compensation amount in Registry of this Court on or before ***31.8.2017.*** Record of the MACT concerned be sent back forthwith. Appeal stands disposed of including all pending miscellaneous application(s), if any.

****

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

Kamal Kumar and others .....Petitioners.

Versus

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

CWP No.1907 of 2007.
Judgment reserved on : 13.06.2017.
Date of decision: 30th June, 2017.

H.P. Co-operative Societies Act, 1968- Section 69- Father of petitioner No.1 was the founding member of the society and worked as Secretary w.e.f. 1946 till his death in 1981 – the petitioner was appointed as a Secretary on 9.1.1981– audit was conducted and it was found that Secretary had committed irregularities and had caused losses by misutilization of the funds of the society- surcharge proceedings were initiated against the petitioner – an appeal was filed and the case was remanded for fresh inquiry – a writ petition was filed and the order passed by the Appellate Authority was set aside – Appellate Authority dismissed the appeal and directed the payment of compensation of Rs.5 lacs in addition to the amount already paid – this order was challenged before Secretary (Co-operation), who held the petition to be not maintainable – held that the basis for a claim under surcharge proceedings is the misappropriation, fraudulent retention of any money or property or commission of breach of trust - respondent No. 2 had recorded detailed findings and had appreciated the evidence correctly – power of judicial review is not intended to assume a supervisory role- a co-operative society cannot act like a private individual and the decision taken by the general body has to be in accordance with H.P. Co-operative Societies Act, 1968 and H.P. Co-operative Societies Rules, 1971- the conduct of chairman/president, officer bearers and members of the society has to be above board– there is no illegality or perversity in the impugned orders – appeal dismissed.(Para-14 to 44)

Cases referred:

Chief Constable of North Wales Police versus Evans (1982) 3 All ER 141

Apparel Export Promotion Council versus A.K.Chopra AIR 1999 SC 625

State of U.P. and another versus Johri Mal (2004) 4 SCC 714

Jayrajbhai Jayantibhai Patel versus Anilbhai Nathubhai Patel and others (2006) 8 SCC 200

Bank of India and others versus T.Jogram (2007) 7 SCC 236

S.R.Tewari versus Union of India and another (2013) 6 SCC 602

Daman Singh and Ors. versus State of Punjab and Ors. 1985 (2) SCC 670

Hindurao Balwant Patil & Anr., versus Krishnarao Parshuram Patil and Ors., AIR 1982 Bombay 216

The Bapauli Co-operative Agricultural Service Society versus The State of Haryana and Ors., AIR 1976 P & H 283

For the Petitioners : Mr.Ashwani K.Sharma, Senior Advocate with Mr. Jeevan Kumar, Advocate.

For the Respondents: Ms. Meenakshi Sharma, Additional Advocate General, for respondents No.1 to 3.

Mr. Raman Sethi, Advocate, for respondent No.4.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

This writ petition has been filed seeking judicial review of the order passed by the Registrar, Co-operative Societies, H.P., on 02.06.2007 in surcharge proceedings initiated against the petitioners under Section 69 of the H.P. Co-operative Societies Act, 1968 (for short the "Act").

2. The case has a chequered history. The "Daulatpur Agriculture Co-operative Society" was incorporated during pre-independence and registered on 09.08.1946. The father of petitioner No.1 was one of the founder members of the society and worked as its Secretary with effect from 1946 uptill his death in 1981. Thereafter, the petitioner was appointed as a Secretary on 09.01.1981.

3. During the course of the audit of the society for the years 1994-95, 1995-96 and 1996-97, there were allegations that petitioner No.1 by abusing his position as Secretary had committed irregularities as he had purchased the land of the society in an illegal manner and had also caused losses by misutilization of the funds of the society and surcharge proceedings were initiated against the petitioners. It would be noticed that petitioner No.1 as a Secretary of respondent No.4 had purchased 18 marlas of land belonging to the society which according to the society was done in an illegal and clandestine manner and had thereby violated the provisions of Rule 57 of the Himachal Pradesh Co-operative Societies Rules, 1971 (for short the "Rules") which read thus:-

> "***57. Prohibition against being interested in contracts etc.-***
>
> *(1) Without prejudice to the provisions of the bye-laws, no-officer of a co-operative Society shall have an interest directly, or indirectly, otherwise than as such officer-*
>
> *(a) in any contract made with the society; or*
>
> *(b) in any property sold or purchased or leased by, or to the society; or*
>
> *(c) in any other transaction of the society except as an investment made or as a loan taken from the society or the provision of residential accommodation by the society to any paid employee of the society.*
>
> *2. No officer of a society shall purchase, directly or indirectly, any property of a member of the society sold for the recovery of his dues to the society.*
>
> *3. The prohibition contained in the rule shall continue to apply for a period of two years after a person ceases to be an officer of the society.*
>
> *The rule debars the officers of the society to have interest in any contract made with the society or any property sold, purchased or leased by the society. Moreover, no officer of the society can purchase the property of a loanee member, which is put to sale in default of non-payment."*

4. The Assistant Registrar, Co-operative Societies, Dharamshala (respondent No.3) initiated inquiry under Section 69 (1) of the Act vide order dated 27.01.1997 wherein the District Audit Officer (Co-operative Societies), Dharamshala was appointed as an Inquiry Officer. In the inquiry, petitioner No.1 (Secretary), petitioner No.2 (Ex-President) alongwith Salig Ram (Ex-Committee Member) (since deceased) were found guilty of the charge and were, therefore, held liable for the recovery of an amount of Rs. 1,23,073/-. The petitioner No.1 was also held liable for an additional sum of Rs. 24,426/-.

5. After conclusion of the inquiry under Section 69(1) of the Act, respondent No.3 carried out the surcharge proceedings under Section 69(2) of the Act against the petitioners and deceased Salig Ram and finally passed the order dated 17.05.1999 whereby he not only upheld the findings of the Inquiry Officer, but ordered the recovery of the amount from the petitioners as arrears of land revenue.

6. The petitioner assailed the order by filing an appeal before the Additional Secretary (Co-operative), who vide order dated 29.07.2000 remanded the case to respondent No.3 for fresh inquiry with a further direction to afford an opportunity of hearing to all the parties whose interests are likely to be affected.

7. The order passed by the Additional Secretary was assailed before this Court by respondent No.4 (Society) by filing CWP No.201 of 2001 and vide judgment dated 16.04.2007 the learned single Judge of this Court held the order passed by the Additional Secretary (Co-operative) to be a non-speaking order and consequently the same was quashed and set aside and Registrar, Co-operative Societies (respondent No.2) was directed to hear the appeal afresh after taking into consideration all the contentions raised by the parties and after affording an opportunity of hearing to them. Respondent No.2 was also directed to pass a speaking order after taking into consideration the entire material placed on record.

8. Respondent No.2 vide order dated 02.06.2007 not only dismissed the appeal filed by the petitioners, but even modified the order dated 17.05.1999 passed by the Assistant Registrar, Co-operative Societies, Dharamshala (respondent No.3) and directed petitioner No.1 to pay compensation in the sum of Rs. 5,00,000/- in addition to the amount already paid towards costs of land and building to the society within a period of four months, failing it was ordered that the society would be entitled to claim interest @ 12% on the amount of compensation with effect from 02.10.2007 till the realization of the entire amount.

9. In addition, it was also held that petitioner No.1 would also be liable to pay interest amount of Rs. 24,426/- as worked out upto 05.10.1996 till realization of the same. Whereas, petitioners No.2 and 3 were held liable to pay a sum of Rs. 25,000/- each as compensation to the society to be paid within a period of four months, failing which the society was held entitled to claim interest @ 12% from 02.10.2007.

10. Respondent No.2 further observed that in case the petitioners failed to pay the aforesaid amount of compensation, the same would be recoverable from their movable and immovable properties as arrears of land revenue as prescribed under Section 87 of the Act and it was also made clear that the findings would not in any way preclude the society to initiate any other proceedings to restore the possession as existing prior to January, 1994 in respect of the land belonging to the society.

11. The order passed by respondent No.2 was unsuccessfully assailed by the petitioners before the Secretary (Co-operation), who vide his order dated 17.08.2007 held the petition to be not maintainable constraining the petitioners to file the instant petition.

12. The orders passed by various authorities from time to time have been assailed in this writ petition on various grounds as taken in the memo of petition.

13. The official-respondents No.1 to 3 have filed their reply wherein they have supported their action in various inquiries conducted by them. As regards the society, it has filed a separate reply wherein various irregularities as alleged to have been committed by the petitioners have been highlighted.

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

14. The word "*surcharge*" has not been defined in the Act. However, one of the meanings given to the word in the Black's Law Dictionary is "*the amount that a Court may charge a fiduciary that has breached its duty*".

15. Section 69 of the H.P. Co-operative Societies Act, 1968 (for short the "Act"), reads thus:-

"***69. Surcharge:-***

1. If in the course of an audit, inquiry, inspection or the winding up of a co-operative society, it is found that any person who is or was entrusted with the

organization or management of such society, or who is or has at any been an officer or an employee of the society, has made any payment contrary to the provisions of this Act, the rules or the bye-law or has caused any deficiency in the assets of the society by breach of trust or willful negligence or has misappropriated or fraudulently retained any money or other property belonging to the society, the Registrar may, of his own motion or on the application of the committee, liquidator or any creditor, inquire himself or direct any person authorized by him, by an order in writing in this behalf, to inquire into the conduct of such person;

[Provided that no such inquiry shall be held after the expiry of six years from the date on which any act of commission or omission referred to in this sub-section comes to knowledge.]

(2) Where an inquiry is made under sub-section (1), the Registrar may, after giving the person concerned an opportunity of being heard, make an order requiring him to repay or restore the money or property or any part thereof with interest at such rate, or to pay contribution and cost or compensation to such extent, as the Registrar may consider just and equitable.

(3).....”

16. The basis for a claim under surcharge proceedings is the misappropriation, fraudulent retention of any money or other property or commission of breach of trust in relation to the society or causing deficiency over the assets of the society by committing breach of trust or willful negligence of the person concerned. These are only some of the examples and not caste-iron imperatives.

17. The surcharge proceedings are of quasi-criminal nature. However, such claim would relate to the dispute between the society and its servant, employees etc. It is in the nature of a civil claim where a Co-operative Society has to prove the same against whom such a claim is made and is liable for the same.

18. Adverting to the order passed by respondent No.2 which has been impugned herein, it would be noticed that the said authority after setting out the respective pleadings of the parties framed three issues for determination which read thus:-

“(a) Regarding purchase of land of the society measuring 0-04-81 Hect in Khasra No.23 situated at Daulatpur, Tehsil & Distt. Kangra by the appellant No.1, who was working as Secretary of the society at the relevant time.

(b) Decision of the then managing Committee resolving to donate 5 marlas of land of the society to Sh.Kamal Kumar by way of Gift deed to install statue of late Sh.Ishwar Dass a freedom fighter/Ex-Secretary of the Society and to establish a library in his memory.

(c) Regarding embezzlement/misappropriation of amount of Rs.67000/- advancement by the society to the appellant No.1 for purchase of land. The above amount remained with the appellant No.1 w.e.f. 31.3.1994 to 5.10.1996 and accordingly the appellant was held liable for payment of interest amounting to Rs.24,426/- @ 12 ½ % interest per annum.”

Issue No.(a).

19. While answering issue No.(a), it was found that though a meeting of the General House of the society was held on 01.02.1995, however, there were conflicting statements of the committee members regarding actual numbers of the members, who were present in the meeting. While answering issue (a), respondent No.2 came to the conclusion that as per resolution passed in the meeting of the General House held on 01.02.1995 of the society, it was mentioned that the society has 0-18 marlas of land over which the society had constructed three rooms and a store comprising of a verandah over an area of 5 marlas. The store was constructed approximately in the year 1971. As per second para of the resolution, it had been mentioned that old store was in a

dilapidated condition and whenever it rains, all water enters inside the building and as a result thereof PDS items and open sales goods are destroyed. Hence, the members had resolved to sell the land/building for a minimum price of Rs. 1,00,000/-. Any purchaser who offers more than this price upto 01.03.1995, the society would sell the land and building to that person. The Managing Committee of the society extended the date upto 10.04.1995 vide resolution dated 15.03.1995. It is here where the dispute arises.

20. Respondent No.2 while examining the minutes of the meeting found that there were over-writings made regarding the area and as per the original resolution recorded in the minutes book of the society, there was an over-writing "18 marlas of land" and, therefore a photocopy of the resolution was procured from respondent No.3 wherein the area so recorded in the resolution was 00-08 and not 0-18 marlas. It was on the basis of this resolution that respondent No.3 from whom the approval for sale of land and building was obtained had accorded his approval vide letter dated 29.03.1995. It was further observed that the members of the society were divided over the area of land which was to be sold by the society. Petitioner No.2, who presided over the General House meeting in his statement has stated that the resolution was passed for sale of 18 marlas of land by 30-35 members of the society and he had no knowledge about the signatures of other members which were obtained lateron by the former Secretary because as per resolution the presence of 88 members had been recorded. S/Sh. Hamir Chand Dogra and Guru Lal, both ex-committee members, had stated that their signatures were obtained by petitioner No.1 subsequent to the resolution passed and they had no knowledge about the resolution for the sale of the building of the society. Shri Hem Raj, Ex Vice President of the society, stated that he was out of station on 01.02.1995 and his signatures were subsequently obtained on the resolution.

21. On the basis of conflicting evidence coming on record, respondent No.2 came to a categorical conclusion that petitioner No.1 had obtained the signatures of the members after conclusion of the proceedings of the meeting in the minutes book of the society and thereafter illegally managed to transfer 18 marlas of land and building thereupon in his own name for a sum of Rs. 1,00,500/-. When petitioner No.1 was confronted with the resolution he himself admitted that there was a clerical mistake that had occurred on 10.04.1995. It was on the basis of overwhelming evidence that respondent No.2 concluded that petitioner No.1 had procured false and forged documents to grab the property of the society in connivance with petitioners No.2 and 3 because the General House of society had resolved to sell 8 marlas of land alongwith structure constructed thereupon, but the same was interpolated and made 18 marlas of land. That apart, respondent No.2 held the entire action of petitioner No.1 in selling the land in his own name to be in violation of Rule 57 of the Rules (supra) and thereafter directed the petitioner to compensate the society for having illegally grabbing its land.

Issue No.(b).

22. Petitioner No.1 had acquired 5 marlas of land of the society by way of gift deed as per the resolution alleged to have been passed by the Managing Committee on 27.12.1993 out of land measuring 0-04-81 hectare. However, respondent No.2 found that as a matter of fact there was no resolution available on the record that had been passed by the Managing Committee on the aforesaid date, but there was one resolution dated 27.01.1994 in which members of the Managing Committee had resolved that the society has its own land measuring 1 Kanal and 5 marlas over which four rooms and a store had been constructed and whatever vacant land is left with the society, no construction will be done over that land. The Managing Committee had decided to establish a library and to install a statue in memory of late Shri Ishwar Dass, Freedom Fighter, who had served the society for 42 years as a Secretary. It was also found that after passing of this resolution four lines were subsequently added after closing of the proceedings on 27.01.1994 which appeared to be in a congested manner, whereas, the resolution had been written "*in a normal way*". As regards these lines, which according to respondent No.2, were added subsequently, it was recorded that on the gifted land, petitioner No.1, the then Secretary, will have a right to construct a library for which gift deed was to be prepared in his name.

Petitioner No.2 and one Salig Ram, member, were authorized to sign transfer documents in favour of petitioner No.1.

23. Thus, in this manner, a conspiracy was hatched by these three persons with a view to depriving the society of the property in an illegal manner. It was further observed that since the property belonged to all the members of the society, the same could not have been disposed of without their approval. Respondent No.2 further concluded that though the resolution dated 27.01.1994 had been shown to be passed in presence of all the members of the Committee, yet three members of the Committee namely S/Shri Hem Raj, Hamir Chand and Guru Lal had categorically denied having passed the said resolution and it was on the basis of their statements that respondent No.2 inferred that four lines empowering Shri B.D.Shukla, petitioner No.2 and one Salig Ram to sign the transfer documents had been subsequently added. Not only this, respondent No.2 held that the Managing Committee was not entitled to donate any property of the members of the society without prior approval of the General Body. Therefore, the action of petitioners No.1 and 2 alongwith Salig Ram, as aforesaid, was illegal and against the provisions of Rule 57 of the Act.

Issue No.(c).

24. It was the case of petitioner No.1 that he had been advanced a sum of Rs. 67,000/- for purchase of 9 marlas of land, however, respondent No.2 on the basis of the record came to the conclusion that there was no necessity to advance the said amount to petitioner No.1 as the amount could have been directly paid to the owner of the land once a deal had been finalized. Notably, it has come on record that this amount of Rs. 67,000/- had been illegally retained by petitioner No.1 fore more than two years and six months and utilized by him for his personal use and, therefore, he was liable to pay interest on the advanced amount. Not only this, it has specifically come on record that during the pendency of the case, petitioner No.1 had admitted his negligence and the factum of temporary misappropriation of the aforesaid amount. Petitioner No.1 also submitted that he was ready to deposit the interest amount as worked out by respondent No.3 on the said amount.

25. It was on the basis of the findings recorded on three issues (supra) that respondent No.2 came to a categorical conclusion that the petitioners were not only negligent and disloyal to the society, but by their actions, they had inflicted huge losses on the society and its shareholders, who had been cheated. Here, it shall be apt to reproduce the final conclusion drawn by respondent No.2 which reads thus:-

> *"The detailed narrations in the foregoing paras have clearly brought out the misdeeds of the appellants while occupying the responsible positions in managing the affairs of respondent society. The appellants have not only been negligent and disloyal to the society but by their actions they have inflicted huge losses to the society and its share holders who have been cheated. Though ultimate authority of society vests in shareholders but the appellants have made mockery of the entire process of system of check and balances in the society. The appellant No.1 who had to safeguard the interests of the society indulged in selfservice at the cost of society. The entire chain of events proves his disloyalty to the employer. Though he has been removed from service but he has by his actions inflicted irreparable losses/damages on the society. His actions have been such that any amount of compensation awarded to the society will be inadequate. And keeping in view the obvious legal and practical difficulties such as determining the true market value of land at different points of times, assessing the cost of building raised on the land over the period of time, undoing the sale transactions etc., it seems proper that he is required to compensate the respondent society properly and adequately. This is a clear case of forgery and cheating whereby Ex-Secretary has deprived the society from its land & building. Therefore, appropriate compensation needs to be imposed upon the 1st appellant for this wrongful act. I, therefore, modify the order of Assistant Registrar Co-operative Societies Dharamshala passed on 17.5.1999 and*

direct the 1st appellant to pay a compensation of Rs.5.00 lac in addition to the amount already paid towards the cost of land/building to the society within a period of four months from today failing which the society shall be entitled to claim interest @ 12% on the amount of compensation w.e.f. 2nd October, 2007 till the realization of entire amount. In addition, he (appellant No.1) shall also be liable to pay interest amount of Rs.24,426/- as worked out upto 5.10.1996 (as awarded vide impugned order) plus interest on this amount @ 12 ½ % till the realization of the entire amount in respect of matter referred at point No.(c) above. The other two members of the managing committee have assisted the 1st appellant in disposing of property of the Society in a wrongful manner, hence they are also held liable to play a sum of Rs.25,000/- each as compensation to the society within a period of four months failing which the society shall claim interest @ 12% w.e.f. 2nd October, 2007. Since Sh. Salig Ram Ex-committee member has expired, the above amount of Rs.25,000/- shall be paid to the Society by Sh. Dharam Chand s/o the deceased. The above compensation awarded shall be in lieu of the amount awarded against the appellants vide the impugned order dated 17.5.1999. In case the appellants fail to pay the above amount of compensation, the same shall be recovered from moveable/immovable properties of the appellants as an arrear of land Revenue in the manner prescribed under Section 87 of the H.P. Cooperative Societies Act, 1968. It is further made clear that this order and the findings therein shall not in anyway preclude the right of respondent society to initiate any other legal proceedings to restore the position as obtained prior to January, 1994 in respect of land belonging to the society."

26. Even though, the learned counsel for the petitioners would vehemently argue that aforesaid findings are perverse, however, the said plea cannot be accepted as I have no hesitation to conclude that the findings rendered by respondent No.2 are detailed one and quite akin to the findings recorded by the Civil Court wherein not only the pleadings, but even evidence led by the parties alongwith legal proposition has been correctly appreciated.

27. What would be the scope of interference in a writ of certiorari is a question that stands decided by a learned Division Bench of this Court in ***CWP No.749 of 2017***, titled ***Partap Singh*** *versus* ***State of Himachal Pradesh and others***, decided on 22.05.2017, wherein it was held as under:-

"*5. The scope of interference is in a writ jurisdiction under Article 226 of the Constitution of India, is now well settled.*

6. The principles on which the writ of certiorari is issued are well-settled. The Constitution Bench in The Custodian of Evacuee Property Bangalore Vs. Khan Saheb Abdul Shukoor etc. (1961) 3 SCR 855 stated :-

" The limit of the jurisdiction of the High Court in issuing writs of certiorari was considered by this Court in a 7-Judge Bench decision of this Court in Hari Vishnu Kamath Vs. Ahmad Ishaque 1955-I S 1104 : ((s) AIR 1955 SC 233) and the following four propositions were laid down :-

"(1) Certiorari will be issued for correcting errors of jurisdiction;

(2) Certiorari will also be issued when the Court or Tribunal acts illegally in the exercise of its undoubted jurisdiction, as when it decides without giving an opportunity to the parties to be heard, or violates the principles of natural justice;

(3) The court issuing a writ of certiorari acts in exercise of a supervisory and not appellate jurisdiction. One consequence of this is that the court will not review findings of fact reached by the inferior court or tribunal, even if they be erroneous.

(4) An error in the decision or determination itself may also be amenable to a writ of certiorari if it is a manifest error apparent on the face of the proceedings, e.g., when it is based on clear ignorance or disregard of the provisions of law. In other words, it is a patent error which can be corrected by certiorari but not a mere wrong decision."'

7. That an error apparent on face of record can be corrected by certiorari. The broad working rule for determining what is a patent error or an error apparent on the face of the record was well set out in Satyanarayan Laxminarayan Hegde and Ors. Vs. Mallikarjun Bhavanappa Tirumale, (1960) 1 SCR 890. It was held that the alleged error should be self-evident. An error which needs to be established by lengthy and complicated arguments or an error in a long-drawn process of reasoning on points where there may conceivably be two opinions cannot be called a patent error. In a writ of certiorari the High Court may quash the proceedings of the tribunal, authority or court but may not substitute its own findings or directions in lieu of one given in the proceedings forming the subject-matter of certiorari."

28. Lord Hailsham in ***Chief Constable of North Wales Police*** *versus* ***Evans (1982) 3 All ER 141*** held as under:-

"The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorized or enjoined by law to decide for itself a conclusion which is correct in the eyes of law."

29. While dealing with the ambit of judicial review, the Hon'ble Supreme Court in ***Apparel Export Promotion Council*** *versus* ***A.K.Chopra AIR 1999 SC 625*** observed as under:-

"18.Judicial Review, not being an appeal from a decision, but a review of the manner in which the decision was arrived at, the Court while exercising the power of Judicial Review must remain conscious of the fact that if the decision has been arrived at by the Administrative Authority after following the principles established by law and the rules of natural justice and the individual has received a fair treatment to meet the case against him, the Court cannot substitute its judgment for that of the Administrative Authority on a matter which fell squarely within the sphere of jurisdiction of that authority.

19. It is useful to note the following observations of this Court in Union of India v. Sardar Bahadur, (1972) 4 SCC 618 : (1972 Lab IC 627 at Pp. 630-31) :

"Where there are some relevant materials which the authority has accepted and which materials may reasonably support the conclusion that the officer is guilty, it is not the function of the High Court exercising its jurisdiction under Article 226 to review the materials and to arrive at an independent finding on the materials.

If the enquiry has been properly held the question of adequacy or reliability of the evidence cannot be canvassed before the High Court."

20. After a detailed review of the law on the subject, this Court while dealing with the jurisdiction of the High Court or Tribunal to interfere with the disciplinary matters and punishment in Union of India v. Parma Nanda, (1989) 2 SCC 177 : (AIR 1989 SC 1185) opined : (at P. 1192 of AIR):

"We must unequivocally state that the jurisdiction of the Tribunal to interfere with the disciplinary matters or punishment cannot be equated with an appellate jurisdiction. The Tribunal cannot interfere with the findings of the Enquiry Officer or Competent Authority where they are not arbitrary or utterly perverse. It is appropriate to remember that the power to impose penalty on a delinquent officer is conferred on the competent

authority either by an Act of Legislature or Rules made under the proviso to Article 309 of the Constitution. If there has been an enquiry consistent with the rules and in accordance with principles of natural justice what punishment would meet the ends of justice is a matter of exclusively within the jurisdiction of the competent authority. If the penalty can lawfully be imposed and is imposed on the proved misconduct, the Tribunal has no power to substitute its own discretion for that of the authority.

21. In B.C. Chaturvedi v. Union of India, (1995) 6 SCC 749: (1995 AIR SCW 4374, this Court opined (at P.4379 of AIR SCW):

"The disciplinary authority is the sole judge of facts. Where appeal is presented, the appellate authority has coextensive power to reappreciate them evidence or the nature of punishment. In a Disciplinary Enquiry, the strict proof of legal evidence and findings on that evidence are not relevant. Adequacy of evidence or reliability of evidence cannot be permitted to be canvassed before the Court/Tribunal."

Further it was held : (at P.4380 of AIR SCW):

"A review of the above legal position would establish that the disciplinary authority, and on appeal the appellate authority, being fact-finding authorities have exclusive power to consider the evidence with a view to maintain discipline. They are invested with the discretion to impose appropriate punishment keeping in view the magnitude or gravity of the misconduct. The High Court/Tribunal, while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the High Court/Tribunal, it would appropriately mould the relief, either directing the disciplinary/appellate authority to reconsider the penalty imposed, or to shorten the litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof." (Emphasis supplied)"

30. In ***State of U.P. and another*** *versus* ***Johri Mal (2004) 4 SCC 714***, a Bench of three Hon'ble Judges of the Hon'ble Supreme Court held that power of judicial review of the Court was not intended to assume a supervisory role or done the robes of omnipresent and the following principles of judicial review were laid down:-

"JUDICIAL REVIEW:

22. The power of judicial review is now well-defined in a series of decisions of this Court. It is trite that the court will have no jurisdiction to entertain a writ application in a matter governed by contract qua contract (assuming such professional engagement to be one), as therein public law element would not be involved. (See Life Insurance Corporation Vs. Escorts Ltd. and Ors. [AIR 1986 SC 1370], F.C.I. and Ors. Vs. Jagannath Dutta and Ors., [AIR 1993 SC 1494], State of Gujarat and Ors. Vs. Meghji Pethraj Shah Charitable Trust and Ors., [(1994) 3 SCC 552], Assistant Excise Commissioner and Ors. Vs. Issac Peter and Ors., (1994) 4 SCC 104], National Highway Authority of India Vs. M/s. Ganga Enterprises & Anr. 2003 (7) SCALE 171).

23.In any event, the modern trend also points to judicial restraint in administration action as has been held in Tata Cellular Vs. Union of India [(1994) 6 SCC 651]. (See also Monarch Infrastructure (P) Ltd. Vs. Commissioner, Ulhasnagar Municipal Corporation and Others [(2000) 5 SCC 287] and W.B. State Electricity Board Vs.

Patel Engineering Co. Ltd. and Others [(2001) 2 SCC 451)] and L.I.C. and Anr. vs. Consumer Education and Research Centre and Ors., [AIR 1995 SC 1811].

24. The legal right of an individual may be founded upon a contract or a statute or an instrument having the force of law. For a public law remedy enforceable under Article 226 of the Constitution, the actions of the authority need to fall in the realm of public law -be it a legislative act or the State, an executive act of the State or an instrumentality or a person or authority imbued with public law element. The question is required to be determined in each case having regard to the nature of and extent of authority vested in the State. However, it may not be possible to generalize the nature of the action which would come either under public law remedy or private law field nor is it desirable to give exhaustive list of such actions.

25.In Council of Civil Services Unions Vs. Minister for the Civil Service [(1985) AC 374] while extending the scope of judicial review the House of Lords decided that judicial review should not be available if the particular decision under challenge was not justiciable. However, in granting relief the Court shall take into consideration the factors like national security issue. In Constitution Reform in the UK by Dawn Oliver, it is stated at page 210:

> *"In the CCSU case the House of Lords decided that judicial review should not available if the particular decision under challenge was not justiciable. In effect they respected the political Constitution and deferred to government in some sensitive areas. In this case the Government was alleging that for them to have consulted the unions before before the decision was taken would have provoked industrial action at GCHQ, which would in turn have been damaging to national security. In the view of the House of Lords this made an otherwise reviewable decision not suitable for judicial review - not justiciable. Other decisions taken under the royal prerogative, which the court indicated would be non- justiciable, included treaty making and foreign affairs. Despite the outcome of the CCSU that the prerogative is in principle reviewable and that were it not for the national security issue the government should have consulted the unions before imposing these changes was a major step forward in the judicialization of government action, including the actual conduct of government, and a step away from the political Constitution."*

26.However, we may notice that judicial review was held to be available when justiciability of foreign relations came to be considered in R. (Abbasi) Vs. Secretary of State for the Foreign and Commonwealth Office and Secretary of State for the Home Department [2002] EWCA Civ., 6 November 2002 stating:

> *"Although the statutory context in which Adan was decided was highly material, the passage from Lord Cross' speech in Cattermole supports the view that, albeit that caution must be exercised by this Court when faced with an allegation that a foreign state is in breach of its international obligations, this Court does not need the statutory context in order to be free to express a view in relation to what it conceives to be a clear breach of its international obligations, this Court does not need the statutory context in order to be free to express a view in relation to what it conceives to be a clear breach of international law, particularly in the context of human rights."*

27.In Council of Civil Services Unions Vs. Minister of Civil Service the power of judicial review was restricted ordinarily to illegality, irrationality and impropriety stating:

"If the power has been exercised on a non-consideration or non-application of mind to relevant factors, the exercise of power will be regarded as manifestly erroneous. If a power (whether legislative or administrative) is exercised on the basis of facts which do not exist and which are patently erroneous, such exercise of power will stand vitiated."

28. The Scope and extent of power of the judicial review of the High Court contained in Article 226 of the Constitution of India would vary from case to case, the nature of the order, the relevant statute as also the other relevant factors including the nature of power exercised by the public authorities, namely, whether the power is statutory, quasi judicial or administrative. The power of judicial review is not intended to assume a supervisory role or done the robes of omnipresent. The power is not intended either to review governance under the rule of law nor do the courts step into the areas exclusively reserved by the suprema lex to the other organs of the State. Decisions and actions which do not have adjudicative disposition may not strictly fall for consideration before a judicial review court. The limited scope of judicial review, succinctly put is :

(i) Courts, while exercising the power of judicial review, do not sit in appeal over the decisions of administrative bodies;

(ii) A petition for a judicial review would lie only on certain well-defined grounds.

(iii) An order passed by an administrative authority exercising discretion vested in it, cannot be interfered in judicial review unless it is shown that exercise of discretion itself is perverse or illegal.

(iv) A mere wrong decision without anything more is not enough to attract the power of judicial review; the supervisory jurisdiction conferred on a Court is limited to seeing that Tribunal functions within the limits of its authority and that its decisions do not occasion miscarriage of justice.

(v) The Courts cannot be called upon to undertake the Government duties and functions. The Court shall not ordinarily interfere with a policy decision of the State. Social and economic belief of a Judge should not be invoked as a substitute for the judgment of the legislative bodies. (See Ira Munn Vs. State of Ellinois, 1876 (94) US (Supreme Reports) 113)

29. In Wade's Administrative Law, 8th edition at pages 33-34, it is stated:

"Review, Legality and discretion

The system of judicial review is radically different from the system of appeals. When hearing an appeal the court is concerned with the merits of a decision: is it correct? When subjecting some administrative act or order to judicial review, the court is concerned with its legality: is it within the limits of the powers granted? On an appeal the question is 'right or wrong?' On review the question is 'lawful or unlawful?'

Rights of appeal are always statutory. Judicial review, on the other hand, is the exercise of the court's inherent power to determine whether action is lawful or not and to award suitable relief. For this no statutory authority is necessary: the court is simply performing its ordinary functions in order to enforce the law. The basis of judicial review, therefore, is common law. This is none the less true because nearly all cases in administrative law arise under some Act of Parliament. Where the Court quashes an order made by a minister under some Act, it typically uses its common law power to declare that the Act did not entitle the minister to do what he did and that he was in some way exceeding or abusing his powers.

> *Judicial review thus is a fundamental mechanism for keeping public authorities within due bounds and for upholding the rule of law. Instead of substituting its own decision for that of some other body, as happens when on appeal, the court on review is concerned only with the question whether the act or order under attack should be allowed to stand or not. If the Home Secretary revokes a television licence unlawfully, the court may simply declare that the revocation is null and void. Should the case be one involving breach of duty rather than excess of power, the question will be whether the public authority should be ordered to make good a default. Refusal to issue a television licence to someone entitled to have one would be remedied by an order of the court requiring the issue of the licence. If administrative action is in excess of power (ultra vires), the court has only to quash it or declare it unlawful (these are in effect the same thing) and then no one need pay any attention to it. The minister or tribunal or other authority has in law done nothing, and must make a fresh decision."*

30.It is well-settled that while exercising the power of judicial review the Court is more concerned with the decision making process than the merit of the decision itself. In doing so, it is often argued by the defender of an impugned decision that the Court is not competent to exercise its power when there are serious disputed questions of facts; when the decision of the Tribunal or the decision of the fact finding body or the arbitrator is given finality by the statute which governs a given situation or which, by nature of the activity the decision maker's opinion on facts is final. But while examining and scrutinizing the decision making process it becomes inevitable to also appreciate the facts of a given case as otherwise the decision cannot be tested under the grounds of illegality, irrationality or procedural impropriety. How far the court of judicial review can reappreciate the findings of facts depends on the ground of judicial review. For example, if a decision is challenged as irrational, it would be well-nigh impossible to record a finding whether a decision is rational or irrational without first evaluating the facts of the case and coming to a plausible conclusion and then testing the decision of the authority on the touch-stone of the tests laid down by the Court with special reference to a given case. This position is well settled in Indian administrative law. Therefore, to a limited extent of scrutinizing the decision making process, it is always open to the Court to review the evaluation of facts by the decision maker.

31. In Chief Constable of the North Wales Police Vs. Evans [1982 (3) All ER 141], the law is stated in the following terms: (All ER p.144a)

> *"The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorized or enjoined by law to decide for itself a conclusion which is correct in the eyes of the court."*

32. Prof. Bernard Schwartz in his celebrated book (Administrative Law, III Edn. Little Brown Company 1991) dealing with the present status of judicial review in American context, summarized as under:

> *"If the scope of review is too broad, agencies are turned into little more than media for the transmission of cases to the Courts. That would destroy the values of agencies, created to secure the benefit of special knowledge acquired through continuous administration in the complicated fields. At the same time, Court should not rubber-stamp agencies; the scope of judicial enquiry must not be so restricted that it prevents full enquiry into the action of legality. If that question cannot be properly explored by the Judge, the right to review becomes meaningless...in the final analysis, the*

scope of review depends on the individual judges estimate of the justice of the case."

33. Prof. Clive Lewis in his book (Judicial Remedies in Public Law 1992 Edn., at pp. 294-295) stated:

> *"The Courts now recognise that the impact on the administration is relevant in the exercise of their remedial jurisdiction'...Earlier cases took a robust line that the law has to be observed and the decision invalidated, what ever the administrative inconvenience caused. The Courts now-a-days recognise that such an approach is not always appropriate and may not be in the wider public interest. The effect on the administrative process is relevant to the Court's remedial discretion may prove decisive...They may also be influenced to the extent to which the illegality arises from the conduct of the administrative body itself, and their view of that conduct."*

34. Grahame Aldous and John Alder in "Applications for Judicial Review, Law and Practice" stated thus:

> *"There is a general presumption against ousting the jurisdiction of the courts, so that statutory provisions which purport to exclude judicial review are construed restrictively. There are, however, certain areas of governmental activity, national security being the paradigm, which the courts regard themselves as incompetent to investigate, beyond an initial decision as to whether the government's claim is bona fide. In this kind of non-justiciable area judicial review is not entirely excluded, but very limited. It has also been said that powers conferred by the royal prerogative are inherently unreviewable but since the speeches of the House of Lords in Council of Civil Service Unions Vs. Minister for the Civil Service this is doubtful. Lords Diplock, Scaman and Roskili appeared to agree that there is no general distinction between powers, based upon whether their source is statutory or prerogative but that judicial review can be limited by the subject matter of a particular power, in that case national security. Many prerogative powers are in fact concerned with sensitive, non- justiciable areas, for example, foreign affairs, but some are reviewable in principle, including where national security is not involved. Another non-justiciable power is the Attorney General's preprogative to decide whether to institute legal proceedings on behalf of the public interest."*

35. In Wade's Administrative Law, 8th Edition at p.551, the author states:

"Rights and Remedies:

> *Rights depend upon remedies. Legal history is rich in examples of rules of law which have been distilled from the system of remedies, as the remedies have been extended and adapted from one class of case to another. There is no better example than habeas corpus. This remedy, since the sixteenth century the chief cornerstone of personal liberty, grew out of a medieval writ which at first played an inconspicuous part in the law of procedure: it was used to secure the appearance of a party, in particular where he was in detention by some inferior court. It was later invoked to challenge detention by the king and by the Council; and finally it became the standard procedure by which the legality of any imprisonment could be tested. The right to personal freedom was almost a by-product of the procedural rules.*
>
> *This tendency has both good and bad effects. It is good in that the emphasis falls on the practical methods of enforcing any right. Efficient*

remedies are of the utmost importance, and the remedies provided by English administrative law are notably efficient. But sometimes the remedy comes to be looked upon as a thing in itself, divorced from the legal policy to which it ought to give expression. In the past this has led to gaps and anomalies, and to a confusion of doctrine to which the courts have sometimes seemed strangely indifferent."

31. In ***Jayrajbhai Jayantibhai Patel*** *versus* ***Anilbhai Nathubhai Patel and others (2006) 8 SCC 200***, the law on the subject of judicial review was succinctly laid down in the following terms:-

"18. Having regard to it all, it is manifest that the power of judicial review may not be exercised unless the administrative decision is illogical or suffers from procedural impropriety or it shocks the conscience of the court in the sense that it is in defiance of logic or moral standards but no standardised formula, universally applicable to all cases, can be evolved. Each case has to be considered on its own facts, depending upon the authority that exercises the power, the source, the nature or scope of power and the indelible effects it generates in the operation of law or affects the individual or society. Though judicial restraint, albeit self-recognised, is the order of the day, yet an administrative decision or action which is based on wholly irrelevant considerations or material; or excludes from consideration the relevant material; or it is so absurd that no reasonable person could have arrived at it on the given material, may be struck down. In other words, when a Court is satisfied that there is an abuse or misuse of power, and its jurisdiction is invoked, it is incumbent on the Court to intervene. It is nevertheless, trite that the scope of judicial review is limited to the deficiency in the decision-making process and not the decision."

32. In ***Bank of India and others*** *versus* ***T.Jogram (2007) 7 SCC 236,*** the Hon'ble Supreme Court held as under:-

"15. By now it is well-settled principle of law that judicial review is not against the decision. It is against the decision making process....."

33. In ***S.R.Tewari*** *versus* ***Union of India and another (2013) 6 SCC 602***, the Hon'ble Supreme Court reiterated the law on the subject in the following terms:-

"19. In Commissioner of Income-tax, Bombay & Ors. v. Mahindra & Mahindra Ltd. & Ors., AIR 1984 SC 1182, this Court held that various parameters of the court's power of judicial review of administrative or executive action on which the court can interfere had been well settled and it would be redundant to recapitulate the whole catena of decisions. The Court further held: (SCC p.402, para 11)

"11....It is a settled position that if the action or decision is perverse or is such that no reasonable body of persons, properly informed, could come to, or has been arrived at by the authority misdirecting itself by adopting a wrong approach, or has been influenced by irrelevant or extraneous matters the court would be justified in interfering with the same."

20. The court can exercise the power of judicial review if there is a manifest error in the exercise of power or the exercise of power is manifestly arbitrary or if the power is exercised on the basis of facts which do not exist and which are patently erroneous. Such exercise of power would stand vitiated. The court may be justified in exercising the power of judicial review if the impugned order suffers from mala fide, dishonest or corrupt practices, for the reason, that the order had been passed by the authority beyond the limits conferred upon the authority by the legislature. Thus, the court has to be satisfied that the order had been passed by the authority only on the grounds of illegality, irrationality and procedural impropriety before it interferes. The court does not have the expertise to correct the administrative

decision. Therefore, the court itself may be fallible and interfering with the order of the authority may impose heavy administrative burden on the State or may lead to unbudgeted expenditure. (Vide: Tata Cellular v. Union of India, AIR 1996 SC 11; People's Union for Civil Liberties & Anr. v. Union of India & Ors., AIR 2004 SC 456; and State of N.C.T. of Delhi & Anr. v. Sanjeev alias Bittoo, AIR 2005 SC 2080).

21. In Air India Ltd. v. Cochin International Airport Ltd. & Ors., AIR 2000 SC 801, this Court explaining the scope of judicial review held that the court must act with great caution and should exercise such power only in furtherance to public interest and not merely on the making out of a legal point. The court must always keep the larger public interest in mind in order to decide whether its intervention is called for or not.

22. There may be a case where the holders of public offices have forgotten that the offices entrusted to them are a sacred trust and such offices are meant for use and not abuse. Where such trustees turn to dishonest means to gain an undue advantage, the scope of judicial review attains paramount importance. (Vide: Krishan Yadav & Anr. v. State of Haryana & Ors., AIR 1994 SC 2166).

23. The court must keep in mind that judicial review is not akin to adjudication on merit by re-appreciating the evidence as an appellate authority. Thus, the court is devoid of the power to re-appreciate the evidence and come to its own conclusion on the proof of a particular charge, as the scope of judicial review is limited to the process of making the decision and not against the decision itself and in such a situation the court cannot arrive on its own independent finding. (Vide: High Court of Judicature at Bombay through its Registrar v. Udaysingh s/o Ganpatrao Naik Nimbalkar & Ors., AIR 1997 SC 2286; Government of Andhra Pradesh & Ors. v. Mohd. Nasrullah Khan, AIR 2006 SC 1214; and Union of India & Ors. v. Manab Kumar Guha, (2011) 11 SCC 535).

24. The question of interference on the quantum of punishment, has been considered by this Court in a catena of judgments, and it was held that if the punishment awarded is disproportionate to the gravity of the misconduct, it would be arbitrary, and thus, would violate the mandate of Article 14 of the Constitution. In Ranjit Thakur v. Union of India & Ors., AIR 1987 SC 2386, this Court observed as under: (SCC pp.620-21, paras 25 & 27)

> *"25.But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on the aspect, which is otherwise, within the exclusive province of the Court Martial, if the decision of the Court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction.*
>
> * * *
>
> *27. In the present case, the punishment is so stringently disproportionate as to call for and justify interference. It cannot be allowed to remain uncorrected in judicial review." (Emphasis supplied)*

(See also: Union of India & Anr. v. G. Ganayutham (dead by Lrs.), AIR 1997 SC 3387; State of Uttar Pradesh & Ors. v. J.P. Saraswat, (2011) 4 SCC 545; Chandra Kumar Chopra v. Union of India & Ors., (2012) 6 SCC 369; and Registrar General, Patna High Court v. Pandey Gajendra Prasad & Ors., AIR 2012 SC 2319).

25. In B.C. Chaturvedi v. Union of India & Ors., AIR 1996 SC 484, this Court after examining various its earlier decisions observed that in exercise of the powers of judicial review, the court cannot "normally" substitute its own conclusion or

penalty. However, if the penalty imposed by an authority "shocks the conscience" of the court, it would appropriately mould the relief either directing the authority to reconsider the penalty imposed and in exceptional and rare cases, in order to shorten the litigation, itself, impose appropriate punishment with cogent reasons in support thereof. While examining the issue of proportionality, court can also consider the circumstances under which the misconduct was committed. In a given case, the prevailing circumstances might have forced the accused to act in a certain manner though he had not intended to do so. The court may further examine the effect, if the order is set aside or substituted by some other penalty. However, it is only in very rare cases that the court might, to shorten the litigation, think of substituting its own view as to the quantum of punishment in place of punishment awarded by the Competent Authority.

26. In V. Ramana v. A.P.S.R.T.C. & Ors., AIR 2005 SC 3417, this Court considered the scope of judicial review as to the quantum of punishment is permissible only if it is found that it is not commensurate with the gravity of the charges and if the court comes to the conclusion that the scope of judicial review as to the quantum of punishment is permissible only if it is found to be "shocking to the conscience of the Court, in the sense that it was in defiance of logic or moral standards." In a normal course, if the punishment imposed is shockingly disproportionate, it would be appropriate to direct the Disciplinary Authority to reconsider the penalty imposed. However, in order to shorten the litigation, in exceptional and rare cases, the Court itself can impose appropriate punishment by recording cogent reasons in support thereof.

27. In State of Meghalaya & Ors. v. Mecken Singh N. Marak, AIR 2008 SC 2862, this Court observed that: (SCC p.584, paras 13-14)

> *"13....A Court or a Tribunal while dealing with the quantum of punishment has to record reasons as to why it is felt that the punishment is not commensurate with the proved charges.*
>
> *14. In the matter of imposition of sentence, the scope for interference is very limited and restricted to exceptional cases. The punishment imposed by the disciplinary authority or the appellate authority unless shocks the conscience of the court, cannot be subjected to judicial review.*
>
> *(See also: Depot Manager, A.P.S.R.T.C. v. P. Jayaram Reddy, (2009) 2 SCC 681).*

28. The role of the court in the matter of departmental proceedings is very limited and the court cannot substitute its own views or findings by replacing the findings arrived at by the authority on detailed appreciation of the evidence on record. In the matter of imposition of sentence, the scope for interference by the court is very limited and restricted to exceptional cases. The punishment imposed by the disciplinary authority or the appellate authority unless shocking to the conscience of the court, cannot be subjected to judicial review. The court has to record reasons as to why the punishment is disproportionate. Failure to give reasons amounts to denial of justice. The mere statement that it is disproportionate would not suffice. (Vide: Union of India & Ors. v. Bodupalli Gopalaswami, (2011) 13 SCC 553; and Sanjay Kumar Singh v. Union of India & Ors., AIR 2012 SC 1783).

29. In Union of India & Ors. v. R.K. Sharma, AIR 2001 SC 3053, this Court explained the observations made in Ranjit Thakur (supra) observing that if the charge was ridiculous, the punishment was harsh or strikingly disproportionate it would warrant interference. However, the said observations in Ranjit Thakur (supra) are not to be taken to mean that a court can, while exercising the power of judicial review, interfere with the punishment merely because it considers the

punishment to be disproportionate. It was held that only in extreme cases, which on their face, show perversity or irrationality, there could be judicial review and courts should not interfere merely on compassionate grounds."

34. What would be the scope of interference by the Court has also been succinctly laid down in the aforesaid decision in ***S.R.Tewari's case*** (supra) in the following terms:-

"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 Administration, AIR 1984 SC 1805; Kuldeep Singh v. Commissioner of Police & Ors., AIR 1999 SC 677; Gamini Bala Koteswara Rao & Ors. v. State of Andhra Pradesh thr. Secretary, AIR 2010 SC 589; and Babu v. State of Kerala, (2010) 9 SCC 189).

31. Hence, where there is evidence of malpractice, gross irregularity or illegality, interference is permissible."

35. It may be observed that the very philosophy and the concept of the cooperative movement is impregnable with public interest. A cooperative society is a substitute for self-interest of an individual or a group of individuals for the benefit of the whole community. Therefore, even the general body of the members cannot take any steps which may be derogatory to the promotion of the interests of any one of its member(s) or its employee(s) and the same is necessarily be in accordance with the cooperative principles. Conversely, the general body of the members cannot act in a manner so as to confer undue benefit or advantage in favour of anyone of its member(s) or employee(s). Above all, the society unlike a private individual cannot act as it pleases and the decision taken by the general body has to be in accordance with the H.P. Cooperative Societies Act, 1968 (for short '**Act**'), H.P. Cooperative Societies Rules, 1971 (for short '**Rules**') and the bye-laws of the society.

36. A Co-operative Society is registered on cooperative principles of democracy, equity, equality and solidarity. Democratic accountability, mutual trust, fairness, impartiality, unity and agreement amongst its members are some of the cardinal dimensions of the cooperative principles. Therefore, the decision taken by the executive body of the society should enjoy the confidence and must have the backing of majority of its members.

37. Moreover, the cooperative societies are corporations within the meaning of Article 31-A (1) (c) as held by the Hon'ble Supreme Court in ***Daman Singh and Ors.*** *versus* ***State of Punjab and Ors. 1985 (2) SCC 670***. The very philosophy and concept of the cooperative movement is impregnable with public interest. Once a person becomes the member of the cooperative society, he loses his individuality qua the society and he has no independent right except those given to him by the statute and bye-laws. What is a corporation has been considered in the Daman Singh's case in the following manners:-

"5. What is a corporation? In Halsbury's Laws of England, fourth Edition, Volume 9, Paragraph 1201, it is said, A corporation may be defined as a body of persons (in the case of a corporation aggregate) or an office (in the case of a corporation sole) which is recognized by the law as having a personality which is distinct from the separate personalities of the members of the body or the personality of the individual holder for the time being of the office in question."

38. A corporation is a substitute for self-interest of an individual or a group of individuals for the benefit of the whole community, therefore, the cooperative movement cannot be permitted to be polluted by certain vested interest at the helm of affairs.

39. In this context, it shall be advantageous to refer to the judgment rendered by the Bombay High Court in ***Hindurao Balwant Patil & Anr.,*** *versus* ***Krishnarao Parshuram Patil and Ors., AIR 1982 Bombay 216***, wherein it was observed:-

> *"Co-operative movement cannot be permitted to be polluted or choked by internal or individual strike nor it can be permitted to be polluted by party politics. Co-operative capitalism despotism is not co-operation. On the other hand co-operation is a substitute for self interest of an individual or a group of individuals for the benefit of whole community. Therefore, if the society itself while framing and adopting its own code of conduct in the form of bye-laws, which are to be duly approved by the Registrar, has not made any provision for removal of the Chairman and vice Chairman by passing a vote of no confidence, it cannot be said that the step taken by the Society or Registrar in that behalf is not a regulatory one nor is in the interest of the society or the general public. The so-called mandate theory cannot be pushed to ridiculous extremes to convert co-operative movement into an arena or akhada of power politics. Whenever the legislature thought that a person is not fit to continue as a member of the board, specific provisions are made for his removal. A person is elected as Chairman or Vice Chairman for a particular term. His office is controlled by the provisions of the Act……"*

40. At this stage, I may also refer to the decision made by the Punjab & Haryana High Court in ***The Bapauli Co-operative Agricultural Service Society*** *versus* ***The State of Haryana and Ors., AIR 1976 P&H 283***, wherein it was observed as under:-

> *"The final authority in a co-operative society does of course vest in the general body of its members or its managing body elected in accordance with its bye-laws as laid down in Section 23 of the Act, but this authority is not absolute and free from restraints. Even the general body of the members cannot take any steps which may be derogatory to the promotion of the economic interests of the members of a society in accordance with co-operative principles; nor can the general body take any decision which may be contrary to the Act or the Rules framed thereunder. When considered in this light, Section 23 of the Act has to be interpreted in such a manner so that its operation does not set at naught some of the other provisions of the Act. It is settled law that two provisions of a statute have to be read in such a manner that one of them does not necessarily repeal the other. The question of repeal of one provision of a statute by another arises only when two of them are wholly incompatible with one another or if they are read together they would lead to wholly absurd consequences. If on a fair and proper interpretation these two provisions can be reconciled with each other, the Courts of law are under a duty to adopt such an interpretation and to give full effect to the two provisions of the Act instead of holding that one of them is repealed by the other……."*

41. The principle of accountability and transparency in the functioning of any institutions, be it a society, cooperative society etc. are essential for its proper governance. The conduct of the Chairman/President, office bearers and the members of the society in discharge of their duties, has to be above board and beyond censure till and so long as the Act, Rules, and Bye-laws are occupying the field, the authorities cannot be left to run the affairs in their subjective and whimsical approach and hotch-potch manner. Certain objective criterias have to be evolved to administer the affairs of the society otherwise there is bound to have an element of favourtism, nepotism and other sort of manipulations as are clearly evident in this case.

42. It has to be remembered that registered cooperative societies like anybody corporate has a power to hold property and is capable of entering into contract. However, it cannot be assumed that property which it holds is the property of its members or they are owners. This property in law is the property of the society. Likewise, the employees engaged by the society are employees of the society and not the employees of any one member or members of the society. The society has to act in accordance with its constitution and apply the property for the purposes which it is held and likewise deal with its employees as per the mandate of the Act, rules and bye-laws of the society in a fair and transparent manner, without indulging in any favourtism or nepotism.

43. Although a cooperative society cannot strictly be compared with a State, nonetheless, it is bound by and has to adhere to the provisions of the Act, Rules and Bye-laws framed by it, which do oblige the society to conduct itself with high probity and candour with its employees. The managing committee of the society cannot act as despots or monarchs and are obliged to act in accordance with the principles of democracy, equity, equality and solidarity.

44. Reverting back to the facts, it would be noticed that petitioner No.1 by purchasing the land of the society has violated the provisions of Rule 57 of the Rules and all the issues raised herein already stand discussed threadbare by respondent No.2 in the decision impugned before this Court. It is more than settled that this Court would not act as an Appellate Authority. It is equally settled that a mere wrong decision without anything more is not enough to attract the powers of judicial review and the supervisory jurisdiction conferred on this Court is limited to see that the adjudicatory authority functions within the limits of its authority and its decision does not occasion miscarriage of justice. The findings of fact recorded by respondent No.2 can only be interfered with in case the same are perverse which, however, is not the fact situation obtaining in the instant case.

45. As observed above, there is no illegality or perversity in the impugned orders. Hence, for all the reasons stated above, I do not find any merit in this petition and the same is accordingly dismissed, so also the pending application, if any.

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

Oriental Insurance Company Ltd. ....Petitioner.

Versus

Satya Devi and others ....Respondents

CMPMO No. 376 of 2016
Date of Decision 30th June, 2017

Income Tax Act, 1961- Section 194-A- The Insurance Company deposited an amount of Rs.60,902/- as TDS on interest paid to the respondent on the compensation awarded – a direction was issued by the Court to deposit the amount deducted by the company- held that the interest is part of compensation and no income tax is payable on the same – the deduction is illegal and contrary to law – direction issued to refund the tax to the company and thereafter the company directed to disbursethe amount to the claimant. (Para-2 to 6)

Case referred:
Court on its own motion vs. The H.P. State Cooperative Bank Ltd. and others 2014 (Suppl.) Him.L.R. (DB) 2575

For the Petitioner: Mr. Ashwani K. Sharma, Sr. Advocate with Mr. Ishan Thakur, Advocate.
For the Respondents: Mr.Vinay Kuthiala, Sr. Advocate with Ms. Vandana Kuthiala, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.(Oral)

Present petition has been filed against direction passed by the Motor Accident Claims Tribunal in execution petition No. 405/6 of 2015 filed by claimants/respondents No. 1 to 4 for payment of balance amount of Rs.60,902/- which were not paid by the petitioner/Insurance Company to the claimants/respondents but were deducted as TDS for income tax on interest payable to the claimants/respondents on compensation awarded in their favour as Motor Accident Claim and deposited with respondent No. 5 through Income Tax Officer, Ward No. 2, Mandi.

2. In execution petition preferred by the claimants/respondents for payment of balance amount of compensation, the Motor Accident Claims Tribunal, vide impugned order, has directed petitioner/Insurance Company to deposit the balance amount of Rs.60,902/- within 30 days from the date of order, failing which petitioner company has also directed to pay the interest at the rate of 9% on the said amount w.e.f. date of order till payment/deposit.

3. Section 194-A of Income Tax Act, 1961, clearly provides that any person, not being an individual or a Hindu undivided family, responsible for paying to a 'resident' any income by way of interest, other than income by way of interest on securities, shall deduct income tax on such income at the time of payment thereof in cash or by issue of cheque or by any other mode. Compensation awarded under Motor Vehicle Act cannot be said to be taxable income. Compensation is awarded in lieu of death of a person or bodily injury suffered in a vehicular accident, which is damage and not income.

4. It is well settled that interest awarded by the Motor Accident Claims Tribunal on a compensation is also a part of compensation upon which income tax is not chargeable as also held by the Division Bench of this Court in ***Court on its own motion vs. The H.P. State Cooperative Bank Ltd. and others*** reported in ***2014 (Suppl.) Him.L.R. (DB) 2575*** and reiterated in ***CWP No. 460 of 2014 titled Shiv Ram Sharma vs. Union of India and others*** and other connected matters vide decision dated 3.6.2015.

5. Therefore, in view of above said decision, deduction of income tax by petitioner/Insurance Company on the interest accrued/awarded on the compensation deposited by the petitioner/Insurance Company is illegal and is contrary to the law of land.

6. In view of above discussion, this petition is disposed of directing respondent No. 5 Income Tax Officer, Ward No. II, Mandi to refund the TDS to the petitioner/Insurance Company within ten weeks from date of receiving information thereof, which shall be supplied by petitioner/Insurance Company within two weeks from today, as per Rules applicable and petitioner company is also directed to make payment of balance amount of compensation along with interest, if any received by it from the Income Tax Department to the claimants/respondents, within four weeks from the date of receipt of refund, failing which petitioner company shall also be liable to pay interest @ 9% per annum on the said amount with effect from 5.1.2016 till payment/deposit. Petition is disposed of in aforesaid terms. Interim order dated 3.10.2016 passed in CMP No. 8043 of 2016 also stands vacated in above terms. The Motor Accident Claims Tribunal, Bilaspur is directed to proceed further accordingly. No order as to costs.

Dasti copy on usual terms.

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