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Code of Criminal Procedure, 1973- Section 127- Maintenance of Rs.2,500/- was awarded to the wife in the year 2004- an application for enhancement of maintenance was filed, which was allowed and maintenance was enhanced from Rs.2,500/- to Rs.4,500/- - aggrieved from the order, present revision has been filed- held, that husband had retired as Superintendent and his salary was Rs.49,000/- at the time of superannuation – he received a sum of Rs.18,67,344/- as GPF and reasonable amount as Death-cum-Retirement Gratuity- his pension was Rs.15,000/- to 18,000/- per month- wife was engaged as daily mid-day meal worker and her income was Rs.10,000/- per annum- taking into consideration the amount of the pension and escalation in price, amount of Rs.4,500/- per month cannot be said to be excessive- petition dismissed. (Para-5 to 9) Title: Chain Singh Vs. Kavita Page-239

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Code of Criminal Procedure, 1973- Section 378- Petitioners were tried and acquitted of the commission of offences punishable under Sections 41 and 42 of Indian Forest Act and 120-B of Indian Penal Code– an appeal was filed, which was allowed and the judgment of acquittal was set aside – petitioners were held guilty of violation of Rule 5 of H.P. Forest Produce Transit (Land Routes) Rules, 1978 punishable under Rule 20 and Section 42 of Indian Forest Act – held, that appeal against bailable and non-cognizable offences is not maintainable before the Court of Sessions but the same has to be filed before the High Court – Sections 41 and 42 of Indian Forest Act are bailable and non-cognizable – the appeal filed before Sessions Judge was not maintainable – adjudication of the same by the Sessions Judge was without jurisdiction- appeal allowed – judgment of the Sessions Judge set aside. (Para-9 to 12) Title: Pushap Raj and another Vs. The State of Himachal Pradesh Page-219

Code of Criminal Procedure, 1973- Section 438- Applicant was found in possession of 18.140 kgs of poppy husk – he filed an application seeking pre-arrest bail, which was dismissed by the Trial Court as not maintainable- held that rigors of Section 37 of N.D.P.S. Act are applicable when a person is booked for the commission of offences punishable under Section 19 or 24 or Section 27(a) of N.D.P.S. Act and where the quantity seized is commercial quantity – in the present case, the quantity stated to have been recovered is less than commercial quantity and rigors of Section 37 are not applicable- seven criminal cases have been registered against the applicant and present case is the eighth one- therefore, the concession of pre-arrest bail cannot be granted to the applicant – application dismissed. (Para- 2 to 5) Title: Veerdeen @ BiruVs. State of Himachal Pradesh Page-278

Constitution of India, 1950- Article 226- A memo was issued to the petitioner intimating that the respondent proposed to hold an inquiry against him- the petitioner was directed to submit his written statement whether he admitted or denied all the articles of charge – the petitioner accepted the allegation in the articles of charge and Inquiry Officer was appointed – the petitioner appeared before Inquiry Officer and admitted all the articles of charge – the Inquiry Officer submitted a report holding that the charges against the petitioner stood proved – the petitioner was called upon to submit his representation against the findings recorded by Inquiry Officer – the petitioner submitted a representation and admitted all the allegations – the disciplinary authority imposed a penalty of removal, which shall not be disqualification for future employment – the petitioner filed an appeal in which he stated that he was forced to confess the charges to save the other officers of the Company – the appeal was dismissed by the Appellate Authority-aggrieved from the order of the disciplinary authority, present writ petition was filed- held, that three communications of guilt were submitted by the petitioner on different dates- there is no material on record to show that the confession was not voluntary but on account of coercion or duress exercised by his senior officers – the officers asking the petitioner to confess have not been impleaded as parties – no violation of the procedure was pointed out – the penalty was imposed

on the basis of confession- the order passed by Appellate Authority is self speaking and does not suffer from any infirmity, irregularity or illegality – Writ Court does not act as the Appellate Court - principles of natural justice were followed – the order was passed on the basis of material on record- writ petition dismissed.(Para-19 to 22) Title: Bhoop Ram Garg Vs. United India Insurance Company Ltd.and others Page-124

Constitution of India, 1950- Article 226- Applications were invited for awarding distribution dealership outlet of Rajiv Gandhi Grameen LPG VitrakYojna under open category – petitioner was declared qualified for the draw of selection and was called upon to be present along with his photo identity for draw of lots- a letter was sent that there was a mistake in the description of khasra number- certain short-comings were noticed and the petitioner was called upon to remove the same within a period of seven days- thereafter his candidature was cancelled without affording an opportunity of being heard- aggrieved from the order, petitioner filed the present writ petition- held, that candidature of the petitioner was cancelled without affording an opportunity, which is a violation of principle of natural justice - present writ petition allowed and the Corporation directed to afford an opportunity of being heard. (Para-3 to 5) Title: Srijan Sharma Vs. Union of India and Ors. Page-241

Constitution of India, 1950- Article 226- Departmental inquiry was drawn against the writ petitioner after his retirement – held, that departmental inquiry cannot be drawn against the employee after his retirement – The Tribunal had rightly allowed the application- writ petition dismissed. (Para-5 to 8) Title: The Himachal Pradesh State Co-operative Milk Producers' Federation Limited Vs. Sudhir Chand Katoch (D.B.) Page-157

Constitution of India, 1950- Article 226- Petitioner had not approached the Tribunal within a reasonable time and had invoked the jurisdiction of the Tribunal after the lapse of ten years- held, that a person who is a fence sitter cannot claim any benefit after noticing that the same had been granted to similarly situated persons- Tribunal had rightly dismissed the original application- writ petition dismissed. (Para-3 to 6) Title: Raj Kumar Vs. Bharat Sanchar Nigam Limited and others (D.B.) Page-101

Constitution of India, 1950- Article 226- Petitioner has questioned the result of entrance examination for SAS conducted by H.P. Public Service Commission on the ground that no marks were awarded to the petitioner for some of the correct answers – the respondent stated that the answer sheets were rightly evaluated by the Experts and re-checking of the answer-sheets is not permissible –held, that the Court cannot sit in appeal over the expert's opinion- further, it was specifically mentioned in the advertisement that re-evaluation or re-checking is not permissible – the petitioner had gone through the advertisement and had participated after knowing about the conditions- he cannot seek the re-evaluation of the answer sheets- writ petition dismissed. (Para-2 to 11) Title: Dalip Kumar Vs. H.P. Public Service Commission (D.B.) Page-267

Constitution of India, 1950- Article 226- Petitioner was appointed as Anganwari worker in the month of August, 2007 – an appeal was preferred against the appointment on the ground that petitioner is not resident of survey area of Anganwari center – the appeal was allowed and the appointment of the petitioner was set aside- the petitioner preferred a second appeal before Divisional Commissioner, which was dismissed- direction was issued to conduct fresh interview to select eligible candidate strictly in accordance with the scheme/guidelines issued by the department – a writ petition was filed, which was disposed of with a direction to the Appellate Authority to consider the case afresh – again it was held that petitioner is not a resident of survey/feeding area and her appointment was against the guidelines – the present writ petition has been filed against the order passed by Appellate Authority – held, that it was specifically held in the writ petition that the person should be resident of Village/ward, where the Center is located – it was specifically stated in the affidavit of respondent No. 4 that part of the Village where house of the petitioner is situated does not fall under the feeder area of Anganwari, where she was appointed- patwari had also reported the same fact- no document was placed on record

to show that the house of the petitioner falls within the feeder area – the Appellate Authority had rightly set aside the appointment of the petitioner – petition dismissed. (Para-9 & 10) Title: Savita Vs. State of H.P. and others Page-117

Constitution of India, 1950- Article 226- Petitioner was appointed as Chowkidar on Contract basis – he was transferred as security guard- subsequently, his services were terminated in the year 2003 – a reference was sought but the same was declined by Labour Commissioner on the ground of delay- aggrieved from the order, present writ petition has been filed- held that no reason for delay was given by the petitioner – stale claims should not be allowed unless there is specific explanation for the delay –there is no illegality in the order passed by the Commissioner – writ petition dismissed.(Para-5 to 7) Title: Nishi Sharma Vs. Secretary, Department of Labour& Employment and others Page-5

Constitution of India, 1950- Article 226- Petitioner was appointed as anganwari helper- her selection was assailed by the private respondent by filing an appeal, which was allowed – a direction was issued to conduct fresh interview – the respondent was selection as anganwari helper – Appellate Authority held the respondent to be ineligible for appointment – a direction was issued to conduct fresh interview – aggrieved from the order, the petitioner filed the present writ petition – held that once the Appellate Authority concluded that the respondent was not eligible, a direction should not have been issued to hold the fresh interview, in which the respondent would also participate - the order of the Appellate Authority set aside and direction issued to re-engage the petitioner. (Para-9 to 13) Title: Achhri Bibi Vs. State of Himachal Pradesh and others Page-359

Constitution of India, 1950- Article 226- Petitioners were appointed as Safaiwalas in Rashitriya Military School, Chail – they were on probation of two years – they were issued warnings for unauthorized absence – services of the petitioners were terminated on 1.6.2015 – petitioners filed original applications before Central Administrative Tribunal - respondent pleaded that the performance of both the petitioners was not satisfactory during the probation period and they were issued various warnings – the Tribunal dismissed the original application- aggrieved from the order, present writ petitions have been filed- held that lots of complaints were filed against the petitioners- repeated warnings were issued to the petitioners- the performance of the petitioners was not found satisfactory and authorities took a conscious decisions not to extend the probation period – no inquiry was required to be conducted as the termination was not stigmatic – the applications were rightly dismissed by the Tribunal- petition dismissed.(Para-15 to 27) Title: Narender Kumar Vs. Union of India and others (D.B.) Page-16

Constitution of India, 1950- Article 226- The Office of Naib Tehsildar was functioning at Village Chandol – office of Kanungo is already located at Village Salech– the Government has issued a notification establishing the headquarters of newly created sub-Tehsil Pajhota at Nohri- it was contended by the petitioner that there is insufficient accommodation at Nohri for establishing the headquarters – offices are already working at Villages Salech/Chandol and they are appropriate places for setting up the headquarters – Gram Panchayats have also passed resolution for establishing the headquarters at Salech/Chandol – residents have also offered 2.5 bighas of land and there is no justification for issuance of notification – respondents contended that the decision was taken to establish headquarters at Nohri for providing better services – held that petitioner is not authorized by the public to file the present writ petition – the decision to establish headquarters at Nohri has been taken in public interest – people had made land available free of cost to establish headquarters at Nohri – Courts cannot interfere in the policy decision unless the decision is capricious or arbitrary – the decision is not shown to be arbitrary or based upon irrational consideration- petition dismissed.(Para-7 to 12) Title: Prem Singh Chauhan Vs. The State of H.P. and others (D.B.) Page-380

Constitution of India,, 1950- Article 226- TehsildarKangra submitted his report to ADM, Kangra, wherein the annual income of the petitioner was shown as Rs.16,742/- and earlier

income certificate was cancelled- while computing the income of the petitioner, the income of her mother-in-law received as pension was also considered – the petitioner claimed that her mother-in-law resides separately and she has annexed copy of parivar register to this effect – the petitioner challenged the report by filing an appeal before the Appellate Authority, which was dismissed- aggrieved from the order, present writ petition has been filed – held, that mother-in-law of the petitioner has been shown as family member along with the petitioner – the pension amount goes to the family of the petitioner and is being used for its well-being – the Tehsildar had rightly taken the pension into consideration- writ petition dismissed. (Para-5 to 8) Title: Tripta Devi Vs. Sub Divisional Officer (Kangra) Page-197

Contempt of Courts Act, 1972 - Section 12- The respondents were directed to implement the policy framed by them within a period of 6 months – State Government formulated a policy for taking over the services of the petitioners and similarly situated persons with the condition precedent that all those who are to be benefited by the policy should not have any litigation pending- the respondents are not implementing their policy- held, that the tables filed by the respondent show that the judgment stands complied with – no case of willful contempt is made out – petition dismissed.(Para-9 to 16) Title: Abhilash Chand and others Vs. Sanjay Gupta and others (D.B) Page-82

Contempt of Courts Act, 1972- Section 12- The petitioner-union comprising of employees of erstwhile Central Co-operative Consumers Store Shimla raised an industrial dispute claiming regular pay scales at par with the employees of federation with arrears – the reference was allowed – writ petitions were filed and it was held that petitioners would be entitled to all monetary benefits which were being paid to them on 18.6.1994 including increments and other emoluments – LPA was filed, which was partly allowed- the judgment was modified by directing H.P. State Co-operative Marking and Consumers Federation Limited, Shimla to do the needful and take follow up action – a contempt petition was filed pleading that the corporation has not complied with the orders passed in the writ petition – held, that power of contempt has to be exercised with great care and circumspection – the petitioners were held entitled to pay scales which were payable to them on 18.6.1994 and were specifically held disentitled to the DA and ADA etc. at par with the regular employees of the federation – the plea of the entitlement of revised pay scales at par with the employees of the federation was never upheld by the Court – the members of the union cannot claim any benefit over and above to what they were held entitled in the judgment- contempt petition dismissed.(Para-12 to 17) Title: General Secretary / Pradhan, Employees Union Central Cooperative Consumer Store, Shimla Vs. K.C. Chaman (D.B.) Page-90

'E'

Employees Compensation Act, 1923- Section 3- Deceased was engaged as driver who died in a motor vehicle accident- it was contended that vehicle was transferred and the liability was wrongly fastened upon the appellant- held, that employment is a necessary condition for getting compensation in Workmen Compensation Act- deceased was employed by the appellant and, therefore, he is liable for the payment of compensation- liability cannot be fastened upon the person recorded as owner in R.C.- appeal dismissed. (Para-2 to 4) Title: Jagdish Vs. Pinky Devi and others Page-245

Employees Compensation Act, 1923- Section 4- Deceased was employed under respondent No.1- he died in the accident – it was contended that the insurer is not liable as the vehicle was transferred by respondent No.1 to respondent No.4 and there is no privity of contract between respondent No.1 and the insurer– held, that it was proved that deceased was employed as driver by respondent No.4 and the insurer was rightly held liable – the deceased was drawing wages of Rs.3,000/- per month and daily expenses of Rs. 100/- - the compensation of Rs.3,14,880/- cannot be said to be excessive – appeal dismissed and penalty of Rs.1 lac imposed upon the

respondent No.4. (Para- 3 to 5) Title: United India Insurance Ltd. Vs. Fulan Devi and others Page-121

Employees Compensation Act, 1923- Section 4- Deceased was working as a beldar - a boulder slided from the hill side and hit the deceased on his head- he died on the spot- a compensation of Rs.2,58,336/- was awarded by the Commissioner- a sum of Rs.1,52,313 was awarded as interest- Insurer was directed to deposit the amount with interest within a period of one month from the date of the award or to pay the penalty- held, that the terms of the policy were not brought on record to show that insurer was not liable to pay the interest- the liability to pay the penalty is that of the insured and not of the insurer- hence, award modified to the extent that liability to pay the penalty imposed upon the insurer is quashed and set aside. (Para-7 to 9) Title: New India Assurance Company Ltd. Vs. Bhim Chhring Maghar & ors. Page-99

'H'

H.P. Municipal Corporation Act, 1994- Section 254(1)- Petitioners were directed by respondent No.2 to stop the construction work and to take demarcation by associating their immediate neighbours- an appeal was filed, which was dismissed- aggrieved from the order, the present petition has been filed contending that the order is beyond the scope of Section 254(1) – held, that the notice issued by the Commissioner did not touch any of the conditions contemplated by Section 254 of the M.C. Act – the power was exercised for extraneous consideration – the Appellate Court had also not looked into this aspect while deciding the appeal – notice under Section 254(1) cannot be served in a routine, casualor callous manner on the basis of allegations made in the complaint by the neighbour– it was incumbent upon the respondent to set out in detail various acts of omission and commission to afford an opportunity to meet the case against the petitioners – reply filed by the petitioners was not even taken into consideration while passing the order – no reasons were assigned in support of the order- the notice was to be issued by the Commissioner and could not have been issued by Architect planner – he had exercised a jurisdiction not vested in him – petition allowed- order passed by respondent No.2 quashed and set aside. (Para- 8 to 51) Title: Ashok Thakur and another Vs. M.C. Shimla and others Page-226

Himachal Pradesh Agricultural & Horticultural Produce Marketing (Development and Regulation) Act, 2005- Section 40- Petitioner, a company registered under Indian Companies Act, 1956, has a manufacturing unit at Una and is exclusively engaged in the manufacture of Liquid Glucose, Dextrose, Monohydrate, Liquid MaltoDextrine, MaltoDextrine Powder, Maize Glutane, Maize Germ and Maize Husk out of Maize –it was asked to get itself registered under H.P. Agricultural & Horticultural Produce Marketing (Development and Regulation) Act, 2005- the petitioner contended that it is not engaged in the processing of any agriculture produce and is not covered under the Act – an amount of Rs. 22,52,535/- was recovered and a prayer was made for the refund of the amount – it was stated in the reply that maize is an agricultural produce and the petitioner is duty bound to pay the fee and get itself registered- held that there is a distinction between manufacturing and processing activity – in case of manufacturing, there is complete transformation of the original articles to produce a commercially different article or commodity having its own character, use and name, whereas in case of processing, the identity remains exactly the same- the end product produced by the petitioner is totally different from the original product namely, maize- petitioner is carrying out manufacturing activity and not processing activity and is not covered under the Act- it is not liable to pay any market fee – therefore, a direction issued to refund market fee realized from the petitioner within three months. (Para-7 to 43) Title: M/s. Sukhjit Starch and Chemicals Ltd. Vs. The Agriculture Produce Market Committee, Una, Himachal Pradesh, through its Secretary Page-362

'I'

Indian Penal Code, 1860- Section 147, 148, 149, 323, 324, 325, 341 and 427- Complainant and his son were ploughing their field – accused H and N came armed with sickle and stick- accused

K was present on the spot and he asked the complainant to stop ploughing the field – the accused attacked the complainant and complainant sustained injuries – he and his son raised alarm on which K and R arrived at the spot, who were also beaten – the accused were tried and acquitted by the Trial Court- held in appeal that there was a cross FIR- accused had also sustained injuries- the place where the incident took place does not belong to the complainant but is in the possession of the accused- it was not proved that accused were aggressors and they were rightly acquitted by the Trial Court- appeal dismissed.(Para- 8 to 13) Title: State of Himachal Pradesh Vs. Hardev Singh & ors. Page-213

Indian Penal Code, 1860- Section 148, 341, 323, 324 read with Section 149- Complainant was going to drop his driver – when the car reached near M, the driver stated that he could not undertake the journey on foot to his house as it was pitch dark - he requested the complainant to return – a tractor was found parked in the middle of the road which was causing obstruction to the traffic – the complainant got down from the car and requested the persons standing near the tractor to give him the way but accused R and R attacked the complainant – other accused inflicted stick blows – driver and occupant of the car of the complainant cried for help on which accused ran away – the accused were tried and acquitted by the Trial Court- held in appeal thatthere are contradictions in the testimonies of prosecution witnesses- the disclosure statement was not recorded prior to effecting recovery and the recovery is not admissible – Trial Court had properly appreciated the evidence- appeal dismissed.(Para-9 to 17) Title: State of Himachal Pradesh Vs. Ranjeet Singh & Others Page-248

Indian Penal Code, 1860- Section 228- Accused was appearing as a prosecution witness in the Court of the complainant – she started quarreling with defence counsel – she was requested to remain calm – she started shouting that she had no faith in the system and especially in the Court of the complainant- she was advised to maintain decorum in the Court but she continued with her behaviour – she was informed that her behaviour amounted to contempt of Court but she replied that she did not care for anyone – the complainant took cognizance and filed a complaint before the Court- the accused was tried and convicted by the Trial Court- an appeal was preferred pleading that the same be treated as a mercy petition on which the Appellate Court reduced the sentence imposed by the Trial Court- held in revision that the conviction of the accused was not challenged in appeal on merit and it was pleaded that the appeal be treated as a mercy petition – the Appellate Court has reduced the sentence and it is not open to the accused to agitate the matter on merit –however, considering the fact that the complaint was filed by a judicial officer, the matter re-examined on merit – it was duly proved by the prosecution witnesses that accused was asked to remain calm and to maintain the decorum of the Court but the accused continued to disrupt the proceedings- the defence version was not probable – the accused was rightly convicted by the Courts- revision dismissed. (Para-8 to 18) Title: Subhadra KumariVs. State of Himachal Pradesh Page-413

Indian Penal Code, 1860- Section 279 and 337- Accused was riding a motorcycle with high speed and hit the cycle due to which cyclist sustained injuries- the accused was tried and convicted by the Trial Court- an appeal was filed, which was allowed and the accused was acquitted – held, that independent witnesses had not supported the prosecution version- sole testimony of the victim does not inspire confidence – the Appellate Court had rightly appreciated the evidence to hold that prosecution version was not proved- appeal dismissed.(Para-9 to 11) Title: State of H.P.Vs. Akhilesh Kumar Page-32

Indian Penal Code, 1860- Section 279, 337 and 304-A- Accused was driving a tempo- he could not control the same and hit the bus coming from the opposite side – 4-5 passengers sustained injuries – one passenger succumbed to the injures- the accused was tried and acquitted by the Trial Court- held in appeal that the death was proved by post mortem report – prosecution version was proved by the prosecution witnesses – mere non-association of the passengers will not make the prosecution case doubtful – the Trial Court had relied upon the report of the mechanical expert but there is no evidence of any defect in the vehicle prior to the accident – the

Trial Court had wrongly acquitted the accused – appeal allowed- judgment passed by the Trial Court set aside- accused convicted of the commission of offences punishable under Sections 279, 337 and 304-A of I.P.C. (Para-9 to 19) Title: State of H.P. Vs. Hari Singh Page-309

Indian Penal Code, 1860- Section 279, 337 and 338- Accused was driving a jeep in a rash and negligent manner and struck his jeep against B – B sustained simple and grievous injuries- he was taken to hospital, where he succumbed to the injuries – the accused was tried and acquitted by the Trial Court- held in appeal that PW-1 had supported the prosecution version- mere fact that PW-3 and PW-4 had turned hostile will not make the prosecution case suspect- no mechanical defect was found in the vehicle –the accident was caused due to the high speed of the vehicle – the Trial Court had wrongly acquitted the accused- appeal allowed- accused convicted of the commission of offences punishable under Sections 279, 337 and 338 of I.P.C. (Para-9 to 22) Title: State of H.P. Vs. Kewal Singh Page-76

Indian Penal Code, 1860- Section 279, 337 and 338- Accused was driving a motor cycle with the high speed- the motor cycle hit the bus – accused and pillion rider sustained injuries - the accused was tried and acquitted by the Trial Court- held in appeal thatbus was moved after the accident and no reliance can be placed upon the site plan – the presence of eye-witnesses was not established as the tickets were not collected by the Investigating Officer from them to show their presence- pillion rider did not support the prosecution version – the Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed. (Para-9 to 13) Title: State of H.P. Vs. Sanjiv Kumar Page-151

Indian Penal Code, 1860- Section 279, 337 and 338- Accused was driving a Mahindra Jeep with a high speed – the complainant and his brother-in-law were waiting for a bus on the side of the road – the jeep hit the complainant due to which the complainant fell down- he sustained injuries on his legs – the accused was tried and convicted by the Trial Court for the commission of offences punishable under Sections 279, 337 and 338 of IPC – an appeal was preferred, which was dismissed – held in revision that the accused admitted in his statement recorded under Section 313 Cr.P.C that he was driving the vehicle slowly, which shows that the fact that accused was the driver was not in dispute- PW-4 and PW-5 expressly stated that accused was driving the vehicle in a rash and negligent manner – medical evidence corroborated the version of the prosecution – the Courts had rightly convicted the accused, in these circumstances- however, considering the time, which has elapsed since the date of incident, sentence modified. (Para-10 to 14) Title: Prem Chand Vs. State of Himachal Pradesh Page-417

Indian Penal Code, 1860- Section 279, 337, 338 and 304- Accused was driving a truck- he took his truck towards the wrong side and hit the right side of a bus- one passengers fell down and suffered fatal injuries- other passengers suffered multiple injuries- accused was tried and convicted by the Trial Court- an appeal was filed, which was dismissed- held in revision that mechanical report makes the defence probable that there was mechanical defect in the vehicle due to which the truck went towards the wrong side of the road - the Courts had ignored this part of the evidence- judgments of the Court set aside and the accused acquitted of the charged offences. (Para-9 to 20) Title: Diwan Chand Vs. State of Himachal Pradesh Page-1

Indian Penal Code, 1860- Section 302- Accused, deceased and A were engaged as labourers by PW-1 and PW-8 for laying marble in their house – the deceased under the influence of liquor abused the accused- the accused inflicted a blow of pick-axe on the person of the deceased due to which he died- the accused was tried and acquitted by the Trial Court- held in appeal that A was not examined by the prosecution and no reasonable cause was assigned for the same – extra judicial confession and recovery were not established – the Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed. (Para-10 to 19) Title: State of H.P. Vs. Dalip Kumar (D.B.) Page-34

Indian Penal Code, 1860- Section 302, 201 read with Section 34- Deceased went to work but did not return – his dead body was found – it was found on inquiry that deceased and accused V had consumed liquor in the room of D – the accusedwere tried and acquitted by the Trial Court- held thatthe wife of the deceased had improved upon her previous version – it was not proved that deceased was last seen in the company of the accused –no independent witness, who was present at the time of recovery of dead body, was examined- further, the mere recovery of the dead body will not connect the accused with the commission of offences- disclosure statements and consequent recoveries were not established – the motive to commit the crime was also not proved- the Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed.(Para-8 to 27) Title: State of Himachal Pradesh Vs. Desh Raj and another (D.B.) Page-257

Indian Penal Code, 1860- Section 307 and 323- Complainant had asked his brother to take the cattle for drinking water- when brother of the complainant reached near the old house, his parental uncle (accused) asked as to why he had come there and started abusing him – brother of the complainant objected, on which accused inflicted a blow of axe on the forehead – when the complainant tried to lift his brother, accused pelted stones due to which complainant sustained injuries – the accused was tried and convicted by the Trial Court- held in appeal that PW-4 is an interested witness and independent witnesses were not examined by the prosecution – witness to the recovery resiled from his testimony- further, no disclosure statement was recorded prior to effecting recovery - axe was not sent to FSL for examination and is, therefore, not connected to the accused – the defence version is made probable by the injury sustained by the accused- the victims were the aggressors and accused was in possession – the Trial Court had wrongly convicted the accused - appeal allowed- judgment passed by the Trial Court set aside. (Para-9 to 24) Title: Rasal Singh Vs. State of H.P Page-103

Indian Penal Code, 1860- Section 325- Complainant and K had gone to pluck walnut from a tree- accused B came to the spot and claimed that walnut tree was in joint owner-ship - the complainant refused to give walnut to the accused on which the accused gave a danda blow on the face of the complainant – one tooth of the complainant was broken – the accused went away – the accused was tried and acquitted by the Trial Court – held in appeal there are contradictions in the testimonies of complainant and his father- recovery of danda is suspicious – the presence of eye-witnesses at the spot was doubtful – two views are possible and Trial Court had taken a reasonable view while acquitting the accused – appeal dismissed. (Para- 7 to 12) Title: State of Himachal PradeshVs. Bhagat Ram Page-211

Indian Penal Code, 1860- Section 325 read with Section 34- Accused assaulted the complainant by giving him kicks and fist blows- he fell down and lost his two teeth- one A tried to rescue the complainant but he was also assaulted by the accused- the accused was tried and acquitted by the Trial Court- held in appeal that there are contradictions in the ocular and medical versions- no independent witness was examined- delay in lodging the report was not explained- Trial Court had properly appreciated the evidence- appeal dismissed.(Para-9 to 11) Title: State of H.P. Vs. Suresh Kumar and others Page-40

Indian Penal Code, 1860- Section 325, 341, 504- P was filling water by the side of the road – accused B came and told P that P had got his name registered in Antyodya scheme, whereas he was not eligible for the same- B started abusing P – he picked up a bamboo stick and inflicted injury on the head of P – K and A rescued the complainant - accused was tried and acquitted by the Trial Court- held in appeal that the accused had also lodged an FIR regarding the incident prior to FIR lodged by the complainant – accused had sustained injuries – there are discrepancies in the testimonies of the complainant and his mother –the stick was not connected with the commission of offences- the Trial Court had rightly acquitted the accused- appeal dismissed.(Para-9 to 13) Title: State of H.P. Vs. Bhag Singh Page-148

Indian Penal Code, 1860- Section 341 and 354 read with Section 34- Prosecutrix was going to Jungle to bring grass – a motor cycle came on which two persons were sitting – they parked the motorcycle and proceeded towards the prosecutrix – she identified pillion rider as S – S restrained her and K embraced her – S caught hold of her arm and started kissing her – she raised hue and cry on which K arrived at the spot – the accused went away on seeing K - the prosecutrix narrated the incident to K – K was taking her to her mother – they met sister-in-law of the prosecutrix on the way – prosecutrix also narrated the incident to her - accused were tried and convicted by the Trial Court- an appeal was filed, which was dismissed- held in revision that mother of the prosecutrix and PW-5 have corroborated the case of the prosecution – prosecutrix admitted in her cross-examination that she was not deposing against the accused as the matter had been compromised between the accused and her father – she supported the prosecution version in cross-examination – it was correctly concluded by the Trial Court that the case was proved beyond reasonable doubt – revision dismissed .(Para-10 to 19) Title: Kamal Kishore Vs. State of Himachal Pradesh

Indian Penal Code, 1860- Section 341, 353 and 332 read with Section 34- Complainant was working as room attendant in a restaurant owned and managed by the Punjab Tourism - some customers came and complainant was directed by the Manager to show the room to the customers- customers opted to occupy the room shown to them- complainant went out to bring the luggage- accused were the employees of Hotel Ishan and told that they were charging Rs.100/- only for the night stay- complainant made a report to the Manager- accused threatened to beat the complainant and thereafter gave beating to him- he suffered injuries- accused were tried and convicted by the Trial Court- an appeal was preferred, which was allowed- held that complainant stated that he had lost gold chain and money – however, these articles were not recovered- medical evidence did not support the version of the complainant- complainant had improved upon his version- it was not found that clothes were torn – presence of eye-witness was suspicious - Appellate Court had taken a reasonable view while acquitting the accused- appeal dismissed. (Para-9 to 11) Title: State of H.P. Vs. Kamal and others Page-316

Indian Penal Code, 1860- Section 353 and 506 read with Section 34- Accused went to the blood bank where the complainant was discharging duty as in charge – they had donated blood in the morning and were to take blood in exchange for administration to a patient – the accused were late - technician and other officials had left the blood bank- the accused could not provide blood so the accused misbehaved with the complainant – they caught hold of the complainant, abused and threatened him- the accused were tried and convicted by the Trial Court- an appeal was filed, which was allowed and the judgment of Trial Court was reversed- aggrieved from the judgment of the Appellate Court, present appeal has been filed- held in appeal that complainant had not deposed about the presence of any person at the time of incident – hence, the statements of alleged eye witnesses cannot be believed- testimony of the complainant was not creditworthy – the Appellate Court had rightly acquitted the accused- appeal dismissed.(Para-9 to 12) Title: State of H.P. Vs. Ved Prakash & others Page-349

Indian Penal Code, 1860- Section 353-Complainant was working as Conductor in HRTC and was deputed on Kaza-Shimla route – the accused boarded the bus at Tapri – the complainant asked the accused for a ticket on which the accused started abusing the complainant and thereafter slapped him- the accused was tried and convicted by the Trial Court- an appeal was preferred, which was allowed- held that complainant and other witnesses had supported the prosecution version – the occurrence was not disputed in the cross-examination and it was suggested that the accused had apologized, which apology was accepted by the complainant – the prosecution case was proved beyond reasonable doubt and the Appellate Court had wrongly acquitted the accused- appeal allowed – judgment of Appellate Court set aside and accused convicted of the Commission of offence punishable under Section 353 of I.P.C. (Para-9 to 12) Title: State of H.P. Vs. Mahinder Singh Page-170

Indian Penal Code, 1860- Section 363, 366, 120-B and 376- Prosecutrix was studying in 9th standard – she went with PW-20 and spent the night in the house of PW-2 – accused finding the prosecutrix alone at bus stand took her to Bilaspur on the allurement of marriage – she was subjected to sexual assault – the prosecutrix was taken by accused S – accused were tried and convicted by the Trial Court- held in appeal that prosecutrix was proved to be minor at the time of incident – prosecutrix had not disclosed the details of the accused – names of the parents of the accused S or his residence were also not disclosed – she had altered the core story regarding the sexual assault- she stated that she was assaulted by R but B was arrested for which no explanation was provided – no test identification parade was conducted to establish that B was R- the prosecution version did not inspire confidence – delay in reporting the matter was not also explained- the evidence was not properly appreciated – the judgment of the Trial Court set aside and the accused acquitted.(Para-8 to 57) Title: Bihari Lal Vs. State of H.P. (D.B.) Page-158

Indian Penal Code, 1860- Section 376(2)(g)- Accused gang raped the prosecutrix – they were tried and acquitted by the trial Court- an appeal was filed and the order was set aside – the case was remanded with a direction to alter the charge from Section 376 read with Section 34 to Section 376 (2)(g)- the accused were tried and acquitted by the Trial Court- held in appeal that the prosecutrix was not proved to be minor – different dates of birth were mentioned in the certificates brought on record by the prosecution- the radiological age of the prosecutrix was found to be 16 to 17 years and there can be a difference of three years – thus, it was not proved that prosecutrix was minor – she had voluntarily accompanied accused No. 5 –however, she had not consented for sexual intercourse with the accused No. 5- the other accused came and raped her – the prosecutrix has supported the prosecution version – minor improvements in her statement are not sufficient to discard the same- the prosecution version was proved beyond reasonable doubt- appeal allowed and accused convicted of the commission of offence punishable under Section 376(2)(g) of I.P.C. (Para-23 to 41) Title: State of H.P. Vs. Raghubir Singh and others (D.B.) Page-48

Indian Penal Code, 1860- Section 379 read with Section 34- C, A and K had gone to Neugal Café in their car- the car was parked outside the café – the accused also parked their van outside the Neugal Café- the accused consumed a bottle of beer and thereafter left the café - when C and his friends came out of the café, they found that their vehicles were missing – the complainant suspected the accused and reported the matter to police – the car was stopped at Bhattu and was found to be driven by accused No.1- O was also sitting in the Car – a fictitious number plate was fixed to the Car – the accused were tried and convicted by the Trial Court – an appeal was preferred, which was dismissed- held in revision the accused were found in possession of the Car- the possession was not explained – there was no error in appreciation of evidence- revisional court can exercise jurisdiction to correct miscarriage of justice and cannot re-appreciate the evidence – judgments passed by Trial Court and upheld by the Appellate Court do not suffer from any infirmity – revision dismissed.(Para-9 to 16) Title: Om Parkash Vs. State of Himachal Pradesh Page-201

Indian Penal Code, 1860- Section 451, 325, 504 and 506(1)- Accused came to the house of the complainant to make a telephonic call – wife of the complainant handed over the apparatus to the accused through window –the accused could not connect the number so he asked the wife of the complainant to connect the number – the wife of the complainant stated that she could not dial the number in darkness – the accused got agitated on hearing this and started hurling filthy abuses – the complainant asked the accused not to do so, on which the accused entered inside the room armed with stick and gave blows to the complainant – the accused was tried and acquitted by the Trial Court – held in appeal that no disclosure statement was made prior to the recovery –hence, no probative value can be attached to the recovery- the Trial Court had correctly appreciated the evidence – appeal dismissed.(Para- 9 to 11) Title: State of H.P. Vs. Ramesh Chand Cr. Appeal No. 221 of 2007 Page-243

Indian Penal Code, 1860- Section 498-A and 306 read with Section 34- Deceased was married to accused M- the accused M was adopted son of co-accused R and D – accused started treating the deceased with mental and physical cruelty – father of the deceased requested the accused to behave with his daughter properly – the deceased informed her mother that accused were fighting with the deceased and she had consumed some medicine-father of the deceased visited the house of the accused accompanied by his wife and both sons– they found the deceased was lying unconscious – she was taken to Hospital from where she was referred to a better institution having better facilities- she was taken to Jalandhar but she breathed her last – the accused were tried and acquitted by the Trial Court- held, that the deceased had committed suicide in her matrimonial home – however, the evidence regarding the mal-treatment and torturing the deceased was not satisfactory as different witnesses had given different versions regarding the same – mother of the deceased was not examined and she was a material witness – the comments stated to have been uttered by the accused were not of such a nature as would drive any person to commit suicide –the call record was not produced and an adverse inference has to be drawn against the prosecution – the Trial Court had rightly acquitted the accused- appeal dismissed.(Para-11 to 37) Title: Varinder Singh Vs. State of Himachal Pradesh &ors. (D.B.) Page-319

Indian Penal Code, 1860- Sections 498-A and 306 read with Section 34- Deceased was married to accused D – S was the mother-in-law of the deceased- she used to harass the deceased continuously by saying that she would solemnize second marriage of D- she did not send the deceased to attend the marriage of her cousin – deceased was found hanging with the fan – the accused were tried and acquitted by the Trial Court- held in appeal that prosecution witnesses had improved upon their original version – payment of Rs.40,000/- was not proved – it was not proved that accused S had threatened to get her son re-married – vague allegations made by the prosecution witnesses do not amount to cruelty – Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed.(Para-5 to 30) Title: State of Himachal Pradesh Vs. Mohar Singh and others Page-422

Indian Penal Code, 1860- Sections 498-A and 306 read with Section 34- Deceased was married to the accused – the accused used to doubt the character of deceased and beat her – he also used to demand dowry – the deceased committed suicide- the accused was tried and acquitted by the Trial Court- held in appeal thatno complaint of ill-treatment was ever made to Panchayat or police during the life time of deceased- no specific incident of demand of dowry was proved – it was admitted that the deceased had given birth to a child after six months of the marriage – the possibility of deceased being under stress due to this fact cannot be ruled out- it was not proved that accused had instigated/abetted the deceased to commit suicide- the Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed. (Para-9 to 30) Title: State of Himachal Pradesh Vs. Hem Raj (D.B.) Page-336

Indian Succession Act, 1925- Section 63- Plaintiff filed a civil suit pleading that B was owner in possession of the suit land – the defendant No.1 set up a Will stated to have been executed by B and got the mutation attested – B had not executed any Will and was not in sound disposing state of mind prior to his death – the defendant No.1 had alienated some portion of the land and the alienation is not binding upon the plaintiff – the suit was dismissed by the Trial Court- an appeal was preferred, which was allowed- the judgment and decree passed by the Trial Court were set aside- held in second appeal that propounder of the Will had taken an active role at the time of the execution of the Will - scribe of the Will was not examined – the marginal witness stated that he had identified the executant and thus he cannot be called to be a marginal witness – B was more than 95 years at the time of alleged execution of the Will – the Will was shrouded in suspicious circumstances – the sale deeds were executed when the defendant No.1 was recorded as the owner in the revenue record – the sale deeds were also not challenged – the plea of the purchasers that they were bona-fide purchasers for consideration appears to be probable – appeal

partly allowed. (Para-15 to 26) Title: Vikram Singh and others Vs. Tota Ram (since deceased) through L.Rs Page-394

Indian Succession Act, 1925- Section 63- Plaintiff pleaded that he is cultivating the land for more than 40 years on the payment of batai – the entry in the revenue record was not corrected due to cordial relation between the plaintiff and the deceased- the deceased had executed a Will in his favour and in favour of the defendant- the defendant also produced the Will – the revenue authorities sanctioned the mutation on the basis of the Will of the defendant – the defendant pleaded that the deceased had executed a valid Will in his favour and mutation was rightly sanctioned on the basis of the same- the suit was partly decreed by the Trial Court – separate appealswere preferred, which were partly allowed- held that the Will propounded by the plaintiff was duly proved and Appellate Court had wrongly ignored the same – the Will set up by the defendant was not proved satisfactorily and Appellate Court had wrongly held the same to be proved – the judgment of Appellate Court set aside and judgment passed by Trial Court restored. (Para-22 to 53) Title: Jeet Singh Vs. Tilak Raj Page-280

Indian Succession Act, 1925- Section 63- S was the owner in possession of the suit land – he died intestate- the defendants forged a bogus Will stated to have been executed by S–defendants pleaded that the Will was executed by the deceased in his sound disposing state of mind and the plaintiff not being the son of the deceased has no locus standi to file the suit – the suit was dismissed by the Trial Court- an appeal was preferred, which was allowed- held, that the plaintiff is not proved to be son of the deceased and hence, he has no locus standi to file the present suit- the Will was shrouded in suspicious circumstances, which were not explained- the Appellate Court had wrongly allowed the appeal – appeal allowed- judgment of Appellate Court set aside and that of the Trial Court restored.(Para-7 to 10) Title: Chet Ram (died through his LRs) and others Vs. Dola Ram and others Page-129

Industrial Disputes Act, 1947- Section 25- Claimants pleaded that they were continuously working with the respondent from April, 1990- their services were terminated on 1.7.2001 – a reference was sought, which was answered in negative – held, that the respondent had taken a plea that workmen had abandoned their job voluntarily- however, this plea was never accepted by the Court – hence, writ petition allowed and the case remanded to the Labour Court for a fresh decision. (Para-11 to 14) Title: Pawan Kumar Vs. Himachal Pradesh State Electricity Board through its Secretary &Anr. Page-306

Industrial Disputes Act, 1947- Section 25- The workman was working as un-skilled mazdoor– his services were terminated without following the provisions of Industrial Disputes Act – he sought reinstatement with consequential benefits – the Tribunal allowed the claim of the petitioner and directed the employer to re-engage the petitioner forthwith along with continuity in service and seniority from the date of termination with back wages – aggrieved from the award, present writ petition was filed – held that the employer had failed to prove that the workman had abandoned the job – workman had suffered accident during the course of employment and remained under treatment – he was given light job on the recommendation of the Medical Board- no notice required under Section 25-F was served upon the workman – no notice was issued asking the workman to join the duties – the Writ Court cannot act as Appellate Court and cannot re-appreciate the evidence- Writ petition dismissed.(Para-10 to 16) Title: Punjab Laminate Private Limited Vs. Gurdas Ram Page-8

Industrial Disputes Act, 1947-Section 36 (4)- A reference was made by the Competent Authority on the demand raised by the petitioner- the reference was initially answered in favour of the petitioner ex-parte- however, the award was set aside on an application moved by the respondent-- an application under Section 36(4) was filed, which was dismissed-held, that the petitioner and respondent were initially represented by legal practitioner - neither the petitioner nor the Labour Court had objected to the appearance by the Advocate – the representation is not onlyat the state of appearance but during subsequent stages as well- the application was rightly dismissed by the

Labour Court- writ petition dismissed. (Para-2 to 4) Title: Harbans Singh Vs. M/s Alembic Ltd. Page-96

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Land Acquisition Act, 1894- Section 18- Land was acquired for the construction of Railway Line – collector determined the market value – a reference was made and reference Court re-determined the market value at the rate of Rs.75,000/- per kanal irrespective of classification and category – aggrieved from the award, present appeal has been filed- held, that exemplar award pertains to the same acquisition wherein the reference court had re-determined the market value @ Rs.75,000/- per kanal irrespective of classification – the acquired land is similar to the land forming the subject matter of the exemplar award – exemplar sale deeds also pertain to the sale of land in the same Village and can be taken into consideration for determining the market value-hence, the compensation enhanced from Rs.75,000/- per kanal to Rs. 82,500/- per kanal– appeal allowed. (Para-7 to 16) Title: General Manager, Northern Railway Vs. Surinder Kumar & others Page- 167

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Motor Vehicles Act, 1988- Section 149- Claimant had specifically pleaded and proved that deceased was working as labourer/cleaner in the offending vehicle and was travelling in the said capacity in the vehicle at the time of accident- no evidence was led to prove that the deceased was travelling in the vehicle as a gratuitous passenger – the driver had a valid licence at the time of accident – the insurer was rightly saddled with liability. (Para-8 to 10) Title: Oriental Insurance Company Limited Vs. Ramku and others Page-188

Motor Vehicles Act, 1988- Section 149- **Insurance Act, 1938**- Section 64-VB- Insurer contended that the premium was paid by means of cheque which was bounced and, therefore, it is not liable- held, that there is no proof of the fact that insured was informed of the dishonour of the cheque – in these circumstances, insurer was rightly held liable to pay the amount. (Para-2 to 5) Title: The National Insurance Co. Ltd. Vs. Swarna Devi and another Page-80

Motor Vehicles Act, 1988- Section 149- MACT saddled the insurer with liability with a right to recovery – insurer filed an appeal – held, that the vehicle was insured - the interest of third party cannot be defeated- even if, the insured had committed breach of the terms and conditions of the policy, the insurer is liable to pay the amount with a right of recovery – appeal dismissed. (Para-2 to 10) Title: National Insurance Company Ltd. Vs. Prem Chand & others Page-68

Motor Vehicles Act, 1988- Section 149- No evidence was led by the insurer to prove that the driver did not have a valid licence or he had committed breach of the terms and conditions of the policy – the insurer was rightly saddled with liability- appeal dismissed. (Para-12 and 13) Title: Reliance General Insurance Company Limited Vs. Bulo Devi and others Page-74

Motor Vehicles Act, 1988- Section 149- The offending vehicle was a tractor – the driver was competent to drive light motor vehicle- held, that there is no requirement of endorsement in the driving licence- in these circumstances, the insurer was rightly held liable - appeal dismissed.(Para-15 to 21) Title:National Insurance Company LimitedVs. Kartar Singh and others Page-64

Motor Vehicles Act, 1988- Section 166- Appellant was registered owner of the vehicle but had sold the same to R on 12.9.1996 – the vehicle was purchased by J in the year 2003 by an agreement – the vehicle was also released in favour of J – held, that the person who is in actual possession and control of the vehicle at the time of accident has to satisfy the liability – since, J was in actual possession and control of the vehicle, therefore, he has to satisfy the entire liability

– appeal allowed and J directed to satisfy the entire liability. (Para-4 to 7) Title: Randip Singh Vs. Ikram Khan and another Page-70

Motor Vehicles Act, 1988- Section 166- Claimant/injured remained admitted in the Zonal Hospital w.e.f. 30th January, 2004 to 11th February, 2004- he had sustained 20% permanent disability- Medical Officer stated that injured will not be able to do heavy manual work- salary certificate shows that the income of the claimant was Rs.6,395/- per month- considering the 20% disability, it can be safely held that claimant had sustained loss of the income to the extent of Rs.500/- per month- keeping in view the age of the claimant, multiplier of 11 is just and appropriate- claimant is entitled to Rs.66,000/- (500 x 12 x 11) - compensation of Rs.6,000/- under the head cost of attendant and Rs.15,000/- under the head cost of transportation is maintained- compensation of Rs.50,000/- awarded under the head loss of amenities of life and Rs.50,000/- awarded under the head pain and suffering- claimant is also entitled to Rs.20,000/- under the head medical expenses already incurred and to be incurred in future- thus, claimant is entitled to Rs.2,07,000/- with interest @ 7.5% per annum from the date of the award till realization. (Para-7 to 19) Title: Karam Singh Vs. M/S TheKangra Ex-Serviceman TPTand others Page-183

Motor Vehicles Act, 1988- Section 166- Claimants have specifically pleaded in the claim petition that the deceased was their brother- he was not having wife and was issueless- it was further pleaded that claimants were dependent upon the deceased – the MACT had rightly held that the claim petition was maintainable – further, the deceased was working as beldar and his gross salary was Rs.10,180/- per month – 50% amount has to be deducted towards personal expenses and the loss of dependency will be Rs. 5,000/- per month – the age of the deceased was 55 years at the time of accident- multiplier of 9 was applied by the Tribunal, which is not correct and multiplier of 8 is applicable- thus, the claimants are entitled to Rs.5,000 x 12 x 8 = Rs. 4,80,000/- under the heads loss of source of dependency- claimants are also held entitled to Rs. 10,000/- each under the heads loss of love and affection and funeral expenses- thus, claimants are entitled to Rs. 4,80,000+ 20,000 = Rs. 5,00,000/- along with interest. (Para-10 to 14) Title: Oriental Insurance Company LimitedVs. Vijay Ram & others Page-190

Motor Vehicles Act, 1988- Section 166- Deceased was a driver by profession- he was earning Rs.6,000/- per month – claimants are three in number- 1/3rd is to be deducted towards personal expenses of the deceased- thus, the claimants have sustained loss of dependency of Rs. 4,000/- per month- the deceased was aged 29 years at the time of accident – Tribunal had wrongly applied multiplier of 17 and multiplier of 16 was applicable- thus, claimants are entitled to Rs. 4,000 x 12 x 16= Rs. 7,68,000/- under the head loss of dependency – the deceased was taken to CHC, Ratti, thereafter to Zonal Hosiptal, Mandi from where he was referred to PGI– he succumbed to his injuries- the compensation awarded towards cost of attendant to the tune of Rs. 21,000/-, cost of medicine and transportation to the tune of Rs. 40,000/- is meager but is maintained – claimants are also held entitled to Rs. 10,000/- each under the heads loss of consortium, loss of estate, loss of love and affection and funeral expenses- thus, claimants are entitled to Rs. 7,68,000 +21,000 + 40,000 + 10,000+ 10,000 + 10,000+ 10,000 = Rs. 8,69,000/- along with interest. (Para- 28 to 35) Title: Dila Ram Vs. Rekha Devi and others Page-173

Motor Vehicles Act, 1988- Section 166- Deceased was a government employee drawing monthly salary of Rs.26,886/- per month – Tribunal had deducted the family pension payable after ten years, which is not correct as family pension cannot be deducted while awarding compensation to the claimants – 1/3rd amount was deducted by tribunal towards personal expenses of the deceased, whereas 1/4th amount was to be deducted keeping in view the fact that claimants are five in number -claimants have lost source of dependency of Rs.20,000/- per month – the deceased was aged 48 years at the time of accident- multiplier of 10 was applicable – thus, the claimants have lost source of dependency of Rs.20,000 x 12 x 10= Rs. 24,00,000/- - the claimants are also entitled to Rs.10,000/- each under the heads loss of love and affection, loss of estate, funeral expenses and loss of consortium- thus, claimants are entitled to Rs.24,40,000/-

along with interest @ 7.5% per annum from the date of award till realization. (Para-4 and 5) Title: Neem Kala and others Vs. Forest Department through Secretary Forest, to the Government of HP and another Page-186

Motor Vehicles Act, 1988- Section 166- MACT held that the deceased being a daily wager was earning Rs. 300/- per day for 25 days in a month and assessed his income as Rs. 7,500/- per month- held, that the wages of a daily wager are not more than Rs. 200/- per day- therefore, the monthly income of the deceased would have been Rs. 6,000/- per month – 1/3rd was to be deducted towards personal expenses- the claimants have lost source of dependency of Rs. 4,000/- per month- the deceased was aged 23 years at the time of accident – multiplier of 18 was rightly applied by the Tribunal – claimants are entitled to Rs. 4,000/- x 12 x 18= Rs. 8,64,000/- under the head loss of dependency- claimants are also entitled to Rs. 10,000/- each under the heads loss of consortium, loss of estate, loss of love and affection and funeral expenses- thus, claimants are entitled to Rs. 9,04,000/- with interest awarded by the Tribunal. (Para- 5 to 11) Title: ICICI Lombard General Insurance Company Limited Vs. Preeti and others Page-62

'N'

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 3 kgs. Ganja- he was tried and acquitted by the Trial Court- held in appeal that there is discrepancy in the description of the seal impressionson the sample parcels analyzed in the laboratory and those prepared at the spot – R.C. was not proved to explain this discrepancy – bulk parcel produced in the Court was not connected to the parcel prepared at the spot – independent witnesses had not supported the prosecution version- trial Court had rightly acquitted the accused- appeal dismissed.(Para-8 to 14) Title: Nageshwar Mehto Vs. State of Himachal Pradesh Page-141

Negotiable Instruments Act, 1881- Section 138- Accused approached the complainant for financial help for his personal and domestic needs- the accused borrowed a sum of Rs. 2 lacs from the complainant and issued a cheque of Rs. 2 lacs towards the re-payment of the amount- the check was dishonoured with the remarks insufficient amounts- the accused failed to repay the amount despite the receipt of valid notice of demand- the accused was tried and acquitted by the Trial Court on the ground that the bank account against which the cheque was drawn was not owned, managed or controlled in his individual capacity by the accused- the accused was managing the account in the capacity of the secretary and there was no privity of account - held in appeal that accused had not led any evidence to prove the books of account were maintained by him in his capacity as secretary of the society – the evidence led by the complainant proved the ingredients of offence punishable under Section 138 of N.I. Act- the accused was wrongly acquitted by the Trial Court- appeal allowed – judgment passed by the Trial Court set aside and accused convicted of the commission of offence punishable under Section 138 of N.I. Act.(Para-8 & 9) Title: Prabhu Dayal Sharma Vs. Suraj Mani Page-46

Negotiable Instruments Act, 1881- Section 138- Accused had taken Rs.4 lacs for his personal requirement- he issued two cheques, which were dishonourd- a complaint was filed and the accused was convicted by the Trial Court- an appeal was filed, which was also dismissed- held, that complainant had supported his version - the dishonour was proved by the bank officials- accused admitted the issuance of cheques but stated that these cheques were issued as security – defence taken by the accused was not probablized – the Court had rightly convicted the accused and the appeal was also rightly dismissed- revision dismissed. (Para-10 to 14) Title: Gulab Singh Shandil Vs. Vidya Sagar Sharma Page-179

Negotiable Instruments Act, 1881- Section 138- Complainant advanced a sum of Rs.60,000/- to the accused- the accused issued a postdatedcheque for Rs.60,000/- the cheque was dishonoured for want of sufficient funds- the amount was not paid despite the receipt of the notice – the accused was tried and convicted by the Trial Court- an appeal was filed, which was dismissed- held in revision that the complainant had categorically supported the prosecution

version- the defence version was not proved – the complainant had successfully proved the basic ingredients of the offence punishable under Section 138 of N.I. Act – the accused had failed to rebut the presumption under N.I Act- he was rightly convicted by the Trial Court- revision dismissed.(Para-10 to 16) Title: Tula Ram Vs. Prem Singh Page-110

'S'

Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989- Section 3(x)- Complainant and others had attended the marriage of K- they were asked by the accused to get up from the row in which other guests were sitting to take meals by saying that girls belonging to scheduled caste will not allowed to sit with him in the same row – the accused was tried and acquitted by the Trial Court- held in appeal that there was a delay of more than one month in reporting the matter to the police, which was not explained – a compromise was effected between the parties in which it was stated that there was some misunderstanding – the defence version that therewas no mens rea was probable – the Trial Court had properly appreciated the evidence – appeal dismissed. (Para-9 to 13) Title: State of H.P. Vs. Ramesh Chand Page-254

Specific Relief Act, 1963- Section 34- Plaintiff filed a civil suit pleading that S was original owner of the suit land and he had mortgaged the same to A, father of the parties, with possession for a sum of Rs.2,600/-- sons of A succeeded to him and after his death the mortgaged was not redeemed within the prescribed period- mortgagee had become owner by afflux of time- sons of S sold his interest in favour of defendant No.2 to the extent of 3/4th share and in favour of defendant No.1 to the extent of 1/4th share- defendants lost their title with the passage of time – fake redemption entries of mortgage were got attested behind the back of plaintiffs – suit was decreed by the Trial Court- an appeal was filed, which was also dismissed- held in second appeal that the period of limitation to redeem the mortgage is thirty years from the date of mortgage – however, no limitation has been provided for redemption of usufructuary mortgages- the mortgagee is entitled to receive the rent and profits and to appropriate the same in lieu of payment of the mortgage money – the possession is to be delivered on the liquidation of mortgage money - there is no evidence in the present case that mortgagee was authorized to receive the interest towards the payment of interest- Court had rightly appreciated the evidence and law- appeal dismissed. (Para-17 to 19) Title: Karam Singh Vs. Piara Singh and others Page-406

Specific Relief Act, 1963- Section 34- Plaintiffs filed a civil suit for declaration pleading that suit land was mortgaged by them to defendant No.2 and predecessor-in-interest of defendant No.3 to 9 as security for the payment of debt of Rs.55/- - the revenueauthorities recorded the name of the defendants as tenants at Will- the security amount wasre-paid in the month of Jaith, 1965 the names of the defendants as tenants at Will are wrong, illegal, null and void – the mutations were wrongly attested on the basis of these entries in the name of defendant No.2 and P behind the back of the plaintiffs against the statutory provisions of H.P. Tenancy and Land Reforms Act- the suitwas decreed by the Trial Court – an appeal was preferred, which was dismissed – held in second appeal that it was not proved that defendant No.2 and P were inducted as tenantsover the suit land- the entries in the jamabandi are not sufficient to conclude that they were inducted as tenants over the suit land- tenancy is bilateral agreement and tenant has to pay rent to the landlord- there is no evidence that any rent was paid by defendant No.2 and P to the landlord – it was duly proved that the mortgage was redeemed by the plaintiffs on the payment of the mortgage money in the year 1965 – mutations were correctly entered as the defendant No.2 and P were not in possession and could not have relinquished the suit land in favour of defendant No.1- a procedure for relinquishment has to be followed - there is no evidence that the said procedure was followed- the Courts had rightly decreed the suit – appeal dismissed. (Para-16 to 25) Title: State of H.P. Vs. Harbans and others Page-204

Specific Relief Act, 1963- Section 34- Plaintiffs pleaded that they had purchased the suit land vide sale deed- defendant No.1 had also purchased adjacent plot and had constructed a four storeyed house on the land purchased by him – the stairs were constructed by defendant No.1 in

the land purchased by the plaintiffs- plaintiffs requested the defendant No.1 to demolish the stairs but the defendant No.1 stated that the stairs could be used by both parties and did not remove the stairs – hence, the suit was filed for permanent prohibitory and mandatory injunction- the suit was decreed by the Trial Court- an appeal was filed by defendant No.1, which was dismissed- held in second appeal that demarcation report shows that stairs were raised in the land of the plaintiffs- the demarcation was conducted in accordance with law- the Courts had rightly decreed the suit – appeal dismissed.(Para-12 to 18) Title: Dr. V.P. MadhyakVs. Inder Pal & others Page-312

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit pleading that he had purchased the suit land from N- defendants started fencing the suit land without any right to do so – matter was reported to police and demarcation was conducted – a boundary wall was put on the suit land but the defendants are interfering with the possession of the plaintiff by removing the retaining wall – the suit was opposed by filing a written statement pleading that plaintiff was not in possession – the suit was dismissed by the Trial Court after holding that the plaintiff had failed to prove his possession- an appeal was filed, which was dismissed- held in second appeal that no demarcation report was placed on record- no application for appointment of Local Commissioner was filed and there was no necessity to conduct a fresh demarcation- additional evidence cannot be led as the documents were in the knowledge of the plaintiff - the application was filed to fill up the lacuna – appeal dismissed. (Para- 11 to 29) Title: Moti Ram Vs. Ses Ram and others Page-298

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit for permanent prohibitory injunction pleading that K, his father had executed a Will in favour of the plaintiff and plaintiffs' brother - sister of the plaintiff (defendant No.1) was disinherited by the Will- defendants started interfering with the suit land without any right to do so- the defendants pleaded that they had become the owners by way of adverse possession- the execution of the Will was not disputed by them- the suit was decreed by the Trial Court- an appeal was filed, which was partly allowed – held in second appeal that plaintiff had proved that one and half storeyedhouse exists on the suit land, which is owned and possessed by him – the defendants had failed to prove the adverse possession – the Appellate Court had wrongly appreciated the evidence – the Appellate Court should give reasons for reversing the findings of the Trial Court and should show as to how the findings recorded by Trial Court were erroneous – the Appellate Court had failed to assign reasons while reversing the decree – appeal allowed – judgment passed by Appellate Court set aside.(Para-10 to 21) Title: Bhag Singh Vs. Piar Dassi and others Page-341

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit for injunction pleading that plaintiff and his family members reside in a house- the defendants are having their residential house in the same area located at a distance of 20 meters – the defendants are cultivating/growing mushroom in their courtyard and are using mixture of water, wheat husk and chicken manure – this mixture is emitting foul smell and it is difficult to reside in the house due to the foul smell – the defendants pleaded that mushroom industry is not injurious to human health – the suit was decreed by the Trial Court- an appeal was preferred, which was allowed- aggrieved from the judgment, present appeal has been filed- held in second appeal that local commissioner had found foul smell emitting from the mixture – this was causing nuisance to the plaintiff and other inhabitants – the Appellate Court had wrongly reversed the findings of the Trial Court – appeal allowed- judgment of the Appellate Court set aside and that of the Trial Court restored.(Para-9 to 16) Title: Prem Singh Vs. Narotam Singh & others Page-389

Specific Relief Act, 1963- Section 38- Plaintiff filed a suit pleading that the defendants were interfering with his possession without any right to do so- the suit was partly decreed by the Trial Court- an appeal was preferred, which was dismissed- held in second appeal that the High Court cannot interfere with the concurrent finding of facts unless the findings are perverse- there was no boundary dispute between the parties – plaintiff had filed his case on the basis of Tatima issued by Patwari who did not support the case of the plaintiff – he filed an application for appointment of a Local Commissioner, which was dismissed by the Trial Court after holding that

the plaintiff can apply for demarcation to the revenue authorities – the Local Commissioner cannot be appointed to delay the proceedings or to create some evidence – the application was rightly rejected by the Trial Court – appeal dismissed.(Para-12 to 15) Title: Nand Lal Vs. Sanjana Sood and others Page-192

Specific Relief Act, 1963- Section 38- The original plaintiff filed a suit seeking injunction pleading that the defendants were interfering with his possession without any right, title or interest- the defendants pleaded that plaintiff had agreed to sell the suit land and had handed over the possession to the defendants- they had raised an orchard over the same – the Trial Court dismissed the suit- an appeal was filed, which was allowed – held in second appeal that plaintiff is recorded to be the owner in possession of the suit land – entry in jamabandi carries with it a presumption of correctness – the defendants had not led sufficient evidence to rebut the presumption – the Appellate Court had rightly reversed the decree of the Trial Court- appeal dismissed. (Para-8 to 12) Title: Hari Ram & another Vs. Santi Devi &others Page-332

Specific Relief Act, 1963- Section 63- Plaintiff filed a Civil Suit for seeking permanent prohibitory injunction pleading that the suit land is jointly owned – the defendant had purchased the share of a co-sharer and wanted to occupy the best portion of the suit land – the defendant pleaded that he is in exclusive possession of the suit land – the possession was handed over at the time of sale – the suit was dismissed by the Trial Court- an appeal was filed, which was dismissed- held in second appeal that plaintiff had earlier filed a civil suit in the year 1990, which was withdrawn without obtaining any liberty – the present suit is barred under Order 23 of C.P.C. – the defendant was found in possession of the suit land during demarcation – the injunction was rightly declined by the Courts- appeal dismissed.(Para-12 to 25) Title: Gita Devi Vs. Subhash Chand Page-270

Specific Relief Act, 1963-Section 34- Plaintiff filed a Civil suit seeking declaration with consequential relief of permanent prohibitory injunction – the suit was opposed by pleading that Civil Court had no jurisdiction as the proprietary rights were conferred regarding the suit land - Trial Court returned the plaint for presentation before Competent Forum as the Civil Court did not have jurisdiction to adjudicate upon the dispute – an appeal was preferred and the findings of Trial Court were reversed – held in appeal that mutation conferring the proprietary rights was attested on 30.1.1977 – Appellate Court held that the mutation was null and void – there is no proof of the payment of rent and mere entry of gairmaurusi is not sufficient to confer proprietary rights upon a person – therefore the mutation was illegal and the Civil Court will have jurisdiction- the Trial Court had wrongly returned the plaint - appeal dismissed. (Para-9 to 16) Title: Het Ram & others Vs. Partap Singh & others Page-133

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Union of India v. Ibrahim Uddin and Anr", (2012) 8 Supreme Court Cases 148

'V'

V.K. Mishra and another v. State of Uttarakhand and another, (2015) 9 SCC 588

Ved Prakash Garg versus Premi Devi and others, (1997) 8 Supreme Court Cases 1

Vinobabai and others versus K.S.R.T.C. and another, 1979 ACJ 282

'Z'

Zuari Cement Ltd vs. Regional Director, ESIC, Hyderabad & Ors., AIR 2015, SC 2764

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

Diwan Chand .....Petitioner.
Versus
State of Himachal Pradesh ....Respondent.

Cr. R No. 164 of 2011
Decided on : 22.12.2016

Indian Penal Code, 1860- Section 279, 337, 338 and 304- Accused was driving a truck- he took his truck towards the wrong side and hit the right side of a bus- one passengers fell down and suffered fatal injuries- other passengers suffered multiple injuries- accused was tried and convicted by the Trial Court- an appeal was filed, which was dismissed- held in revision that mechanical report makes the defence probable that there was mechanical defect in the vehicle due to which the truck went towards the wrong side of the road - the Courts had ignored this part of the evidence- judgments of the Court set aside and the accused acquitted of the charged offences. (Para-9 to 20)

For the Petitioner: Mr. N.S Chandel, Advocate.
For the Respondent-State: Mr. Vivek Singh Attri, Deputy Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

The instant revision petition stands directed against the judgment of 28.5.2011 rendered by the learned Sessions Judge, Shimla in Cr. Appeal No. 63-S/10 of 2008, whereby he affirmed the findings of conviction recorded against the Revisionist (for short "the accused") by the learned C.J.M Shimla on 30.9.2008 in criminal case No. 62/2 of 06/02.

2. The brief facts of the case are that PW-2 Nakshter Singh and PW-1 Tarsem Singh had been working as driver and conductor, respectively in Punjab Roadways Jalandhar Depot. On 31.7.2002, PWs aforesaid had been detailed on duty on bus bearing No. PB-12C-9620 catering to Shimla-Jalandhar route. There were 10-15 passengers in the bus. When the bus had crossed Tara Devi and had been at a distance of about 200 meters towards Shoghi at about 6.45 a.m. truck bearing registration No. HP-11/1781 was noticed coming from the opposite direction. The accused had been on the wheel of the truck. He had been driving rashly and negligently and had even crossed the mid line. Finding the truck coming on wrong side from opposite direction, PW-2 had slowed down and had taken the bus to extreme left side. The accused had not been able to control the truck and had struck against front right side of the bus. As a result of the impact of the truck, one passenger Sh. Putani Lal Gupta of the bus had fallen down and had suffered fatal injuries. Some other passengers had also suffered multiple injuries. The police stood informed about the accident. After completing all codal formalities and on conclusion of the investigation into the offence, allegedly committed by the accused, the Investigating Officer prepared challan and filed the same in the Court.

3. The accused stood charged by the learned trial Court for his committing offence(s) punishable under Sections 279, 337, 304-A and 338 of I.P.C, to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 13 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. However, he did not choose to lead any evidence in his defence.

5. On an appraisal of the evidence on record, the learned trial Court returned findings of conviction upon the accused. The learned Appellate Court in affirmation to the judgment of the learned trial Court also convicted the accused.

6. The learned counsel for the accused/revisionist has concertedly and vigorously contended qua the findings of conviction recorded by the learned trial Court, findings whereof stood affirmed by the learned Appellate 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 conviction being reversed by this Court in the exercise of its revisional jurisdiction and theirs being replaced by findings of acquittal.

7. The learned Deputy Advocate General for the respondent-State has with considerable force and vigor contended qua the concurrent findings of conviction recorded upon the accused by both the Courts 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 sequel to a collision which occurred inter-se the vehicle bearing Number HP-11-1781 driven by the accused vis-à-vis the bus bearing No. PB-12C-9620, a passenger occupying the bus aforesaid suffered demise. The apposite post mortem report borne on Ex. PW-9/C unveils qua the demise of one Putani Lal Gupta ensuing from hemorrhagic shock in sequel to multiple injuries as stood entailed upon his body. PW-9 in his deposition held in his examination-in-chief underscores therein qua 4-8 hours elapsing since the begetting of the fatal injury noticed by him on his subjecting the deceased aforesaid to post mortem examination wherefrom the prosecution attains success qua its propagation qua the deceased suffering his demise in sequel to injuries standing entailed upon his person at the relevant time whereat a collision occurred inter-se the vehicle driven by the accused vis-à-vis the bus occupied by the deceased.

10. Also the prosecution in sustaining the charge against the accused had depended upon the testimonies of ocular witnesses to the occurrence who testified as PW-1 and PW-2 before the learned Magistrate. Since the testifications of both the aforesaid PWs who therein unveil a credible ocular account qua the occurrence stand un-ingrained with any gross or stark contradictions occurring in their respective testifications held in their respective examinations-in-chief vis-à-vis the communications respectively made by them in their respective cross-examinations, as also when their respective testifications qua the ill-fated occurrence are bereft of any taint of any fatal intra-se contradictions thereupon also the prosecution attains success in proving the charge against the accused.

11. The learned Sessions Judge had discarded the efficacy of the apposite testification of PW-6 who in sequel to his holding the apposite vehicle driven by the accused to a thorough mechanical examination prepared Ex. PW-6/A wherein he voiced qua there being a possibility of the offending vehicle prior to the occurrence begetting locking of its steering whereupon the defence had concerted to attribute the relevant collision inter-se the relevant vehicles to stand aroused from the aforesaid mechanical defect preceding the ill-fated occurrence erupting therein on the trite reason qua with the accused for obviating the relevant collision/accident holding the apposite capacity to apply the brakes of the apposite vehicle, whereas his not applying the brakes of the offending vehicle hence generating an inference qua with the accused evidently plying his vehicle on the inappropriate side of the road, his, thereupon evidently holding the necessary mens rea of deviating from the standards of due care and caution. Also the learned Sessions Judge did not impute any apt gravity to the factum of the steering wheel of the vehicle driven by the accused standing pronounced in the testification of PW-6 to beget locking nor he imputed any gravity to the factum articulated by PW-6 qua even the brakes besides the clutches of the offending vehicle standing locked whereupon obviously the accused stood precluded to for thwarting the relevant collision apply the brakes of the offending vehicle nor obviously the assignment of a reason by the learned Sessions Judge qua the relevant

collision being obviable by application of brakes of the offending vehicle by the accused whereas the accused not applying brakes of the offending vehicle evidently thereupon his holding a penally inculpable mens rea of negligence, whereupon the verdict impugned hereat recorded by the learned Sessions Judge would for reasons ascribed hereinafter suffer reversal.

12. Visibly as consistently deposed by the ocular witnesses besides as unraveled by the site plan, the truck driven by the accused wantonly wandered astray from the appropriate side of the road whereat a collision occurred inter-se the vehicle driven by the accused vis-à-vis the bus. However PW-6 in his testification borne in his examination-in-chief communicates therein qua on his examining the truck driven by the accused, his noticing qua its brake, clutch and steering all standing locked obviously reiteratedly thereupon the reason assigned by the learned Sessions Judge qua the accident which occurred inter-se the truck driven by the accused vis-à-vis the bus being obviable by application by the accused of the brakes of the offending vehicle falters. Despite this Court dispelling the vigour aforesaid of the reason assigned by the learned Sessions Judge for disimputing credence to the espousal of the defence, would not beget any inference from this Court qua with the vehicle driven by the accused evidently wandering astray from the appropriate portion of the road thereupon the aforestated evident factum yet also not constituting any firm evidence against the accused qua his holding the penally inculpable mens rea of negligently driving his vehicle. Moreso when credible un-tainted ocular testifications of eye witnesses to the occurrence make open and candid communications therein qua the accused negligently driving his vehicle at the relevant site of occurrence.

13. Nowat, the factum of the accused intentionally negotiating his vehicle to the inappropriate site of the road or his standing disabled by eruption of a sudden mechanical defect in the offending vehicle to maneuver it to the appropriate portion of the road warrants pronouncement of a just adjudication, whereupon the efficacy of the testification occurring in the examination-in-chief of PW-6 who therein proved his mechanical report borne on Ex.PW-6/A warrants allusion. PW-6 in his examination-in-chief has with lack of firmness besides with stark want of formidability echoed therein qua the locking of the steering of the vehicle occurring prior to the accident or in contemporanity vis-à-vis it or subsequent thereto. His aforesaid nebulous testification qua the aforesaid trite factum occurring in his examination-in-chief does groom a lingering doubt qua the relevant sudden mechanical defect(s) aforesaid noticed by him in the offending vehicle arising prior to the accident or in contemporanity therewith or subsequent thereto, whereupon an inference stands sustained qua the inability of the accused to maneuver his vehicle to the appropriate side of the road standing spurred by prior to the ill-fated collision which occurred inter-se the vehicle driven by the accused vis-à-vis the bus aforesaid, the offending vehicle driven by the accused suddenly developing a mechanical defect qua its brakes, clutch and steering standing locked. The vagueness qua the aforesaid relevant factum probandum propounded by PW-6 in his testification occurring in his examination-in-chief does hold immense leverage to purvey this Court strength to conclude qua PW-6 not firmly with an unshaken commitment displaying nor negating qua the relevant defects noticed by him to occur in the relevant offending vehicle which stood inspected by him not occurring prior to the occurrence wherefrom the aforesaid factum probandum whereupon the accused rests his defence stands shrouded in deep doubt, benefit whereof ought to be meted to the accused.

14. In aftermath, the occupation of the inappropriate side of the road by the vehicle driven by the accused stood generated by eruption therein of the aforesaid mechanical defect, eruption whereof thereon occurred prior to the ill-fated collision whereby his inability to maneuver his vehicle to the appropriate side of the road cannot engender any inference qua the accused holding any penally inculpable mens rea of negligence also thereupon it is befitting to conclude qua the defence succeeding in infecting the prosecution story with a pervasive aura of doubt also thereupon the prosecution has unveiled its inability to firmly negate the efficacy of the aforesaid defence reared in exculpation of the guilt of the accused.

15. The learned Deputy Advocate General has with utmost vigour and vehemence contended before this Court qua the aforesaid lingering doubt generated by PW-6 echoing in his

examination-in-chief qua the relevant defects erupting in the vehicle prior to the accident standing evaporated by the factum of photographs existing on record with a disclosure therein qua the tyres of the vehicle standing tilted towards the appropriate side of the road whereupon the occurrence of mechanical defects thereon as noticed by PW-6 on his examining the offending vehicle driven by the accused being ascribable to their eruption therein occurring subsequent to the mishap whereupon he contends qua the prosecution succeeding in proving the charge against the accused. He contends with force qua the aforesaid espousal holding absolute tandem with the credible depositions of the ocular witnesses, thereupon any leverage as concerted to be derived by the learned counsel for the accused upon the apposite doubt un-raveled in the examination-in-chief of PW-6 standing stripped of its merit besides legal worth.

16. The learned Deputy Advocate General while making the aforesaid submission before this Court, has not borne in mind the trite tenet of criminal jurisprudence qua the prosecution standing enjoined with a solemn obligation to prove the charge against the accused. In discharge of the aforesaid onus, though the prosecution led PW-6 into the witness box, yet the learned A.P.P. while holding him to examination-in-chief though therein had unearthed from him echoings displaying a lingering doubt qua the locking of the steering of the vehicle driven by the accused occurring prior to the accident whereupon this Court stands prodded to conclude qua hence it precluding the accused to even when the bus driven by the PW-2 occupied the apposite site of occurrence, to maneuver the offending vehicle to the appropriate side of the road, yet the learned A.P.P. concerned while eliciting the aforesaid echoings from PW-6 while holding him to examination-in-chief has hence throttled the prosecution case, rather he has given immense sinew to the espousal of the defence qua the accident which occurred at the relevant side of occurrence being unavoidable significantly with the steering of the vehicle standing prior to the mishap entailed with a sudden defect of its standing locked. Moreover, when the benefit of the aforesaid lingering doubt qua the relevant eruption in the offending vehicle of defects, defects whereof stand articulated by PW-6 to may be arise therein prior to the collision has to be accorded to the accused. Conspicuously the learned P.P. concerned while eliciting the aforesaid relevant doubt from PW-6 qua the factum probandum while holding him to examination-in-chief did not proceed to seek any clarification from PW-6 qua the locking of the steering of the vehicle besides the locking of its brake besides clutch erupting subsequent to the occurrence or in contemporanity vis-à-vis it whereupon his omission in the aforesaid regard gives redoubled fervor to the doubt qua the relevant facet echoed by PW-6 in his examination-in-chief thereupon the benefit of the relevant doubt has to stand afforded to the accused.

17. The existence of any display in photographs qua the wheel of the truck tilting towards the appropriate side of the road whereupon the learned Deputy Advocate General contends qua with prior to the accident no mechanical defect standing spelt out in PW-6/A to occur in the offending vehicle also does not impute any tenacity to the relevant testifications embodied in the examination-in-chief of PW-6 rather hence relieves the lingering doubt qua the factum probandum grooved in the examination-in-chief of PW-6 nor also the testification occurring in the examination-in-chief of PW-6 qua the eruption of mechanical defect(s) pronounced in PW-6/A to stand on the inspection of the relevant vehicle noticed thereon by him to may be arise thereon prior to the accident taking place inter se the vehicle driven by the accused vis-à-vis the bus occupied by the deceased holds any tenacity. However when the photographs of the truck making the aforesaid disclosure for hence thereupon theirs succoring the propagation of the prosecution stood not shown to PW-6 by the APP concerned during the course of his holding him to examination-in-chief nor they stood shown to him subsequently on his standing granted the apposite permission by the learned trial Court whereas only when the learned A.P.P confronted PW-6 with the relevant photographs holding the aforesaid display, he would hence have evinced a firm opinion from PW-6, an expert, qua the display in the photographs of the tyres of the relevant vehicle tilting towards the appropriate side of the road facilitating hence an inference of the relevant mechanical defect(s) occurring subsequent to the occurrence not prior thereto, whereas with PW-6 evidently remaining unconfronted with the relevant photographs wherewithin the aforesaid display occurs, does constrain this Court to

discountenance the submission of the learned Deputy Advocate General also his submission qua this Court in the manner espoused by him read the photographs of the truck holds no legal worth, significantly when there is no provision in the Evidence Act for this Court excepting the one engrafted in Section 73 of the Indian Evidence Act to analyse the testimony of PW-6 an expert vis-à-vis photographs whereupon no opinion stood elicited from him also when the realm of or the domain of the aforesaid relevant analysis falls squarely within the ambit of the apposite skills besides the expertise possessed solitarily by the expert(s) concerned, expertise whereof standing not possessed either by the learned Deputy Advocate General or by this Court reiteratedly renders both incapacitated to pronounce any opinion thereon.

18. The summom bonum of the above discussion is that the credible testification(s) of the ocular witnesses to the occurrence for the reasons aforestated suffering erosion also when with this Court erecting an inference for reasons aforestated qua the relevant defects in the vehicle driven by the accused occurring therein prior to the accident, thereupon a firm conclusion stands generated from this Court qua the occupation of the appropriate site of the road by the vehicle driven by the accused standing reared by the aforesaid sudden eruption of defects in the apposite vehicle also when PW-1 in his cross-examination acquiesces to the suggestion qua the accident being obviable if the driver applying the brakes of the bus does also hence exculpate the guilt of the accused.

19. A wholesome analysis of the evidence on record portrays that the appreciation of evidence as done by the learned Court below suffers from perversity and absurdity or it can be said that the learned Court below in recording findings of conviction have committed a grave legal misdemeanor, in as much, as, theirs mis-appreciating the evidence on record or theirs omitting to appreciate the relevant and admissible evidence. In aftermath this Court deems it fit and appropriate that the findings of conviction recorded by the learned Courts below merit interference.

20. In view of above, the present petition is accepted. The impugned judgment(s) are quashed and set aside. The accused is acquitted of the offences charged. Fine amount, if any, deposited by the accused be refunded to him. Pending applications stand disposed of accordingly. Personal and surety bonds if furnished by the accused be cancelled. Records be sent back.

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

Nishi Sharma .....Petitioner

Versus

Secretary, Department of Labaour & Employment and others .....Respondents

CWP No. 7580 of 2011
Decided on January 3, 2017

Constitution of India, 1950- Article 226- Petitioner was appointed as Chowkidar on Contract basis – he was transferred as security guard- subsequently, his services were terminated in the year 2003 – a reference was sought but the same was declined by Labour Commissioner on the ground of delay- aggrieved from the order, present writ petition has been filed- held that no reason for delay was given by the petitioner – stale claims should not be allowed unless there is specific explanation for the delay –there is no illegality in the order passed by the Commissioner – writ petition dismissed.(Para-5 to 7)

Case referred:
Prabhakar versus Joint Director Sericulture Department and another, AIR 2016 SC 2984

For the petitioner : Mr. H.C. Sharma, Advocate.

For the respondents : Mr. P.M. Negi, Additional Advocate General with Mr. Ramesh Thakur, Deputy Advocate General, for respondents No. 1 and 2.
Mr. Bhuvnesh Sharma, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (Oral):

Instant petition has been filed by the petitioner under Articles 226/227 of the Constitution of India, seeking following main reliefs:-

> "I. To direct the respondent No.2, appoint the petitioner as Chowkidar over and above the juniors stated above.
>
> II. To quash and set aside the annexure P-3 dated 25-4-2011 and direct the respondent no. 2 to send the reference to the Labour Court for decision in accordance with law."

2. Petitioner being aggrieved and dissatisfied with the action of respondent No.2 i.e. Labour Commissioner, Department of Labour & Employment, HP, Shimla, whereby he declined to refer the dispute raised by the petitioner to the Labour Court for adjudication, approached this Court seeking reliefs, as have been reproduced herein above. Petitioner was appointed as Chowkidar, purely on contract basis on the fixed salary of `2600 per month by respondent No.3 on 15.3.2001 initially for 180 days. He continued to work till 10.9.2001. It also emerges from the record that contract was extended upto 31.1.2002 and petitioner worked as such upto 19.1.2002, whereafter, petitioner was transferred as Security Guard in BSNL Telephone Exchange, Ghumarwin. Thereafter, petitioner worked upto 31.8.2003, on which date, his services were terminated and thereafter, he was not allowed to join work. Petitioner being aggrieved and dissatisfied with the aforesaid termination, filed claim before Labour Officer, Bilaspur. However, Labour Commissioner, vide communication dated 25.4.2011, (Annexure P-4), declined to refer the dispute to the Labour Court on the ground of inordinate delay. It would be appropriate to reproduce contents of annexure P-4 as under:

> "This is with reference to your demand notice and report under Section 12 (4) of the Industrial Disputes Act, 1947 received from the Labour Officer-cum-Conciliation Officer, Bilaspur, District Bilaspur, H.P. in respect of your dispute with the Chairman-cum-Managing Director, H.P. Ex-Serviceman Corporation, Hamirpur, District Hamirpur, H.P. After careful examination of the above report and reply filed by the employer, it is found that you had worked up to 31-08-2003. You have raised the present demand notice dated 22-03-2010 i.e. after more than 6 years meaning thereby that there was no dispute w.e.f. 31-08-2003 to 22-03-2010. If there was no dispute for more than 6 years then there can not be any dispute after this period and there is no fresh cause of action which was not there in the present case. Therefore, in view of the Judgment of Division Bench of Hon'ble High Court of H.P. in C.W.P. No. 398/2001- titled M.C. Paonta Sahib V/S State of H.P. Nisar Ali etc., your dispute had faded away and not in existence and now there is no justification of making reference to Ld. Labour Court. Therefore, your demand notice is prima-facie, vexatious and frivolous.
>
> Accordingly, you are informed as per provisions of Section 12(5) of the Industrial Disputes Act, 1947 that your dispute under reference in view of above mentioned reasons is not being referred to the Ld. Labour Court of Himachal Pradesh for legal adjudication."

3. In the aforesaid background, petitioner approached this Court.

4. I have heard the learned counsel representing the parties and also gone through the record.

5. Perusal of impugned order dated 12.4.2011 (Annexure P-4) clearly suggests that the petitioner worked with respondent No.3 upto 31.8.2003 and thereafter remained out of job and raised demand notice dated 22.3.2010 after a delay of more than six years. Labour Commissioner, while passing impugned order dated 12.4.2011, ha specifically concluded that since no demand was raised for more than six years, there was no dispute with effect from 31.8.2003 to 22.3.210 and as such there is no justification for referring dispute to the Labour Court for adjudication. Bare perusal of present petition, whereby impugned order has been challenged, nowhere stipulated reasons, if any, for delay on the part of the petitioner in raising demand after a considerable delay of more than six years. There is no whisper, if any, in the averments contained in the present petition, suggestive of the fact that for the reasons, which were completely beyond the control of the present petitioner, petitioner was unable to raise demand within reasonable period. Similarly, perusal of impugned order, as reproduced hereinabove, also suggests that no explanations worth the name was rendered in the demand notice raised by the petitioner qua the inordinate delay in raising dispute and as such this Court sees no illegality or infirmity in the impugned order having been passed by Labour Commissioner, which is certainly in conformity with the recent law laid down by Apex Court in **Prabhakar versus Joint Director Sericulture Department and another** reported in AIR 2016 SC 2984, whereby Apex Court has held that if a dispute survives, reference is to be made and if dispute does not survive, reference is not to be made. In the case in hand, it stands duly proved on record that there was no dispute, if any, with effect from 31.8.2003 to 22.3.2010, because, admittedly, during this period, no steps were taken by the petitioner to raise demand for referring the matter to Labour Court for adjudication. It would be appropriate to reproduce paras 42 and 43 of the said judgment as under:

> "42. To summarise, although there is no limitation prescribed under the Act for making a reference Under Section 10(1) of the Act, yet it is for the 'appropriate Government' to consider whether it is expedient or not to make the reference. The words 'at any time' used in Section 10(1) do not admit of any limitation in making an order of reference and laws of limitation are not applicable to proceedings under the Act. However, the policy of industrial adjudication is that very stale claims should not be generally encouraged or allowed inasmuch as unless there is satisfactory explanation for delay as, apart from the obvious risk to industrial peace from the entertainment of claims after long lapse of time, it is necessary also to take into account the unsettling effect which it is likely to have on the employers' financial arrangement and to avoid dislocation of an industry.
>
> 43. On the application of the aforesaid principle to the facts of the present case, we are of the view that High Court correctly decided the issue holding that the reference at such a belated stage i.e. after fourteen years of termination without any justifiable explanation for delay, the appropriate Government had not jurisdiction or power to make reference of a non-existing dispute."

6. In the aforesaid judgment having been passed by the Hon'ble Apex Court, it has been specifically held that stale claim should not be encouraged/ allowed, unless there is specific explanation for delay. In the instant case, as has been observed above, there is no explanation worth the name for delay, if any, caused in raising demand notice by the petitioner, as such, this Court sees no illegality or infirmity in the impugned order dated 12.4.2011 passed by Labour Commissioner. Since no demand was raised by the petitioner immediately after his termination on 31.8.2003, and even thereafter for more than six years, it can be safely presumed that the petitioner virtually accepted his termination order, thus, he is caught by delay, act and conduct, acquiescence and waiver. Apart from above, Division Bench of this Court, while taking cognizance of aforesaid law passed by Apex Court also decided CWP No. 1912/2016 titled **Bego Devi versus State of HP and others** on 26.10.2016 and held that a person, who does not seek relief within time, his case/petition deserves to be dismissed only on the ground of delay and laches, otherwise it would amount to gross misuse of jurisdiction and disturbing settled position.

7. Consequently, in view of aforesaid discussion as well as law referred to herein above, this Court sees no illegality or infirmity in the impugned order passed by the Labour Commissioner.

8. Accordingly, the present petition is dismissed. Pending applications, if any, are disposed of.

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BEFORE HON'BLE MR. JUSTICE SANDEEP SHARMA, J

Punjab Laminate Private Limited .....Petitioner
Versus
Sh. Gurdas Ram .....Respondent

CWP No. 5958 of 2010
Reserved on: January 6, 2017
Decided on : January 10, 2017

Industrial Disputes Act, 1947- Section 25- The workman was working as un-skilled mazdoor– his services were terminated without following the provisions of Industrial Disputes Act – he sought reinstatement with consequential benefits – the Tribunal allowed the claim of the petitioner and directed the employer to re-engage the petitioner forthwith along with continuity in service and seniority from the date of termination with back wages – aggrieved from the award, present writ petition was filed – held that the employer had failed to prove that the workman had abandoned the job – workman had suffered accident during the course of employment and remained under treatment – he was given light job on the recommendation of the Medical Board- no notice required under Section 25-F was served upon the workman – no notice was issued asking the workman to join the duties – the Writ Court cannot act as Appellate Court and cannot re-appreciate the evidence- Writ petition dismissed.(Para-10 to 16)

Cases referred:
Ocean Creations Vs. Manohar Gangaram Kamble 2013 SCC Online Bom 1537:2014)140 FLR 725
Raghubir Singh vs. General Manager, Haryana Roadways, Hissar, 2014(6) SLR 6 (S.C.)
Bhuvnesh Kumar Dwivedi vs. M/s Hindalco Industries Ltd. 2014 AIR SCW 3157

For the petitioner : Mr. Divya Raj Singh, Advocate.
For the respondent : Mr. Kulbhushan Khajuria, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:

Instant petition under Article 226/227 of the Constitution of India, is directed against Award dated 3.6.2010 passed by the learned Presiding Judge, Industrial Tribunal-cum-Labour Court, Dharamshala (HP) in Ref. No. 92/2016, whereby learned Tribunal below while allowing reference made by appropriate Government in favour of the respondent-workman (here in after, 'workman') held termination of the workman bad and accordingly, ordered his reengagement with full back wages, continuity in service and seniority from the date of his termination. Present petitioner-employer (herein after, 'employer') being aggrieved and dissatisfied with the aforesaid award has filed instant petition praying therein for quashing and setting aside the award dated 3.6.2010.

2. "Key facts" as emerge from the record are that appropriate Government made following terms of reference under Section 10(1) of the Industrial Disputes Act to the learned Industrial Tribunal-cum-Labour Court for adjudication:

> "Whether the termination of services of Sh. Gurdas Ram S/o Sh. Lakhu Ram workman by the Management of M/s. Punjab Laminates (Pvt.) Ltd., 9-10, Industrial Area, Mehatpur, District Una, H.P. w.e.f. 4.6.97 without complying the provisions of the Industrial Disputes Act, 1947 is proper and justified? If not, what relief of service benefits and amount of compensation the above aggrieved workman is entitled to?"

3. Workman, by way of statement of claim, filed before learned Tribunal below claimed that he was working as Unskilled Mazdoor with the employer since 27.7.1997, uninterruptedly. He further stated that on 16.6.1996, while discharging his duties, he met with an accident, as a result of which, he suffered multiple injuries on his legs as well as head and as such remained under treatment in ESI Dispensary, Government Hospital, Bharatgarh, Una and also at PGI. As per workman, after the accident, he worked for two months but again due to pain and disability remained under treatment. However, the fact remains that the employer treated him to have abandoned the job and terminated his service vide order dated 29.9.1997 with effect from 4.6.1997, without resorting to the provisions of the Industrial Disputes Act. Workman further claimed that since his termination was in violation of the provisions contained in the Industrial Disputes Act, as well as principles of natural justice, he may be ordered to be reinstated with consequential benefits.

4. On the other hand, employer by way of reply to the aforesaid statement of claim, opposed the claim as set up by the workman, by raising preliminary objections of cause of action, locus standi and estoppel etc. Further, on merits also, employer denied the claim by stating that at no point of time, services of workman were terminated, rather workman, himself, sent a letter stating therein that he is unable to do his job and his dues may be cleared. Employer specifically denied that the services of the workman were ever terminated/ retrenched and claimed that in fact, workman had abandoned the job. Workman also filed rejoinder to reply reaffirming his claim as set up in the petition and controverted the contents of reply. Record suggests that the workman tendered his evidence by way of filing affidavit reiterating averments made in the statement of claim.

5. Workman tendered his evidence by filing affidavit reiterating averments made in the statement of claim. Rejoinder to reply was also filed by the workman. Employer produced one witness on its behalf. Learned Tribunal below, on the basis of pleadings of the parties, framed following issues:

> "1. Whether the disengagement from service of the petitioner is proper and justified? OPP
>
> 2. If the above issue No.1 is proved in affirmative to what relief the petitioner is entitled from the respondent? OPP
>
> 3. Whether the claim petition is maintainable before this Court? OPR
>
> 4. Relief."

6. Subsequently, the learned Tribunal below, vide Award dated 3.6.2010, allowed the reference and held the termination of the workman to be bad and accordingly, quashed the same. Learned Tribunal below while allowing claim of the petitioner, directed the employer to reengage him forthwith alongwith continuity in service and seniority from the date of termination with back wages. In the aforesaid background, employer has assailed the award by way of present petition.

7. Mr. Divya Raj Singh, learned counsel representing the employer, vehemently argued that the impugned award passed by the learned Tribunal below is not sustainable in the eyes of law as the same is not based upon correct appreciation of evidence adduced on record by

the respective parties. As per Mr. Singh, it is ample clear from the document Ext. RW-1/A that the workman himself abandoned the job and at no point of time, his services were either retrenched or terminated by the employer. Mr. Singh further contended that pursuant to aforesaid request of workman to clear his dues, employer paid entire payment in full and as such there is no merit in the claim of the workman and same is required to be rejected. Mr. Singh further pointed out that the learned Tribunal below fell in grave error while entertaining reference having been made at the behest of the workman, because, admittedly, same was belated as the alleged termination, if any, was made on 4.6.1997, whereas reference was made on 17.11.2003, and, as such, on this sole ground, impugned award passed by learned Tribunal below deserves to be set aside.

8. Mr. Kulbhushan Khajuria, learned counsel representing the workman, supported the award passed by learned Tribunal below. Mr. Khajuria, while referring to the impugned award passed by the learned Tribunal below, vehemently argued that there is no illegality or infirmity in the impugned award, rather same is based upon correct appreciation of evidence adduced on record by the respective parties as well as law and there is no scope of interference, whatsoever, by this Court, especially when learned Tribunal below has dealt with each and every aspect of the matter meticulously. While refuting contentions having been put forth by the learned counsel representing the employer, Mr. Khajuria contended that Ext. RW-1/A as being relied upon by the employer, is of no help to the employer since the same was written on 29.5.1999. He further stated that the same can not be termed as resignation from service because bare reading of same suggests that vide this letter, workman had simply asked for clearing his dues. Mr. Khajuria further contended that more over, as per own case of the employer, services of the workman were terminated with effect from 4.6.1997 and as such no reliance could be placed on letter Ext. RW-1/A, which is dated 29.5.1999. While concluding his arguments, Mr. Khajuria strenuously argued that there is no document available on record suggestive of the fact that employer paid all the dues to the workman and as such there is no illegality or infirmity in the impugned award passed by the learned Tribunal below, whereby employer has been directed to reengage the workman with all consequential benefits.

9. I have heard the learned counsel representing the parties and also gone through the Award and records.

10. During proceedings of the case, this Court had an occasion to peruse pleadings of the parties as well as documents available on record, perusal whereof clearly shows that there is no illegality or infirmity in the findings returned by the learned Tribunal below, whereby it concluded that employer has failed to prove that the workman had abandoned the job. It emerges from the record that there is no dispute with regard to the fact that workman was working with the employer since 27.7.1992. Similarly, there appears to be no dispute with regard to the alleged accident of workman on 16.9.1996, during the course of his employment, wherein he suffered multiple injuries. Similarly, there is no dispute with regard to the fact that workman remained under treatment because it is admitted case of the employer that after recommendation of the medical board, it had offered light job to the workman. As per the case set up by the workman, his services came to be terminated by the employer with effect from 4.6.1997 in violation of provisions of Industrial Disputes Act, whereas, employer, while refuting stand taken by the workman, stated that due to ill health, workman himself, abandoned the job. Employer further claimed that though it offered opportunity to the workman to join light duties, but he failed to report for duty and consequently, his services came to be terminated. Employer, by way of placing on record certain documents i.e. RW-1/B dated 10.7.1997, Ext. RW-1/D dated 13.8.1997 and Ext. RW-1/E dated 22.12.1997, made an attempt to demonstrate that it had sent communications to the workman advising him to perform duties. Employer, with a view to prove that the workman, himself, abandoned the job, heavily relied upon document Ext. RW-1/A i.e. letter dated 29.5.1999, written by workman. Perusal of Ext. RW-1/A suggests that there is overwriting of date. It appears that letter was dated 24.12.1997 but the fact remains that employer claimed it to be dated 29.5.1999. If version put forth by the employer is taken to be correct, that workman had expressed his desire to abandon the job on 29.5.1999, it is not

understood that how his services were dispensed with by employer with effect from 4.6.1997 that too, without resorting to provisions of Industrial Disputes Act. Rather, this Court, after examining stand having been taken by the employer in the reply to the claim, has no hesitation to conclude that workman was on the rolls of the employer till 29.5.1999, when, for the first time, he expressed his desire to abandon the job. Hence, termination /disengagement of the workman with effect from 4.6.1997, can not be termed to be in accordance with law because, admittedly, there is nothing on record suggestive of the fact that at the time of disengaging services of workman on 4.6.1997, notice, if any, under Section 25 F of the Act was ever issued to the workman. If, for the sake of arguments, stand taken by the employer is taken to be correct that vide communication dated 29.5.1999, workman, himself abandoned the job, even in that eventuality, termination order with effect from 4.6.1997 can not be allowed to sustain because, admittedly, no evidence worth the name has been led on record by the employer to demonstrate that while disengaging /terminating workman on 4.6.1997, it had taken recourse to the provisions of Industrial Disputes Act.

11. In view of the aforesaid, this Court sees no illegality in the order passed by the learned Tribunal below whereby it has held termination of workman bad. Though, perusal of Ext. RW-1/A suggests that workman Gurdas Ram informed the employer that he has been declared 40% disabled by medical board, and he is incapacitated to do job, as such, made request for clearing his dues but certainly there is nothing in this letter which could suggest that by way of aforesaid communication, workman tendered his resignation. Moreover, employer has not led on record any evidence, be it ocular or documentary, suggestive of the fact that pursuant to aforesaid alleged request having been made by workman vide letter dated 29.5.1999, action, if any, was taken by it and admissible dues were paid to the workman. Learned Tribunal below has specifically recorded that there is no evidence on record that what amount was paid and to whom such amount was paid and there is no receipt qua the same. Learned Tribunal below has further observed that there is no explanation that why compensation was granted and what were the dues paid to the workman. Hence, this Court sees no illegality or infirmity in the findings recorded by learned Tribunal, whereby it has specifically concluded that document dated 29.5.1999 Ext. RW-1/A is doubtful. As has been noticed above, this letter was originally dated 24.12.1997 and after cutting date has been changed to 29.5.1999. But otherwise also, aforesaid letter dated 29.5.1999 Ext. RW-1/A is of no help to the employer, especially when employer has specifically claimed that the workman abandoned job with effect from 4.6.1997. Had the workman abandoned job with effect from 4.6.1997, where was the occasion for him to write communication on 29.5.1999, rather, this Court is of the view that after acknowledging letter dated 29.5.1999, purportedly written by workman, employer has acknowledged that workman was on its rolls till 29.5.1999 and as such termination order with effect from 4.6.1997 can not be allowed to sustain. Manager of the Company, Naseeb Kumar, while deposing as RW-1, admitted that the workman was employed with the company on 27.7.1992. He also admitted that the workman met with an accident. Though aforesaid witness by placing reliance upon communications dated 10.7.1997, (Ext. RW-1/B), dated 13.8.1997 (Ext. RW-1/D) and dated 22.12.1997 (Ext. RW-1/E) made an attempt to demonstrate that, after receipt of the opinion of the medical board, employer had offered light duties to the workman and in this regard, had sent communication to the workman to join duty but, interestingly, aforesaid communications have been sent after 4.6.1997, when allegedly workman had abandoned the job. Once, as per employer, workman had abandoned the job on 4.6.1997, it is not understood where was the occasion for the employer to send communications as mentioned above, calling upon the workman to join duties, which action on the part of employer, clearly belies its stand taken in written statement, which compels this Court to draw adverse inference that alleged documents were manufactured to defeat the genuine claim of the workman. Hence, this Court, after carefully examining entire evidence on record, has no hesitation to conclude that plea of abandonment, that too on the basis of Ext. RW-1/A dated 29.5.1999, is not sustainable at all and was rightly rejected by the learned Tribunal below.

12. It is settled law that plea of abandonment taken by employer may not be sufficient to prove abandonment, rather it is necessary for the employer to place on record that specific notice was issued to the workman before alleged abandonment asking the workman to join duty within a stipulated period. In this regard, reliance is placed upon the judgment passed by Bombay High Court in case titled **Ocean Creations Vs. Manohar Gangaram Kamble** 2013 SCC Online Bom 1537:2014)140 FLR 725. It is profitable to reproduce paras No.8,9 and 10 of the judgment herein:-

> "8. The legal position is also settled that 'abandonment or relinquishment of service' is always a question of intention and normally such intention cannot be attributed to an employee without adequate evidence in that behalf. This is a question of fact which is to be determined in the light of surrounding circumstances of each case. It is well settled that even in case of abandonment of service, unless the service conditions make special provisions to the contrary, employer has to give notice to the workman calling upon him to resume duties and where he fails to resume duties, to hold an enquiry before terminating services on such ground.
>
> 9. In somewhat similar circumstances a Division Bench of this court comprising P.B.Sawant, J.(as he then was) and V.V.Vaze, J. in the case of Gaurishanker Vishwakarma v. Engle Spring Industries Pvt. Lted. Observed thus:
>
> > ".....it is now well settled that even in the case of the abandonment of service, the employer has to give a notice to the workman calling upon him to resume his duty and also to hold an enquiry before terminating his service on that ground. In the present case the employer has done neither. It was for the employer to prove that the workman had abandoned the service..... It is therefore difficult to believe that the workman who had worked continuously for six to seven years, would abandon his service for no rhyme or reason. It has also to be remembered that it was the workman who had approached the Government Labour Officer with a specific grievance that he was not allowed to join his duty. It was also his grievance that although he had approached the company for work from time to time, and the company's partner Anand had kept on promising him that he would be taken in service, he was not given work and hence he was forced to approach the Government Labour Officer. In the circumstances, it is difficult to believe that he would refuse the offer of work when it was given to him before the Labour Officer...."
>
> 10. Again a learned Single Judge of this court R.M.Lodha, J(as he then was) in the case of Mahamadsha Ganishah Patel v. Mastanbaug Consumers' Co-op. Wholesale & Retail Stores Ltd. Observed thus:-
>
> > "....The legal position is almost settled that even in the case of abandonment of service, the employer has to give notice to the employee calling upon him to resume his duty. If the employee does not turn up despite such notice, the employer should hold inquiry on that ground and then passs appropriate order of termination. At the time when employment is scarce, ordinarily abandonment of service by employee cannot be presumed. Moreover, abandonment of service is always a matter of intention and such intention in the absence of supportable evidence cannot be attributed to the employee. It goes without saying that whether the employee has abandoned the service or not is always a question of fact which has to be adjudicated on the basis of evidence and attending circumstances. In the present case employer has miserably failed to discharge the burden by leading evidence that employee abandoned service. The Labour Court has considered this aspect, and, in

> my view rightly reached the conclusion that the employer has failed to establish any abandonment of service and it was a clear case of termination. The termination being illegal, the Labour Court did not commit any error in holding the act of employer as unfair labour practice under Item-I, Schedule IV of the MRTU & PULP Act....."

13. It is admitted case of the parties that workman sustained injuries during the course of his employment and as such there is no illegality in the findings returned by the learned Tribunal below that the absence of workman was because of accident arising out of and in the course of employment and this period was required to be counted as continuous service as per requirement of provisions contained in Section 25B of the Act. In the instant case, employer before terminating services of the workman, has failed to resort to the provisions of Section 25 F of the Act because no notice has been issued and as such termination of workman can not be held to be valid. Otherwise also, if it is presumed that workman after suffering injuries in the accident failed to resume duties, despite there being notices, at best, it could be a case of misconduct and services of employees on the ground of misconduct can not be terminated without resorting to the provisions as contained in the Act and after holding an inquiry. As such, learned Tribunal below rightly concluded that termination of the workman on the ground of absence from duty is bad. Since, termination of the workman was held to be bad, there is no illegality in granting benefit of continuity in service with back wages, especially when on the basis of the evidence adduced on record learned Tribunal came to the conclusion that the termination is bad being in violation of various provision of the Act. Learned Tribunal could not deny the benefit of back wages, especially when the petitioner was granted the benefits of continuity in service and seniority. The benefit of continuity in service and seniority could only be granted by the Court if it was satisfied that workman/petitioner was not allowed to work during the retrenchment period despite there being sufficient work available with the management.

14. In this regard reliance is placed on the judgment of the Hon'ble Apex Court in ***Raghubir Singh vs. General Manager, Haryana Roadways, Hissar, 2014(6) SLR 6 (S.C.),*** wherein the Court held:

> **"39.** Now, it is necessary for this Court to examine another aspect of the case on hand, whether the appellant is entitled for reinstatement, back wages and the other consequential benefits. In the case of **Deepali Gundu Surwase V. Kranti Junior Adhyapak Mahavidyalaya (D. Ed) and Ors.,(2013)10 SCC 324: [2013(6) SLR 642 (SC),** this Court opined as under:-
>
> > **"22. The very idea of restoring an employee to** the position which he held before dismissal or removal or termination of service implies that the employee will be put in the same position in which he would have been but for the illegal action taken by the employer. The injury suffered by a person, who is dismissed or removed or is otherwise terminated from service cannot easily be measured in terms of money. With the passing of an order which has the effect of severing the employer employee relationship, the latter's source of income gets dried up. Not only the concerned employee, but his entire family suffers grave adversities. They are deprived of the source of sustenance. The children are deprived of nutritious food and all opportunities of education and advancement in life. At times, the family has to borrow from the relatives and other acquaintance to avoid starvation. These sufferings continue till the competent adjudicatory forum decides on the legality of the action taken by the employer. The reinstatement of such an employee, which is preceded by a finding of the competent judicial/quasi judicial body or Court that the action taken by the employer is ultra vires the relevant statutory provisions or the principles of natural justice, entitles the employee to claim full back wages. If the employer wants to deny back wages to the employee or contest his entitlement to get consequential benefits, then it is for him/her to specifically plead and prove that during the intervening period the employee was gainfully employed and was getting the same emoluments. Denial

of back wages to an employee, who has suffered due to an illegal act of the employer would amount to indirectly punishing the concerned employee and rewarding the employer by relieving him of the obligation to pay back wages including the emoluments.

23. A somewhat similar issue was considered by a three Judge Bench in Hindustan Tin Works Pvt. Ltd. v. Employees of Hindustan Tin Works Pvt. Ltd. (supra).....The relief of reinstatement with continuity of service can be granted where termination of service is found to be invalid. It would mean that the employer has taken away illegally the right to work of the workman contrary to the relevant law or in breach of contract and simultaneously deprived the workman of his earnings. If thus the employer is found to be in the wrong as a result of which the workman is directed to be reinstated, the employer could not shirk his responsibility of paying the wages which the workman has been deprived of by the illegal or invalid action of the employer. Speaking realistically, where termination of service is questioned as invalid or illegal and the workman has to go through the gamut of litigation, his capacity to sustain himself throughout the protracted litigation is itself such an awesome factor that he may not survive to see the day when relief is granted. More so in our system where the law's proverbial delay has become stupefying. If after such a protracted time and energy consuming litigation during which period the workman just sustains himself, ultimately he is to be told that though he will be reinstated, he will be denied the back wages which would be due to him, the workman would be subjected to a sort of penalty for no fault of his and it is wholly undeserved. Ordinarily, therefore, a workman whose service has been illegally terminated would be entitled to full back wages except to the extent he was gainfully employed during the enforced idleness. That is the normal rule. Any other view would be a premium on the unwarranted litigative activity of the employer. If the employer terminates the service illegally and the termination is motivated as in this case viz. to resist the workmen's demand for revision of wages, the termination may well amount to unfair labour practice. In such circumstances reinstatement being the normal rule, it should be followed with full back wages..... In the very nature of things there cannot be a strait-jacket formula for awarding relief of back wages. All relevant considerations will enter the verdict. More or less, it would be a motion addressed to the discretion of the Tribunal. Full back wages would be the normal rule and the party objecting to it must establish the circumstances necessitating departure. At that stage the Tribunal will exercise its discretion keeping in view all the relevant circumstances. But the discretion must be exercised in a judicial and judicious manner. The reason for exercising discretion must be cogent and convincing and must appear on the face of the record. When it is said that something is to be done within the discretion of the authority, that something is to be done according to the Rules of reason and justice, according to law and not humour. It is not to be arbitrary, vague and fanciful but legal and regular.....

24. Another three Judge Bench considered the same issue in **Surendra Kumar Verma v. Central Government Industrial Tribunal-cum-Labour Court, New Delhi (supra)** and observed: Plain common sense dictates that the removal of an order terminating the services of workmen must ordinarily lead to the reinstatement of the services of the workmen. It is as if the order has never been, and so it must ordinarily lead to back wages too.....In such and other exceptional cases the court may mould the relief, but, ordinarily the relief to be awarded must be reinstatement with full back wages. That relief must be awarded where no special impediment in the way of awarding the relief is clearly shown. True, occasional hardship may be caused to an employer but we must

remember that, more often than not, comparatively far greater hardship is certain to be caused to the workmen if the relief is denied than to the employer if the relief is granted." **(Emphasis supplied by this Court)"(pp.23-25)**

15. Hence, this Court, after carefully examining the Award passed by the Tribunal below, sees no reason to interfere in the findings recorded by the Tribunal, which are otherwise also based upon correct appreciation of evidence led on record by the parties, as such, impugned award deserves to be upheld. It is well settled law that the Courts while examining correctness and genuineness of award passed by Tribunal have very limited powers to re-appreciate the evidence led before the Tribunal below, especially the findings of fact recorded by the Tribunal below. Apart from above, findings of fact recorded by learned Tribunal below on the basis of appreciation of evidence cannot be questioned in writ proceedings and writ court cannot act as an appellate court. In this regard, reliance is placed upon the judgment passed by Hon'ble Apex Court in case titled ***Bhuvnesh Kumar Dwivedi vs. M/s Hindalco Industries Ltd. 2014 AIR SCW 3157***. It is profitable to reproduce paras 16, 17 and 18 of the judgment herein:

> "16. .....The question about the limits of the jurisdiction of High Courts in issuing a writ of certiorari under Article 226 has been frequently considered by this Court and the true legal position in that behalf is no longer in doubt. A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior Courts or tribunals: these are cases where orders are passed by inferior Courts or Tribunals without jurisdiction, or is in excess of it, or as a result of failure to exercise jurisdiction. A writ can similarly be issued where in exercise of jurisdiction conferred on it, the Court or Tribunal acts illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however, no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the Court exercising it is no entitled to act as an Appellate Court. This limitation necessarily means that findings of fact reached by the inferior court or Tribunal as result of the appreciation of evidence cannot be reopened for questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by the Tribunal, a writ of certiorari can be issued if it is shown that in recording the said finding, the Tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari. In dealing with this category of cases, however, we must always bear in mind that a finding of fact recorded by the Tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the Tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the interference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal, and the said points cannot be agitated before a writ Court. It is within these limits that the jurisdiction conferred on the High Courts under Article 226 to issue a writ of certiorari can be legitimately exercised.

16. In view of above, the present petition lacks merit, deserves dismissal and is accordingly dismissed. The award passed by the learned Tribunal below is upheld.

17. Pending applications, if any, are disposed of.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Narender Kumar .....Petitioner
Versus
Union of India and others ....Respondents

CWP No. 4481 of 2015 with
CWP No. 4482 of 2015
Reserved on: December 29, 2016
Decided on: January 11, 2017

Constitution of India, 1950- Article 226- Petitioners were appointed as Safaiwalas in Rashitriya Military School, Chail – they were on probation of two years – they were issued warnings for unauthorized absence – services of the petitioners were terminated on 1.6.2015 – petitioners filed original applications before Central Administrative Tribunal - respondent pleaded that the performance of both the petitioners was not satisfactory during the probation period and they were issued various warnings – the Tribunal dismissed the original application- aggrieved from the order, present writ petitions have been filed- held that lots of complaints were filed against the petitioners- repeated warnings were issued to the petitioners- the performance of the petitioners was not found satisfactory and authorities took a conscious decisions not to extend the probation period – no inquiry was required to be conducted as the termination was not stigmatic – the applications were rightly dismissed by the Tribunal- petition dismissed.(Para-15 to 27)

Cases referred:
Rajesh Kohli v. High Court of J & K, (2010) 12 SCC 783
Ratnesh Kumar Choudhary v. Indira Gandhi Institute of Medical Sciences, (2015) 15 SCC 151

For the petitioner(s) Mr. Adarsh K. Vashishta, Advocate, in both the petitions.
For the respondents: Mr. Ashok Sharma, Assistant Solicitor General of India with Mr. Nipun Sharma, Advocate, in both the petitions.

The following judgment of the Court was delivered:

Per Sandeep Sharma, Judge:

These two petitions were clubbed vide order dated 29.12.2016, for the reason that these are outcome of a common order dated 19.11.2015 made by the Central Administrative Tribunal (for short, 'impugned order'), are being disposed of by this common judgment. However, for the sake of clarity, facts from CWP No. 4481 of 2015 are being discussed herein.

2. Petitioner Narender Kumar, who was appointed as a 'Safaiwala' in the Rashtriya Military School, Chail, District Solan, H.P., on 5.11.2012 on probation for two years and joined on 20.11.2012. He had taken 55 days' Extra Ordinary Leave for appearing in selection process for the post of Clerk with Assam Riffles in Nagaland. He was issued warning vide letter dated 03.09.2013, which was replied by him on 7.9.2013. Another disciplinary warning against him was issued on 11.7.2014 stating that he was sanctioned leave from 26.6.2014 to 28.6.2014 but he left the station on 25.6.2014 and reported back for duty on 30.6.2014. He was also directed to re-apply for leave from 25.6.2014 to 30.6.2014, which he did. Another disciplinary warning was issued on 5.8.2014 for remaining absent for seven days from 28.7.2014. It was also replied by the petitioner. One more disciplinary warning was issued on 18.9.2014 which was also replied by the petitioner. Probation period of the petitioner was extended from 23.3.2015 for another six months from 13.1.2015.

3. In terms of order dated 1.6.2015, services of petitioner were terminated. Petitioner questioned the same by the medium of OA No. 063/00092/2015-HP/2015 before the Central Administrative Tribunal, Chandigarh, and sought following reliefs:

> "i The impugned order dated 01.06.2015 (Annexure A-1) may kindly be quashed.
>
> ii. The respondents be further directed to reinstate the applicant in service with all consequential benefits."

4 Similar are the facts of another case, wherein, petitioner Anil Kumar was also appointed and working as a 'Safaiwala' in the Rashtriya Military School, Chail, District Solan, H.P., and two disciplinary warnings were issued on 7.7.2014 and 1.4.2015. In this case also, probation period was extended vide letter date 27.3.2015 for one year and six months from 25.5.2014. His services were terminated vide order dated 1.6.2015, which reads as under:

"NOTICE OF TERMINATION OF SERVICE"

1. Refer following:-

(a) Appointment letter No. AO104/RTG/Rul/VI/ dt. 22 May 2012

(b) This office letter No.AO103/Est/IV dt.27 Mar 2015

2. It is intimated that your services shall stand terminated with effect from the date of expiry of period of one month from the date on which the notice is served on, or, as the case be, tendered to you, since your performance is not satisfactory. You are, hereby, instructed to get your clearance done and handover charge, keys and any other government property held with you at the earliest.

3. Please acknowledge.

Sd/-
(Vineet Ohri)
Lt. Col
Principal"

5. Petitioner Anil Kumar also sought similar reliefs in OA No. 063/00091/2015 as sought in aforesaid Original Application of Narender Kumar.

6. The respondents in their written statement/ reply to the Original Applications, pleaded that performance of both the petitioners during probation period was not satisfactory and they were issued various warnings.

7. Petitioner Anil Kumar had even stolen shoes of a school cadet. Cadets of Taxila House made complaint on 28.5.2015 against both the petitioners and Matron of Taxila House also made another complaint on 30.5.2015 against both the petitioners.

8. Petitioners filed replications to the written statement and while reiterating their stand in Original Applications, pleaded that they had made complaints to the Police regarding appointment of one Ms. Neelam Rani, Matron of Taxila House, which, as per them, was against Rules being ineligible and unqualified for the post, in repercussion whereof, complaints were filed against them.

9. The learned Tribunal below while clubbing both the Original Applications, has taken note of various incidents against both the petitioners. The plea taken on behalf of the petitioners that probation period was not extended within stipulated period and was not conveyed to them, was turned down by the learned Tribunal below observing that same was done within time and also communicated to the petitioners. Regarding complaints filed against Ms. Neelam Rani by the petitioners, the learned Tribunal below noted that same were made on 24.6.2015 and not prior to the complaint dated 30.5.2015 made by Neelam Rani against the petitioners. The learned Tribunal below dismissed both the Original Applications vide order dated 19.11.2015.

10. The petitioners assailed the common order of the learned Tribunal below by filing two separate writ petitions. Since reliefs are similar in both the petitions, main reliefs of CWP No. 4481 of 2015 are reproduced below:

> "i) That a writ in the nature of certiorari may kindly be issued for quashing the impugned notice of termination dated 1.06.2015, Annexure P-7 issued by the Respondent No. 3 and the order passed Annexure P-10, by Ld. Central Administrative Tribunal Bench at Chandigarh in OA No. 063/9991/305, titled 'Narender Kumar Vs Union of India & Others ' decided on 19.11.2015.
>
> ii) That a writ of mandamus may kindly be issued directing the respondents to allow the petitioner to work on 'as is-where is basis"

11. The respondents filed separate replies in both the petitions, taking preliminary objections and preliminary submissions, refuting the claim stated that their action in terminating the services of petitioners is well within the Rules. Respondents have alleged suppression of facts on the part of the petitioners and further denied the averments made in the petitions that the work and conduct of the petitioners was satisfactory and there was no complaint against them during probation period.

12. Mr. Adarsh K. Vashishta, Advocate, appearing for the petitioners, in both the petitions has strenuously argued that the order passed by the Central Administrative Tribunal is illegal, arbitrary and against the settled position of law. His clients were appointed as 'Safaiwala' and were on probation for a period of two years. His clients had been working diligently and to the best of their abilities. He further averred that there was no complaint against his clients during the period of probation. He has admitted the fact that disciplinary warnings were issued to his clients at different times, which were duly replied to. Mr. Vashishta, Advocate also admitted that the probation periods of his clients were extended. But unfortunately, the services of his clients were terminated unceremoniously after serving one month's notice. He further argued that principles of natural justice have been violated while serving notice of termination upon his clients and no opportunity of hearing was granted to them. Mr. Vashishta pleaded that the order of termination was not merely an order terminating services of his clients but same was a penalty under the garb of termination.

13. Mr. Ashok Sharma, learned Assistant Solicitor General of India duly assisted by Mr. Nipun Sharma, Advocate, has supported the order passed by the learned Tribunal below. He pleaded that the petitioners have suppressed material facts. Mr. Sharma, further controverted the argument of the learned counsel representing the petitioners that there were no complaints against petitioners. Mr. Sharma further cited Rule 5 of the Central Civil Services (Temporary Service) Rules, 1965 to support the action of the respondents in terminating services of the petitioners, who were on probation and were temporary employees. While referring to the pleadings, Mr. Sharma cited many instances, when complaints were made against the petitioners, by the staff of the Rashtriya Military School. He also stated that general assessment of the petitioners was not satisfactory and as such their names were not included in the DPC for confirmation of probationers and accordingly, their probation period was extended. Thereafter, their performance was not found satisfactory. In the aforesaid background, he prayed for dismissal of the petitions.

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

15. Both the petitioners namely Narender Kumar and Anil Kumar, were appointed as 'Safaiwalas', in respondent No.3 School, after going through due selection process and they were appointed vide appointment letters dated 5.11.2012 and 22.5.2012, respectively on probation for two years. Documents available on record further suggest that pursuant to aforesaid appointment, both the petitioners joined as Safaiwalas on 20.11.2012 and 26.5.2012, respectively. Since during probation period, their performance was found to be unsatisfactory, they were not confirmed and perusal of documents placed on record alongwith petitions as well as sequence of events as stands mentioned in the impugned order having been passed by the

learned Tribunal below clearly suggests that both the petitioners were issued repeated warnings qua their performance during probation. It clearly emerges from the various notices/ reminders issued that despite of that their performance was not satisfactory.

16. It also emerges from the record that repeated complaints were made by the students regarding their behaviour and conduct. Record further reveals that petitioner namely Narender Kumar overstayed his leave and he left the station without there being sanctioned leave in his favour. Despite above, authorities taking a lenient view, advised petitioner Narender Kumar to re-apply for leave for the period of absence. As per petitioners, since their work and conduct was found satisfactory, their probation period was extended for one year and six months and as such there is no force in the allegations having been made by the authorities that petitioners were found wanting in their service.

17. This Court, solely with a view to ascertain the genuineness and correctness of the aforesaid arguments having been made by the learned counsel representing the parties, carefully perused the documents available on record, perusal whereof clearly suggests that there were lot of complaints against the petitioners, who were appointed as, 'Safaiwalas' but despite there being numerous complaints by the students and staff of the School, authorities instead of taking drastic step of terminating services of the petitioners, issued repeated warnings. It also emerges from the record that documents were called from Narender Kumar, by the authorities enabling them to take decision with regard to his confirmation after completion of probation period but before, decision if any, could be taken with regard to confirmation of petitioners, numerous complaints were received by the authorities from students as well as other staff with regard to their performance and as such their case could not be considered for confirmation. This Court, after carefully perusing impugned order of learned Tribunal below, wherein various incidents with regard to performance of both the petitioners have been noticed, has no hesitation to conclude that there was ample material on record before the learned Tribunal below suggestive of the fact that the performance of both the petitioners was not satisfactory.

18. Learned Tribunal below while agreeing with the decision of the authorities in terminating services of the petitioners has taken note of the facts discussed herein above.

19. This Court also finds no force in the contentions of the learned counsel representing the petitioners that, as per clause 10 of the Consolidated Instruction of Probation dated 21.7.2014, issued with regard to extension of probation period was to be decided within 6-8 weeks prior to expiry of initial probation period and same was required to be communicated to the petitioners, because it emerges from the record that in case of Narender Kumar, decision was taken and communicated within ten weeks of expiry of probation period, whereas in the case of Anil Kumar, though it was belated but instructions as contained in clause 10 were further modified vide OM dated 19.5.1983 as mentioned in clause 24 of the Consolidated instructions, wherein it was provided that confirmation of probationer after completion of probation is not automatic but it is to be followed by formal orders and as long as no specific order of successful completion of probation is not issued, such probationer would be deemed to have been on continued probation. In the instant case, as clearly emerges from documents on record, since no specific order of confirmation on satisfactory completion of probation was issued, both the petitioners were deemed to be on probation till the termination orders were made.

20. Leaving everything aside, bare perusal of impugned termination orders nowhere suggests that same have been passed on the basis of misconduct by way of penalty as claimed by the learned counsel representing the petitioners. Perusal of impugned termination order clearly suggests that the performance of petitioners during probation was not found satisfactory, notices were issued to them intimating therein that their services shall stand terminated after expiry of one month of the date, on which notices were served, as such, by no stretch of imagination, it can be concluded that termination orders are violative of Article 311(2) of Constitution of India and as such they are null and void. True it is that as per settled law, if order of discharge or termination is based on misconduct, they become unsustainable, if same are passed without holding any inquiry. But, in the instant case, as has been noticed above, termination orders are not by way of

punishment and are not stigmatic in any manner, as such, there was no occasion, if any, for authorities to hold inquiry before passing termination orders. Rather, in the present case, as clearly emerges from the record, performance of the petitioners was not found satisfactory during probation period and as such authorities took a conscious decision not to extend their probation beyond stipulated period and as such this Court sees no illegality or infirmity in the decision having been taken by the authorities, which otherwise appears to be based upon correct appreciation of material available on record.

21. Mere reference of unsatisfactory service of a person in termination order can not be said to be 'stigmatic'. It is well within the domain of the authorities to examine service record of the incumbents before deciding extension, if any, of the probation period. It is always open for the authorities to record such satisfaction regarding unsatisfactory service and mere mention of same in the order, in no manner, would amount to casting any aspersions on the incumbent. In this regard, reliance is placed upon judgment of Apex Court in Rajesh Kohli v. High Court of J & K reported in (2010) 12 SCC 783, wherein it is held as under:

> "21. In the present case, two orders are challenged, one, which was the order of the High Court based on the basis of the resolution of the full court and the other one issued by the Government of Jammu & Kashmir on the ground that they were stigmatic orders.
>
> 22. In our considered opinion, none of the aforesaid two orders could be said to be a stigmatic order as no stigma is attached. Of course, aforesaid letters were issued in view of the resolution of the full court meeting where the full court of the High Court held that the service of the petitioner is unsatisfactory. Whether or not the probation period could be or should be extended or his service should be confirmed is required to be considered by the full court of the High Court and while doing so necessarily the service records of the petitioner are required to be considered and if from the service records it is disclosed that the service of the petitioner is not satisfactory it is open for the respondents to record such satisfaction regarding his unsatisfactory service and even mentioning the same in the order would not amount to casting any aspersion on the petitioner nor it could be said that stating in the order that his service is unsatisfactory amounts to a stigmatic order.
>
> 23. This position is no longer res integra and it is well- settled that even if an order of termination refers to unsatisfactory service of the person concerned, the same cannot be said to be stigmatic. In Pavanendra Narayan Verma v. Sanjay Gandhi PGI Of Medical Sciences reported in (2002) 1 SCC 520, this Court has explained at length the tests that would apply to determine if an order terminating the services of a probationer is stigmatic. On the facts of that case it was held that the opinion expressed in the termination order that the probationer's "work and conduct has not been found satisfactory" was not ex facie stigmatic and in such circumstances the question of having to comply with the principles of natural justice do not arise.
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> 29. One of the issues that were raised by the petitioner was that he was granted two increments during the period of two and a half years of his service. Therefore the stand taken by the respondents that his service was unsatisfactory is belied according to the petitioner because of the aforesaid action even on the part of the respondents impliedly accepting the position that his service was satisfactory.
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> 30. The aforesaid submission of the petitioner is devoid of any merit in view of the fact that since the petitioner was continuing in service, therefore, the case for granting increment was required to be considered which was so granted. The mere granting of yearly increments would not in any manner indicate that after completion of the probation period the full court of the High Court was not

competent to scrutinize his records and on the basis thereof take a decision as to whether or not his service should be confirmed or dispensed with or whether his probation period should be extended."

22. Apex Court, in a catena of cases, has held that, if a probationer is discharged on the ground of unsatisfactory service or inefficiency or for similar reason without proper inquiry and without giving a reasonable opportunity of showing case against his discharge, it may, in the given facts, amount to removal from service within the meaning of Article 311 (2) of the Constitution of India and, in such a case, the simplicity of the form of the order will not give any sanctity. Apex Court in recent judgment in **Ratnesh Kumar Choudhary v. Indira Gandhi Institute of Medical Sciences** reported in (2015) 15 SCC 151, held that if ex-parte enquiry or report is the motive for the termination order, then the termination is not to be called punitive merely because the principles of natural justice have not been followed. Apex Court further held that if the facts revealed in the enquiry are not the motive but the foundation for the termination of the services of the temporary servant or probationer, it would be punitive and principles of natural justice are bound to be followed and failure to do so would make the order legally unsound.

23. In the aforesaid judgment, Apex Court, while dealing with the case of a person, who was offered appointment for a period of two years on probation, has specifically dealt the issues; (i) Whether the order of termination passed by the authority is stigmatic or not; and, (ii) whether there had been violation of principles of natural justice, since no regular enquiry was conducted. In the aforesaid judgment, Apex Court took note of various judgment passed by it while dealing with the issue of termination of services of probationer holding as under:

"14. The aforesaid submissions have been controverted by the learned counsel for the respondents.

15. To appreciate the controversy, we may refer to certain authorities which are pertinent to appreciate the controversy. In Samsher Singh v. State of Punjab[1], a seven-Judge Bench was considering the legal propriety of the discharge of two judicial officers of the Punjab Judicial Service who were serving as probationers. The majority laying down the law stated that:-

> "No abstract proposition can be laid down that where the services of a probationer are terminated without saying anything more in the order of termination than that the services are terminated it can never amount to a punishment in the facts and circumstances of the case. If a probationer is discharged on the ground of misconduct, or inefficiency or for similar reason without a proper enquiry and without his getting a reasonable opportunity of showing cause against his discharge it may in a given case amount to removal from service within the meaning of Article 311(2) of the Constitution." And again:-
>
> "The form of the order is not decisive as to whether the order is by way of punishment. Even an innocuously worded order terminating the service may in the facts and circumstances of the case establish that an enquiry into allegations of serious and grave character of misconduct involving stigma has been made in infraction of the provision of Article 311. In such a case the simplicity of the form of the order will not give any sanctity. That is exactly what has happened in the case of Ishwar Chand Agarwal. The order of termination is illegal and must be set aside."

16. In Radhey Shyam Gupta vs. U.P. State Agro Industries Corporation Ltd. and Another[2], the services of the appellant were terminated as he was a probationer. He challenged the order of termination before the Administrative Tribunal, Lucknow, U.P., alleging that though the termination order appeared to be innocuous, it was really punitive in nature, inasmuch as it was based on an ex-parte report of enquiry which indicated that he had accepted the bribe and,

therefore, it was not merely the motive, but the very foundation of the order of termination. The tribunal allowed the application of the appellant and quashed the order of termination. The High Court in the writ petition, placing reliance on the decisions rendered in State of U.P. vs. Kaushal Kishore Shukla[3], Triveni Shankar Saxena vs. State of U.P.[4] and State of U.P. vs. Prem Lata Misra[5], came to hold that the order of termination had not been founded on any misconduct, but on the other hand, the competent authority had found that the employee was not fit to be continued in service on account of unsatisfactory work and conduct. The High Court also observed that even if some ex-parte preliminary enquiry had been conducted or a disciplinary enquiry was initiated to inquire into some misconduct, it was the option of the competent authority to withdraw the disciplinary proceedings and take the action of termination of service under the terms of appointment and the same would not be by way of punishment. This Court after taking note of the submissions of the learned counsel for the parties posed the following question:-

> "Whether the report of Shri Ram Pal Singh was a preliminary report and whether it was the motive or the foundation for the termination order and whether it was permissible to go behind the order?"

17. This Court noticed that there are two lines of authorities. In certain cases of temporary servants and probationers, it had taken the view that if the ex-parte enquiry or report is the motive for the termination order, then the termination is not to be called punitive merely because the principles of natural justice have not been followed; and in the other line of decisions, this Court has ruled that if the facts revealed in the enquiry are not the motive but the foundation for the termination of the services of the temporary servant or probationer, it would be punitive and principles of natural justice are bound to be followed and failure to do so would make the order legally unsound. The Court referred to the judgments rendered in Samsher Singh (supra), Parshotam Lal Dhingra vs. Union of India[6], State of Bihar vs. Gopi Kishore Prasad[7] and State of Orissa vs. Ram Narayan Das[8] and, eventually, opined that if there was any difficulty as to what was "motive" or "foundation" even after the Samsher Singh's case the said doubts were removed in Gujarat Steel Tubes Ltd. vs. Gujarat Steel Tubes Mazdoor Sabha[9]. The clarification given by the Constitution Bench in the said case, being instructive, the two-Judge Bench reproduced the same, which we think we should do:-

> "53. Masters and servants cannot be permitted to play hide and seek with the law of dismissals and the plain and proper criteria are not to be misdirected by terminological cover-ups or by appeal to psychic processes but must be grounded on the substantive reason for the order, whether disclosed or undisclosed. The Court will find out from other proceedings or documents connected with the formal order of termination what the true ground for the termination is. If, thus scrutinised, the order has a punitive flavour in cause or consequence, it is dismissal. If it falls short of this test, it cannot be called a punishment. To put it slightly differently, a termination effected because the master is satisfied of the misconduct and of the consequent desirability of terminating the service of the delinquent servant, is a dismissal, even if he had the right in law to terminate with an innocent order under the standing order or otherwise. Whether, in such a case the grounds are recorded in a different proceeding from the formal order does not detract from its nature. Nor the fact that, after being satisfied of the guilt, the master abandons the enquiry and proceeds to terminate. Given an alleged misconduct and a live nexus between it and the termination of

service the conclusion is dismissal, even if full benefits as on simple termination, are given and non-injurious terminology is used.

54. On the contrary, even if there is suspicion of misconduct the master may say that he does not wish to bother about it and may not go into his guilt but may feel like not keeping a man he is not happy with. He may not like to investigate nor take the risk of continuing a dubious servant. Then it is not dismissal but termination simpliciter, if no injurious record of reasons or punitive pecuniary cut-back on his full terminal benefits is found. For, in fact, misconduct is not then the moving factor in the discharge. We need not chase other hypothetical situations here."

18. On that basis, the Court proceeded to opine thus:-

"In other words, it will be a case of motive if the master, after gathering some prima facie facts, does not really wish to go into their truth but decides merely not to continue a dubious employee. The master does not want to decide or direct a decision about the truth of the allegations. But if he conducts an enquiry only for the purpose of proving the misconduct and the employee is not heard, it is a case where the enquiry is the foundation and the termination will be bad."

19. After stating the said principle, the Court traced the history and referred to Anoop Jaiswal vs. Govt. of India[10], Nepal Singh vs. State of U.P.[11] and Commissioner, Food & Civil Supplies vs. Prakash Chandra Saxena[12] and opined as follows:-

"33. It will be noticed from the above decisions that the termination of the services of a temporary servant or one on probation, on the basis of adverse entries or on the basis of an assessment that his work is not satisfactory will not be punitive inasmuch as the above facts are merely the motive and not the foundation. The reason why they are the motive is that the assessment is not done with the object of finding out any misconduct on the part of the officer, as stated by Shah, J. (as he then was) in Ram Narayan Das case. It is done only with a view to decide whether he is to be retained or continued in service. The position is not different even if a preliminary enquiry is held because the purpose of a preliminary enquiry is to find out if there is prima facie evidence or material to initiate a regular departmental enquiry. It has been so decided in Champaklal case. The purpose of the preliminary enquiry is not to find out misconduct on the part of the officer and if a termination follows without giving an opportunity, it will not be bad. Even in a case where a regular departmental enquiry is started, a charge-memo issued, reply obtained, and an enquiry officer is appointed — if at that point of time, the enquiry is dropped and a simple notice of termination is passed, the same will not be punitive because the enquiry officer has not recorded evidence nor given any findings on the charges. That is what is held in Sukh Raj Bahadur case and in Benjamin case. In the latter case, the departmental enquiry was stopped because the employer was not sure of establishing the guilt of the employee. In all these cases, the allegations against the employee merely raised a cloud on his conduct and as pointed by Krishna Iyer, J. in Gujarat Steel Tubes case the employer was entitled to say that he would not continue an employee against whom allegations were made the truth of which the employer was not interested to ascertain. In fact, the employer by opting to pass a simple order of termination as permitted by the terms of appointment or as permitted by the rules was conferring a benefit on the employee by passing a simple order of termination so that the employee would not

suffer from any stigma which would attach to the rest of his career if a dismissal or other punitive order was passed. The above are all examples where the allegations whose truth has not been found, and were merely the motive.

34. But in cases where the termination is preceded by an enquiry and evidence is received and findings as to misconduct of a definitive nature are arrived at behind the back of the officer and where on the basis of such a report, the termination order is issued, such an order will be violative of the principles of natural justice inasmuch as the purpose of the enquiry is to find out the truth of the allegations with a view to punish him and not merely to gather evidence for a future regular departmental enquiry. In such cases, the termination is to be treated as based or founded upon misconduct and will be punitive. These are obviously not cases where the employer feels that there is a mere cloud against the employee's conduct but are cases where the employer has virtually accepted the definitive and clear findings of the enquiry officer, which are all arrived at behind the back of the employee — even though such acceptance of findings is not recorded in the order of termination. That is why the misconduct is the foundation and not merely the motive in such cases."

20. Appreciating the facts of the said case, the Court set aside the judgment of the High Court and restored that of the tribunal by holding that the order was punitive in nature.

21. In Chandra Prakash Shahi vs. State of U.P. and Others[13] after addressing the history pertaining to "motive" and "foundation" and referring to series of decisions, a two-Judge Bench had held that:-

"28. The important principles which are deducible on the concept of "motive" and "foundation", concerning a probationer, are that a probationer has no right to hold the post and his services can be terminated at any time during or at the end of the period of probation on account of general unsuitability for the post in question. If for the determination of suitability of the probationer for the post in question or for his further retention in service or for confirmation, an inquiry is held and it is on the basis of that inquiry that a decision is taken to terminate his service, the order will not be punitive in nature. But, if there are allegations of misconduct and an inquiry is held to find out the truth of that misconduct and an order terminating the service is passed on the basis of that inquiry, the order would be punitive in nature as the inquiry was held not for assessing the general suitability of the employee for the post in question, but to find out the truth of allegations of misconduct against that employee. In this situation, the order would be founded on misconduct and it will not be a mere matter of "motive".

29. "Motive" is the moving power which impels action for a definite result, or to put it differently, "motive" is that which incites or stimulates a person to do an act. An order terminating the services of an employee is an act done by the employer. What is that factor which impelled the employer to take this action? If it was the factor of general unsuitability of the employee for the post held by him, the action would be upheld in law. If, however, there were allegations of serious misconduct against the employee and a preliminary inquiry is held behind his back to ascertain the truth of those allegations and a termination order is passed thereafter, the order, having regard to other circumstances, would be

> founded on the allegations of misconduct which were found to be true in the preliminary inquiry."

22. A three-Judge Bench in Union of India and Others vs. Mahaveer C. Singhvi[14], dwelled upon the issue whether the order of discharge of a probationer was simpliciter or punitive, referred to the authority in Dipti Prakash Banerjee vs. Satyendra Nath Bose National Centre for Basic Sciences[15] and came to hold thus:-

> "It was held by this Court in Dipti Prakash Banerjee case that whether an order of termination of a probationer can be said to be punitive or not depends on whether the allegations which are the cause of the termination are the motive or foundation. It was observed that if findings were arrived at in inquiry as to misconduct, behind the back of the officer or without a regular departmental enquiry, a simple order of termination is to be treated as founded on the allegations and would be bad, but if the enquiry was not held, and no findings were arrived at and the employer was not inclined to conduct an enquiry, but, at the same time, he did not want to continue the employee's services, it would only be a case of motive and the order of termination of the employee would not be bad."

23. At this juncture, we must refer to the decision rendered in Pavanendra Narayan Verma vs. Sanjay Gandhi P.G.I. of Medical Sciences and Another[16], wherein a two-Judge Bench struck a discordant note by stating that:-

> "Before considering the facts of the case before us one further, seemingly intractable, area relating to the first test needs to be cleared viz. what language in a termination order would amount to a stigma? Generally speaking when a probationer's appointment is terminated it means that the probationer is unfit for the job, whether by reason of misconduct or ineptitude, whatever the language used in the termination order may be. Although strictly speaking, the stigma is implicit in the termination, a simple termination is not stigmatic. A termination order which explicitly states what is implicit in every order of termination of a probationer's appointment, is also not stigmatic. The decisions cited by the parties and noted by us earlier, also do not hold so. In order to amount to a stigma, the order must be in a language which imputes something over and above mere unsuitability for the job."

24. The said decision has been discussed at length in State Bank of India and Others vs. Palak Modi and Another[17] and, eventually, commenting on the same, the Court ruled thus:-

> "The proposition laid down in none of the five judgments relied upon by the learned counsel for the appellants is of any assistance to their cause, which were decided on their own facts. We may also add that the abstract proposition laid down in para 29 in Pavanendra Narayan Verma v. Sanjay Gandhi PGI of Medical Sciences is not only contrary to the Constitution Bench judgment in Samsher Singh v. State of Punjab, but a large number of other judgments—State of Bihar v. Shiva Bhikshuk Mishra, Gujarat Steel Tubes Ltd. v. Mazdoor Sabha and Anoop Jaiswal v. Govt. of India to which reference has been made by us and to which attention of the two-Judge Bench does not appear to have been drawn. Therefore, the said proposition must be read as confined to the facts of that case and cannot be relied upon for taking the view that a simple order of termination of service can never be declared as punitive even though it may be founded on serious allegation of misconduct or

misdemeanour on the part of the employee." We respectfully agree with the view expressed herein-above.

25. In Palak Modi's case, the ratio that has been laid down by the two- Judge Bench is to the following effect:-

> "The ratio of the abovenoted judgments is that a probationer has no right to hold the post and his service can be terminated at any time during or at the end of the period of probation on account of general unsuitability for the post held by him. If the competent authority holds an inquiry for judging the suitability of the probationer or for his further continuance in service or for confirmation and such inquiry is the basis for taking decision to terminate his service, then the action of the competent authority cannot be castigated as punitive. However, if the allegation of misconduct constitutes the foundation of the action taken, the ultimate decision taken by the competent authority can be nullified on the ground of violation of the rules of natural justice.

26. In the facts of the case, the Court proceeded to state that there is a marked distinction between the concepts of satisfactory completion of probation and successful passing of the training/test held during or at the end of the period of probation, which are sine qua non for confirmation of a probationer and the Bank's right to punish a probationer for any defined misconduct, misbehaviour or misdemeanour. In a given case, the competent authority may, while deciding the issue of suitability of the probationer to be confirmed, ignore the act(s) of misconduct and terminate his service without casting any aspersion or stigma which may adversely affect his future prospects but, if the misconduct/misdemeanour constitutes the basis of the final decision taken by the competent authority to dispense with the service of the probationer albeit by a non-stigmatic order, the Court can lift the veil and declare that in the garb of termination simpliciter, the employer has punished the employee for an act of misconduct."

24. Similarly, Apex Court in **State of Punjab and others v. Sukhwinder Singh** decided on 14.7.2005, has held that period of probation gives time and opportunity to the employer to watch the work ability, efficiency, sincerity and competent of the servant and if he is found not suitable for the post, the master reserves a right to dispense with his service without anything more during or at the end of the prescribed period, which is styled as period of probation. The Apex Court has held as under:

> "18. It must be borne in mind that no employee whether a probationer or temporary will be discharged or reverted, arbitrarily, without any rhyme or reason. Where a superior officer, in order to satisfy himself whether the employee concerned should be continued in service or not makes inquiries for this purpose, it would be wrong to hold that the inquiry which was held, was really intended for the purpose of imposing punishment. If in every case where some kind of fact finding inquiry is made, wherein the employee is either given an opportunity to explain or the inquiry is held behind his back, it is held that the order of discharge or termination from service is punitive in nature, even a bona fide attempt by the superior officer to decide whether the employee concerned should be retained in service or not would run the risk of being dubbed as an order of punishment. The decision to discharge a probationer during the period of probation or the order to terminate the service of a temporary employee is taken by the appointing authority or administrative heads of various departments, who are not judicially trained people. The superior authorities of the departments have to take work from an employee and they are the best people to judge whether an employee should be continued in service and made a permanent

> employee or not having regard to his performance, conduct and overall suitability for the job. As mentioned earlier a probationer is on test and a temporary employee has no right to the post. If mere holding of an inquiry to ascertain the relevant facts for arriving at a decision on objective considerations whether to continue the employee in service or to make him permanent is treated as an inquiry "for the purpose of imposing punishment" and an order of discharge or termination of service as a result thereof "punitive in character", the fundamental difference between a probationer or a temporary employee and a permanent employee would be completely obliterated, which would be wholly wrong.
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> 19. In the present case neither any formal departmental inquiry nor any preliminary fact finding inquiry had been held and a simple order of discharge had been passed. The High Court has built an edifice on the basis of a statement made in the written statement that the respondent was habitual absentee during his short period of service and has concluded therefrom that it was his absence from duty that weighed in the mind of Senior Superintendent of Police as absence from duty is a misconduct. The High Court has further gone on to hold that there is direct nexus between the order of discharge of the respondent from service and his absence from duty and, therefore, the order discharging him from service will be viewed as punitive in nature calling for a regular inquiry under Rule 16.24 of the Rules. We are of the opinion that the High Court has gone completely wrong in drawing the inference that the order of discharge dated 16.3.1990 was, in fact, based upon the misconduct and was, therefore, punitive in nature, which should have been preceded by a regular departmental inquiry. There cannot be any doubt that the respondent was on probation having been appointed about eight months back. As observed in Ajit Singh and others etc. vs. State of Punjab and another (supra) the period of probation gives time and opportunity to the employer to watch the work ability, efficiency, sincerity and competence of the servant and if he is found not suitable for the post, the master reserves a right to dispense with his service without anything more during or at the end of the prescribed period, which is styled as period of probation. The mere holding of preliminary inquiry where explanation is called from an employee would not make an otherwise innocuous order of discharge or termination of service punitive in nature. Therefore, the High Court was clearly in error in holding that the respondent's absence from duty was the foundation of the order, which necessitated an inquiry as envisaged under Rule 16.24(ix) of the Rules."

25. Careful perusal of aforesaid judgments having been rendered by the Apex Court, clearly suggests that satisfactory completion of probation and successful passing of training/test held during or at the end of period of probation are *sine qua non* for confirmation of a probationer and authorities, while deciding issue of suitability of the probationer can take note of conduct of probationer during period of his probation. Order, if any, of termination if is based upon inquiry, then principles of natural justice are required to be adhered to by affording due opportunity of hearing to the person concerned.

26. In the instant case, as clearly emerges from the termination orders, same have been passed because of unsatisfactory performance of the petitioners during probation period and in no terms, same can be said to be stigmatic or by way of penalty and on the face of documents made available on record by the authorities, no inquiry was required to be held against the petitioners, rather the work, conduct and performance of the petitioners was sufficient to pass the termination orders.

27. In view of the law laid down by the Hon'ble Apex Court, petitions at hand lack merit and are dismissed accordingly. Impugned order is upheld. Pending applications are also disposed of.

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

Bhisham Lal Garg .....Appellant.
Versus
Hardei and Ors. .....Respondents.

RSA No. 449 of 2009.
Date of Decision: 27.2.2017.

Code of Civil Procedure, 1908- Order 41 Rule 27- An application for leading additional evidence was filed – the appeal was dismissed, without taking note of the application – held, that application under Order 41 Rule 27 is required to be decided alongwith the main appeal- it was incumbent upon the Appellate Court to decide the application before disposing of the appeal – disposal of the appeal without deciding the application was not proper – appeal allowed- the judgment of the Appellate Court set aside- case remanded to the Appellate Court with a direction to decide the application and the appeal in accordance with law within a period of 6 months.

(Para-2 to 9)

Cases referred:

Jatinder Singh & Anr. (Minor through mother) v. Mehar singh and Ors. with Balbir Singh & Anr. V. Jatinder Singh and Anr", AIR 2009 (Vol. 96) Supreme Court 354
Union of India v. Ibrahim Uddin and Anr", (2012) 8 Supreme Court Cases 148

For the appellant: Mr. J.R. Poswal, Advocate.
For the respondents: Mr. Nitin Thakur, Advocate for respondent No.1 and LRs No. 2(a) to 2(e).

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Having regard to the nature of order, this Court proposes to pass, it may not be necessary to take note of the facts of the case, save and except that the plaintiff-appellant, who had lost in both the learned courts below, had preferred an application under Order 41 Rule 27 during the pendency of appeal before learned first Appellate Court, wherein he sought to produce certain documents. Careful perusal of record, as perused by this Court, suggests that the aforesaid application having been preferred by the plaintiff appellant was entertained and time was granted to the opposite party to file reply. Similarly, perusal of order sheet suggests that matter was repeatedly adjourned on the request of respective parties to enable them to complete pleadings in the proceedings arising out of application under Order 41 Rule 27. However, as a matter of fact, matter was ordered to be heard finally on 15.5.2009 and thereafter, vide judgment dated 22.5.2009, appeal having been preferred by the plaintiff was dismissed without taking note of application under Order 41 Rule 27.

2. Close scrutiny of record made available to this Court clearly suggests that while deciding the main appeal, learned lower appellate Court failed to take note of the application filed under Order 41 Rule 27 as well as documents accompanying the same. This court was unable to find any mention with regard to the pendency of aforesaid application in the impugned judgment. Learned first appellate Court without caring to look into the merits of the aforesaid application, proceeded to decide the appeal in slipshod manner.

3. By now, it is well settled that application filed under Order 41 Rule 27 is required to be decided along with the main appeal but as has been observed above, there is no consideration of the application for leading additional evidence by the learned trial Court while passing the final judgment in the appeal having been preferred by the appellant plaintiff. Once an application under Order 41 Rule 27 CPC was filed and thereafter entertained by the first appellate Court, it was incumbent upon the first appellate Court to consider/deal with the same

on merits but impugned judgment having been passed by the learned first appellate Court nowhere suggests that above referred application was ever considered by the Court while deciding the main appeal.

4. It has been repeatedly held by the Hon'ble Apex Court that dismissal of appeal without deciding the application of additional evidence is improper and in all eventualities, application for additional evidence under Order 41 Rule 27 CPC should be dealt with on merits at the first instance. In this regard, reliance is placed on judgment passed by the Hon'ble Supreme Court in case titled "***Jatinder Singh & Anr. (Minor through mother) v. Mehar singh and Ors. with Balbir Singh & Anr. V. Jatinder Singh and Anr", AIR 2009 (Vol. 96) Supreme Court 354***, the relevant paragraphs are being reproduced herein below:-

> *"3. In our view, this appeal can be decided on a very short question. The trial court as well as the appellate court and finally the High Court in the second appeal dismissed the suit filed by the plaintiffs/appellants for declaration challenging the sale deed dated 29th of May, 1989, executed by the respondent Nos. 1 to 3 in favour of respondent Nos. 9 and 10 as well as the compromise (Exhibit No. C1) dated 7th of April, 1986 in a suit title Ujagar Singh vs. Puran Singh, But it is an admitted position that before the High Court, the appellants filed an application under Order 41 Rule 27 of the Code of Civil Procedure for acceptance of additional evidence, namely, documents such as certificate of Military service, voter list of concerned assembly segment for the year 1982, receipt of house tax 1988-89, payment of chaowkdra of khariff 1986, rabi 1990, rabi 1991, khariff 1992, identity card issued by Election Commission of India, Ration Card etc.*
>
> *4. While deciding the second appeal, however, the High Court had failed to take notice of the application under Order 41 Rule 27 of the Code of Civil Procedure and decide whether additional evidence could be permitted to be admitted into evidence. In our view, when an application for acceptance of additional evidence under Order 41 Rule 27 of the Code of Civil Procedure was filed by the appellants, it was the duty of the High Court to deal with the same on merits. That being the admitted position, we have no other alternative but to set aside the judgment of the High Court and remit the appeal back to it for a decision afresh in the second appeal along with the application for acceptance of additional evidence in accordance with law.*
>
> *5. For the reasons aforesaid, the impugned Judgment is set aside. The appeal is thus allowed to the extent indicated above. There will be no order as to costs."*

5. As a court of first appeal, it is bounden duty of the court below to deal with all issues and evidence led by the parties before recording its finding, particularly by discussing additional evidence.

6. True it is, it is the pure discretion of the appellate court to allow/disallow the additional evidence proposed to be led on record and such discretion is required to be used sparingly. Under Order 41 Rule 27 CPC, appellate court has power to allow the document to be produced and witness to be examined but the requirement of Court must be limited to those cases where it found necessary to obtain such evidence for enabling it to pronounce judgment. But before exercising the discretion as referred above, Court is expected to assign reasons for accepting or rejecting the additional evidence sought to be adduced on record during the pendency of the first appeal. In this regard, reliance is placed on judgment passed by the Hon'ble Apex Court in case titled "**Union of India v. Ibrahim Uddin and Anr", (20*12) 8 Supreme Court Cases 148***, the relevant paras whereof are reproduced herein below:-

> *"36. The general principle is that the Appellate Court should not travel outside the record of the lower court and cannot take any evidence in appeal. However, as an exception, Order XLI Rule 27 CPC enables the Appellate Court to take additional evidence in exceptional circumstances. The Appellate Court may permit additional*

evidence only and only if the conditions laid down in this rule are found to exist. The parties are not entitled, as of right, to the admission of such evidence. Thus, provision does not apply, when on the basis of evidence on record, the Appellate Court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is to be used sparingly. Such a discretion is only a judicial discretion circumscribed by the limitation specified in the rule itself. (Vide: K. Venkataramiah v. A. Seetharama Reddy & Ors., AIR 1963 SC 1526; The Municipal Corporation of Greater Bombay v. Lala Pancham & Ors., AIR 1965 SC 1008; Soonda Ram & Anr. v. Rameshwaralal & Anr., AIR 1975 SC 479; and Syed Abdul Khader v. Rami Reddy & Ors., AIR 1979 SC 553).

37. The Appellate Court should not, ordinarily allow new evidence to be adduced in order to enable a party to raise a new point in appeal. Similarly, where a party on whom the onus of proving a certain point lies fails to discharge the onus, he is not entitled to a fresh opportunity to produce evidence, as the Court can, in such a case, pronounce judgment against him and does not require any additional evidence to enable it to pronounce judgment. (Vide: Haji Mohammed Ishaq Wd. S. K. Mohammed & Ors. v. Mohamed Iqbal and Mohamed Ali and Co., AIR 1978 SC 798).

38. Under Order XLI , Rule 27 CPC, the appellate Court has the power to allow a document to be produced and a witness to be examined. But the requirement of the said Court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. This provision does not entitle the appellate Court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate Court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate Court is empowered to admit additional evidence. (Vide: Lala Pancham & Ors.)

39. It is not the business of the Appellate Court to supplement the evidence adduced by one party or the other in the lower Court. Hence, in the absence of satisfactory reasons for the non- production of the evidence in the trial court, additional evidence should not be admitted in appeal as a party guilty of remissness in the lower court is not entitled to the indulgence of being allowed to give further evidence under this rule. So a party who had ample opportunity to produce certain evidence in the lower court but failed to do so or elected not to do so, cannot have it admitted in appeal. (Vide: State of U.P. v. Manbodhan Lal Srivastava, AIR 1957 SC 912; and S. Rajagopal v. C.M. Armugam & Ors., AIR 1969 SC 101).

40. The inadvertence of the party or his inability to understand the legal issues involved or the wrong advice of a pleader or the negligence of a pleader or that the party did not realise the importance of a document does not constitute a "substantial cause" within the meaning of this rule. The mere fact that certain evidence is important, is not in itself a sufficient ground for admitting that evidence in appeal.

41. The words "for any other substantial cause" must be read with the word "requires" in the beginning of sentence, so that it is only where, for any other substantial cause, the Appellate Court requires additional evidence, that this rule will apply, e.g., when evidence has been taken by the lower Court so imperfectly that the Appellate Court cannot pass a satisfactory judgment.

42. Whenever the appellate Court admits additional evidence it should record its reasons for doing so. (Sub-rule 2). It is a salutary provision which operates as a check against a too easy reception of evidence at a late stage of litigation and the

statement of reasons may inspire confidence and disarm objection. Another reason of this requirement is that, where a further appeal lies from the decision, the record of reasons will be useful and necessary for the Court of further appeal to see, if the discretion under this rule has been properly exercised by the Court below. The omission to record the reasons must, therefore, be treated as a serious defect. But this provision is only directory and not mandatory, if the reception of such evidence can be justified under the rule.

43. The reasons need not be recorded in a separate order provided they are embodied in the judgment of the appellate Court. A mere reference to the peculiar circumstances of the case, or mere statement that the evidence is necessary to pronounce judgment, or that the additional evidence is required to be admitted in the interests of justice, or that there is no reason to reject the prayer for the admission of the additional evidence, is not enough comp1iance with the requirement as to recording of reasons.

44. It is a settled legal proposition that not only administrative order, but also judicial order must be supported by reasons, recorded in it. Thus, while deciding an issue, the Court is bound to give reasons for its conclusion. It is the duty and obligation on the part of the Court to record reasons while disposing of the case. The hallmark of order and exercise of judicial power by a judicial forum is for the forum to disclose its reasons by itself and giving of reasons has always been insisted upon as one of the fundamentals of sound administration of the justice – delivery system, to make it known that there had been proper and due application of mind to the issue before the Court and also as an essential requisite of the principles of natural justice. The reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same, the order becomes lifeless. Reasons substitute subjectivity with objectivity. The absence of reasons renders an order indefensible/unsustainable particularly when the order is subject to further challenge before a higher forum. Recording of reasons is principle of natural justice and every judicial order must be supported by reasons recorded in writing. It ensures transparency and fairness in decision making. The person who is adversely affected must know why his application has been rejected. (Vide: State of Orissa v. Dhaniram Luhar, AIR 2004 SC 1794; State of Uttaranchal & Anr. v. Sunil Kumar Singh Negi, AIR 2008 SC 2026; The Secretary & Curator, Victoria Memorial Hall v. Howrah Ganatantrik Nagrik Samity & Ors., AIR 2010 SC 1285; and Sant Lal Gupta & Ors. v. Modern Cooperative Group Housing Society Limited & Ors., (2010) 13 SCC 336): (2010) 4 SCC (Civ)904).. " [Emphasis supplied]

[See "Eastern Equipment & Sales Limited vs. Ing. Yash Kumar Khanna", (2008) 12 Supreme Court Cases 739 and Rajender Singh and others v. Mani Ram, Latest HLJ 2014 (HP) Suppl. 127)]

7. In the instant case, as has been observed above, learned lower appellate Court has failed to discharge the obligation placed on it and judgment under appeal is absolutely cryptic and no reasons, whatsoever, have been assigned by the first appellate Court while rejecting/accepting the application having been moved by the appellant-plaintiff under Order 41 Rule 27.

8. In view of the above position, this Court sees substantial force in the argument made by Mr. Poswal, learned counsel appearing for the petitioner that great prejudice has been caused to the appellant plaintiff in as much as there is no decision on the application under Order 41 Rule 27 preferred by him. It has been repeatedly held by this court that first appeal is a valuable right and the parties have right to be heard on both the questions of law and facts and the judgment in first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of such findings.

9. Consequently, in view of the above, impugned judgment passed by the learned appellate Court is set-aside and the learned District Judge, Bilaspur, is directed to decide the appeal afresh in accordance with law. Considering the facts and circumstances of the case, Learned first appellate court, in view of the observations made herein above, is expected to dispose of the present appeal at an early date preferably within a period of six months, from the receipt of the copy of the judgment passed by this Court.

10. The parties through their counsel are directed to appear before the learned lower appellate Court on **14.3.2017**. The records be sent back immediately so as to reach before the date fixed.

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

State of H.P. .....Appellant.
Versus
Akhilesh Kumar .....Respondent.

Cr. Appeal No. 140 of 2009
Decided on : 1/3/2017

Indian Penal Code, 1860- Section 279 and 337- Accused was riding a motorcycle with high speed and hit the cycle due to which cyclist sustained injuries- the accused was tried and convicted by the Trial Court- an appeal was filed, which was allowed and the accused was acquitted – held, that independent witnesses had not supported the prosecution version- sole testimony of the victim does not inspire confidence – the Appellate Court had rightly appreciated the evidence to hold that prosecution version was not proved- appeal dismissed.(Para-9 to 11)

For the Appellant: Mr. M.L.Chauhan, Addl. Advocate General with Mr. Neeraj Kumar Sharma, Dy. A.G.
For the Respondent: Mr. Gaurav Gautam, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral)

The instant appeal stands directed by the State of Himachal Pradesh against the impugned judgment recorded by the learned Appellate Court whereby it reversed the findings of conviction recorded upon the accused by the learned trial Court.

2. The brief facts of the case are that PW-6 Balwant Singh was returning from Burawala on his cycle and on 5.5.2002 at about 9.30 a.m. motor cycle bearing no. HP-12A-2050 driven by Akhilesh Kumar came in a high speed from opposite side and struck against the cycle as a result of which cycle fell down and he sustained injuries. FIR was lodged by PW-1 Amar Chand upon which a case under Sections 279 and 337 IPC came to be registered at Police Station Barotiwala. Injured was removed to PSI dispensary Barotiwala. Motor cycle was got examined from PW-3 Pritam Singh and he found it in order. After recording the statements of the witnesses and on completion of the investigation, the accused was challaned under Sections 279 and 337 of the Indian Penal Code. 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. Notice of accusation stood put to the accused by the learned trial Court for his committing offences punishable under Sections 279 and 337 of the Indian Penal Code to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 7 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 any evidence in defence.

5. On an appraisal of the evidence on record, the learned trial Court returned findings of conviction against the accused whereas the learned Addl. Sessions Judge, Fast Track Court returned findings of acquittal qua the accused.

6. The learned Additional Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned Appellate Court standing not based on a proper appreciation of evidence on record, rather theirs standing sequelled by gross mis-appreciation by it of the relevant 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 respondent has with considerable force and vigour contended qua the findings of acquittal recorded by the Appellate Court standing based on a mature and balanced appreciation of evidence on record by the learned Appellate Court 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 ill-fated incident rest upon the testimonies of two purported independent witnesses to the incident, who testified before the learned trial Court as PW-1 and PW-2. However, both the purported independent witnesses to the ill-fated incident omitted to lend succor to the charge to which the accused respondent stood subjected to. With the purported independent witnesses to the ill-fated occurrence not lending succor to the charge to which the accused respondent stood subjected to thereupon the anvil of the prosecution case gets unhinged.

10. However, the solitary testimony of an injured victim does not ipso facto lose its vigour unless an incisive scanning of his testimony unveils qua his contradicting the apposite reflections occurring in the site plan comprised in Ext.PW-7/B. PW-6 sustained on his person simple injuries embodied in Ext.PW-5/A, in pursuance to the cycle whereupon he was atop standing struck by the motorcycle whereupon the accused was astride at the relevant time. PW-6 identified the accused respondent in Court thereupon the omission if any in the testification of PW-6 to recall the number of the motorcycle whereupon the accused respondent was astride, cannot, give any capitalization to the defence to thereupon canvass qua the prosecution failing to prove the factum of the motorcycle whereupon the accused respondent was astride striking the cycle whereupon the victim was atop hence sequelling befalment of simple injuries on his person. The trite factum warranting adjudication by adduction of clinching evidence is qua dehors the speed at which the accused respondent was plying his motorcycle qua thereupon the apposite collision, which occurred at the relevant time inter se the respective vehicles, standing sequelled by the relevant motorcycle or the cycle respectively occupying the inappropriate side of the road. PW-6 in his testimony has made an empathetic proclamation qua his plying his cycle on the appropriate side of the road also he pronounces therein qua the accused/respondent driving his motorcycle on the inappropriate side of the road. However, the truth of the aforesaid version stands contradicted by site plan comprised in Ext.PW-7/B, a perusal whereof discloses qua the cycle as stood plied at the relevant time by the injured its arriving from a Galli at the site of occurrence also it marks the factum of the cycle plied by the victim injured moving towards Baddi whereupon obviously a conclusion emanates qua the accused respondent plying his motorcycle on the appropriate side of the road also thereupon it is apt to conclude qua dehors the speed at

which the accused respondent was driving the relevant motorcycle, his not being negligent in driving it rather contrarily the victim/injured conspicuously given his plying the cycle on the inappropriate side of the road, his hence not adhering to the standards of due care and caution also concomitantly his being negligent in navigating it whereupon the inculpation of the accused respondent is both specious besides not amenable to imputation of credence.

11. For the reasons which have been recorded hereinabove, this Court holds that the learned Addl. Sessions Judge 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 Addl. Sessions Judge 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 DHARAM CHAND CHAUDHARY, J. AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

State of H.P. .....Appellant
Versus
Dalip Kumar .....Respondent

Cr. Appeal No. 175 of 2013
Reserved on : 08.12.2016
Decided on: 1.3.2017

Indian Penal Code, 1860- Section 302- Accused, deceased and A were engaged as labourers by PW-1 and PW-8 for laying marble in their house – the deceased under the influence of liquor abused the accused- the accused inflicted a blow of pick-axe on the person of the deceased due to which he died- the accused was tried and acquitted by the Trial Court- held in appeal that A was not examined by the prosecution and no reasonable cause was assigned for the same – extra judicial confession and recovery were not established – the Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed. (Para-10 to 19)

Case referred:
Jagriti Devi vs. State of Himachal Pradesh, AIR 2009 SC 2869

For the appellant: Mr. D.S. Nainta and Mr. Virender Verma, Addl. A.Gs
For the respondent: Mr. Bhuvnesh Sharma and Mr. Surender Mohan Sharma, Advocates.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge.

State of Himachal Pradesh is aggrieved by the judgment dated 27.11.2012 passed by learned Additional Sessions Judge, Fast Track Court, Kangra at Dharamshala in Sessions Trial No. 6-P/VII/2011, whereby the respondent Dalip Kumar(hereinafter referred as to the 'accused') has been acquitted of the charge under Section 302 of the Indian Penal Code framed against him with the allegations that on 26/27.10.2010 he caused death of Arvind Goswami by inflicting blow of pickaxe (Gainti) and thereby committed the offence punishable under Section 302 of the Indian Penal Code.

2. The legality and validity of the impugned judgment has been questioned on the grounds inter-alia that cogent and reliable evidence produced by the prosecution has erroneously been discarded without assigning any reasons. Therefore, the acquittal of the accused is stated to be in utter disregard of material evidence available on record. The testimony of PW-1 Ankush Kumar and his father Chandersheel that accused confessed his guilt before them on 26.10.2010 and thereafter fled away from the spot is not appreciated at all. The extra judicial confession so made by the accused and duly proved on record in accordance with law has also not been appreciated at all. The findings that PW-1 was neither Panch or Pradhan of Gram Panchayat nor had any acquaintance with the accused, there was no occasion to the latter to have confessed his guilt before him nor he had expected from the said witness to save him from his prosecution, are erroneously recorded. The trial Court has allegedly failed to appreciate that irrespective of the accused an outsider was working as labourer in the house under construction of PW-1 and his father PW-8 at village Gandhar, District Kangra, hence was known to them is also ignored. Both PW-1 and PW-8 rather were the best persons before whom the accused could have confessed his guilt with the expectation that they may save him from his prosecution. The testimony of PW-9 Jugal Kishore and PW-10 Purshotam Chand qua the disclosure statement Ext. PW-9/A and the recovery of pickaxe Ext. P-1, pursuant to the same has also been misconstrued. Learned trial Court has also failed to appreciate the evidence as has come on record by way of their testimony that the pickaxe, weapon of offence was recovered at the instance of accused. The medical evidence as has come on record by way of testimony of PW-2 Dr. Vinay Mahajan that the blow as was on the head of deceased could have been caused with pickaxe, Ext. P-1 has also been ignored erroneously. The findings that the pickaxe when produced before the doctor PW-2 to obtain his opinion was not stained with blood, are contradictory to the evidence available on record as according to the appellate-State the Court below has failed to appreciate that non-mentioning of such facts by the doctor in the post-mortem report is not fatal to the prosecution case. The factum of PW-1 and PW-8 have corroborated the version of each other and they had no enmity to implicate the accused falsely in this case is also not taken into consideration.

3. The occurrence allegedly has taken place on 26.10.2010 during the night time at village Gandhar in the under construction house of PW-8 Chandersheel and took away the life of Arvind Goswami, the deceased, resident of village Lakhanpur, Post Office Navinpur, Police Station and District Jamuhi (Bihar). The allegations against the accused again a fellow villager and co-labourer of deceased are that, it is he who killed him by way of inflicting the blow of pickaxe, Ext. P-1 when the deceased was under the influence of liquor and allegedly quarreled with the accused. As per further case of the prosecution, the accused along with deceased and one Avdesh was engaged as labourers by PW-1 and PW-8 to execute work of laying marvel in their house under construction at village Gandhar. On the fateful day, Avdesh came to the old house of PW-1 and PW-8 to have curd from them at 9.00 p.m. Behind him accused also came there. They both watched programme on television for a while. After sometime, the complainant went to the under construction house in the village along with accused Dalip Kumar and his fellow labourer Avdesh. On the way, when they were near Radha Krishan temple, accused told PW-1 that deceased under the influence of liquor started hurling abuses to him and also quarreled and as he did not stop hurling abuses and quarreling with him despite request made, he killed him. On this, PW-1 returned to the old house along with accused and Avdesh. There he apprised his father PW-8 Chandersheel about the disclosure so made by accused Dalip Kumar. On this, he (PW-1) his father Chandersheel and his cousin Sanjeev Kumar accompanied by the accused and Avdesh went to the house under construction. PW-8 asked the accused to open the door. The accused told him that door is open. They all entered inside the house to see deceased Arvind Goswami. The accused who was standing outside, however, fled away towards nearby fields. In the room, they noticed the dead body of Arvind Goswami covered with white coloured printed Chaddar and blood oozing out of the wound on his head. On seeing Arvind Goswami, he was found to have already expired. They tried to search the accused, however, he was not available. On this PW-8 had informed Purshotam Chand (PW-10), Pradhan Gram Panchayat and also PW-9 Jugal Kishore, Ward Panch. They also arrived on the spot. PW-10 informed the police of Police Station, Lambagaon, District Kangra over telephone. In the police station, the information so

received was entered in the daily diary vide rapat Ext. PW-14/A at 23.45 hours (11.45 p.m mid night). Consequently, the I.O. SI/SHO Tilak Chand accompanied by SI Gambhir Chand and other police officials rushed to the spot in official vehicle. After recording the statement Ext. PW-1/A, the same was sent to police station for registration of case through HHC Vinod Kumar. On the basis thereof FIR Ext. PW-11/A was registered.

4. PW-14 received the case file and called PW-13 Sinodh Kumar, a photographer and got the dead body photraphed vide photographs Ext. PW-13/A to Ext. PW-13/D. On spot inspection, map Ext. PW-14/C was prepared on the next day, blood stained mattress (talai) Ext. P-3 was taken in possession vide memo Ext. PW-9/A in the presence of PW-9 and PW-10. The sample of blood lying scattered on the floor near the dead body was lifted with cotton cloth, Ext. P-5 and put in a plastic vial, Ext. P-4. The same was taken in possession vide memo Ext. PW-9/B in presence of PW-9 and PW-10. The inquest papers Ext. PW-2/B were prepared. The application Ext. PW-2/A was made to the Medical Officer, CHC, Palampur and the dead body was sent through HC Chaman Singh for conducting the post-mortem. The accused was apprehended on 27.10.2010 at Sujanpur. He was brought to the police station and during his interrogation conducted on 28.10.2010, he made disclosure statement Ext. PW-9/E to the effect that he had concealed the pickaxe under the bushes near the house under construction of PW-8 Chandersheel and that it is he who could get the same recovered. He led the police party to the place near the house under construction and took out the pickaxe from the bushes which was photographed vide photograph Ext. PW-13/E and taken in possession vide memo Ext. PW-9/E duly sealed. The map Ext. PW-14/C of the place of recovery was also prepared separately. The statements of witnesses were recorded. In order to seek the opinion of the Medical Officer that injury caused with Ext. P-1 could have possibly caused the death of deceased, the application Ext. PW-2/D was moved. In the opinion of doctor, the fatal injury resulting the death of deceased could have been implicated therewith. The post mortem report Ext. PW-2/C was collected from the hospital. On the application, Ext. PW7/A moved to the Assistant Engineer, H.P.P.W.D, site plan Ext. PW-7/B was got prepared and added in the police file. On receipt of the report of chemical examiner Ext. P-A and Ext. P-B and on completion of the investigation, challan was filed against the accused in the Court.

5. Learned trial Judge after recording its satisfaction qua the existence of prima-facie case against the accused had framed the charge under Section 302 of the Indian Penal Code against him. He, however, pleaded not guilty to the charge and claimed trial. Therefore, the prosecution in order to sustain the charge against him has examined 14 witnesses in all. The material prosecution witnesses are, however, PW-1 Ankush Kumar, PW-8 Chandersheel, PW-9 Jugal Kishore and PW-10 Purshotam Chand. The remaining prosecution witnesses are formal as PW-2 Dr. Vinay Mahajan has been associated to prove the post-mortem report Ext. PW-2/C and his opinion qua cause of death of deceased as well as the blow inflicted with pickaxe Ext. P-1 could have caused his death or not. PW-3 HHG Ravinder Kumar had obtained the opinion of Medical Officer as to whether the death of deceased could have been caused with the blow of pickaxe Ext. P-1. PW-4 Prem Chand had deposited the sealed parcels six in number containing the case property of this case in FSL., Junga. PW-5 HC Khem Chand was officiating as MHC in the police station at the relevant time to whom the custody of case property of this case was entrusted by the I.O. PW-14. He entered the same in the malkhana and retained in his safe custody. PW-6 Kuldeep Chand was posted as regular MHC and as he was on leave and in his absence PW-5 was officiating as MHC, on his arrival to the police station after availing leave, the custody of case property of this case was entrusted to him by PW-5. Later on, it was sent by him to FSL vide RC No. 107/10, Ext. PW-6/A through HHC Prem Chand. PW-7 is the Surveyor who was working as such in H.P.P.W.D Sub-division, Thural. On the application Ext. PW-7/A, moved by the police, he had prepared the site plan Ext. PW-7/B. PW-11 ASI Suresh Kumar had registered the FIR Ext. PW-11/A on the receipt of rukka Ext. PW-1/A. PW-12 Gambhir Chand had conducted the investigation of this case partly as the statement of Arun Kumar, PW-7 was recorded by him. PW-13 is the photographer, who had taken the photographs Ext. PW-13/A to

Ext. PW-13/D with his digital camera. The I.O. of this case is PW-14 Inspector Tilak Raj, who had conducted the investigation of this case.

6. Learned trial Court on appreciation of the evidence available on record and hearing learned Public Prosecutor as well as learned defence counsel has concluded that the prosecution has failed to prove the disclosure statement Ext. PW-9/E. The testimony of PW-1 and PW-8 is also stated to be hearsay as the occurrence had not taken place in their presence. In the opinion of learned trial Judge, their testimony should have not been taken to fasten any criminal liability upon the accused. It was further observed that only important witness could have been Avdesh, who was living in the same room and working as labourer with the accused, however, the prosecution to the reasons best known to it has not opted for being associated him nor he has been examined. The prosecution in the opinion of learned trial Judge had failed to prove its case against the accused beyond all reasonable doubt. He, as such, was acquitted of the charge.

7. Mr. D.S. Nainta, learned Additional Advocate General has argued with all vehemence that the testimony of PW-1 and PW-8 supported by the disclosure statement Ext. PW-9/E and the recovery of pickaxe Ext. P-1, consequent upon the same is suggestive of that the prosecution had proved its case against the accused beyond all reasonable doubt. However, cogent and reliable evidence produced by the prosecution has not been considered and erroneously brushed aside.

8. On the other hand, Mr. Bhuvnesh Sharma, Advocate assisted by Mr. Surender Mohan Sharma, Advocate representing the accused has urged that direct evidence has not been produced by the investigating agency to the reasons best known to it. The testimony of PW-1 and PW-8 being highly undependable and unreliable, has rightly been ignored by learned trial Judge. Also that, the recovery of pickaxe Ext. P-1, consequent upon the disclosure statement Ext. PW-9/E is not at all proved, as according to learned counsel the witnesses PW-9 and PW-10 have not supported the prosecution case in this regard at all nor proved that the disclosure statement allegedly made by the accused while in the custody was recorded in the police station. Therefore, the accused, according to learned counsel, has rightly been acquitted of the charge by learned trial Judge.

9. On reappraisal of the facts and circumstances of this case and also the evidence available on record as well as taking into consideration the rival submissions, the only question arises for our consideration is that though the prosecution had proved its case against the accused beyond all reasonable doubt, however, it is the learned trial Court, which has failed to appreciate the same and erroneously recorded the findings of acquittal. However, before coming to answer the poser so arises for our consideration, it is desirable to take note as to what constitutes an offence punishable under Section 302 of the Indian Penal Code.

10. As per Section 300 IPC, culpable homicide is murder firstly if the offender is found to have acted with an intention to cause death or secondly with an intention of causing such bodily injury knowing fully well that the same is likely to cause death of someone or thirdly intention causing bodily injury to any person and such injury intended to be inflicted is sufficient in the ordinary course of nature to cause death or if it is known to such person that the act done is imminently dangerous that the same in all probability shall cause death or such bodily injury as is likely to cause death.

11. Culpable homicide has been defined under Section 299 IPC. Whoever causes death by way of an act with the intention of causing death or with the intention of causing such bodily injury as is likely to cause death or with the knowledge that he is likely by such act to cause death can be said to have committed the offence of culpable homicide. Culpable homicide is murder if the act by which death is caused is done with the intention of causing death. Expression “intent” and “knowledge” postulate the existence of a positive mental attitude which is of different degree. We are drawing support in this regard from the judgment of Apex Court in ***Jagriti Devi vs. State of Himachal Pradesh, AIR 2009 SC 2869.***

12. The ingredients of culpable homicide amounting to murder therefore are; (i) causing death intentionally and (ii) causing bodily injury which is likely to cause death. Whether the present is a case where the evidence available on record is suggestive of that it is the accused who had inflicted the blow of pickaxe, Ext. P-1 when the deceased was under the influence of liquor and allegedly quarreled with him, intentionally to cause his death and such an act on his part amounts to culpable homicide amounting to murder or not, needs re-appraisal of the evidence available on record. However, before that it is deemed appropriate to point out that if the accused had motive to cause the death of the deceased, the eye witness count of the occurrence may not be required, however, where the motive is missing, the prosecution is required to prove its case with the help of testimony of eye witnesses.

13. Now if coming to the question hereinabove, which has engaged our attention in this case. The answer thereto in all fairness and in the ends of justice would be in negative for the reason that the present is a case where cogent and reliable evidence to show that it is the accused alone who inflicted fatal blow on the head of deceased with pickaxe, Ext. P-1 at such a stage when latter was quarreling with the former under the influence of liquor and thereby caused his death, could have come on record by way of the testimony of Avdesh, a fellow labourer of the accused and deceased who was residing with them in the same room. However, such evidence which could have thrown some light qua the manner in which the occurrence and death of Arvind Goswami had taken place has been withheld by the prosecution to the reasons best known to it.

14. The star prosecution witnesses PW-1 and PW-8 are son and father respectively, in relation. Their house was under construction at village Gandhar. The accused, deceased and Avdesh were engaged by them to execute the work of laying marvel in the said house. Admittedly, they had not seen the deceased and accused quarreling with each other. They had also not seen the accused inflicting the blow on the head of deceased with pickaxe, Ext. P-1. Their testimony that the accused had caused fatal blow with pickaxe on the head of deceased even if believed to be true is hearsay because it is the accused himself who allegedly revealed so to PW-1 at such a stage when he along with Avdesh was going to the under construction house. On hearing the disclosure so made by the accused, PW-1 allegedly returned to the house in the same village along with him and Avdesh and there he apprised his father PW-8 about the disclosure so made by the accused. The only direct evidence, qua the manner in which the incident sparked off and the occurrence took place could have come on record by way of associating Avdesh during the course of investigation and also examining him as a witness during the course of trial. Since he has not been examined, therefore, the plea of the accused that he was in the house of PW-1 and PW-8, they had implicated him falsely. On being asked by the I.O., PW-14 to implicate someone in this case, failing which, it is they who will be booked for the murder of deceased. Arvind Goswami whose dead body was lying in their house under construction, appears to be nearer to the factual position. The testimony of PW-1 and PW-8 that it is the accused who had murdered the deceased, therefore, being hearsay has rightly been discarded by learned trial Judge. The remaining part of the testimony of PW-8 pertains to the proceedings conducted by the I.O. including inspection of the dead body, getting the same photographed, preparation of inquest papers and sending the dead body for post-mortem etc. etc. is formal in nature, hence need not to be elaborated.

15. It is well settled that the extra judicial confession by an accused is made only to a person close to him and from whom he expect that he/she will save him from his prosecution. The law laid down by the apex Court by way of various judicial pronouncements qua this aspect of the matter has been discussed in detail by learned trial Judge. We are drawing support in this regard from the judgment of this Court also in Cr. Appeal No. 43 of 2006 and its connected matter titled Sudesh Sharma alias Shuppa Vs. State of Himachal Pradesh decided on 02.06.2014. The acquaintance of PW-1 with the accused was only to the extent that the latter was working as labourer in their house under construction at village Gandhar. The accused and deceased both were resident of Bihar. PW-1 as such, was not a person either closely related to the accused or in his friend circle. The said witness was also neither Panch or Pradhan so as to infer that he could

have influenced the local police or a person of the high status who could have protected the accused from his harassment by the police in this case. Therefore, there is no question of making the so called extra judicial confession by the accused before PW-1. Testimony of PW-9 and PW-10 qua this aspect of the matter is also of no help to the prosecution case for the reason that they were apprised by PW-8 qua the death of deceased caused by the accused by inflicting the blow with pickaxe, Ext. P-1.

16. The recovery of pickaxe, Ext. P-1 consequent upon the alleged disclosure statement is highly doubtful for the reason that as per the testimony of PW-14 the Investigating Officer, disclosure statement Ext. PW-9/E was made by the accused in the police station while in custody in the presence of PW-9 Jugal Kishore, the Ward Panch and PW-10 Purshotam Chand, Pradhan Gram Panchayat. True it is that both Jugal Kishore and Purshotam Chand have supported the prosecution case qua the statement so made by the accused, however, accused to them on the spot i.e. at village Gandhar where the house of PW-1 and PW-8 was under construction and not in the police station. Being so, there emerge two possible views i.e. as per testimony of the I.O. PW-14, such statement was recorded in the police station in the presence of PW-9 and PW-10, whereas, as per the testimony of these witnesses, the same was recorded on the spot. No doubt, PW-10 was recalled and re-examined and in his statement recorded on 27.06.2012, he had clarified that the accused was interrogated in the police station and his statement Ext. PW-9/E was recorded there in his presence and also in the presence of Ward Panch (PW-9). Also that portion 'A' to A' and 'B' to 'B' of his statement recorded on 14.10.2011 is due to the reason that he had forgotten the facts. When cross-examined, it is stated that he reached in the police station at 5.00 a.m. on that day. It is Chandersheel PW-9 who had called him there. The clarification so come on record is also of any help to the prosecution case for the reason that the testimony of PW-9 Jugal Kishore that the so called disclosure statement was recorded at the spot remained unshattered. Not only this but Chandersheel while in the witness box as PW-8 has not said anything about the recording of statement Ext. PW-9/E. Had in term of the clarification given by PW-10 the said witness was called to the police station by PW-8, Chandesheel, this witness would have also present there. Therefore, he should have also been examined qua this aspect of the matter. The failure to do so amply demonstrates that nothing of the sort did take place on the spot nor the accused made any disclosure statement to the police while in custody and as such the statement seems to have been engineered and fabricated to implicate the accused falsely in this case. The possibility that he was subjected to 3rd degree method while in custody during the night intervening 27/28.10.2010 and made to sign this document, cannot be ruled-out.

17. When recording of disclosure statement in the manner as claimed by the prosecution is not at all proved, there is no question of recovery of pickaxe, Ext. P-1 on the basis thereof. Otherwise also, the so called motive that accused under the influence of liquor started hurling abuses to the accused and it is for this reason, the latter assaulted him with pickaxe is not at all established because no-one has been associated to substantiate this part of the prosecution case. Had it been so, atleast Avdesh, their fellow labourer would have witnessed the quarrel, if any, taken place between the two. Had the deceased been killed by the accused, it is not understandable as to why he would have not fled away after the commission of crime. There was no occasion for him to have gone to the house of PW-1 and PW-8. He would have not accompanied PW-1 and PW-8 to the house under construction and the story that when they entered inside the under construction house, he stayed outside and fled away also seems to be engineered and fabricated and may be at the behest of PW-1 and PW-8 who were owners of the house under construction to save themselves from any possible imputation at a later stage made to them in connection with the death of Arvind Goswami. Therefore, for want of any direct evidence and the evidence as has come on record by way of testimony of PW-1 and PW-8 and for that matter of PW-9 and PW-10 which is neither cogent nor reliable, no criminal liability could have been fastened upon the accused. Learned trial Judge has, therefore, not committed any illegality or irregularity while acquitting the accused of the charge framed against him.

18. The remaining evidence as already pointed out is formal in nature and would have of some relevance had the prosecution been otherwise able to prove that deceased Arvind Goswami has been murdered by the accused. The same, therefore, need not to be elaborated any further.

19. In view of re-appraisal of the oral as well as documentary evidence on record, in our considered opinion, the trial Court has not committed any illegality or irregularity while passing the judgment under challenge in this appeal. The same, as such, is affirmed and the appeal is dismissed. Personal bonds furnished by the accused persons shall stand cancelled and sureties discharged.

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

State of H.P. .....Appellant.
Versus
Suresh Kumar and others .....Respondents.

Cr. Appeal No. 469 of 2007
Decided on : 01/03/2017

Indian Penal Code, 1860- Section 325 read with Section 34- Accused assaulted the complainant by giving him kicks and fist blows- he fell down and lost his two teeth- one A tried to rescue the complainant but he was also assaulted by the accused- the accused was tried and acquitted by the Trial Court- held in appeal that there are contradictions in the ocular and medical versions- no independent witness was examined- delay in lodging the report was not explained- Trial Court had properly appreciated the evidence- appeal dismissed.(Para-9 to 11)

For the Appellant: Mr. M.L.Chauhan, Addl. Advocate General.
For the Respondents: Mr. Vinod Thakur, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral)

The instant appeal stands directed by the State of Himachal Pradesh against the impugned judgment rendered on 30.4.2007 by the learned Judicial Magistrate 1st Class, Jogindernagar, District Mandi, Himachal Pradesh, whereby he acquitted the respondents (for short 'accused') for the offences charged.

2. The brief facts of the case are that on dated 22.11.2000 at about 3.30 p.m. when the complainant was coming at place Chauntra, the accused persons met him and assaulted him by giving him kick and the fist blows, as a result of which, he fell down and lost his two teeth. The further case of the prosecution is to the effect that the complainant was rescued by one Anil Kumar from the clutches of the accused, who too was assaulted by the accused persons. On the next day, the complainant approached the Police Post Ghatta and narrated the matter to the police upon which a rapat was entered. The complainant was got medically examined and on confirmation of the fact that the grievous injuries were suffered by the complainant, the matter was referred to P.S. Joginder Nagar where, an FIR under Section 325 read with Section 34 IPC was lodged against the accused persons. 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 theirs committing offences punishable under Sections 325 read with Section 34 of the Indian Penal Code to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 11 witnesses. On closure of prosecution evidence, the 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 did not choose to lead any evidence in defence.

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 Additional Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned trial Court standing not based on a proper appreciation of evidence on record, rather theirs standing sequelled by gross mis-appreciation by it of the relevant 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 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. With Ext.PW-5/B prepared by PW-5 marking underscorings therein qua injury No.2 enunciated therein being grievous besides with both the victims/injured in the ill-fated occurrence deposing with want of any intra se contradictions in their respective examinations in chief vis.a.vis their respective cross-examinations also theirs deposing with intra se harmony, hence constrain the learned Additional Advocate General to make a submission qua the prosecution succeeding in proving its case whereupon he contends qua the findings of acquittal recorded by the learned Judicial Magistrate 1st Class, Jogindernagar, warranting reversal. However, for the reasons to be ascribed hereinafter, the submission addressed herebefore by the learned Additional Advocate General suffers emasculation (a) PW-5 in his deposition contradicting the victim/complainant qua in sequel to the victim complainant standing belaboured on his face with fist blows delivered thereon by the accused thereupon one tooth of his upper jaw standing both dislodged besides it falling onto the ground, contradiction whereof emanates from PW-5 voicing qua contrarily the relevant tooth in the upper jaw of the victim rather remaining intact thereat though it standing cracked.

10. The contradiction aforesaid as stands brought to the fore by PW-5 comprised in his disclosing in his testimony qua at the time whereat he conducted the medical examination of the relevant portion of the person of the victim/complainant, his analyzing qua the right upper tooth standing broken besides the second incisor holding cracks, whereupon apparently hence when he omits to pronounce with intra se harmony with the complainant/injured qua its standing both disjoined besides its falling onto the ground fillips an inference qua the graphic contradiction aforesaid negating the version propounded by the complainant qua in sequel to the ill-fated incident, his right upper tooth also his second incisor getting loosed besides falling onto the ground, an ensuable apt sequel whereof is qua the genesis of the prosecution case suffering a jolt also recovery, if any, of the purported fallen right upper tooth and of the second incisor under memo Ext.PW-1/C, both losing vigour. An inference qua the aforesaid factum standing contrived under Ext.PW-1/C gets enhanced by the factum of the complainant/injured not collecting the purportedly disjoined right upper incisor immediately on its purportedly falling onto the ground nor his handing it in quick promptitude thereto, to the Investigating Officer concerned rather his delaying its collection from the site of occurrence upto two days since the incident. (b) The incident stood witnessed by Anil Kumar s/o Kushal besides other independent witnesses, none of whom stood examined by the prosecution whereas the version qua the incident testified by them would have purveyed an impartisan/uninterested version thereto also would have dispelled the aura of doubt arising from the aforesaid factum, engulfing the prosecution version.

Consequently, the omission of the prosecution to examine the relevant independent witnesses to the illfated occurrence garners an inference qua the prosecution smothering the truth qua the genesis of the prosecution case. (c) Apparently a delay in the lodging of the F.I.R qua the incident has visibly occurred. The complainant in purported explication of the delay has propounded a false reason qua his not promptly visiting the Police Station concerned for lodging the apposite information thereat despite it standing evidently located in immediate vicinity to the relevant site of incident, falsity whereof stands embodied in the factum qua his feeling unwell whereas in his cross-examination he narrates qua on the day of the incident his visiting the police station as well as the hospital whereupon his omission to report the incident to the police on the day when he visited the police Station concerned when stands construed in conjunction with the factum of his ascribing a false reason for the delay, galvanizes a deduction qua the story propounded by the complainant holding no scintilla of truth.

11. For the reasons which stand 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 material on record by the learned trial Court 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 whereupon its judgement warrants no interference.

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 AJAY MOHAN GOEL, VACATION J.

Anil Sharma .....Petitioner.

Vs.

Alka Sharma and others .....Respondents.

Cr. Rev. No.: 16 of 2016
Reserved on: 01.03.2017
Date of Decision: 02.03.2017

Code of Criminal Procedure, 1973- Section 125- The marriage between parties was solemnized as per Hindu Rites and Customs – two children were born – husband and his family members started harassing the wife for dowry – she started residing in the house of her parents- wife had no independent source of income while the husband was earning Rs. 40,000/- per month – an application for interim maintenance was filed, which was allowed and maintenance of Rs. 1,000/- per month was awarded in favour of the wife and children- aggrieved from the order, the present revision was filed- held, that the merits of the claim are not to be seen while deciding the application for ad-interim maintenance – wife and the children cannot be left without means during the pendency of the petition – the revisional jurisdiction can be exercised to correct miscarriage of justice, irregularity of the procedure, neglect of proper procedure or apparent harshness of the treatment- no such fact has been proved – revision petition dismissed.

(Para-10 to 16)

Cases referred:

Savitri W/o Govind Singh Rawat Vs. Govind Singh Rawat (1985) 4 Supreme Court Cases 337
Dwarika Prasad Satpathy Vs. Bidyut Prava Dixit, (1999) 7 SCC 675
Badshah Vs. Urmila Badshah Godse and another (2014) 1 Supreme Court Cases 188

For the petitioner: Mr. Mohan Singh, Advocate.
For the respondents: Mr. Karan Singh Kanwar, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge:

By way of this revision petition, the petitioner has challenged the order passed by the Court of learned Judicial Magistrate, 1st Class, Nahan, District Sirmaur in petition No. 86/4 of 2014, dated 13.10.2015, vide which the learned Court below has partly allowed the ad-interim maintenance application filed by the present respondents under Section 125 of the Code of Criminal Procedure for grant of maintenance in their favour and has directed the present petitioner to pay an amount of Rs. 1,000/- each to the present respondents per month from the date of order till the disposal of the petition filed under Section 125 of the Code of Criminal Procedure.

2. Brief facts necessary for the adjudication of the case are that the present respondents/applicants (hereinafter referred to as 'the applicants') filed a petition under Section 125 of the Code of Criminal Procedure in the Court of learned Chief Judicial Magistrate, Nahan, District Sirmaur, in which it was averred that applicant No. 1 Alka Sharma was the legally wedded wife of the present petitioner/respondent (hereinafter referred to as 'the respondent'). Marriage between applicant No. 1 and the respondent took place on 14.02.2000 as per Hindu rites and ceremonies and two children were born out of the said wedlock and the respondent and his family members kept applicant No. 1 properly for some time, but thereafter they started torturing her both physically and mentally on the demand of dowry. Further, as per the averments made in the petition, despite efforts made by the family of applicant No. 1, respondent and his family members kept on harassing applicant No. 1 and respondent also neglected and refused to maintain the applicants. It was further averred in the petition that applicant No. 1 was having no independent source of income and she was residing in the house of her parents at the mercy of her brother and respondent was having transport business and was owner of number of vehicles and was also having agricultural land as well as rental income from the shops let out by him was earning more than Rs. 40,000/- per month. It was further averred in the petition that respondent be directed to pay to the applicants an amount of Rs. 15,000/- per month for the maintenance of applicant No. 1, his wife and an amount of Rs. 5,000/- each for the maintenance of his two children, i.e. applicants No. 2 and 3 as well as litigation expenses.

3. The said petition was opposed by the respondent *inter alia* on the ground that applicant No. 1 is not legally wedded wife of the respondent and there has never been any cohabitation between the parties at any time. It was further mentioned in the reply filed by the respondent that his family as well as the family of applicant No. 1 were known to each other and that on account of the said intimacy between the families, applicant No. 1 pressurized the respondent to marry her, but he as well as his family members refused to do so. As per the respondent, the petition was filed by the applicants on false and frivolous grounds to harass and humiliate him. He also denied that he was owner of number of vehicles or was having agricultural land or any rental income or was earning an amount of Rs. 40,000/- per month.

4. In the said proceedings, applicants also filed an application for grant of ad-interim maintenance during the pendency of the petition.

5. By way of impugned order, learned Court below has directed the respondent to pay an amount of Rs. 1,000/- each to the applicants by partially allowing the ad-interim maintenance application filed by the applicants.

6. While passing the said order, it has been observed by the learned Court below that it is apparent from the assertions of the respondent that he has denied relationship of husband and wife between him and applicant No. 1 or that he was father of applicants No. 2 and 3, but though the factum of applicant No. 1 being the legally wedded wife of respondent had come into dispute, however, question of validity of marriage could not be decided in summary proceedings under Section 125 of the Code of Criminal Procedure. Learned Court below has further observed that denial of marriage by the respondent cannot be a ground at this stage to

allow the applicants to die of starvation, destitution and vagrancy, simply on the ground that respondent has taken the plea that he is not the husband of applicant No. 1. Learned Court below has also observed that at the stage of passing interim orders, Court has to look into the basic purpose as to why Section 125 of the Code of Criminal Procedure was enacted and the reason was to make provision of interim maintenance for destitute wife as well as children so that they are not devoid of basic requirements of life, i.e. food and other basic necessities. On these bases, it was held by the learned Court below that the applicants had to be maintained till the Court prima facie comes to the conclusion about marriage between the respondent and applicant No. 1 and with regard to applicants No. 2 and 3 being born out of their wedlock. Learned Court below further held that the contention of the applicants that they were residing in the parental house of applicant No. 1 could not be disputed by the respondent and there was pertinence in the contention of applicant No. 1 that she alongnwith her children were subjected to maltreatment and that she was not having any source of income nor any property to maintain herself. Learned Court below further held that respondent has not disputed his ability to earn livelihood and that it was apparent that respondent was an able bodied person and was a man of means and on these bases, learned Court below partly allowed the application and has directed the respondent to pay an amount of Rs. 1,000/- each per month as maintenance in favour of the applicants by calculating the income of the respondent to be nominal income that was being earned by a labourer to the tune of Rs. 5,000/- to 6,000/- per month.

7. Feeling aggrieved by the said order, the petitioner/respondent has filed this revision petition.

8. The sole ground on which learned counsel for the petitioner has urged that the impugned order is not sustainable in law is that when the present petitioner/respondent had denied the factum of marriage having been solemnized between him and respondent/applicant No. 1 and the factum of respondents/applicants No. 2 and 3 being his children, learned trial Court could not have had passed order of grant of ad-interim maintenance in favour of the respondents/applicants.

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

10. Admittedly, the order under challenge is an order of ad- interim maintenance passed by the learned Court below and whether or not the applicants are entitled for maintenance, as has been prayed in the main petition filed under Section 125 of the Code of Criminal Procedure is yet to be adjudicated.

11. The Hon'ble Supreme Court in **Savitri W/o Govind Singh Rawat** Vs. **Govind Singh Rawat** (1985) 4 Supreme Court Cases 337 has held that jurisdiction of a Magistrate under Chapter IX of the Code of Criminal Procedure is not strictly a criminal jurisdiction and while passing an order under the said Chapter, asking a person to pay maintenance to his wife, child or parent, as the case may be, the Magistrate is not imposing any punishment on such person for a crime committed by him. It has been further held by the Hon'ble Supreme Court that it is the duty of the Court to interpret the provisions of Chapter IX of the Code of Criminal Procedure in such a way that the construction placed on them would not defeat the very object of the legislation. Hon'ble Supreme Court has further held that it is quite common that applications made under Section 125 of the Code also take several months for being disposed of finally and in order to enjoy the fruits of the proceedings under Section 125, the applicant should be alive till the date of the final order and that the applicant can do in a large number of cases only if an order for payment of interim maintenance is passed by the Court. It has been further held by the Hon'ble Supreme Court that every Court must be deemed to possess by necessary intendment all such powers as are necessary to make its orders effective. The Hon'ble Supreme Court has further held:

> *"Having regard to the nature of the jurisdiction exercised by a magistrate under Section 125 of the Code, we feel that the said provision should be interpreted*

as conferring power by necessary implication on the magistrate to pass an order directing a person against whom an application is made under it to pay a reasonable sum by way of interim maintenance subject to the other conditions referred to therein pending final disposal of the application."

12. The Hon'ble Supreme Court in **Dwarika Prasad Satpathy** Vs. **Bidyut Prava Dixit**, (1999) 7 SCC 675 has held that it is to be remembered that the order passed in an application under Section 125 Cr. P.C. does not finally determine the rights and obligations of the parties and the said Section is enacted with a view to provide summary remedy for providing maintenance to a wife, children and parents. The Hon'ble Supreme Court has further held that the validity of the marriage for the purpose of summary proceedings under Section 125 Cr. P.C. is to be determined on the basis of evidence brought on record by the parties and the standard of proof of marriage in such proceedings is not as strict as is required in a trial of offence under Section 494 IPC. The Hon'ble Supreme Court has further held that if the claimant in proceedings under Section 125 of the Code succeeds in showing that she and the respondent have lived together as husband and wife, the Court can presume that they are legally wedded spouses and in such a situation, the party who denies the marital status can rebut the presumption. Hon'ble Supreme Court has further held that from the evidence which is led, if the Magistrate is prima facie satisfied with regard to performance of marriage in proceedings under Section 125 of the Code of Criminal Procedure which are of a summary nature, strict proof of performance of essential rites is not required.

13. It has been held by the Hon'ble Supreme Court in **Badshah** Vs. **Urmila Badshah Godse and another** (2014) 1 Supreme Court Cases 188 that a liberal interpretation has to be given to the term 'wife' under Section 125 of the Code of Criminal Procedure and would include cases where a man and woman have been living as husband and wife for a reasonably long period of time, and strict proof of marriage should not be a precondition for claim of maintenance under Section 125 of the Code of Criminal Procedure.

14. Incidentally, a perusal of the reply filed by the present petitioner/respondent to petition filed under Section 125 of the Code of Criminal Procedure Code demonstrates that he has admitted the factum of the present respondent/applicant No. 1 being known to him, though he has denied relationship of husband and wife between himself and respondent/applicant No. 1. Therefore, it is not the case of the present petitioner/respondent that respondent/applicant No. 1 is a stranger. Besides this, prima facie no cogent explanation has come forth in the reply so filed by the petitioner as to why respondent/applicant No. 1 would be falsely claiming herself to be his wife and further claim respondents/applicants No. 2 and 3 to be his children. Further, taking into consideration the fact that the impugned order is only an ad-interim order, all these aspects of the matter are otherwise also required to be gone into by the learned Court below and it is always open to the petitioner to demonstrate before the learned Court below that present respondent No. 1 is not his wife or that present respondents No. 2 and 3 are not his children. However, till the main petition filed under Section 125 of the Code of Criminal Procedure is decided, neither present respondent No. 1 nor respondents No. 2 and 3 can be left in oblivion and in this background, this Court does not find any infirmity or illegality in the order passed by the learned Court below granting ad-interim maintenance of Rs. 1,000/- to each of the respondents/applicants during the pendency of the petition filed under Section 125 of the Code of Criminal Procedure. The amount of maintenance granted by the learned Court below can also not be said to be unreasonable and rather it is on the lower side.

15. Otherwise also, in view of the law laid down by the Hon'ble Supreme Court, there is no merit in the contention of the learned counsel for the petitioner that learned Court below was not having any power to pass an ad interim order directing the present petitioner/respondent to pay maintenance to the present respondents/applicants till the issue was adjudicated upon as to whether respondent/applicant No. 1 is wife of the present petitioner/respondent and respondents/applicants No. 2 and 3 are his children.

16. It is well settled law that the jurisdiction of High Court in revision is severely restricted and it cannot embark upon re-appreciation of evidence. The High Court in revision cannot in the absence of error on a point of law, re-appreciate evidence and reverse a finding. It has been further held by the Hon'ble Supreme Court that the object of the revisional jurisdiction was to confer upon superior criminal Courts a kind of paternal or supervisory jurisdiction in order to correct miscarriage of justice arising from misconception of law, irregularity of procedure, neglect of proper precaution or apparent harshness of treatment which has resulted in undeserved hardship to individuals. Learned counsel for the petitioner could not point out any of the above infirmities in the impugned order.

17. Therefore, in view of above discussion, I do not find any merit in the present revision petition. Thus, as the revision sans merit, the same is dismissed.

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

Prabhu Dayal Sharma .....Appellant.

Versus

Suraj Mani .....Respondent.

Cr. Appeal No. 212 of 2016
Decided on : 02/03/2017

Negotiable Instruments Act, 1881- Section 138- Accused approached the complainant for financial help for his personal and domestic needs- the accused borrowed a sum of Rs. 2 lacs from the complainant and issued a cheque of Rs. 2 lacs towards the re-payment of the amount- the check was dishonoured with the remarks insufficient amounts- the accused failed to repay the amount despite the receipt of valid notice of demand- the accused was tried and acquitted by the Trial Court on the ground that the bank account against which the cheque was drawn was not owned, managed or controlled in his individual capacity by the accused- the accused was managing the account in the capacity of the secretary and there was no privity of account - held in appeal that accused had not led any evidence to prove the books of account were maintained by him in his capacity as secretary of the society – the evidence led by the complainant proved the ingredients of offence punishable under Section 138 of N.I. Act- the accused was wrongly acquitted by the Trial Court- appeal allowed – judgment passed by the Trial Court set aside and accused convicted of the commission of offence punishable under Section 138 of N.I. Act.

(Para-8 & 9)

For the Appellant: Mr. J.L.Bhardwaj, Advocate.
For the Respondent: Mr. G.R.Palsra, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral)

The instant appeal stands directed against the impugned judgment rendered by the learned Judicial Magistrate 1st Class, Manali, District Kullu, Himachal Pradesh, whereby he dismissed the complaint instituted therebefore under Section 138 of the Negotiable Instruments Act by the complainant.

2. The brief facts of the case are that complainant and the accused were known to each other and in the month of October, 2008 the accused approached the complainant for financial help for his personal use and domestic needs and the accused had borrowed a sum of Rs.2,00,000/- from the complainant and in discharge of his liability the accused has issued and handed over a cheque amounting to Rs.2,00,000/- drawn on the Himachal Pradesh State Cooperative Bank Limited, branch Balichowki in favour of the complainant. As per the

complainant, on presentation, the said cheque was returned being dishonoured vide memo dated 02.01.2009 with remarks insufficient funds. As per the complainant, even after issuance and receipt of legal notice no payment was made by the accused. After recording of preliminary evidence Court of the Judicial Magistrate 1st Class, Manali, took cognizance against the accused and notice of accusation under Section 138 of the Negotiable Instruments Act was put to the accused to which he pleaded not guilty and claimed trial.

3. In order to prove its case, the complainant examined himself as CW-1. On closure of complainants' 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 chose to lead evidence in defence.

4. On an appraisal of the evidence on record, the learned trial Court returned findings of acquittal in favour of the accused.

5. The learned counsel for the complainant 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 by it of the relevant material on record. Hence, he contends qua the findings of acquittal standing reversed by this Court in the exercise of its appellate jurisdiction and theirs standing 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 by the learned trial Court and theirs not necessitating any 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. Negotiable instrument comprised in Ext. CW-1/A holding therein a sum of Rs.2,00,000/- stood issued by the accused/respondent qua the appellant complainant. On its presentation before the bank concerned, it, on account of lack of sufficient funds for liquidating the amount recited therein, stood hence refused to be honoured by the bank concerned whereupon a complaint stood instituted by the aggrieved complainant under Section 138 of the Negotiable Instruments Act before the learned Magistrate concerned. The learned Judicial Magistrate concerned initially convicted the accused whereupon with the latter standing aggrieved, preferred an appeal therefrom before the learned Sessions Judge, Kullu whereupon the learned Appellate Court while reversing the verdict pronounced by the learned Judicial Magistrate concerned remanded the complaint for its fresh adjudication by the learned Judicial Magistrate 1st Class, Manali, thereupon the latter proceeded to dismiss the complaint arising from dishonour of negotiable instrument comprised in Ext.CW-1/A. The reason as assigned by the learned trial Court to pronounce an order dismissing the complaint instituted therebefore by the complainant stands anchored upon the factum of the bank account number whereagainst cheque Ext.CW-1/A stood drawn for meteing/liquidating the purported pecuniary liability arising from the proven commercial transaction inter se the accused vis.a.vis the complainant, standing neither owned, managed or controlled in his individual capacity by the respondent/accused rather his managing the relevant account number whereagainst cheque Ext.CW-1/A stood issued, in the capacity of his being the Secretary of the Chhanjiwala Markanda CMP Society, thereupon it per se concluded qua their existing no privity of contract inter se the accused and the complainant whereupon it stood constrained to dismiss the complaint instituted therebefore by the complainant. The reason aforesaid would hold vigour, only if cheque Ext.CW-1/A held vivid reflections therein qua the accused, in the capacity of his holding the position of Secretary of the Society concerned signaturing Ext.CW-1/A, reflections whereof warranted a graphic pronouncement therein comprised in the signatures of the accused as stand endorsed thereon, holding thereunder the seal of the society concerned. However, the aforesaid reflections are amiss therein hence constraining this Court to conclude qua the accused hence strategizing to mislead the

complainant qua the account number whereagainst Ext.CW-1/A stood issued for its standing drawn also his thereupon colouring the factum qua his not standing individually enjoined to liquidate vis-à-vis the complainant the amount constituted therein qua rather the society concerned holding the apposite liability to liquidate vis-à-vis the complainant the sum constituted therein, also it appears qua in his issuing a cheque apparently drawn against the accounts of the society, his with a *malo animo* pre-contemplating a ground to thereupon contend qua with there, hence, existing no privity of any mercantile pecuniary contract inter se them, thereupon his achieving success in rendering the apposite complaint as may come to be instituted by the aggrieved before the Court concerned, to suffer its dismissal. The further factum of the accused not adducing evidence comprised in the books of accounts maintained by him in his capacity as Secretary of the Society concerned, with manifestations therein qua the amount held in the cheque, standing owned by the society visibly the respondent renders the inevitable inference qua the society concerned from whose account a cheque stood issued for its standing drawn, it thereupon not standing issued qua liquidation of its liability vis-à-vis the complainant rather it standing issued for liquidating the personal liability of the accused vis-à-vis the complainant. The learned trial Magistrate has slighted the impact of the aforesaid material whereupon it has proceeded to dismiss the complaint in a most casual and cursory manner. Since all the evidence as stands adduced by the complainant before the learned trial Magistrate pointedly depicts therein qua satiation qua the ingredients constituted in Section 138 of the Negotiable Instruments Act standing begotten, thereupon it was incumbent upon the learned trial Magistrate to pronounce an order of conviction upon the accused whereas his pronouncing an order of acquittal upon the accused, resting it upon the aforesaid per se flimsy reason has sequelled his committing a manifest error of his grossly mis-appreciating besides his not appreciating the aforesaid relevant and germane material.

9. In view of the above discussion, I find merit in this appeal which is accordingly allowed and the impugned judgment of the learned trial Court stands reversed and set aside. Accordingly, the respondent/accused stands convicted for the offence punishable under Section 138 of the Negotiable Instruments Act. The accused be produced on 16.3.2017 before this Court for his being heard on the quantum of sentence.

Record(s) of the learned trial Court be sent back forthwith.

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

State of H.P. .....Appellant

Versus

Raghubir Singh and others .....Respondents

Cr. Appeal No. 264 of 2009
Reserved on : 16.12.2016
Decided on: 2nd March, 2017

Indian Penal Code, 1860- Section 376(2)(g)- Accused gang raped the prosecutrix – they were tried and acquitted by the trial Court- an appeal was filed and the order was set aside – the case was remanded with a direction to alter the charge from Section 376 read with Section 34 to Section 376 (2)(g)- the accused were tried and acquitted by the Trial Court- held in appeal that the prosecutrix was not proved to be minor – different dates of birth were mentioned in the certificates brought on record by the prosecution- the radiological age of the prosecutrix was found to be 16 to 17 years and there can be a difference of three years – thus, it was not proved that prosecutrix was minor – she had voluntarily accompanied accused No. 5 –however, she had not consented for sexual intercourse with the accused No. 5- the other accused came and raped her – the prosecutrix has supported the prosecution version – minor improvements in her

statement are not sufficient to discard the same- the prosecution version was proved beyond reasonable doubt- appeal allowed and accused convicted of the commission of offence punishable under Section 376(2)(g) of I.P.C. (Para-23 to 41)

Cases referred:
Raja and others V. State of Karnataka, 2016(10) SCC 506
State of Punjab V. Gurmeet Singh and others, AIR 1996 SC 1393

For the appellant: Mr. D.S. Nainta and Mr. Virender Verma, Addl. A.Gs.
For the respondents: Mr. R.L. Sood, Senior Advocate with Mr. Arjun Lal, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge.

Aggrieved by the judgment dated 24.09.2008 passed by learned Sessions Judge, Kullu in Session Trial No. 3 of 90/14 of 08, whereby the respondents Raghubir Singh, Hari Ram, Ravi Parkash, Sunil Kumar and Vijay Kumar (hereinafter referred as to 'accused No. 1 to 5') have been acquitted of the charge under Section 376(2) (g) of the Indian Penal Code framed against each of them.

2. The prosecution case as disclosed from the statement of the prosecutrix PW-5 (name withheld) recorded under Section 154 Cr.P.C shortly stated is that with the permission of her mother Nimo Devi (PW-6) on 8.7.1989, she had gone to purchase shoe in the market at Manali. While in the market, she visited 'star video' to see matinee show. In the video parlour, accused No. 5 (Vijay Kumar) was sitting next to her. He started developing intimacy with the prosecutrix and asked her to accompany him to have bath at Vashisth. Though she was reluctant to come out from the video parlour and accompany the said accused, however, on being persuaded by him, she left the parlour. She was taken by the accused to Vashisth mor, where he brought a jeep bearing HPY-70. The same was being driven by accused Munna and occupied by accused No. 3, Ravi Parkash. She was dragged inside the jeep and taken to Solang Nalla side. On the way, vehicle was stopped on road side and accused No. 5 caught hold her hand and took her on river bank behind a big boulder. He forcibly opened her salwar. She was made to lie down and thereby subjected her to sexual intercourse. After such ghastly act committed by accused No. 5, she got up and was about to move from that place, however, in the meanwhile, one more taxi arrived there and three persons accused No. 4 Sunil, one Bittu and Ninnu alighted therefrom. She was again made to lie down and they all also subjected her to sexual intercourse. She being frightened could not speak anything. At that very time, one Tikam Ram and Raghu Mahant also came there. Considering them that they are local persons, she accompanied them. Accused No. 5 and accused No. 4 accompanied by Bittu left for Manali from that place in a taxi. Aforesaid Tikam Ram, Raghu Mahant, Munna and accused No. 3 Ravi Parkash and Ninnu made her to board jeep No. HPY-70, which proceeded towards Manali side. They, however, made the jeep to stop on Kenchi Mor. Raghubir Mahant allegedly picked her up and brought out of the vehicle on the road and taking benefit of night hours and darkness, they all subjected her to sexual intercourse. It is accused Tikam who lastly subjected her to sexual intercourse. They all fled away by leaving her alone on the road. She any how or other could reach in her house at 11/12.00 mid night and revealed the entire episode to her mother. On the basis of statement Ext. P-g, FIR Ext. P-N was recorded against the accused persons under Section 376 of the Indian Penal Code.

3. The prosecutrix during the course of investigation has made the supplementary statement mark D-A. According to her she was reluctant to accompany accused No. 5 to Solang Nalla, however, on allurement made to her, accompanied him and when after being subjected by him forcibly to sexual intercourse, she was coming back from the place of occurrence, accused No. 4 accompanied by Bittu and Ninnu came there and they also caught hold her and taken

behind the big boulder. There she was threatened by them with dire consequences and succeeded in opening her salwar. First it is accused No. 4 who had subjected her to sexual intercourse and thereafter his companion Ninnu and third person Bittu was in the process of making him prepared to assault her sexually, however, in the meanwhile, Raghu Mahant and Tikam Ram arrived there and, therefore, said Bittu on account of afraid of said persons, failed to do so. Said Raghu Mahant brought her to Solang Nalla where she had tea with him. Accused No. 5 and accused No. 4 fled away in vehicle No. HPY 885 towards Manali side. Ninnu, Ravi Parkash, accused No. 3 and Raghu Mahant after having tea occupied jeep No. HPY-70. She was also made to sit in the said jeep. The same was about to move, however, in the meanwhile, Chuni Lal, Pradhan of Barua also arrived there and said that he was also going to Bahang. He was also made to sit in the jeep. While in the jeep, he did not enquire about her whereabouts. The jeep when reached at Kenchi Mor was made to stop there on the road. Said Chuni Lal, Pradhan alighted therefrom and went ahead. She also want to accompany him, however, Raghu Mahant (accused No. 1 @ Raghubir Singh) caught hold her, whereas, Munna who was on the wheel of the jeep taken out one bed sheet and they all subjected her to sexual intercourse turn by turn at an isolated place ahead Kenchi Mor.

4. On the registration of FIR Ext. P-N under Section 376 read with Section 34 of the Indian Penal Code against the accused persons, the prosecutrix was got medically examined from Dr. Shashi Thakur (PW-4) vide MLC Ext. P-F. Her salwar Ext. P-2 was also taken into possession by PW-4. For ascertaining the radiological age of the prosecutrix, her x-ray was conducted vide skigram Ext. P-1 by PW-4 Dr. V.K. Mutreja. The report is Ext. P-E. The school certificate of the prosecutrix Ext. P-R was taken into possession from the school vide memo Ext. P-J, whereas, copy of abstract of family register Ext. P-T from the Gram Panchayat. The bed sheet was taken in possession vide recovery memo Ext. P-H. Two vehicles bearing No. HPY-70 and HPY-885 were also seized by the police along with documents thereof. Accused No. 3 and Bittu @ Anil Kumar were arrested on 9.07.1989. They were got medically examined vide MLCs Ext. P-A and P-C in CHC Manali. Accused No. 1 was arrested on 22.07.1989 and also got medically examined vide MLC Ext. P-D. On receipt of report of chemical examiner, Ext. P-2 and completion of investigation Challan was initially filed against accused Nos. 3, 5, one Bittu @ Anil Kumar and accused No. 1 Raghubir Singh, however, for want of evidence, accused Chuni Lal implicated by the prosecutrix in her supplementary statement mark D-A on 24.07.1989, he was kept in column No. 2 of the Challan. Accused No. 2 Hari Ram, Ninnu, accused No. 4 Sunil Kumar and Munna had absconded, hence were proceeded under Section 82 Cr.P.C. The case against remaining accused was committed to the Sessions Court at Kullu.

5. Before order on charge was passed by learned trial Court, an application was filed by the prosecution under Section 319 Cr.P.C with a prayer to implicate accused No. 4 Sunil Kumar and accused No. 2 Hari Ram, Munna and Ninnu, who were absconded as accused persons. Notice of the application was issued to the proposed accused persons. Consequently, accused No. 2 and accused No. 4 had put in appearance and they were also added as accused persons. The remaining accused Munna and Ninnu were already declared proclaimed offender by learned Committal Court vide its order dated 15.3.1990. The supplementary Challan was filed against accused No. 2 and 4 also.

6. On hearing learned Public Prosecutor and also learned defence counsel on the point of charge, no case was found to be made out against accused Chuni Lal. He was accordingly discharged. However, charge under Section 376/34 IPC was framed against accused persons and also against accused Sunil.

7. The accused, however, pleaded not guilty to the charge and claimed trial, therefore, the prosecution has examined 10 witnesses in all. The material prosecution witnesses are the prosecutrix PW-5, her mother Smt. Nimo Devi (PW-6), PW-7 Atma Ram is a witness to the recovery memo of bed sheet Ext. P-3, which according to him was taken into possession in his presence vide recovery memo Ext. P-H. The date of birth certificate Ext. P-I was also taken into possession in his presence vide memo Ext. P-K. The photocopies of the RC and the jeep were also

taken into possession vide memo Ext. P-L. The remaining prosecution witnesses i.e. PW-1 Dr. R.D. Chandel, PW-2 Dr. Krishan Bihari, PW-3 Dr. V.K. Mutreja and PW-4 Dr. Shashi Thakur have been associated as expert witnesses because PW-4 had conducted the medical examination of the prosecutrix, whereas, PW-3 Dr. V.K. Mutreja examined the prosecutrix to ascertain her radiological age. PW-1 and PW-2 have examined the accused persons to find out their competency to commit sexual intercourse. The remaining prosecution witnesses i.e. Bhagi Ram (PW-8) is the investigating Officer. Inspector Lekh Raj PW-9 has also investigated this case partly. PW-10 Gian Chand, Secretary, Gram Panchayat, Nasogi was examined to prove the date of birth certificate Ext. P-S and abstract of parivar register Ext. P-T.

8. On the other hand, accused No. 5 in his statement recorded under Section 313 Cr.P.C has admitted the prosecution case to the extent that the prosecutrix came to Manali bazaar for purchasing shoe for herself and went to video parlour and watched movie there. It was also admitted that he was sitting in her side, but he did nothing and rather it is she who herself asked him to accompany her to Vashisth and Solang Nalla. She accompanied him to Solang Nalla voluntarily and it is she who took him to the Nalla. He, however, expressed his ignorance that accused Munna and Ravi also subjected her to sexual intercourse. He, however, committed sexual intercourse with the prosecutrix with her consent. It was also admitted that PW-1 Dr. R.D. Chandel had conducted his medical examination and also that of accused No. 3 on 9.7.1989 vide MLC Ext. P-A. The said doctor had conducted the medical examination of accused No. 5 vide MLC Ext. P-B and that of accused Bittu @ Anil Kumar vide MLC Ext. P-C. The rest of the incriminating circumstances appearing against him in the prosecution evidence have either been denied being incorrect or for want of knowledge. In his defence, while answering question No. 32 and 33, it was stated that since the prosecutrix demanded Rs. 100/- from him but he could only offer a sum of Rs. 20/- which she refused to accept, therefore, it is for this reason, she deposed falsely against him. In reply to question No. 34, it was further stated that the prosecutrix had developed intimacy with him since the last one year and on 2-3 occasions, she had committed sexual intercourse with him. She used to charge money for having sexual intercourse with her. They had been paying sometimes Rs. 20/- and sometime even less amount also.

9. Accused Bittu @ Anil Kumar in his statement recorded under Section 313 Cr.P.C has admitted that he was examined by PW-1 vide MLC Ext. P-C, however, denied the remaining incriminating circumstances appearing against him in the prosecution case either being incorrect or for want of knowledge. While answering question No. 33 and 34, it was stated that he was suffering from vineral decease hence did not join the prosecutrix when she invited him to have sexual intercourse with her. She demanded money from him for which he refused and it is for this reason, case was lodged against him by her falsely.

10. Accused No. 2 Hari Ram while answering question No. 11 has stated that the prosecutrix came to Solang Nalla, where he was present along with Chuni Pradhan and accused No. 1 Raghubir Singh. He was told by Chuni Lal, Pradhan to board the jeep. Rest of the incriminating circumstances appearing against the said accused have either been denied being incorrect or for want of knowledge. While answering question No. 32 and 34, it was stated that he being an employee of Chuni Pradhan has unnecessarily been dragged in this case.

11. Accused No. 4 Sunil Kumar while denying all the incriminating circumstances appearing against him in the prosecution evidence being wrong has stated while answering question No. 8 that accused Vijay had not committed rape with the prosecutrix at the time when he along with accused Munna and accused No. 3 Ravi Prakash reached there. While answering question No. 32 and 34, his answer was that the prosecutrix had accompanied him earlier also, however, she did not charge money on such occasion. This time she though invited him to have sexual intercourse with her, however, demanded Rs. 100/- for the same. He offered only Rs. 50/- which she refused to accept. Since he could not pay Rs. 100/- to the prosecutrix, therefore, she lodged this case against him falsely.

12. Accused No. 3 Ravi Prakash has admitted that the prosecutrix was brought by them to Solang Nalla. She accompanied accused Vijay Kumar voluntarily. According to him, she

was not subjected to sexual intercourse. He, however, admitted that he along with accused No. 1 Raghubir Singh, Ninnu, accused No. 2 Hari Ram @ Tikam and Chuni Pradhan had subjected her to sexual intercourse. He was medically examined vide MLC Ext. P-A by PW-1 Dr. R.D. Chandel on 9.7.1989. The said doctor also examined accused Bittu @ Anil Kumar and accused Vijay Kumar vide MLCs Ext. P-B and P-C respectively. The rest of incriminating circumstances appearing against him in the prosecution evidence have either been denied being wrong or for want of knowledge. In his defence, while answering question No. 32 and 33, it was stated that the prosecutrix had demanded money, qua which he was told by accused No. 5 Vijay Kumar. According to him he was invited by her to have sexual intercourse at her own. Since he had no money, he was falsely implicated in this case.

13. Accused Raghubir Singh while denying the entire prosecution case being incorrect or for want of knowledge had stated that at Solang Nalla, the prosecutrix was advised by Chuni Pradhan and Hari Ram @ Tikam Ram to go to her house. While answering question No. 32 and 33 his answer was that since he has good relations with Chuni Pradhan, therefore, it is for this reason alone was implicated falsely in this case.

14. The accused, however, when given an opportunity to lead evidence in their defence have opted for not producing any evidence.

15. Therefore, learned trial Court on hearing the parties on both sides and on appreciation of the evidence available on record has arrived at a conclusion that the prosecution has failed to prove its case against the accused persons beyond all reasonable doubt and had acquitted all the accused vide judgment dated 30.9.1992.

16. A Division Bench of this Court vide order dated 28.03.2008 passed in Criminal Appeal No. 103/99, filed earlier by the State of Himachal Pradesh against judgment of acquittal dated 30.9.1992 passed by learned trial Court had set aside the same and remanded the case to the trial Court to alter the charge from Section 376 read with Section 34 of I.P.C. to the charge of gang rape under Sub-section (2) (g) of Section 376 of the Indian Penal Code and to try and decide the case afresh as per law.

17. On remand the case when listed on 2.8.2008 in the trial Court, the prosecutrix was recalled to the witness box, however, she stated that her statement recorded earlier as PW-5 may only be read in evidence and that to the amended charge she had nothing more to add. When subjected to cross-examination her answer was that now she did not remember the facts of the case, therefore, leaned Public Prosecutor as per his statement recorded separately had adopted the statement of the prosecution witnesses recorded initially and further stated that he did not want to lead any more evidence or to re-examine the witnesses, the prosecution already examined. The prosecution evidence was thus ordered to be closed. Learned defence counsel had also adopted the cross-examination of the witnesses already conducted, as per their joint statement recorded on that day.

18. Learned trial Judge on hearing learned Public Prosecutor and learned defence counsel has again arrived at a conclusion that from the evidence available on record, neither it is proved that the prosecutrix was below 16 years of age nor that she was subjected to sexual intercourse forcibly i.e. against her will and without her consent. In view of the evidence available on record, the present, however, was found to be a consensual act of intercourse. The accused have, therefore, been acquitted of the charge framed under Section 376(2) (g) IPC against each of them.

19. Aggrieved by the impugned judgment, the appellant-State has questioned the legality and validity thereof on the grounds *inter-alia* that the prosecution evidence as has come on record by way of own testimony of the prosecutrix and also the admission of the accused persons in their statements recorded under Section 313 Cr.P.C is suggestive of that the accused have subjected the prosecutrix, a minor below 16 years of age to sexual intercourse against her will and without her consent. The evidence qua her age below 16 years produced by the prosecution has erroneously been ignored. The medical evidence as has come on record by way

of the testimony of PW-4 Dr. Shashi Thakur has also been erroneously brushed aside. As a matter of fact, the testimony of PW-4 has satisfactorily established that the prosecutrix was subjected to sexual intercourse. Undue weightage was given to that part of her statement in which it was stated that no injury could be noticed by her on the person of the prosecutrix irrespective of her categoric statement in cross-examination that in case of forcible intercourse the injuries on the body of the prosecutrix are bound to occur.

20. As per the prosecution case, the prosecutrix was subjected to sexual intercourse by nine persons. Out of whom Challan was prepared against six accused persons, whereas, two had absconded and name of Chuni Pradhan specifically disclosed by the prosecutrix in her statement recorded during the course of trial was initially deleted by the police from the array of accused being Pradhan of Ilaqua. It has further been submitted that the evidence available on record has been appreciated in a slip-shod and perfunctory manner and the findings acquitting the accused persons of the charge have been based on hypothesis, conjecture and surmises. The impugned judgment as such, has been sought to be quashed and set aside.

21. Mr. D.S. Nainta, learned Additional Advocate General has argued that the solitary statement of the prosecutrix in this case is sufficient to bring guilt home to the accused, in view of the plea they themselves raised in their defence. It is also argued that the prosecutrix was minor at the time of occurrence, therefore, the plea that she was the consenting party as sought is hardly of any consequence. It is established that all the accused had ravished an innocent village and minor girl and for such ghastly act, they should have been convicted and sentenced in accordance with law.

22. On the other hand, according to Mr. R.L. Sood, learned Senior Advocate assisted by Mr. Arjun Lal, Advocate the prosecution has failed to prove its case against the accused persons beyond all reasonable doubt. According to Mr. Sood, it is not at all proved that the prosecutrix was minor but the own evidence produced by the prosecution itself reveals that she was major and had attained the age of discretion. Even her own statement is suggestive of that she was a consenting party to sexual intercourse committed with her by the accused persons. He, therefore, has urged that well considered and reasoned judgment, whereby the accused have been acquitted of the charge need no interference by this Court in the present appeal. The appeal has, therefore, been sought to be dismissed.

23. At the very out set, it is clarified that out of nine accused, charge was framed against six namely, Raghubir Singh, Hari Ram, Ravi Parkash, Sunil Kumar, Vijay Kumar and Anil Kumar @ Bittu. Accused Munna and Ninnu had absconded and were declared proclaimed offender. Challan against Chuni Pradhan was not filed allegedly for want of sufficient evidence and his name was placed in column No. 2 of the Challan. Later on an application under Section 319 Cr.P.C filed by the prosecution though he was arrayed as one of the accused persons, however, vide order dated 24.12.1991 passed in the trial at the stage of consideration of charge, no case was found to be made out against him even prima-facie and as such, he was discharged. The order of discharge of the said accused was not assailed, however, in the grounds of present appeal and also in that of criminal appeal No. 103/93, previously filed against the judgment dated 30.9.1992 passed by learned trial Court initially in this case the order discharging the said accused has been assailed on the ground that irrespective of statement Ext. P-G and the supplementary statement mark D-A of the prosecutrix not implicate accused Chuni Lal, Pradhan in the commission of the offence, however, she in her statement recorded in the Court has specifically stated that said Chuni Lal Pradhan had also exploited her sexually and this fact was revealed by her to the police when her statement (supplementary) was recorded. The complaint, therefore, is that the police had deleted the name of said accused merely on account of he being the Pradhan of ilaqua. This part of the controversy is left open to be considered in this judgment at a later stage. Such detail, however, was necessary for the purpose of completion of the facts because initially six accused were charged and tried with the commission of offence punishable under Section 376 IPC. However, on finding that in the impugned judgment the name of only five accused figured, it transpired from the trial Court record that after remand of the case vide order

dated 28.3.2008, passed by a co-ordinate Bench of this Court, learned trial Judge had to issue summons to the accused as they failed to put in appearance on the ate fixed by this Court. It is accused Raghubir Singh, Vijay Kumar, Ravi Parkash, Hari Ram and Sunil Kumar could be served with the summons so issued and as regards accused Anil Kumar @ Bittu, he was reported to have expired. It is so recorded by learned trial Court in the order passed on 28.5.2008.

24. The present is a case of gang rape. Therefore, the accused have been charged with the commission of offence punishable under Section 376(2) (g) of the Indian Penal Code. What is rape is defined under Section 375 of the Indian Penal Code. The necessary ingredients to infer the commission of offence of rape against a woman are: firstly, the accused committed sexual intercourse with a woman secondly, such sexual intercourse was (i) against her will, and (ii) without her consent, thirdly, whether such consent was obtained by putting her or any of her relation or interested person in fear of death or hurt, fourthly consent was taken under deceitful belief that accused was her husband fifthly, the consent was taken when she was incapable of understanding its nature and consequences due to (i) unsoundness of mind, (ii) intoxication, (iii) administration of any stupefying drug or substance by the accused personally or through some one else and sixthly, when accused is husband and woman was below 16 years of age (now 18 years).

25. The present is a case where according to the prosecution, the prosecutrix a minor below 16 years was subjected to sexual intercourse by the accused persons and as such falls within the sixth situation hereinabove.

26. In a case of rape of a minor, it is the age aspect which assumes considerable significance. The prosecution claims the age of the prosecutrix below 16 years. As per date of birth certificate Ext. P-S issued by PW-10, the Secretary, Gram Panchayat, Nasogi. The date of birth of the prosecutrix is 1.1.1978. The school leaving certificate Ext. P-R find mentioned her date of birth as 2.2.1974. The third document is the extract of parivar register, in which her age find mentioned as four years. Now if coming to the legal position, the entries in the birth and death register have to be believed as primary evidence of course if original record is produced. The particulars of the person who got entered entries qua birth of the persons whose age is to be determined must establish on record. The another primary piece of evidence in this regard can be the date of birth entered in the primary school or the school where such person was admitted in first/nursery/K.G class as the case may be, however, subject to further evidence i.e. statement of the person at whose instance such admission was made in the school and declaration qua the date of birth and other particulars mentioned in the admission form, in case such person is alive and also the production of the original record maintained in the school by the headmaster or any other employee of the school in the discharge of his official duties. We may draw support in this regard from the judgment of a Single Bench of this Court in ***Criminal Appeal No. 419 of 2012***, titled ***Ramu*** V. ***State of Himachal Pradesh***, ***decided on 21st November, 2014***. The relevant extract of this judgment is reproduced here as under:-

> 19. The primary evidence qua the date of birth of a person is the entry in the Birth and Death Register. As noticed supra, the date of birth of the prosecutrix has been entered in the Birth and Death Register at the instance of some Govind Ram. Said Govind Ram has not been associated during the course of investigation. In case the entries were made at the instance of grand-father of the prosecutrix, he should have been examined. The production of a certificate allegedly from the Birth and Death Register, which is neither properly paged nor contains any certificate and rather pages in between the last entry dated 4th September, 1996 and the entry qua the date of birth of the prosecutrix are blank, is not sufficient to discharge the onus by the prosecution to prove that the prosecutrix is born on 5th August, 1997. A reference can be made to the judgment of the Apex Court in ***Birad Mal Singhvi*** v. ***Anand Purohit 1988 (Supp) SCC 604,*** which reads as follows:

> "To render a document admissible under Section 35, three conditions must be satisfied, firstly, entry that is relied on must be one in a public or other official book, register or record; secondly, it must be an entry stating a fact in issue or relevant fact; and thirdly, it must be made by a public servant in discharge of his official duty, or any other person in performance of a duty specially enjoined by law. An entry relating to date of birth made in the school register is relevant and admissible under Section 35 of the Act but the entry regarding the age of a person in a school register is of not much evidentiary value to prove the age of the person in the absence of the material on which the age was recorded."

20. Similar is the ratio of the judgment again that of Hon'ble Apex Court ***Madan Mohan Singh and others*** v. ***Rajni Kant and another, AIR 2010 SC 2933***, which reads as follows:

> "18. Therefore, a document may be admissible, but as to whether the entry contained therein has any probative value may still be required to be examined in the facts and circumstances of a particular case. The aforesaid legal proposition stands fortified by the judgments of this Court in Ram Prasad Sharma Vs. State of Bihar AIR 1970 SC 326; Ram Murti Vs. State of Haryana AIR 1970 SC 1029; Dayaram & Ors. Vs. Dawalatshah & Anr. AIR 1971 SC 681; Harpal Singh & Anr. Vs. State of Himachal Pradesh AIR 1981 SC 361; Ravinder Singh Gorkhi Vs. State of U.P. (2006) 5 SCC 584; Babloo Pasi Vs. State of Jharkhand & Anr. (2008) 13 SCC 133; Desh Raj Vs. Bodh Raj AIR 2008 SC 632; and Ram Suresh Singh Vs. Prabhat Singh @Chhotu Singh & Anr. (2009) 6 SCC 681. In these cases, it has been held that even if the entry was made in an official record by the concerned official in the discharge of his official duty, it may have weight but still may require corroboration by the person on whose information the entry has been made and as to whether the entry so made has been exhibited and proved. The standard of proof required herein is the same as in other civil and criminal cases.
>
> 19. .....
>
> 20. So far as the entries made in the official record by an official or person authorized in performance of official duties are concerned, they may be admissible under Section 35 of the Evidence Act but the court has a right to examine their probative value. The authenticity of the entries would depend on whose information such entries stood recorded and what was his source of information. The entries in School Register/ School Leaving Certificate require to be proved in accordance with law and the standard of proof required in such cases remained the same as in any other civil or criminal cases."

21. Significantly, in the statement under Section 313 of the Code of Criminal Procedure of the accused a question has been put to him that the age of the prosecutrix was between 15½ - 16½ years. This reveals that the prosecution itself is not sure as to what was the exact age of the prosecutrix at that time and rather as per its own version, her age was 15½ - 16½ years. No question has been put to the accused that the prosecutrix being born on 5th August, 1997 was minor, in his statement under Section 313 of the Code of Criminal Procedure. Therefore, such incriminating circumstance appeared in the prosecution evidence cannot be used against him. It is held so by the Apex Court in ***Sharad Birdhichand Sarda*** v. ***State of Maharashtra, AIR 1984 SC 1622***, as under:

> "142. Apart from the aforesaid comments there is one vital defect in some of the circumstances mentioned above and relied upon by the High Court, viz.,

circumstances Nos. 4, 5, 6, 8, 9, 11, 12, 13, 16 and 17. As these circumstances were not put to the appellant in his statement under Section 313 of the Criminal Procedure Code they must be completely excluded from consideration because the appellant did not have any chance to explain them. This has been consistently held by this Court as far back as 1953 where in the case of Hate Singh Bhagat Singh v. State of Madhya Bharat AIR 1953 SC 468 this Court held that any circumstance in respect of which an accused was not examined under Section 342 of the Criminal Procedure Code cannot be used against him. Ever since this decision, there is a catena of authorities of this Court uniformly taking the view that unless the circumstance appearing against an accused is put to him in his examination under Section 342 or Section 313 of the Criminal Procedure Code, the same cannot be used against him. In Shamu Balu Chaugule v. State of Maharashtra, (1976) 1 SCC 438 this Court held thus:

> "The fact that the appellant was said to be absconding, not having been put to him under Section 342, Criminal Procedure Code, could not be used against him.

144. It is not necessary for us to multiply authorities on this point as this question now stands concluded by several decisions of this Court. In this view of the matter, the circumstances which were not put to the appellant in his examination under Section 313 of the Criminal Procedure Code have to be completely excluded from consideration."

22. This Court has held in ***State of H.P.*** v. ***Phurva and others, Latest HLJ 2011 (HP) 490,*** as under:

> "19. In present like cases, age of the Prosecutrix is of utmost importance. Prosecutrix though at the time of her examination has stated that she was 17 years of age, yet there is no document with respect to the date of birth obtained by the police during investigation of the case, from the concerned Panchayat or from any School or Institution where she was admitted and studied. However, the prosecution has put its reliance only on the ossification report Ext. PW10/C showing her between 16-17 years on the basis of the epiphysis of bones. To prove this report PW10 Dr. G. D. Gaur was examined. His opinion is based upon the study of *Dr. M.L. Aggarwal and I.C. Pathak* in Punjab Region which has no hilly terrace. He also admitted that the development of bone depends on hereditary, dietary, harmonious factors, climatic condition and it varies from place to place. He also admitted that assessment of the age on the basis of fusion of bones is not a perfect science. It is also equally fallacious to apply the study of Dr. M.L. Aggarwal and I.C. Pathak to hilly terrace with respect to their studies which they have conducted in Punjab region. Admittedly, both the parties, in this case belong to tribal area of Lahaul where development of the bones differs considerably from the subject which is in the plain and warmer areas. The pubic signs appear early in warmer and lower parts of India whereas physical development, fusion of bones and also puberty is always delayed in the hilly areas. Thus giving the benefit of +2 years on both sides, as per the Modi's Jurisprudence, the age of the prosecutrix comes to 18-19 years at the relevant time and in any case above the age of discretion."

27. If coming to the case in hand, neither certificate Ext. P-S nor Ext. P-R can be termed as primary evidence to infer that the prosecutrix was born on 1.1.1978 or 2.2.1974 for the reason that PW-10 Gian Chand, Secretary Gram Panchayat, Nasogi has not produced the original Birth and Death register being not available as the same according to him was deposited in the office of Chief Medical Officer, Kullu. Since no-one has been associated nor examined during the

course of trial from the school nor record such as admission and withdrawal register produced, therefore, school leaving certificate Ext. P-R cannot be treated as legal and valid evidence qua the date of birth of the prosecutrix as 2.2.1974.

28. Now if coming to the extract of parivar register Ext. P-T, the same is again of no help to the prosecution for the reason that firstly the date of birth of the prosecutrix does not find mentioned therein and rather she has been shown four years of age in this document and secondly, the entries in the parivar register cannot be treated as legal and acceptable evidence qua date of birth or age of a person. Support in this regard can also be drawn from the judgment of a Co-ordinate Bench of this Court in Ajnana Devi @ Anju V. State of Himachal Pradesh along with its connected matters, decided on 24th June, 2016. The relevant extract of the judgment reads as follows:-

> 19. In similar circumstances this Court has already held such certificate not to have established the correct date of birth. [State of H.P. v. Narender Kumar alias Hira and others, 2010 Cri.L.J. 3545].
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> 20. The Apex Court in Birad Mal Singhvi v. Anand Purohit, (1988) Supp. 1 SCC 604 has held that "To render a document admissible under Section 35, three conditions must be satisfied, firstly, entry that is relied on must be one in a public or other official book, register or record; secondly, it must be an entry stating a fact in issue or relevant fact; and thirdly, it must be made by a public servant in discharge of his official duty, or any other person in performance of a duty specially enjoined by law. An entry relating to date of birth made in the school register is relevant and admissible under Section 35 of the Act but the entry regarding the age of a person in a school register is of not much evidentiary value to prove the age of the person in the absence of the material on which the age was recorded." [Emphasis supplied]
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> 21. The principle stands reiterated in Ravinder Singh Gorkhi vs. State of U.P, (2006) 5 SCC 584 and Ram Suresh Singh vs. Prabhat Singh, (2009) 6 SCC 681.
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> 22. As such, not much credence can be lent to the certificates more so when it has not come on record as to who got these entries recorded at the time of admission of the child in the school. Consequently certificates (Ext.PW-8/B and Ext.PW-12/A) cannot be accepted to be legal evidence proving the factum of date of birth of the prosecutrix.
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> 23. Thus, it can safely be held that the findings returned by the Court below qua the age of the prosecutrix are totally borne out from the record.

29. If coming to the ocular version qua this aspect of the matter, the prosecutrix on 8.4.1992 while in the witness box had disclosed her age as 17 years. Since the occurrence is dated 8.7.1989, therefore, if the age so given by her on the date of her examination is believed to be true, she was +14 years when assaulted by the accused sexually. Though, she has not been cross-examined qua her age aspect as she disclosed in her examination-in-chief. There being no documentary evidence showing her age below 16 years of age and the certificates Ext. P-S and P-R rather contain two different date of births i.e. 1.1.1978 and 2.2.1974 respectively. Therefore, it cannot be believed that she was 17 years of age on the date of her examination i.e. 8.4.1992 or above fourteen years on the date of occurrence i.e. 8.7.1989.

30. Now if coming to the testimony of her mother PW-6, the prosecutrix was her second child as the eldest one has died. According to her she had married at the age of 16 years, however, voluntarily stated that at the age of 14 years and the child who had expired was born to her when she was 18 years of age. However, again said that at the age of16 years. She expressed her ignorance that prosecutrix was born to her after two years of her marriage, however, it is denied that the prosecutrix is of 20 years of age. Her statement is vague and absurd so far as the age of the prosecutrix is concerned. Therefore, the same cannot also be believed to be true to arrive at a conclusion that on the day of occurrence the prosecutrix was below 16 years of age.

31. On the other hand, the radiological age of the prosecutrix has been assessed between 16 to 17 years as has come in the statement of PW-3 Dr. V.K. Mutreja. This witness has also admitted that there could be variation of three years on either side while determining the radiological age. Therefore, the medical evidence which has been considered in its right perspective by learned trial Court, it cannot be said that the prosecutrix was below 16 years of age.

32. In view of the discussion qua age aspect of the prosecutrix, the prosecution has miserably failed to prove that she was 16 years of age on the day when assaulted sexually.

33. Therefore, assuming her age above 16 years, the next question which has engaged our attention is whether the present is a case of commission of sexual intercourse with the prosecutrix by the accused persons with her consent or forcibly, i.e. without her consent and against her will. In the given facts and circumstances and also the evidence as has come on record by way of sole testimony of the prosecutrix, the present, to us, appears to be a case where the prosecutrix at the most can be said to have accompanied accused No. 5 Vijay Kumar voluntarily because as per her own testimony, the said accused was sitting by her side in the video parlour and he made her to agree to accompany him to Vashisth bath, though she was taken to Solang Nalla side. She seems to have acquaintance with the said accused as it has come in her statement that he had shown his interest to solemnize marriage with her. As per arrangement between them, when came out of the parlour, she walked ahead of accused No. 5 as he had told her to wait for him on the bridge in the town itself. Accordingly, she reached on the bridge and accused No. 5 came behind in a taxi which was being occupied by accused Munna and accused No. 3 Ravi Prakash. She was made to sit in the jeep and taken to Solang Nalla side. Meaning thereby that she only agreed to accompany accused Munna and Ravi Prakash. As per further version, accused stopped the vehicle on road side and she was taken by accused No. 5 Vijay to Nalla in the valley side, whereas, his co-accused Munna and Ravi Prakash got themselves concealed on the road nearby the jeep. Accused No. 5 behind a big boulder committed sexual intercourse with her without her consent as according to her she resisted (I said no) commission of rape with her by the said accused. Though she had got up, however, in the meanwhile accused Munna and accused No. 3 Ravi Prakash as well as accused No. 4 Sunil @ Bittu (since dead) had also came there in a Gypsy with accused Ninnu. Accused No. 4 caught hold her arm and he as well as his co-accused Anil @ Bittu, Ninnu and Munna (proclaimed offender) have also assaulted her sexually. She cried before they could commit sexual intercourse with her, howver, accused No. 4 threatened her to keep shut lest they would do away with her life. Not only this but as per her further testimony, around 6.00 p.m. accused No. 1 Raghubir, accused Chuni Pradhan, accused Hira Lal (name wrongly stated as he is accused No. 2 Hari Ramj) met her at Solang Nalla. On seeing them that they are local persons, she went to them. Accused Chuni Pradhan and Raghubir (Accused No. 1) told her to go to her house. She could not reveal the incident of rape having taken place with her to the said accused as she was immediately lifted and put in the Gypsy which was boarded by accused No. 1 Raghubir Singh, Munna, Chuni Pradhan and accused No. 2 Hari Ram @ Tikam. She was brought by them to Kenchi Mor. By that time, it was almost dark. At Kenchi Mor, accused No. 1 Raghubir Singh, Accused Ninnu, Accused No. 3 Ravi Prakash, accused No. 2 Hari Ram and accused Chuni Pradhan had subjected her to sexual intercourse. She insisted and requested the said accused persons that she wanted to go home and that drop her at her place lest her parents would beat her, but of no avail. She was left in the road and they all went to her respective places. She shouted on them that she also wants to go with them but they did not stop the Gypsy and as such she was left behind on the road. She remained on the road for longtime and when a truck came from Lahaul side, she took lift in that truck and came to Manali bazaar from where she went to her house.

34. Above statement of the prosecutrix that she was subjected to sexual intercourse by each and very accused persons need no corroboration because as noticed hereinabove, accused No. 5 Vijay Kumar, deceased accused Anil Kumar @ Bittu, accused No. 1 Raghubir Singh, accused No. 2 Hari Ram, accused No. 3 Ravi Prakash and accused No. 4 Sunil Kumar who have been charged with the commission of offence punishable under Section 376(2)(g) IPC have

admitted that they subjected the prosecutrix to sexual intercourse. The explanation as set-forth by them, however, is that it is she who invited them to have sexual intercourse with her. They were subjecting her to sexual intercourse with her consent earlier also. However, on this occasion, she demanded money i.e. Rs. 100/- from each of them and as accused No. 5 offered Rs. 20/-, whereas, accused No. 4 Rs. 50/- and accused No. 3 Ravi Prakash and accused Anil @ Bittu had no money to pay to her, therefore, it is for this reason, she implicated them in this case falsely.

35. Mr. R.L. Sood, learned arguing counsel while drawing the attention of this Court to the statement of prosecutrix in her cross-examination that she walked ahead of accused No. 5 and waited for him at the bridge where he came with his co-accused Munna (proclaimed offender) and accused No. 3 Ravi Prakash in a vehicle, she boarded the vehicle, her admission that it was a crowded area where shops and residences were in existence, went to Nalla with accused Vijay Kumar by covering a distance of two furlang where she was sexually assaulted by the said accused, accused Munna and accused No. 3 came there in another Gypsy, accused No. 4 Sunil, accused Anil @ Bittu (since dead) and accused Ninnu (proclaimed offender) also came there in the said Gypsy and subjected her to sexual intercourse, establish that she was a consenting party to sexual intercourse by the accused with her. According to Mr. Sood, she did not raise any hue and cry and rather walked ahead of accused No. 5 while going to bridge through Manali market. She boarded the Gypsy voluntarily at her own. The Gypsy crossed the shops in existence on road side. She did not cry for help. Her further testimony that she saw accused Raghubir Singh, accused Chuni Pradhan and accused Hari Ram sitting in Solang Nalla and went to them who advised her to go to house, her conduct in not narrating the incident of sexual assault with her to them and her admission that she took tea and biscuits with them at Solang Nalla also demonstrates that she had no grudge against the accused persons, who according to him had subjected her to sexual intercourse with her consent. Had it not been so, she would have complained to accused No. 1 Raghubir Singh, accused Chuni Pradhan and accused No. 2 Hari Ram against their co-accused who had already assaulted her sexually when she met them. Also that instead of going to home as advised by the said accused, she took tea and biscuits with them. Not only this but she according to her statement accompanied the said accused persons in the Gypsy to Kenchi Mor. Therefore, if she was subjected to sexual intercourse by the said accused also, such an act with her was also voluntary and consensual.

36. We are not in agreement with the argument so addressed on behalf of the accused person for the reason that all the accused had ganged up and in a planned manner. Accused No. 5 managed her to accompany him from the video parlour. As already pointed out, the present at the most can be said to be a case of voluntarily accompanying the said accused by the prosecutrix. She was not a consenting party to accompany the other accused. She was not a consenting party even with accused No. 5. The said accused has rather subjected her to sexual intercourse forcibly against her will and without her consent because she has categorically stated that she resisted the commission of such an act with her by the said accused 'by saying no' but he did not stop. Even if it is believed that she was a consenting party, the said consent was only qua commission of sexual intercourse with her by accused No. 5 and not by the said accused persons for the reason that firstly it is accused No. 5 who had taken her to the Nalla behind the big boulder and subjected her to sexual intercourse there. His co-accused i.e. accused No. 4 Sunil, accused Anil @ Bittu (since dead), accused Ninu and Munna (proclaimed offender) had also come down at such a stage when she had already got up after being assaulted sexually by accused No. 5. Though she cried before the aforesaid accused persons who have ravished her sexually but of no avail as accused No. 4 threatened her to keep shut lest, they would do away with her life. No cross-examination of the prosecutrix qua this aspect of the matter has been conducted. While in the witness box she has categorically stated that accused No. 1 Raghubir Singh, accused No. 2 Hari Ram and accused Chuni Lal Pradhan who were present at Solang Nalla had made her to board Gypsy with them and they also boarded the same with accused Munna and Ninnu (proclaimed offender) and accused No. 1 Raghubir Singh. They all subjected her to sexual intercourse at Kenchi Mor. She was subjected to sexual intercourse by all of them at that

place. By that time it became dark. A tender age girl in the company of five able bodied persons could have not got herself freed from them. Therefore, the argument so addressed on their behalf that she did not raise any hue and cry is hardly of any help to the accused for the reason that raising hue and cry would have been of no help to her nor she could have got herself freed from their clutches by anyone as it was a case of gang rape. How such a ghastly act with a girl of tender age like the prosecutrix by the accused many in number could have been avoided by her or can be treated as a consensual act? The findings recorded by learned trial Judge that after such a ghastly act having been committed with the prosecutrix, she would have so scared that on seeing local people (accused No. 1 Raghubir Singh, accused No. 2 Hari Ram) narrated the incident to them instead of having tea and biscuits with them. She would have tried to rush to her house as advised by accused No. 1, accused Chuni Pradhan and not agreed to travel with them in their taxi, in which not only the said two accused but accused Munna, Ninnu and accused Chuni Pradhan were also sitting for the reason that the so called local persons i.e. accused No. 1 and accused No. 2 whom the prosecutrix had believed to be of some help to her were as a matter of fact not her sympathizer because had it been so, they would have given lift to her in their vehicle and dropped safe at her in Manali town or taken her to police station to lodge FIR against the incident. No doubt, as per her version said accused No. 1 and accused Chuni Pradhan had advised her to go to home but when it was 6.00 p.m. by that time and in view of topography of Manali town and Solang Nalla where sun sets at early hours of the day and the possibility of it being dark at that time, cannot be ruled out. Since they offered tea and biscuits to her, therefore, obviously she may have accepted the same believing them her sympathizer. It is they who made her to board the taxi and it being darkness she boarded the taxi but their illegal designs to subject her to sexual intercourse on the way most probably were not in her knowledge. Therefore, accused No. 1 Raghubir Singh, accused No. 2 Hari Ram and *prima-facie* accused Chuni Pradhan (discharged from the case) as well as co-accused Munna and Ninnu (proclaimed offender) by taking undue advantage of their position to dominate the will of the prosecutrix who had been traveling with them in a state of helplessness was also subjected to sexual intercourse by each of them, which again cannot be said to be an act of consensual sexual intercourse. The observations made by learned trial Judge that she would have tried to rush to her house as advised by accused No. 1 and accused Chuni Pradhan are again far fetched for the reason that in view of the time being 6.00 p.m. and the night already having set in, how a lonely tender age girl could have traveled to her native place at Manali. This aspect has not been taken into consideration by learned trial Judge. The above said accused who being locals and considered by her to be of some help to her have taken undue advantage of her loneliness and they also subjected her to sexual intercourse. Therefore, instead of criticizing the prosecutrix, learned trial Judge should have taken into consideration such unbecoming behaviour of the said accused. The argument addressed by Mr. R.L. Sood, learned arguing counsel qua this aspect of the matter and law laid down by the apex Court in ***Raja and others*** V. ***State of Karnataka, 2016(10) SCC 506*** are of no help to their case. Not only this but the law laid down by the apex Court in *Raja's* case (supra) is also distinguishable on facts.

37. The improvements that she raised hue and cry at Solang Nalla when accused tried to commit rape with her and accused Sunil Kumar had threatened to kill her and that Bittu did not commit rape on her at Solang Nalla but at Kenchi Mor, even if are there, is hardly of any consequence because the fault, if any, lies on the part of the investigating agency and the possibility of the I.O. having not recorded her statement as per her version, which in the case in hand is just possible as the accused being influential persons, they seem to have influenced the investigation of the case also. At the most, the investigation can be said to be faulty and as such the version of the prosecutrix in the witness box cannot be said to be false, more particularly, when the accused have admittedly assaulted her sexually. Her testimony that it took 5-6 minutes to accused Vijay to convince her to accompany him to Vashisth bath could have not been considered to arrive at a conclusion that she was a consenting party to the sexual intercourse committed by the accused person with her for the reason that the said accused had asked to accompany her to Vashisth bath and not Solang Nalla and she consented only to accompany him and none else. She may have agreed to accompany accused No. 5 as he was known to her

because as per her version, he offered himself to solemnize marriage with her. How accompanying voluntarily with a known person could be taken to believe that she was a consenting party to have sexual intercourse with such person; learned trial Judge has failed to explain. When she never consented to accompany other accused persons and even for the commission of sexual intercourse with her by accused Vijay, therefore, it is established that she objected to and resisted such ghastly act committed upon her by the accused persons. In view of evidence on record, her so called consent was obtained by them under fear of her own life, causing hurt to her.

38. As noticed hereinabove, the accused have not denied that they have subjected the prosecutrix to sexual intercourse. However, their defence is that since they failed to pay money to her, she demanded from each of them, therefore, it is for this reason, they have been implicated in this case falsely. When it is proved and held by us that she was not a consenting party and rather subjected to sexual intercourse without her consent and against her will, therefore, the plea so raised is hardly of any help to them. It is well settled that even a woman of easy virtue and for that matter a prostitute cannot also be subjected to sexual intercourse against her will and without her consent. Learned trial Judge has failed to appreciate this aspect of the matter. Instead of appreciating that nine males have sexually assaulted a tender aged girl and holding them guilty of the commission of offence, learned trial Judge has went on to criticize the prosecutrix. Even if she was of easy virtue could have never consented to have sexual intercourse with this much number of persons (accused herein) i.e., nine. Such an approach of learned trial Court in this matter cannot be termed as legally and factually sustainable. The present is a case where sole testimony of the prosecutrix is sufficient to bring the guilt home to the accused persons. The Apex Court in ***State of Punjab*** V. ***Gurmeet Singh and others, AIR 1996 SC 1393*** has held that own statement of the prosecutrix if inspires confidence is sufficient to bring guilt home to the accused persons.

39. As noticed supra, the prosecutrix in unequivocal terms has supported her version in her statement Ext. P-G recorded under Section 154 Cr.P.C. She has also stated whatever she has deposed in her supplementary statement mark D-A, while in the witness box. In her cross-examination, she has categorically stated that she disclosed the name of Chuni Pradhan on each and every occasion when her statements were recorded by the police. Even accused Ravi Prakash while answering question No. 13 in his statement under Section 313 Cr.P.C. has admitted that besides Raghubir, Ninnu, Hari Ram @ Tikam Ram and Chuni Pradhan had also subjected the prosecutrix to sexual intercourse at Kenchi Mor. The so called improvements to her earlier version in Ext. P-G or mark D-A to our mind are not owing to her acts and conduct but the possibility of the I.O. having not recorded her statement as per her version cannot be ruled-out. She has only been cross-examined to show that she did not raise any hue and cry irrespective of taken in the vehicle by the accused through Vashisth bazaar where shops and houses are in existence, Palchan through the barricades put by the army and irrespective of tourist flow to Solang Nalla area. Though, it is correct, however, initially they were only three accused i.e. accused No. 5 Vijay Kumar, accused No. 3, Ravi Prakash and accused Munna, who was driving the taxi on their way to Solang Nalla side. As observed hereinabove, she had voluntarily accompanied accused Vijay, however, it cannot be inferred that she did so to have sexual intercourse with the said accused, what to speak of the remaining accused namely Ravi Prakash and accused Munna the (proclaimed offender). As per her statement under Section 154 Cr.P.C and also her testimony while in the witness box the said accused got themselves hided on the road nearby the Gypsy and they appeared at the place where she was subjected to sexual intercourse by the said accused when she had already got up after having exploited sexually by accused Vijay against her will and without her consent. The present as such is a case where accused had ganged up and it was part of the conspiracy they hatched that accused No. 5 Vijay who had intimacy with her was assigned the task to bring her so that she could be subjected to sexual intercourse by them turn by turn and in a manner as discussed hereinabove as well as having come on record.

40. Therefore, not only accused No. 5 Vijay but his co-accused No. 1 to 4 namely, Raghubir Singh, Hari Ram, Ravi Prakash and Sunil Kumar (respondents herein) all have assaulted the prosecutrix sexually without her consent and against her will. The present being a case of gang rape, they should have been convicted and sentenced by learned trial Court. The findings of acquittal recorded by the Court below for all the reasons discussed hereinabove are neither legally nor factually sustainable. In view of the evidence discussed hereinabove, accused persons Munna and Ninnu who are absconding have also prima-facie assaulted the prosecutrix sexually. Their guilt, however, is yet to establish as and when they will surrender in the Court or produced in custody by police after holding trial against them. As discussed hereinabove, charge should have also been framed against accused Chuni Lal as prima-facie case is made out against him also. The order of his discharge as such is not legally sustainable.

41. In view of what has been said hereinabove, the present is not a case where it can be said that the prosecution has failed to prove its case against the accused beyond all reasonable doubt. The reappraisal of the evidence by us rather leads to the only conclusion that all the accused persons have assaulted the prosecutrix sexually against her will and without her consent. The charge under Section 376(2)(g) of the Indian Penal Code framed against them is, therefore, fully established on record. Being so, the only inescapable conclusion would be that the accused have committed the offence punishable under Section 376(2)(g) of the Indian Penal Code. They all, therefore, are convicted accordingly. The findings of their acquittal as recorded by learned trial Judge are quashed and set aside. They are directed to surrender to their bail bonds and be produced in the Court on 31.03.2017 for being heard on the quantum of sentence.

42. Before parting with this judgment, we shall be failing in our duty if not issue a direction to the appellant-State to file a report qua the steps taken to ascertain the whereabouts of the proclaimed offenders Munna and Ninnu and also qua attachment of their moveable and immovable property, if any, well before the next date. We also leave it open to consider and pass appropriate orders qua the prosecution of accused Chuni Lal in this case on the next date after affording an opportunity of being heard to him. Notice, therefore, be issued to said Chuni Lal also for the date fixed on his address to be filed by the appellant-State within a week from today. Judgment to continue.

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

ICICI Lombard General Insurance Company Limited ...Appellant.

Versus

Smt. Preeti and others ...Respondents.

FAO No. 427 of 2012

Decided on: 03.03.2017

Motor Vehicles Act, 1988- Section 166- MACT held that the deceased being a daily wager was earning Rs. 300/- per day for 25 days in a month and assessed his income as Rs. 7,500/- per month- held, that the wages of a daily wager are not more than Rs. 200/- per day- therefore, the monthly income of the deceased would have been Rs. 6,000/- per month – 1/3rd was to be deducted towards personal expenses- the claimants have lost source of dependency of Rs. 4,000/- per month- the deceased was aged 23 years at the time of accident – multiplier of 18 was rightly applied by the Tribunal – claimants are entitled to Rs. 4,000/- x 12 x 18= Rs. 8,64,000/- under the head loss of dependency- claimants are also entitled to Rs. 10,000/- each under the heads loss of consortium, loss of estate, loss of love and affection and funeral expenses- thus, claimants are entitled to Rs. 9,04,000/- with interest awarded by the Tribunal. (Para- 5 to 11)

Cases referred:

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

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

For the appellant:	Mr. Jagdish Thakur, Advocate.
For the respondents:	Mr. Umesh Kanwar, Advocate, vice Mr. Manish Sharma, Advocate, for respondents No. 1 to 4. Mr. Kishore Pundeer, Advocate, for respondent No. 5. Nemo for respondent No. 6.

The following judgment of the Court was delivered:

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

Subject matter of this appeal is award, dated 18th September, 2012, made by the Motor Accident Claims Tribunal (III), Shimla, H.P. (for short "the Tribunal") in M.A.C. Petition No. 27-S/2 of 12/09, titled as Smt. Preeti and others versus Shri Dhirender Singh Chauhan and others, whereby compensation to the tune of ₹ 11,10,000/- with interest @ 8% per annum from the date of the petition till its realization came to be awarded in favour of claimants No. 1, 2 & 4 (for short "the claimants") and against the insurer (for short "the impugned award").

2. The claimants, owner-insured and driver of the offending vehicle have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

3. Appellant-insurer has called in question the impugned award on the grounds taken in the memo of appeal.

4. Learned counsel for the appellant-insurer argued that the Tribunal has fallen in an error while calculating the compensation for the reason that the deceased was a daily wager and at the relevant point of time, i.e. in the year 2009, the minimum wages prevalent in the State of Himachal Pradesh for daily wager were ₹ 100/- per day.

5. I have gone through the record and the impugned award and am of the considered view that the Tribunal, in para 9 of the impugned award, has fallen in an error in holding that the deceased, being a daily wager, was earning ₹ 300/- per day for 25 days in a month and assessing his income to be ₹ 7,500/- per month.

6. The wages of a daily wager, as on today, are not more than ₹ 200/- per day. Keeping all the facts in view, it can be safely held that the monthly income of the deceased would have been ₹ 6,000/- per month. One third was to be deducted towards his personal expenses in view of the law laid down by the Apex Court in the case titled as **Sarla Verma (Smt) and others versus Delhi Transport Corporation and another,** reported in **(2009) 6 Supreme Court Cases 121,** which was upheld by a larger Bench of the Apex Court in **Reshma Kumari & Ors. versus Madan Mohan & Anr.,** reported in **2013 AIR SCW 3120.** Accordingly, it is held that the claimants have lost source of dependency to the tune of ₹ 4,000/- per month.

7. The deceased was 23 years of age at the time of the accident. Thus, the Tribunal has rightly applied the multiplier of '18' in view of **Sarla Verma's** and **Reshma Kumari's cases (supra)** read with the Second Schedule appended with the Motor Vehicles Act, 1988 (for short "MV Act").

8. Viewed thus, the claimants are held entitled to ₹ 4,000/- x 12 x 18 = ₹ 8,64,000/- under the head 'loss of income/dependency'.

9. The claimants are also held entitled to ₹ 10,000/- each under the heads 'loss of consortium', 'loss of estate', 'loss of love and affection' and 'funeral expenses'.

10. Viewed thus, it is held that the claimants are entitled to compensation to the tune of ₹ 8,64,000/- + ₹ 10,000/- + ₹ 10,000/- + ₹ 10,000/- + ₹ 10,000/- = ₹ 9,04,000/- with interest as awarded by the Tribunal.

11. The awarded amount be released in favour of the claimants strictly as per the terms and conditions contained in the impugned award after proper identification through payee's account cheque or by depositing the same in their respective bank accounts.

12. Excess amount, if any, be released in favour of the appellant-insurer through payee's account cheque.

13. Having glance of the above discussions, the impugned award is modified, as indicated hereinabove, and the appeal is disposed of accordingly.

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

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

National Insurance Company Limited ...Appellant.

Versus

Shri Kartar Singh and others ...Respondents.

FAO No. 309 of 2015
a/w CO No. 39 of 2015
Decided on: 03.03.2017

Motor Vehicles Act, 1988- Section 149- The offending vehicle was a tractor – the driver was competent to drive light motor vehicle- held, that there is no requirement of endorsement in the driving licence- in these circumstances, the insurer was rightly held liable - appeal dismissed. (Para-15 to 21)

Cases referred:

Chairman, Rajasthan State Road Transport Corporation & ors. versus Smt. Santosh & Ors., 2013 AIR SCW 2791

National Insurance Company Ltd. versus Annappa Irappa Nesaria & Ors., 2008 AIR SCW 906

Kulwant Singh & Ors. versus Oriental Insurance Company Ltd., JT 2014 (12) SC 110

Baldev Singh versus Jagdish Chand & another, I L R 2016 (II) HP 977

Oriental Insurance Company versus Gulam Mohammad (since deceased) & others, Latest HLJ 2014 (HP) 244

Joginder Singh @ Pamma versus Vikram @ Vickey and others, Latest HLJ 2014 (HP) Suppl. 292

Oriental Insurance Company versus Sudesh Kumari and others, 2014 (2) Shim. LC 918

For the appellant: Mr. Anil Tomar, Advocate.

For the respondents: Ms. Anjali Soni Verma, Advocate, for respondents No. 1 (a) and 1 (b).
Mr. Mukul Sood, Advocate, for respondents No. 2 and 3.

The following judgment of the Court was delivered:

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

This appeal is directed against award, dated 16th December, 2014, made by the Motor Accident Claims Tribunal (I), Kangra at Dharamshala, H.P. (for short "the Tribunal") in MACP No. 114-K/13/2011, titled as Subhi Singh and another versus Kartar Singh and others, whereby compensation to the tune of ₹ 5,57,000/- with interest @ 7.5% per annum from the date of filing of the claim petition till its realization came to be awarded in favour of the claimants and the insurer came to be saddled with liability (for short "the impugned award").

2. The owners-insured of the offending vehicle have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

3. The appellant-insurer has questioned the impugned award on the grounds taken in the memo of the appeal.

4. The claimants have called in question the impugned award by the medium of cross objections on the ground of adequacy of compensation.

4. Heard learned counsel for the parties.

5. The impugned award merits to be upheld and the appeal as well as the cross-objections is to be dismissed for the following reasons:

6. The claimants filed claim petition under Section 163-A of the Motor Vehicles Act, 1988 (for short "MV Act") for grant of compensation as per the break-ups given in the claim petition on the ground that they lost their son, in the vehicular accident, which had occurred due to the use of tractor, bearing registration No. HP-36-3462, on 18th October, 2010, in which deceased-Karan Singh, who was driving the offending vehicle, sustained injuries and succumbed to the injuries.

7. The respondents resisted the claim petition on the grounds taken in the respective memo of objections.

8. On the pleadings of the parties, following issues came to be framed by the Tribunal:

> *"1. Whether Karan Singh on 18.10.2010 at 9.40 a.m. at Maroh Ghat (Dohab) had passed away due to use of the Vehicle No. HP-36-3462? OPP*
>
> *2. If issue No. 1 is proved in affirmative to what amount of compensation the petitioners are entitled to and from whom? OPP*
>
> *3. Whether driver of the tractor was not holding effective and valid driving licence at the time of accident? OPR*
>
> *4. Whether tractor No. HP-36-3462 was being driven without valid registration-cum-fitness certificate and route permit? OPR*
>
> *5. Whether the petition is not maintainable? OPR*
>
> *6. Relief."*

9. Parties have led evidence.

10. The Tribunal after scanning the evidence, oral as well as documentary, awarded compensation in favour of the claimants in terms of the impugned award and saddled the appellant-insurer with liability. Hence, the appeal.

11. Learned counsel for the appellant-insurer contested the impugned award on the following two grounds:

> (i) That the driver of the offending vehicle was not having a valid and effective driving licence to drive the same; and
>
> (ii) That the offending vehicle was not having a valid fitness certificate.

12. The dispute involved in the instant appeal and the cross-objections revolves around issues No. 2, 3 and 4 only. There is no challenge to the findings returned by the Tribunal on issue No. 1, thus, the same are upheld.

13. I have gone through the record. It is apt to record herein that the Tribunal has wrongly recorded in the impugned award that the insurer has not led any evidence. Perusal of the record does disclose that the insurer has examined RW-1, Shri Sanjeev Singh, Licensing Clerk from the office of RLA Dehra and RW-2, Shri Sachin Walia, Junior Clerk from the office of RLA, Dharamshala.

14. RW-2, Shri Sachin Walia, Junior Clerk from the office of RLA, Dharamshala, has deposed that the driver of the offending vehicle, i.e. deceased-Karan Singh, was competent to drive light motor vehicle.

15. Learned counsel for the appellant-insurer further argued that the driving licence was not having an endorsement. The said argument is not tenable for the following reasons:

16. A Division Bench of the High Court of Jammu and Kashmir at Srinagar, of which I (Justice Mansoor Ahmad Mir, Chief Justice) was a member, in a case titled as **National Insurance Co. Ltd. versus Muhammad Sidiq Kuchey & ors.,** being **LPA No. 180 of 2002,** decided on **27th September, 2007,** has discussed this issue and held that a driver having licence to drive "LMV" requires no "PSV" endorsement. It is apt to reproduce the relevant portion of the judgment herein:

> *"The question now arises as to whether the driver who possessed driving licence for driving abovementioned vehicles, could he drive a passenger vehicle? The answer, I find, in the judgment passed by this court in case titled National Insurance Co. Ltd. Vs. Irfan Sidiq Bhat, 2004 (II) SLJ 623, wherein it is held that Light Motor Vehicle includes transport vehicle and transport vehicle includes public service vehicle and public service vehicle includes any motor vehicle used or deemed to be used for carriage of passengers. Further held, that the authorization of having PSV endorsement in terms of Rule 41 (a) of the Rules is not required in the given circumstances. It is profitable to reproduce paras 13 and 17 of the judgment hereunder:-*
>
> > *"13. A combined reading of the above provisions leaves no room for doubt that by virtue of licence, about which there is no dispute, both Showkat Ahamd and Zahoor Ahmad were competent in terms of section 3 of the Motor Vehicles Act to drive a public service vehicle without any PSV endorsement and express authorization in terms of rule 4(1)(a) of the State Rules. In other words, the requirement of the State Rules stood satisfied.*
> >
> > *.....*
> >
> > *17. In the case of Mohammad Aslam Khan (CIMA no. 87 of 2002) Peerzada Noor-ud-Din appearing as witness on behalf of Regional Transport Officer did say on recall for further examination that PSV endorsement on the licence of Zahoor Ahmad was fake. In our opinion, the fact that the PSV endorsement on the licence was fake is not at all material, for, even if the claim is considered on the premise that there was no PSV endorsement on the licence, for the reasons stated above, it would not materially affect the claim. By virtue of "C to E" licence Showkat Ahmad was competent to drive a passenger vehicle. In fact, there is no separate definition of passenger vehicle or passenger service vehicle in the Motor Vehicles Act. They come within the ambit of public service vehicle under section 2(35). A holder of driving licence with respect to "light Motor Vehicle" is thus competent to drive any motor vehicle used or adapted to be used for carriage of passengers i.e. a public service vehicle."*
>
> *In the given circumstances of the case PSV endorsement was not required at all."*

17. The mandate of Sections 2 and 3 of the MV Act came up for consideration before the Apex Court in a case titled as **Chairman, Rajasthan State Road Transport Corporation & ors. versus Smt. Santosh & Ors.,** reported in **2013 AIR SCW 2791,** and after examining the various provisions of the MV Act held that Section 3 of the Act casts an obligation on the driver to hold an effective driving licence for the type of vehicle, which he intends to drive. It is apt to reproduce paras 19 and 23 of the judgment herein:

> *"19. Section 2(2) of the Act defines articulated vehicle which means a motor vehicle to which a semi-trailer is attached; Section 2(34) defines public place; Section 2(44)*

defines 'tractor' as a motor vehicle which is not itself constructed to carry any load; Section 2(46) defines `trailer' which means any vehicle, other than a semi- trailer and a side-car, drawn or intended to be drawn by a motor vehicle. Section 3 of the Act provides for necessity for driving license; Section 5 provides for responsibility of owners of the vehicle for contravention of Sections 3 and 4; Section 6 provides for restrictions on the holding of driving license; Section 56 provides for compulsion for having certificate of fitness for transport vehicles; Section 59 empowers the State to fix the age limit of the vehicles; Section 66 provides for necessity for permits to ply any vehicle for any commercial purpose; Section 67 empowers the State to control road transport; Section 112 provides for limits of speed; Sections 133 and 134 imposes a duty on the owners and the drivers of the vehicles in case of accident and injury to a person; Section 146 provides that no person shall use any vehicle at a public place unless the vehicle is insured. In addition thereto, the Motor Vehicle Taxation Act provides for imposition of passenger tax and road tax etc.

20. .....

21. .....

22. .....

23. Section 3 of the Act casts an obligation on a driver to hold an effective driving license for the type of vehicle which he intends to drive. Section 10 of the Act enables the Central Government to prescribe forms of driving licenses for various categories of vehicles mentioned in sub-section (2) of the said Section. The definition clause in Section 2 of the Act defines various categories of vehicles which are covered in broad types mentioned in sub-section (2) of Section 10. They are 'goods carriage', 'heavy goods vehicle', 'heavy passenger motor vehicle', 'invalid carriage', 'light motor vehicle', 'maxi-cab', 'medium goods vehicle', 'medium passenger motor vehicle', 'motor-cab', 'motorcycle', 'omnibus', 'private service vehicle', 'semi- trailer', 'tourist vehicle', 'tractor', 'trailer' and 'transport vehicle'."

18. The Apex Court in another case titled as **National Insurance Company Ltd. versus Annappa Irappa Nesaria & Ors.,** reported in **2008 AIR SCW 906,** has also discussed the purpose of amendments, which were made in the year 1994 and the definitions of 'light motor vehicle', 'medium goods vehicle' and the necessity of having a driving licence. It is apt to reproduce paras 8, 14 and 16 of the judgment herein:

"8. Mr. S.N. Bhat, learned counsel appearing on behalf of the respondents, on the other hand, submitted that the contention raised herein by the appellant has neither been raised before the Tribunal nor before the High Court. In any event, it was urged, that keeping in view the definition of the 'light motor vehicle' as contained in Section 2(21) of the Motor vehicles Act, 1988 ('Act' for short), a light goods carriage would come within the purview thereof.

A 'light goods carriage' having not been defined in the Act, the definition of the 'light motor vehicle' clearly indicates that it takes within its umbrage, both a transport vehicle and a non-transport vehicle.

Strong reliance has been placed in this behalf by the learned counsel in Ashok Gangadhar Maratha vs. Oriental Insurance Company Ltd., [1999 (6) SCC 620].

9. .....

10. .....

11. .....

12. .....

13. .....

14. Rule 14 prescribes for filing of an application in Form 4, for a licence to drive a motor vehicle, categorizing the same in nine types of vehicles.

Clause (e) provides for 'Transport vehicle' which has been substituted by G.S.R. 221(E) with effect from 28.3.2001. Before the amendment in 2001, the entries medium goods vehicle and heavy goods vehicle existed which have been substituted by transport vehicle. As noticed hereinbefore, Light Motor Vehicles also found place therein.

15. .....

16. From what has been noticed hereinbefore, it is evident that 'transport vehicle' has now been substituted for 'medium goods vehicle' and 'heavy goods vehicle'. The light motor vehicle continued, at the relevant point of time, to cover both, 'light passenger carriage vehicle' and 'light goods carriage vehicle'.

A driver who had a valid licence to drive a light motor vehicle, therefore, was authorised to drive a light goods vehicle as well."

19. The Apex Court in the latest judgment in the case titled as **Kulwant Singh & Ors. versus Oriental Insurance Company Ltd.,** reported in **JT 2014 (12) SC 110,** held that PSV endorsement is not required.

20. The argument of the learned counsel for the appellant-insurer that the driver was not competent to drive the offending vehicle, i.e. tractor, is devoid of any force for the reason that this Court in **FAO No. 187 of 2010,** titled as **Baldev Singh versus Jagdish Chand & another,** decided on 8th April, 2016, has held that tractor falls within the definition of 'light motor vehicle'.

21. The same principle has been laid down by this Court in the cases titled as **Oriental Insurance Company versus Gulam Mohammad (since deceased) & others,** reported in **Latest HLJ 2014 (HP) 244; Joginder Singh @ Pamma versus Vikram @ Vickey and others,** reported in **Latest HLJ 2014 (HP) Suppl. 292;** and **Oriental Insurance Company versus Sudesh Kumari and others,** reported in **2014 (2) Shim. LC 918.**

22. Having said so, the findings recorded by the Tribunal on issue No. 3 are upheld for the reasons recorded hereinabove.

23. It was for the insurer to plead and prove that the offending vehicle was not having fitness certificate and that was the cause of the accident. No evidence to this extent has been led by the insurer. Thus, the Tribunal has rightly returned findings on issue No. 4 and the same are, accordingly, upheld.

24. The amount awarded is just and cannot be said to be inadequate.

25. Having glance of the above discussions, the impugned award is upheld and the appeal as well as the cross-objections is dismissed.

26. Registry is directed to release the awarded amount in favour of the claimants strictly as per the terms and conditions contained in the impugned award through payee's account cheque or by depositing the same in their respective bank accounts.

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

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

National Insurance Company Ltd. .....Appellant

Versus

Shri Prem Chand & others .....Respondents

FAO No. 170 of 2012
Decided on : 03.03.2017

Motor Vehicles Act, 1988- Section 149- MACT saddled the insurer with liability with a right to recovery – insurer filed an appeal – held, that the vehicle was insured - the interest of third party cannot be defeated- even if, the insured had committed breach of the terms and conditions of the policy, the insurer is liable to pay the amount with a right of recovery – appeal dismissed.

(Para-2 to 10)

For the Appellant :	Mr. Ashwani K. Sharma, Senior Advocate, with Mr. Jeewan Kumar, Advocate.
For the respondents:	Mr. Naveen K. Bhardwaj, Advocate, for respondent No. 1.
	Mr. Anup Rattan, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

Challenge in this appeal is to judgment and award, dated 16th March, 2012, made by the Motor Accident Claims Tribunal-I, Kangra at Dharamshala (HP) (for short 'the Tribunal') in MAC Petition No. 15-P/II of 2008, titled as **Prem Chand versus Rajni Gupta & others**, whereby compensation to the tune of Rs. 1,87,800/- with interest @ 9% per annum from the date of filing of the claim petition till its realization and costs to the tune of Rs. 2,000/- was awarded in favour of the claimant and the insurer-appellant came to be saddled with liability, with right of recovery (for short "the impugned award").

2. The claimant, owner and driver have not questioned the impugned award on any count. Thus, it has attained finality so far the same relates to them.

3. The appellant-insurer has questioned the impugned award on the grounds taken in the memo of appeal.

4. Learned Counsel for the appellant-insurer argued that the Tribunal has fallen in an error in saddling the insurer with liability and the driver was not having a valid and effective driving licence at the relevant time.

5. I wonder why the appellant-insurer has filed appeal.

6. The offending vehicle was insured and the claimant is the third party.

7. It is a beaten law of the land that interests of third party cannot be defeated and even if the owner-insured has committed breach, the insurer has to satisfy the award, with right of recovery.

8. Having said so, I am of the considered view that the Tribunal has rightly saddled the insurer with the liability, granted right of recovery.

9. Accordingly, the impugned award is upheld and the appeal is dismissed.

10. The Registry is directed to release the awarded amount in favour of the claimant, strictly in terms of conditions contained in the impugned award, through payees account cheque or by depositing the same in his account.

11. Send down the records after placing a copy of the judgment on the Tribunal's file.

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

Shri Randip Singh .....Appellant
Versus
Ikram Khan and another .....Respondents.

FAO (MVA) No. 44 of 2012.
Date of decision: 3rd March, 2017.

Motor Vehicles Act, 1988- Section 166- Appellant was registered owner of the vehicle but had sold the same to R on 12.9.1996 – the vehicle was purchased by J in the year 2003 by an agreement – the vehicle was also released in favour of J – held, that the person who is in actual possession and control of the vehicle at the time of accident has to satisfy the liability – since, J was in actual possession and control of the vehicle, therefore, he has to satisfy the entire liability – appeal allowed and J directed to satisfy the entire liability. (Para-4 to 7)

Case referred:
Lakhwinder Singh Versus Seema Devi and others, I L R 2016 (V) HP 1502

For the appellant: Mr.B.C. Negi, Sr. Advocate, with Mr. Pranay Partap Singh, Advocate.
For the respondents: Mr.Bimal Gupta, Sr. Advocate with Mr. Vineet Vashisht, Advocate, for respondent No.1.
Mr. Naresh Gupta, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

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

This appeal is directed against the judgment and award dated 3.12.2011, passed by the Motor Accident Claims Tribunal-II Sirmaur District at Nahan, HP, hereinafter referred to as "the Tribunal", for short, in MAC Petition No. 118-N/2 of 2005, titled *Ikram Khan versus Sh. Jiwan Singh and another,* whereby compensation to the tune of Rs.1,94,642/- alongwith interest @ 7.5% per annum was awarded in favour of the claimant and respondents in the claim petition came to be saddled with the liability, for short "the impugned award", on the grounds taken in the memo of appeal.

2. Claimant and Jiwan Singh owner–cum- driver of Three Wheeler No. HP-50-0235, have not questioned the impugned award on any ground, thus the same has attained the finality, so far as it relates to them.

3. Appellant has questioned the impugned award on the grounds taken in the memo of appeal.

4. Precisely, the case of the appellant is that though he was registered owner of the offending vehicle but he had sold the vehicle to Raj Kumar in terms of sale letter Ext. RW1/A on 12.9.1996 and in the year 2003, the vehicle was purchased by Jiwan Singh in terms of agreement Ext. RW1/B and had produced the documents before the Tribunal below. Both the documents have been proved, which is recorded in para 12 of the impugned award.

5. During the pendency of the appeal, the documents have been sought from the Investigating Agency. The police produced the Photostat copies of documents which were taken on record and do disclose that during the investigation, the offending vehicle was seized and stood released in favour of Jiwan Singh, on his application, on the ground that he was the owner and possessor of the said vehicle at the relevant point of time, i.e. the date of accident. The

agreement Ext. RW1/B is also on record. Having said so, Jiwan Singh was having control of the vehicle at the relevant point of time.

6. This Court in **FAO No.314 of 2011,** titled, ***Lakhwinder Singh Versus Seema Devi and others*** decided on 7.10.2016, held that the person who is in actual possession of the vehicle and is under control of the same at the time of accident has to satisfy the liability. It is apt to reproduce paras 25 and 26 of the said judgment herein.

> *"25. The Apex Court in case titled as **HDFC Bank Ltd. vs. Kumari Reshma and Ors, 2014 AIR SCW 6673** held that a person who is in possession of the vehicle in terms of a hire purchase agreement or agreement of lease or agreement of hypothecation is the owner of the said vehicle. It is apt to reproduce paragraphs 10 and 24 of the said judgment hereunder:*
>
> > *"10. On a plain reading of the aforesaid definition, it is demonstrable that a person in whose name a motor vehicle stands registered is the owner of the vehicle and, where motor vehicle is the subject of hire-purchase agreement or an agreement of hypothecation, the person in possession of the vehicle under that agreement is the owner. It also stipulates that in case of a minor, the guardian of such a minor shall be treated as the owner. Thus, the intention of the legislature in case of a minor is mandated to treat the guardian of such a minor as the 'owner'. This is the first exception to the definition of the term 'owner'. The second exception that has been carved out is that in relation to a motor vehicle, which is the subject of hire-purchase agreement or an agreement of lease or an agreement of hypothecation, the person in possession of vehicle under that agreement is the owner. Be it noted, the legislature has deliberately carved out these exceptions from registered owners thereby making the guardian of a minor liable, and the person in possession of the vehicle under the agreements mentioned in the dictionary clause to be the owners for the purposes of this Act.*
> >
> > *24. On a careful analysis of the principles stated in the foregoing cases, it is found that there is a common thread that the person in possession of the vehicle under the hypothecation agreement has been treated as the owner. Needless to emphasise, if the vehicle is insured, the insurer is bound to indemnify unless there is violation of the terms of the policy under which the insurer can seek exoneration."*
>
> *26. The Apex Court further held that the person who is in actual possession of the vehicle and is under control of the same at the time of accident has to satisfy the liability. It is apt to reproduce paragraphs 13, 15, 16 and 25 hereunder:*
>
> > *"13. In this context, we may refer to a two-Judge Bench decision in Rajasthan State Road Transport Corporation V. Kailash Nath Kothari & Others, 1997 7 SCC 481. In the said case, plea was taken by the Rajasthan State Road Transport Corporation (RSRTC) before the High Court that as it was only a hirer and not the owner of the bus, it could not be fastened with any liability for payment of compensation but the said stand was not accepted. It was contended before this Court that the Corporation not being the owner of the bus was not liable to pay any compensation arising out of the accident because driver who was driving the bus at the relevant time, was not in the employment of the owner of the bus and not of the Corporation and hence, it could not be held vicariously liable for the rash and negligent act of the driver. The Court referred to the definition in Section 2(3), which defines "contract carriage", Section 2(19), which defines the "owner", Section 2(29), which defines "stage carriage" and Section 42 that dealt with "necessity of permits". Be it stated, these*

provisions reproduced by the Court pertained to Motor Vehicles Act, 1939 (for short, 'the 1939 Act'). The owner under the 1939 Act was defined as follows:

"2. (19) 'owner' means, where the person in possession of a motor vehicle is a minor, the guardian of such minor, and in relation to a motor vehicle which is the subject of a hirepurchase agreement, the person in possession of the vehicle under that agreement;"

The Court referred to the conditions 4 to 7 and 15 of the agreement and in that context held thus:

"The admitted facts unmistakably show that the vehicle in question was in possession and under the actual control of RSRTC for the purpose of running on the specified route and was being used for carrying, on hire, passengers by the RSRTC. The driver was to carry out instructions, orders and directions of the conductor and other officers of the RSRTC for operation of the bus on the route specified by the RSRTC".

While dealing with the definition of the owner under the 1939 Act, the Court ruled that the definition of owner under Section 2(19) of the Act is not exhaustive. It has, therefore to be construed, in a wider sense, in the facts and circumstances of a given case. The expression owner must include, in a given case, the person who has the actual possession and control of the vehicle and under whose directions and commands the driver is obliged to operate the bus. To confine the meaning of "owner" to the registered owner only would in a case where the vehicle is in the actual possession and control of the hirer would not be proper for the purpose of fastening of liability in case of an accident. The liability of the "owner" is vicarious for the tort committed by its employee during the course of his employment and it would be a question of fact in each case as to on whom can vicarious liability be fastened in the case of an accident.

15. In this context, it is profitable to refer to a two-Judge Bench decision in National Insurance Co. Ltd. V. Deepa Devi & Ors., 2008 1 SCC 414. In the said case the question arose whether in the event a car is requisitioned for the purpose of deploying the same in the election duty, who would be liable for payment of compensation to the victim of the accident in terms of the provisions of 1988 Act. The Court referred to the definition of 'owner' in the 1939 Act and the definition of 'owner' under Section 2(30) of the 1988 Act. In that context, the Court observed that the legislature either under the 1939 Act or under the 1988 Act had visualized a situation of this nature. The Court took note of the fact that the respondent no. 3 and 4 continued to be the registered owners of the vehicle despite the fact that the same was requisitioned by the District Collector in exercise of the power conferred upon him under the Representation of People Act, 1951 and the owner of the vehicle cannot refuse to abide by the order of requisition of the vehicle by the District Collector. Proceeding further, the Court ruled thus:

"..... While the vehicle remains under requisition, the owner does not exercise any control thereover. The driver may still be the employee of the owner of the vehicle but he has to drive it as per the direction of the officer of the State, who is put in charge thereof. Save and except for legal ownership, for all intent and purport, the registered owner of the vehicle loses entire control thereover. He has no say as to whether the vehicle should be driven at a given point of time or not. He cannot ask the driver not to drive a vehicle on a bad road. He or the driver could not possibly say

that the vehicle would not be driven in the night. The purpose of requisition is to use the vehicle. For the period the vehicle remains under the control of the State and/or its officers, the owner is only entitled to payment of compensation therefor in terms of the Act but he cannot not exercise any control thereupon. In a situation of this nature, this Court must proceed on the presumption that Parliament while enacting the 1988 Act did not envisage such a situation. If in a given situation, the statutory definitions contained in the 1988 Act cannot be given effect to in letter and spirit, the same should be understood from the common sense point of view.

16. Elaborating the concept, the Court referred to Mukesh K. Tripathi V. Senior Divisional Manager LIC, 2004 8 SCC 387, Ramesh Mehta V. Sanwal Chand Singhvi, 2004 5 SCC 409, State of Maharashtra V. Indian Medical Assn., 2002 1 SCC 589, Pandey & Co. Builders (P) Ltd., V. State of Bihar, 2007 1 SCC 467 and placed reliance on Kailash Nath Kothari , National Insurance Co. Ltd. V. Durdadahya Kumar Samal, 1988 2 TAC 25 and Chief Officer, Bhavnagar Municipality V. Bachubhai Arjanbhai, 1996 AIR(Guj) 51 and eventually opined the State shall be liable to pay the amount of compensation to the claimant and not the registered owner of the vehicle and consequently the appellant therein, the insurance company.

25. In Purnya Kala Devi , a three-Judge Bench has categorically held that the person in control and possession of the vehicle under an agreement of hypothecation should be construed as the owner and not alone the registered owner and thereafter the Court has adverted to the legislative intention, and ruled that the registered owner of the vehicle should not be held liable if the vehicle is not in his possession and control. There is reference to Section 146 of the Act that no person shall use or cause or allow any other person to use a motor vehicle in a public place without insurance as that is the mandatory statutory requirement under the 1988 Act. In the instant case, the predecessor-ininterest of the appellant, Centurion Bank, was the registered owner along with respondent no.2. The respondent No. 2 was in control and possession of the vehicle. He had taken the vehicle from the dealer without paying the full premium to the insurance company and thereby getting the vehicle insured. The High Court has erroneously opined that the financier had the responsibility to get the vehicle insured, if the borrower failed to insure it. The said term in the hypothecation agreement does not convey that the appellant financier had become the owner and was in control and possession of the vehicle. It was the absolute fault of the respondent no.2 to take the vehicle from the dealer without full payment of the insurance. Nothing has been brought on record that this fact was known to the appellant financier or it was done in collusion with the financier. When the intention of the legislature is quite clear to the effect, a registered owner of the vehicle should not be held liable if the vehicle is not in his possession and control and there is evidence on record that the respondent no.2, without the insurance plied the vehicle in violation of the statutory provision contained in Section 146 of the 1988 Act, the High Court could not have mulcted the liability on the financier. The appreciation by the learned Single Judge in appeal, both in fact and law, is wholly unsustainable."

7. In view of the above discussion, it is held that Jiwan Singh, who was in actual possession of the offending vehicle, had the control of the offending vehicle, at the time of accident and thus, has to satisfy the entire liability.

8. Having said so, the impugned award is modified by providing that Jiwan Singh respondent No. 2 herein has to satisfy the award in *toto*.

9. Accordingly, the appeal is allowed and the impugned award is modified as indicated hereinabove.

10. Respondent No. 2 Jiwan Singh is directed to deposit the amount before the Tribunal below, if not already deposited, and on deposit, the Tribunal is directed to release the same in favour of the claimant.

11. Send down the record forthwith, after placing a copy of this judgment.

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

Reliance General Insurance Company Limited ...Appellant.

Versus

Smt. Bulo Devi and others ...Respondents.

FAO No. 469 of 2012
Decided on: 03.03.2017

Motor Vehicles Act, 1988- Section 149- No evidence was led by the insurer to prove that the driver did not have a valid licence or he had committed breach of the terms and conditions of the policy – the insurer was rightly saddled with liability- appeal dismissed. (Para-12 and 13)

For the appellant: Mr. Jagdish Thakur, Advocate.

For the respondents: Mr. Rupinder Singh, Advocate, for respondents No. 1 to 6.
Respondent No. 7 already ex-parte.
Mr. Rajender Dogra, Advocate, for respondents No. 8 to 11.

The following judgment of the Court was delivered:

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

Subject matter of this appeal is award, dated 27th June, 2012, made by the Motor Accident Claims Tribunal-I, Sirmaur District at Nahan, H.P. (for short "the Tribunal") in MAC Petition No. 56-MAC/2 of 2008, titled as Smt. Bulo Devi and others versus Shri Rakesh Kumar and others, whereby compensation to the tune of ₹ 5,00,000/- with interest @ 7.5% per annum from the date of the petition till its realization came to be awarded in favour of the claimants and against the insurer (for short "the impugned award").

2. The claimants, owner-insured and driver of the offending vehicle have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

3. Appellant-insurer has called in question the impugned award on the grounds taken in the memo of appeal.

4. Learned counsel for the appellant-insurer argued that the driver of the offending vehicle was not having a valid and effective driving licence to drive the same and the amount awarded is excessive.

5. Both these arguments are not tenable for the following reasons:

6. The claimants, being the victims of the vehicular accident, which was caused by the driver, namely Shri Rakesh Kumar, while driving tractor, bearing registration No. HR-04A-7307, rashly and negligently on 13th February, 2008, at about 12.15 P.M., near Parmeshwar Gas Factory on Suketi Kala Amb Road, filed the claim petition before the Tribunal for grant of compensation to the tune of ₹ 12,00,000/-, as per the break-ups given in the claim petition.

7. The claim petition was resisted by the respondents and the following issues came to be framed by the Tribunal:

"1. Whether Ganesh Saha died on account of rash or negligent driving of tractor No. HR-04-7307 by respondent No. 1 Rajesh Kumar on 13.02.2008 at about 12.15 PM near Parmeshwar Gas Factory on Saketi-Kala Amb road, as alleged? OPP

2. In case issue No. 1 is proved in affirmative, to what amount of compensation the petitioners are entitled to and from whom? OPP

3. Whether the driver of the vehicle in question did not possess a valid and effective driving licence at the relevant time, as alleged? OPR-3

4. Whether the tractor in question was being plied in violation of the terms and conditions of the insurance policy, as alleged? OPR-3

4-A. Whether the offending vehicle bore registration No. HR-04-A-7307, or not? OPP

5. Relief."

8. Parties have led evidence.

9. The Tribunal after scanning the evidence, oral as well as documentary, awarded compensation in favour of the claimants and saddled the appellant-insurer with liability in terms of the impugned award. Hence, the appeal.

Issues No. 1 and 4-A.

10. The Tribunal, while determining issues No. 1 and 4-A, held that the claimants have proved that the driver, namely Shri Rakesh Kumar, had driven the offending vehicle rashly and negligently on 13th February, 2008, at about 12.15 P.M., near Parmeshwar Gas Factory on Suketi Kala Amb Road, in which deceased-Ganesh Saha sustained injuries and succumbed to the said injuries. There is no challenge to the said findings. Accordingly, the findings returned by the Tribunal on issues No. 1 and 4-A are upheld.

11. Before dealing with issue No. 2, I deem it appropriate to determine issues No. 3 and 4.

Issue No. 3:

12. It was for the insurer to lead evidence to prove that that driver of the offending vehicle was not having a valid and effective driving licence to drive the same. I have gone through the detailed discussions made by the Tribunal in paras 12 to 14 of the impugned award and am of the considered view that the Tribunal has rightly determined issue No. 3 against the insurer and is, accordingly, upheld.

Issue No. 4:

13. It was for the insurer to plead and prove that the owner-insured has committed willful breach of the terms and conditions contained in the insurance policy, has not led any evidence to this effect. Accordingly, the findings returned by the Tribunal on issue No. 4 are upheld.

Issue No. 2:

14. I have gone though the discussions made by the Tribunal in para 11 of the impugned award. The Tribunal has rightly made the assessment, needs no interference. Accordingly, the findings returned by the Tribunal on the said issue are upheld.

15. Having said so, the impugned award is well reasoned and legal one, needs no interference.

16. Having glance of the above discussions, the impugned award is upheld and the appeal is dismissed.

17. The awarded amount be released in favour of the claimants strictly as per the terms and conditions contained in the impugned award after proper identification through payee's account cheque or by depositing the same in their respective bank accounts.

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

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

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

Cr. Appeal No. 69 of 2008
Decided on : 3.3.2017

Indian Penal Code, 1860- Section 279, 337 and 338- Accused was driving a jeep in a rash and negligent manner and struck his jeep against B – B sustained simple and grievous injuries- he was taken to hospital, where he succumbed to the injuries – the accused was tried and acquitted by the Trial Court- held in appeal that PW-1 had supported the prosecution version- mere fact that PW-3 and PW-4 had turned hostile will not make the prosecution case suspect- no mechanical defect was found in the vehicle –the accident was caused due to the high speed of the vehicle – the Trial Court had wrongly acquitted the accused- appeal allowed- accused convicted of the commission of offences punishable under Sections 279, 337 and 338 of I.P.C. (Para-9 to 22)

For the Appellant: Mr. M.L Chauhan, Additional Advocate General.
For the Respondent: Mr. Divay Raj Singh, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The instant appeal stands directed against the impugned judgment of 7.11.2007 rendered by the learned Judicial Magistrate, 1st Class, Court No.II, Una, District Una, H.P. in Criminal Case No. 9-II-99/98, whereby the learned trial Court acquitted the respondent (for short "accused") for the offences charged.

2. Brief facts of the case are that on 30.7.1998 at around 7.30 p.m. near Shiv Mandir, Dangoli the accused was found driving a jeep bearing registration No. DLK-D-5372 on a public road, in a rash and negligent manner so as to endanger human life and personal safety of others and while driving as such accused struck his jeep against Baryam Singh and thereby caused Baryam Singh simple and grievous injuries and thereby committed offence under Sections 279, 337 and 338 of IPC. After the accident the accused could not control his vehicle which was coming in high speed and went down on the road. Injured Baryam Singh who taken to District Hospital Una where he succumbed to injuries on 1.9.1998. This incidence was witnessed by Ram Kishan and Charan Dass and the matter was reported to the police. 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. Notice of accusation stood put to the accused by the learned trial Court qua 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 10 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 claimed false implication. However, he did not choose to lead any evidence in defence.

5. On an appraisal of evidence on record, the learned trial Court returned findings of acquittal qua the accused.

6. The learned Additional Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned trial Court standing not based on a proper appreciation of 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 respondent/accused has with considerable force and vigor contended qua the findings of acquittal recorded by the Court below standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating 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. An FIR qua the ill-fated occurrence stood lodged by the complainant, therein he sustained injuries as pronounced in the apposite MLC comprised in PW-8/A. The apposite opinion enunciated therein by the Doctor, unfolds qua injury No.7 sustained by the victim/complainant being grievous in nature.

10. To prove the genesis of the occurrence, the prosecution had led into the witness box three eye witnesses to the occurrence who respectively deposed as PW-1, PW-2 and PW-3.

11. The learned trial Court on an analysis of the testimony of PW-1 Charan Dass holding revelations therein qua his deceased father at the time when his person stood struck by the vehicle driven by the accused, his standing not accompanied by PW-4 Surinder Kaur nor by PW-2 Ram Krishan, concluded qua the prosecution abysmally failing to sustain the charge. However, the inference aforesaid drawn by it, on anvil of PW-1 articulating in his deposition comprised in his cross-examination qua his father at the relevant time of occurrence standing not accompanied by other eye witnesses thereto yet cannot enhance any concomitant conclusion as stands drawn by it qua the prosecution thereupon failing to prove the charge against the accused nor also it was apt for the learned trial Magistrate to thereupon conclude qua ipso facto the testimony of PW-1, an eye witness to the occurrence holding no credence.

12. The learned counsel appearing for the respondent has contended qua with the deceased complainant in the aforesaid complaint, recording the factum qua at the relevant time, his standing accompanied only by PW-4, his daughter-in-law hence eroding in its entirety the version qua the ill-fated incident testified by PW-1, an eye witness to the occurrence besides he contends qua the testimony of PW-2 (Ram Krishan) who qua the ill-fated occurrence deposed with intra-se harmony with PW-1 likewise holding no probative worth significantly when the name of PW-1 likewise stands unrecorded in the apposite complaint.

13. An incisive scanning of the entire evidence, significantly the one existing in the cross-examination of PW-1 holding underscorings therein qua the factum of the house of the deceased complainant standing located at a distance of 10 meters from the relevant site of occurrence, thereupon even if the complainant, in the FIR lodged qua the occurrence had proceeded to record therein only the presence thereat alongwith him of his daughter-in-law (PW-4) who, however turned hostile also though PW-3 (Surinder Singh), also a purported eye witness to the occurrence turned hostile yet thereupon the factum of PW-1 not witnessing the relevant incident would reiteratedly for the reasons alluded hereinafter not hence stand effaced.

(a) The omission of the deceased complainant, to, in his complaint record the factum of PW-1, his son accompanying him at the relevant site of occurrence would stand subsumed by

the factum qua uncontrovertedly the house of the deceased standing located at a distance of 10 meters from the relevant site of occurrence wherefrom PW-1 testified with aplomb qua his witnessing the occurrence, in testification whereof he inculpated the guilt of the accused.

(b) Furthermore, the evident factum of the deceased taking, to, trudge the road for crossing from its one side to the other side obviously disabled him to notice the presence outside his homestead of PW-1, his son, whereupon he stood precluded to record in the FIR qua PW-1 witnessing the occurrence.

14. Consequently the mere factum qua no unfoldment occurring in the apposite FIR qua PW-1, accompanying him at the relevant site of occurrence, would not constrain any inference qua the ocular version qua the incident rendered by him wherein he has graphically inculpated the guilt of the accused warranting its standing ousted from consideration nor any inference can be erectable qua its holding no probative sinew.

15. Moreover, the factum pronounced by PW-1 in his cross-examination qua at the relevant time of occurrence the deceased complainant being alone whereas the informant disclosing qua his thereat standing accompanied by PW-4 his daughter-in-law, though visibly contradicts the deposition qua the aforesaid facet existing in the cross-examination of PW-1 yet thereupon the version qua the incident initially propounded in the apposite FIR would not perse stand belied whereas preeminently thereupon the testimony of PW-1 stands rendered discardable, conspicuously when the defence fails to belie the presence of PW-4 at the site of occurrence, testimony whereof for reasons alluded hereinabove succors the genesis of the prosecution case.

16. Be that as it may other eye witnesses to the incident who deposed as both PW-3 (Surinder Singh) and PW-4(Surinder Kaur) turned hostile, significantly PW-4 who stands unveiled by the informant to be accompanying him at the relevant time also omitted to lend support to the prosecution case. Nonetheless the opening part of the testimony of PW-4 apparently underlines the factum qua hers at the relevant site of occurrence accompanying her deceased father-in-law also the identity of the relevant vehicle stands emphasized therein whereupon the prosecution has visibly succeeded in proving, the enunciations in the FIR qua the informant at the relevant time standing accompanied by PW-4. Moreover PW-4 in her examination-in-chief has therein made vivid communications qua at the relevant time whereat she was accompanying her father-in-law, the latter thereat concerting to cross from one side of the road to the other, whereat a jeep driven at an excessive high speed arrived whereupon it collided with her deceased father-in-law. The aforesaid communication made by PW-4 in her examination-in-chief wherein she identified the relevant vehicle yet with PW-4 feigning ignorance qua the identity of the accused, stemmed an inference qua the incriminatory role of the accused standing not firmly proven.

17. For determining with invincibility the aforesaid facet, it is imperative to advert qua the reason prevailing upon the learned APP concerned to proceed to seek permission of the learned trial Court to declare her hostile, with a further permission to cross-examine her, permission whereof stood accorded to him, ensuing from the factum of hers in her deposition reneging from her previous statement recorded in writing wherewithin she had named the accused to be driving the relevant vehicle whereas in her deposition comprised in her examination-in-chief, she feigned ignorance qua the factum of the accused occupying the wheel of the relevant vehicle. The apposite reneging by PW-4 qua the factum aforesaid would not give capitalization to the defence to either contend nor it was apt for the learned trial magistrate to conclude qua thereupon the prosecution failing to prove the guilt of the accused arousable from PW-4 not voicing in her deposition qua the accused at the relevant time occupying the wheel of the relevant vehicle.

18. Any formation of any inference qua existence of trite, relevant clinching evidence for thereupon with invincibility concluding qua the accused hence not standing proven to man the driver's seat of the relevant vehicle warrants an allusion to the statement of the accused recorded under Section 313 of Cr.P.C wherein apposite disclosures stand enjoined to carry a

denial qua the accused occupying the drivers seat of the relevant vehicle. However an allusion thereto marks the factum of the accused not therein pointedly denying the factum of his manning the driver's seat of the relevant vehicle. In sequel thereto it stands concluded qua the defence acquiescing qua the factum of the accused occupying the driver's seat of the relevant vehicle thereupon with PW-4 in the opening part of her examination-in-chief identifying the relevant vehicle also renders proven the inculpatory role of the accused in the ill-fated mishap dehors the factum of hers in the later part thereof omitting to in corroboration vis-à-vis her previous statement recorded in writing depose qua the accused occupying the driver's seat of the relevant vehicle.

19. Reiteratedly conspicuously when the effect of the omission qua the aforesaid facet stands benumbed also stands dispelled by the apposite acquiescence(s) emanating from the aforesaid omission of the defence to thereupon belie qua the accused manning the driver's seat of the relevant vehicle. In addition PW-2 has with firmness lent corroboration vis-à-vis PW-4 qua the relevant factum probandum. The mere factum of his name remaining un-enunciated by the informant in the apposite FIR cannot render his testimony to be incredible, inference wherefrom ensues qua his identity being unknown to the complainant. Moreover, with the defence while subjecting him to cross-examination not putting any apposite suggestion(s) to him for belying his presence at the relevant site of incident, contrarily enhances an inference qua the defence concomitantly conceding qua the factum of his at the time contemporaneous to its occurrence being available at the relevant site of mishap. In aftermath his testimony comprised in his examination-in-chief when remains un-eroded of its sanctity despite his facing the ordeal of an exacting cross-examination hence renders it to acquire accentuated credence.

20. The learned counsel for the accused has contended qua with the mechanical expert one Jeet Singh (PW-7) who examined the relevant vehicle pronouncing in his testification qua it not depicting qua any dents or damages standing entailed thereon whereupon the testimony of PW-1 qua, its, after colliding, with the person of the victim/deceased, its rolling down, standing apparently contradicted whereupon he contends qua the version qua the occurrence propounded by PW-1 holds no vigor. However since PW-1 for the reasons ascribed hereinabove did not eye witness the occurrence, the effect of his testimony qua the occurrence standing belied by PW-7, cannot enhance the propagation made by the defence qua the latter deserving an order affirming the verdict of acquittal recorded by the learned trial Magistrate.

21. The learned trial Magistrate on anvil of the testimonies of the prosecution witnesses qua the deceased suffering an auditory impairment had thereupon concluded qua his standing rendered incapacitated to discern the arrival behind him of the relevant vehicle whereupon it further concluded qua no penally inculpable negligence standing ascribable vis-à-vis the accused. Assuming the deceased was suffering from an auditory impairment nonetheless the defence has neither reared (a)qua the deceased abruptly arriving at the site of occurrence (b) the accused sounding the horn of his vehicle, for alarming the deceased to give way to the vehicle driven by the accused. Omissions aforesaid, constrain an inference qua the defence acquiescing qua the factum of the accused by omitting to blow the horn of the relevant vehicle, his thereupon not adhering to the standards of due care and caution rather when he evidently was driving his vehicle at a high speed he hence provenly visibly committed a grave penal misdemeanor wherefrom the tenacity of the aforesaid defence is rendered frail.

22. The crux of the above discussion is that the appeal is allowed and the impugned judgment rendered by the learned trial Court whereby it recorded findings of acquittal qua the accused stands reversed and set aside. Accordingly, the respondent/accused stands convicted for the offence(s) punishable under Sections 279,337 and 338 of the Indian Penal Code. Let the accused/convict be produced on 30.3.2017 before this Court for his being heard on the quantum of sentence. Records of the learned trial Court be sent back forthwith.

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

The National Insurance Co. Ltd. .....Appellant
Versus
Smt. Swarna Devi and another .....Respondents.

FAO (MVA) No. 111 of 2012.
Date of decision: 3rd March, 2017.

Motor Vehicles Act, 1988- Section 149- **Insurance Act, 1938**- Section 64-VB- Insurer contended that the premium was paid by means of cheque which was bounced and, therefore, it is not liable- held, that there is no proof of the fact that insured was informed of the dishonour of the cheque – in these circumstances, insurer was rightly held liable to pay the amount. (Para-2 to 5)

Case referred:
The New India Assurance Company Ltd. versus Chura Mani and others, ILR 2016 (II) HP 1021

For the appellant: Mr. Narender Sharma, Advocate.
For the respondents: Mr. Sunil Mohan Goel, Advocate.

The following judgment of the Court was delivered:

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

This appeal is directed against the judgment and award dated 18.1.2012, passed by the Motor Accident Claims Tribunal-III District Kangra, HP, hereinafter referred to as "the Tribunal", for short, in MACP RBT No. 185-K/07/10, titled *Smt. Swarna Devi versus Rakesh Gupta and another,* whereby compensation to the tune of Rs.85,000/- alongwith interest @ 9% per annum was awarded in favour of the claimant and insurer came to be saddled with the liability, for short "the impugned award", on the grounds taken in the memo of appeal.

2. Claimant and owner-cum-driver have not questioned the impugned award on any ground, thus the same has attained the finality, so far as it relates to them.

3. Insurer has questioned the impugned award on the grounds taken in the memo of appeal.

4. Learned counsel for the appellant argued that the insured had paid the premium by cheque which was bounced and notice was issued to the insured as well as to the Registering Authority. Insured has specifically pleaded that he was not intimated and there is no proof on the file to that effect. The Tribunal has discussed this issue in paras 23 to 28 of the impugned award and held that the insurer had not satisfied the aforesaid formalities.

5. This Court in ***FAO No. 221 of 2010***, titled ***The New India Assurance Company Ltd. versus Chura Mani and others***, decided on **8.4.2016**, held that if intimation is not given and during that period, the accident happens, it is the insurer, who is liable. It is apt to reproduce paras 6 to 10 of the said judgment herein.

> "*6. In terms of Section 64-VB of the Insurance Act, 1938 (hereinafter referred to as "the Insurance Act") read with the provisions of Sections 147 to 149 of the Motor Vehicles Act, 1988 (for short "MV Act"), the insurer has to intimate the insured, which has not been done in the present case, and if intimation is not given and during that period, the accident happens, it is the insurer, who is liable.*
>
> *7.The Apex Court in the case titled as New India Assurance Co. Ltd. versus Rula and others, reported in AIR 2000 Supreme Court 1082, has held that the insurer has to mandatorily intimate the owner by way of notice about the cancellation of*

insurance policy and if the accident occurs between the period till the cancellation is conveyed, it is the insurer, who is liable. It is apt to reproduce para 11 of the judgment herein:

> *"11. This decision, which is a 3-Judge Bench decision, squarely covers the present case also. The subsequent cancellation of the Insurance Policy in the instant case on the ground that the cheque through which premium was paid was dishonoured, would not affect the rights of the third party which had accrued on the issuance of the Policy on the date on which the accident took place. If, on the date of accident, there was a Policy of Insurance in respect of the vehicle in question, the third party would have a claim against the Insurance Company and the owner of the vehicle would have to be indemnified in respect of the claim of that party. Subsequent cancellation of Insurance Policy on the ground of non-payment of premium would not affect the rights already accrued in favour of the third party."*

8.The matter again came up for consideration before the Apex Court in Deddappa & Ors. versus The Branch Manager, National Insurance Co. Ltd., reported in 2007 AIR SCW 7948, and the same principle has been laid down. It is apt to reproduce paras 26 to 28 of the judgment herein:

> *"26. We are not oblivious of the distinction between the statutory liability of the Insurance Company vis-a-vis a third party in the context of Sections 147 and 149 of the Act and its liabilities in other cases. But the same liabilities arising under a contract of insurance would have to be met if the contract is valid. If the contract of insurance has been cancelled and all concerned have been intimated thereabout, we are of the opinion, the insurance company would not be liable to satisfy the claim.*
>
> *27. A beneficial legislation as is well known should not be construed in such a manner so as to bring within its ambit a benefit which was not contemplated by the legislature to be given to the party. In Regional Director, Employees' State Insurance Corporation, Trichur v. Ramanuja Match Industries [AIR 1985 SC 278], this Court held :*
>
> *"We do not doubt that beneficial legislations should have liberal construction with a view to implementing the legislative intent but where such beneficial .legislation has a scheme of its own there is no warrant for the Court to travel beyond the scheme and extend the scope of the statute on the pretext of extending the statutory benefit to those who are not covered by the scheme."*
>
> *We, therefore, agree with the opinion of the High Court.*
>
> *28. However, as the appellant hails from the lowest strata of society, we are of the opinion that in a case of this nature, we should, in exercise of our extra-ordinary jurisdiction under Article 142 of the Constitution of India, direct the Respondent No.1 to pay the amount of claim to the appellants herein and recover the same from the owner of the vehicle viz., Respondent No.2, particularly in view of the fact that no appeal was preferred by him. We direct accordingly.*

9.In the case ***titled as United India Insurance Co. Ltd. versus Laxmamma & Ors., reported in 2012 AIR SCW 2657,*** *the Apex Court has discussed the law developed on the issue and ultimately held that if cancellation order is not made and conveyed and if the accident occurs till the cancellation is made, the insurer is liable. It is profitable to reproduce para 19 of the judgment herein:*

"19. In our view, the legal position is this : where the policy of insurance is issued by an authorized insurer on receipt of cheque towards payment of premium and such cheque is returned dishonoured, the liability of authorized insurer to indemnify third parties in respect of the liability which that policy covered subsists and it has to satisfy award of compensation by reason of the provisions of Sections 147(5) and 149(1) of the M.V. Act unless the policy of insurance is cancelled by the authorized insurer and intimation of such cancellation has reached the insured before the accident. In other words, where the policy of insurance is issued by an authorized insurer to cover a vehicle on receipt of the cheque paid towards premium and the cheque gets dishonored and before the accident of the vehicle occurs, such insurance company cancels the policy of insurance and sends intimation thereof to the owner, the insurance company's liability to indemnify the third parties which that policy covered ceases and the insurance company is not liable to satisfy awards of compensation in respect thereof."

10.The same view has been taken by this Court in the cases titled as ***M/s New Prem Bus Service versus Laxman Singh & another,*** *reported in* ***Latest HLJ 2014 (HP) 579, and United India Insurance Company Ltd. Versus Smt. Sanjana Kumari & others, reported in Latest HLJ 2014 (HP) 1140."***

6. Learned counsel for the appellant frankly conceded that one of the postal receipts has neither been produced on record nor proved by the insurer- appellant, as discussed by the Tribunal.

7. The insurer has not proved that the mandate of law was followed in letter and spirit.

8. Having said so, the impugned award is well reasoned, needs no interference.

9. Viewed thus, the impugned award is upheld and the appeal is dismissed.

10. Registry is directed to release the awarded amount in favour of the claimant strictly as per the terms and conditions contained in the impugned award through payee's account cheque or by depositing the same in her bank account.

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

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

COPC Nos.216 and 217 of 2016.
Judgment reserved on: 28.02.2017.
Date of decision: March 06, 2017.

1. **COPC No.216 of 2016.**
Abhilash Chand and others .....Petitioners.
Versus
Sanjay Gupta and others .....Respondents.

2. **COPC No.217 of 2016.**
Anil Kumar and others .....Petitioners.
Versus
Sanjay Gupta and others .....Respondents.

Contempt of Courts Act, 1972 - Section 12- The respondents were directed to implement the policy framed by them within a period of 6 months – State Government formulated a policy for taking over the services of the petitioners and similarly situated persons with the condition

precedent that all those who are to be benefited by the policy should not have any litigation pending- the respondents are not implementing their policy- held, that the tables filed by the respondent show that the judgment stands complied with – no case of willful contempt is made out – petition dismissed.(Para-9 to 16)

Cases referred:

Priya Gupta and Anr. versus Addl. Secy., Ministry of Health and Family Welfare and Ors. 2013 Criminal law Journal 732

Kshiti Goswami and others versus Subrata Kundu and others (2013) 11 SCC 618

S.V.A. Steel Re-Rolling Mills Limited and others versus State of Kerala and others (2014) 4 SCC 186

For the Petitioners : Mr.M.L.Sharma, Senior Advocate with Mr.B.L.Soni and Mr.Aman Parth Sharma, Advocates.

For the Respondents: Mr.Shrawan Dogra, Advocate General with Mr.Anup Rattan, Mr.Romesh Verma, Additional Advocate Generals and Mr.J.K.Verma, Deputy Advocate General.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

Both these contempt petitions have been filed against the judgment rendered by this Court in CWP No.937/2015, titled as 'Abhilash Chand & others versus State of Himachal Pradesh and others' alongwith connected matters decided on 03.11.2015 whereby the respondents were directed to implement the policy framed by them within a period of six months, as would be evident from the operative portion of the judgment which reads thus:-

> *"3. In view of the above, we deem it proper to dispose of the writ petitions by directing the Authorities concerned to implement the said Policy as early as possible, preferably within six months. Ordered accordingly."*

2. It is averred that it was only on account of the directions passed by this Court that the State Government formulated the policy for taking over the services of the petitioners as well as similarly situated persons with a condition precedent that all those who are to be benefited by the policy should not have any litigation pending. The petitioners with bonafide belief that their services would be regularized withdrew the petition earlier filed by them, but would complain that the respondents were not implementing their own policy notified on 3rd October, 2015, as was undertaken by them.

3. The respondents have filed their reply wherein it is averred that though there has been some delay in implementing the policy, however, the same stands implemented in its letter and spirit.

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

4. Shri M.L.Sharma, learned Senior Counsel, assisted by Shri B.L.Soni and Shri Aman Parth Sharma, Advocates, for the petitioners would vehemently argue that since the respondents have failed to implement the judgment within the stipulated period and un-necessarily dilly-dallying the matter, therefore, they should be prosecuted and punished for having willfully and deliberately flouting the orders passed by this Court and thereby committed the contempt.

5. Learned Senior Counsel for the petitioners in order to buttress his submissions has placed reliance on the following observations of the Hon'ble Supreme Court in ***Priya Gupta***

and Anr. *versus* ***Addl. Secy., Ministry of Health and Family Welfare and Ors. 2013 Criminal law Journal 732*** which read thus:

> *"13. As already noticed, the violations are admitted on the part of this contemnor. The tendering of apology by him, though at the initial stage of the hearings, cannot be accepted by the Court inasmuch as violation of the orders of the Court is willful, intentional, and prejudicial. Such conduct, not only has the adverse effect on the process of admissions and disturbs the faith of people in the administration of justice, but also lowers the dignity of the Court by unambiguously conveying that orders of this Court, its directions and prescribed procedure can be manipulated or circumvented so as to frustrate the very object of such orders and directions, thereby undermining the dignity of the Court. Administration of justice is a matter which cannot be ignored by the Court and the acceptance of apology tendered by the contemnor would amount to establishing a principle that such serious violations would not entail any consequences in law. This would, thus encourage repetition of such offences, rather than discouraging or preventing others from committing offences of similar nature as it would have no preventive or deterrent effect on persons for committing such offences in future. Thus, it is not a case where the Court should extend mercy of discharging the accused by acceptance of apology, as it would amount to encouraging similar behaviour.*
>
> *20. The provisions of the Act do not admit any discretion for the initiation of proceedings under the Act with reference to an order being of general directions or a specific order inter se the parties. The sine qua non to initiation of proceedings under the Act is an order or judgment or direction of a Court and its wilful disobedience. Once these ingredients are satisfied, the machinery under the Act can be invoked by a party or even by the Court suo motu. If the contention raised on behalf of the contemnor is accepted, it will have inevitable consequences of hurting the very rule of law and, thus, the constitutional ethos. The essence of contempt jurisprudence is to ensure obedience of orders of the Court and, thus, to maintain the rule of law. History tells us how a State is protected by its Courts and an independent judiciary is the cardinal pillar of the progress of a stable government. If over-enthusiastic executive attempts to belittle the importance of the Court and its judgments and orders, and also lowers down its prestige and confidence before the people, then greater is the necessity for taking recourse to such power in the interest and safety of the public at large. The power to punish for contempt is inherent in the very nature and purpose of the Court of justice. In our country, such power is codified. It serves at once a dual purpose, namely, as an aid to protect the dignity and authority of the Court and also in aiding the enforcement of civil remedies. Looked at from a wider perspective, contempt power is also a means for ensuring participation in the judicial process and observance of rules by such participants. Once the essentials for initiation of contempt proceedings are satisfied, the Court would initiate an action uninfluenced by the nature of the direction i.e. as to whether these directions were specific in a lis pending between the parties or were of general nature or were in rem."*

6. He further placed reliance on the following observations of the Hon'ble Supreme Court in ***Kshiti Goswami and others*** *versus* ***Subrata Kundu and others (2013) 11 SCC 618*** which read thus:-

> *"11. It is not in dispute that the Selection Committee had recommended the names of 179 candidates including the respondents. Shri Pijush Roy, learned counsel for the petitioners stated that out of 179 candidates recommended by the Selection Committee, 161 were appointed and the remaining 18 persons were not appointed despite the directions given by the Tribunal and the High Court because the merit list had become defunct. He made strenuous effort to persuade us to take the view that in exercise of contempt jurisdiction the High Court cannot issue direction for*

implementation of the order, violation of which led to the initiation of the contempt proceedings, but we have not felt persuaded to agree with him. Rather, we are in complete agreement with the High Court that one of the objects of the contempt jurisdiction which is exercised by the High Court under Article 215 of the Constitution read with the Contempt of Courts Act, 1971 is to ensure faithful implementation of the direction given by it. This is precisely what the Division Bench of the High Court has done in this case. Therefore, we do not find any valid ground or justification to entertain the petitioners' challenge to the impugned order.

12. With the above observations, the special leave petition is dismissed.

13. The Chief Secretary, Government of West Bengal, the Principal Secretary, Public Works Department (Roads), West Bengal and the Chief Engineer, Public Works Department (Roads), West Bengal are directed to implement order dated 12-9-1997 passed by the High Court in Principal Secy., Writers' Building v. Santanu Mitra WPST No.169 of 1997, order dated 12-9-1997 (Cal) within a period of four weeks from today. The appointments to be made hereinafter shall be effective from the date of the order of the Tribunal. It should be specifically mentioned in the appointment letters that the appointees shall get all consequential benefits including seniority except the pay which shall be notionally fixed."

7. Continuing further with his submissions, learned Senior Counsel for the petitioners, would then rely upon the following observations of the Hon'ble Supreme Court in ***S.V.A. Steel Re-Rolling Mills Limited and others*** *versus* ***State of Kerala and others (2014) 4 SCC 186*** which are as under:-

"30. Before laying down any policy which would give benefits to its subjects, the State must think about pros and cons of the policy and its capacity to give the benefits. Without proper appreciation of all the relevant factors, the State should not give any assurance, not only because that would be in violation of the principles of promissory estoppel but it would be unfair and immoral on the part of the State not to act as per its promise."

8. Lastly, learned Senior Counsel for the petitioners, would bank upon the judgment rendered by a Co-ordinate Bench of this Court in which one of us (Hon'ble the Chief Justice was a member) in COPC No.11/2016 titled 'Dr.Rattan Singh versus Shri A.D.N. Vajpayee and others' and connected matters decided on 09.11.2016, more particularly, the following observations:-

"10. Their lordships of the Hon'ble Supreme Court in ***Bihar Finance Service House Construction Coop. Society Ltd. V. Gautam Goswami*** *reported in (2008) 5 SCC 339 have held as under:*

"33. This Court while exercising its jurisdiction under the Contempt of Courts Act or Article 129 of the Constitution of India must strive to give effect to the directions issued by this Court. When the claim of the parties had been adjudicated upon and has attained finality, it is not open for any party to go behind the said orders and seek to take away and/ or truncate the effect thereof. [See T.R. Dhananjaya v. J. Vasudevan (1995) 5 SCC 619]

34. In Prithawi Nath Ram v. State of Jharkhand and Others (2004) 7 SCC 261], this Court held:

"5. While dealing with an application for contempt, the court is really concerned with the question whether the earlier decision which has received its finality had been complied with or not. It would not be permissible for a court to examine the correctness of the earlier decision which had not been assailed and to take a view different than what was taken in the earlier decision."

It was furthermore observed:

> *"6. On the question of impossibility to carry out the direction, the views expressed in T.R. Dhananjaya v. J. Vasudevan need to be noted. It was held that when the claim inter se had been adjudicated and had attained finality, it is not open to the respondent to go behind the orders and truncate the effect thereof by hovering over the rules to get around the result, to legitimize legal alibi to circumvent the order passed by a court."*

35. Moreover undertakings had been given by the respondents before this Court from time to time. What they have done or intend to do is only the compliance thereof. The petitioner had to wait for a long time to get the fruits of requisition made by it for acquisition of land. The lands were acquired in 1983 on the basis of the requisition made by it in 1973.

11. Their lordships of the Hon'ble Supreme Court in ***Sudhir Vasudeva v. M. George Ravishekaran*** *reported in (2014) 3 SCC 373 have held as under:*

> *"15. The power vested in the High Courts as well as this Court to punish for contempt is a special and rare power available both under the Constitution as well as the Contempt of Courts Act, 1971. It is a drastic power which, if misdirected, could even curb the liberty of the individual charged with commission of contempt. The very nature of the power casts a sacred duty in the Courts to exercise the same with the greatest of care and caution. This is also necessary as, more often than not, adjudication of a contempt plea involves a process of self determination of the sweep, meaning and effect of the order in respect of which disobedience is alleged. Courts must not, therefore, travel beyond the four corners of the order which is alleged to have been flouted or enter into questions that have not been dealt with or decided in the judgment or the order violation of which is alleged. Only such directions which are explicit in a judgment or order or are plainly self evident ought to be taken into account for the purpose of consideration as to whether there has been any disobedience or willful violation of the same. Decided issues cannot be reopened; nor the plea of equities can be considered. Courts must also ensure that while considering a contempt plea the power available to the Court in other corrective jurisdictions like review or appeal is not trenched upon. No order or direction supplemental to what has been already expressed should be issued by the Court while exercising jurisdiction in the domain of the contempt law; such an exercise is more appropriate in other jurisdictions vested in the Court, as noticed above. The above principles would appear to be the cumulative outcome of the precedents cited at the bar, namely, Jhareswar Prasad Paul and Another vs. Tarak Nath Ganguly and Others[3], V.M.Manohar Prasad vs. N. Ratnam Raju and Another[4], Bihar Finance Service House Construction Cooperative Society Ltd. vs. Gautam Goswami and Others[5] and Union of India and Others vs. Subedar Devassy PV[6]."*

12. Before concluding, we are constrained to observe that despite there being numerous directions, as noticed in the show cause notices, responsible officers manning decision making posts, sat over the matter purposely and intentionally, solely with a view to defeat the rightful claim of the petitioners. Had the petitioners not come to this Court by way of present contempt petitions, probably, they would have been denied rightful claim as extended to them vide Notification dated 2.8.2014. Normally, after seeing the conduct of the respondents, this Court would not have shown any lenience to the officers concerned but after taking into consideration the latest reply to the show cause notice, wherein they have

tendered unconditional apology for not obeying the direction of this court, this court drops the notice of contempt issued against the respondents. However, they are cautioned to remain more vigilant and prompt, in future, while discharging their duties."

9. Obviously, there cannot be any dispute with the ratio in the judgments relied upon by the learned counsel for the petitioners. The rule of law is a fundamental feature of our Constitution. The right to obtain judicial redress is a feature of its basic structure. In a contempt petition as indeed, in every other case the decision must necessarily rest on the facts of that case. There can be no doubt that where there has been an unequivocal, deliberate and willful disobedience to the order of Court, punishment for contempt of Court is called for and should be unhesitatingly imposed upon the party, if found guilty. The law of contempt is to secure public respect and confidence in judiciary and judicial process. The purpose of contempt proceedings is to preserve and maintain the flow of stream of justice in its unsullied form and purity. But it should be remembered that the Court's power to punish for contempt in summary proceedings must be sparingly used and with circumspection by making appropriate allowances for common human fallings within reasonable limits.

10. This Court has lucidly considered the legal position in COPC No.753/2015 titled Shri Uma Dutt versus Shri Srikant Baldi and others, decided on 09.12.2015 and observed as under:-

"9. While it is duty of the Court to punish a person who tries to obstruct the course of justice or brings to disrepute the institution of judiciary. However, this power has to be exercised not casually or lightly, but with great care and circumspection. Contempt proceedings serve a dual purpose of vindication of the public interest by punishment of the contumacious conduct and coercion to compel the contemnor to do what the law requires of him.

10. A question whether there is contempt of Court or not is a serious one. The Court is both the accuser as well as the judge of the accusation. It behoves the Court to act with as great circumspection as possible making all allowances for errors of judgment and difficulties arising from inveterate practices in Courts and tribunals. It is only when a clear case of contumacious conduct not explainable otherwise, arises that the contemnor must be punished. Punishment under the law of Contempt is called for when the lapse is deliberate and in disregard of one's duty and in defiance of authority.

11. While dealing with the contempt petitions, the Courts are not required to travel beyond the four corners of order, which is alleged to have been disobeyed or disregarded deliberately and willfully. In this connection, it shall be apposite to make a fruitful recapitulation of a recent judgment of the Hon'ble Supreme Court in Ram Kishan Vs. Tarun Bajaj and others 2014 AIR SCW 1218, wherein it was held that:-

"9. Contempt jurisdiction conferred onto the law courts power to punish an offender for his willful disobedience/contumacious conduct or obstruction to the majesty of law, for the reason that respect and authority commanded by the courts of law are the greatest guarantee to an ordinary citizens that his rights shall be protected and the entire democratic fabric of the society will crumble down if the respect of the judiciary is undermined. Undoubtedly, the contempt jurisdiction is a powerful weapon in the hands of the courts of law but that by itself operates as a string of caution and unless, thus, otherwise satisfied beyond reasonable doubt, it would neither fair nor reasonable for the law courts to exercise jurisdiction under the Act. The proceedings are quasi- criminal in nature, and therefore, standard of proof required in these proceedings is beyond all reasonable doubt. It would rather be hazardous to impose sentence for

contempt on the authorities in exercise of contempt jurisdiction on mere probabilities. (Vide: V.G. Nigam & Ors. v. Kedar Nath Gupta & Anr., AIR 1992 SC 2153; Chhotu Ram v. Urvashi Gulati & Anr., AIR 2001 SC 3468; Anil Ratan Sarkar & Ors. v. Hirak Ghosh & Ors., AIR 2002 SC 1405; Bank of Baroda v. Sadruddin Hasan Daya & Anr., AIR 2004 SC 942; Sahdeo alias Sahdeo Singh v. State of U.P. & Ors., (2010) 3 SCC 705; and National Fertilizers Ltd. v. Tuncay Alankus & Anr., AIR 2013 SC 1299).

10. Thus, in order to punish a contemnor, it has to be established that disobedience of the order is wilful. The word wilful introduces a mental element and hence, requires looking into the mind of person/contemnor by gauging his actions, which is an indication of ones state of mind. Wilful means knowingly intentional, conscious, calculated and deliberate with full knowledge of consequences flowing therefrom. It excludes casual, accidental, bonafide or unintentional acts or genuine inability. Wilful acts does not encompass involuntarily or negligent actions. The act has to be done with a bad purpose or without justifiable excuse or stubbornly, obstinately or perversely. Wilful act is to be distinguished from an act done carelessly, thoughtlessly, heedlessly or inadvertently. It does not include any act done negligently or involuntarily. The deliberate conduct of a person means that he knows what he is doing and intends to do the same. Therefore, there has to be a calculated action with evil motive on his part. Even if there is a disobedience of an order, but such disobedience is the result of some compelling circumstances under which it was not possible for the contemnor to comply with the order, the contemnor cannot be punished. Committal or sequestration will not be ordered unless contempt involves a degree of default or misconduct. (Vide: S. Sundaram Pillai, etc. v. V.R. Pattabiraman; AIR 1985 SC 582; Rakapalli Raja Rama Gopala Rao v. Naragani Govinda Sehararao & Anr., AIR 1989 SC 2185; Niaz Mohammad & Ors. etc.etc. v. State of Haryana & Ors., AIR 1995 SC 308; Chordia Automobiles v. S. Moosa, AIR 2000 SC 1880; M/s. Ashok Paper Kamgar Union & Ors. v. Dharam Godha & Ors., AIR 2004 SC 105; State of Orissa & Ors. v. Md. Illiyas, AIR 2006 SC 258; and Uniworth Textiles Ltd. v. CCE, Raipur, (2013) 9 SCC 753).

11. In Lt. Col. K.D. Gupta v. Union of India & Anr., AIR 1989 SC 2071, this Court dealt with a case wherein direction was issued to the Union of India to pay the amount of Rs. 4 lakhs to the applicant therein and release him from defence service. The said amount was paid to the applicant after deducting the income tax payable on the said amount. While dealing with the contempt application, this Court held that withholding the amount cannot be held to be either malafide or was there any scope to impute that the respondents intended to violate the direction of this Court.

12. In Mrityunjoy Das & Anr. v. Sayed Hasibur Rahaman & Ors., AIR 2001 SC 1293, the Court while dealing with the issue whether a doubt persisted as to the applicability of the order of this Court to complainants held that it would not give rise to a contempt petition. The court was dealing with a case wherein the statutory authorities had come to the conclusion that the order of this court was not applicable to the said complainants while dealing with the case under the provision of West Bengal Land Reforms Act, 1955.

13. It is well settled principle of law that if two interpretations are possible, and if the action is not contumacious, a contempt proceeding would not be maintainable. The effect and purport of the order is to be taken into consideration and the same must be read in its entirety. Therefore, the

element of willingness is an indispensable requirement to bring home the charge within the meaning of the Act. (See: Sushila Raje Holkar v. Anil Kak (Retd.), AIR 2008 (Supp-2) SC 1837; and Three Cheers Entertainment Pvt. Ltd. & Ors. v. C.E.S.C. Ltd., AIR 2009 SC 735): (2008 AIR SCW 7951)."

Similar view has been taken by this Bench in Contempt Petition No. 415 of 2014, ***Rulda Ram Vs. Rakesh Kanwar,*** *decided on 28th February, 2015."*

11. As observed earlier, the only grievance of the petitioners is that the respondents have not complied with the judgment in question. However, we find that the respondents have placed on record a tabulated chart in both the cases on the basis of which it can be gathered that the judgment infact stands complied with and the same is reproduced below:-

"ABSTRACT OF THE PETITIONERS OF COPC 216/2016 IN CWP No.937/2015.

Sr. No.	*Particular of the case*	*Remarks*
1.	*Nos. of Petitioners in COPC No.216/2016 in CWP CWP No.937/2015*	*37 (Thirty Seven)*
2.	*Nos. of Petitioners to whom orders for conversion of services into Govt. contract are being issued after the completion of the final checking of documents/ certificates etc; which is under process.*	*15(Fifteen)*
3.	*Nos. of Petitioners exceeded the age of 45 years*	*04 (Four)*
4.	*Nos. of Petitioners who have not completed the required period upto 31/07/2015 for conversion of services as per Govt. Notification dated 03/10/2015.*	*18 (Eighteen)*

1. The Notification dated 03/10/2015 issued by the State Govt. is enclosed as Annexure-A-1.

2. The letter dated 21/10/2015 issued by the State Govt. is enclosed as Annexure-A-II.

3. The letter dated 25/07/2016 alongwith Annexure-A issued by the State Govt. is enclosed as Annexure-A-III."

"ABSTRACT OF THE PETITIONERS OF COPC 217/2016 IN CWP No.1146/2015.

Sr. No.	*Particular of the case*	*Remarks*
1.	*Nos. of Petitioners in COPC No.217/2016 in CWP No.1146/2015*	*80 (Eighty)*
2.	*Nos. of Petitioners to whom orders for conversion of services into Govt. contract are being issued after the completion of the final checking of documents/certificates etc; which is under process.*	*13(Thirteen)*
3.	*Nos. of Petitioners exceeded the age of 45 years*	*02 (Two)*
4.	*Nos. of Petitioners who have not completed the required period upto 31/07/2015 for conversion of services as per Govt. Notification dated 03/10/2015.*	*65 (Sixty Five)*

1. The Notification dated 03/10/2015 issued by the State Govt. is enclosed as Annexure-A-1.

2. The letter dated 21/10/2015 issued by the State Govt. is enclosed as Annexure-A-II.

3. The letter dated 25/07/2016 alongwith Annexure-A issued by the State Govt. is enclosed as Annexure-A-III."

12. To be fair to the learned counsel for the petitioners, he would argue that making the appointments of the petitioners subject to the final outcome of Special Leave Petition (C) No.20353/2016, titled 'Raj Kumar and another versus State of H.P. and others, is completely wrong and would further contend that even the appointment orders issued to some of the petitioners are contrary to the scheme itself.

13. We have noticed these contentions and are of the considered opinion that the respondents by making appointments of the petitioners subject to the outcome of SLP(C) in Raj Kumar's case have not flouted or violated the order passed by this Court and cannot, therefore, be said to have committed any contempt.

14. As regards the appointment orders of some of the petitioners, being in alleged violation of the policy (policies), the same too does not violate any part of the directions passed by this Court, as this Court in its judgment had only directed the Authority concerned to implement the policy as early as possible, preferably within six months. In case, the petitioner(s) is/are still aggrieved by any of condition(s) contained in their orders of appointments, they are free to approach the appropriate forum for redressal of their grievances.

15. The respondents have taken all necessary steps to comply with the judgment of this Court and, therefore, in the given circumstances, we are not satisfied that a case of willful contempt is made out.

16. Having said so, we find no merit in these petitions and the same are dismissed. Pending application(s), if any, also stands disposed of. Registry is directed to place a copy of this judgment on the file of connected matter.

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

General Secretary / Pradhan, Employees Union Central Cooperative Consumer Store, Shimla ...Petitioner

Versus

Sh. K.C. Chaman ...Respondent.

COPC No. 963 of 2015 in LPA No.4053 of 2013.
Judgment reserved on: 27.2.2017
Date of Decision : 06.03. 2017.

Contempt of Courts Act, 1972- Section 12- The petitioner-union comprising of employees of erstwhile Central Co-operative Consumers Store Shimla raised an industrial dispute claiming regular pay scales at par with the employees of federation with arrears – the reference was allowed – writ petitions were filed and it was held that petitioners would be entitled to all monetary benefits which were being paid to them on 18.6.1994 including increments and other emoluments – LPA was filed, which was partly allowed- the judgment was modified by directing H.P. State Co-operative Marking and Consumers Federation Limited, Shimla to do the needful and take follow up action – a contempt petition was filed pleading that the corporation has not complied with the orders passed in the writ petition – held, that power of contempt has to be exercised with great care and circumspection – the petitioners were held entitled to pay scales which were payable to them on 18.6.1994 and were specifically held disentitled to the DA and ADA etc. at par with the regular employees of the federation – the plea of the entitlement of revised pay scales at par with the employees of the federation was never upheld by the Court –

the members of the union cannot claim any benefit over and above to what they were held entitled in the judgment- contempt petition dismissed.(Para-12 to 17)

For the Petitioner Mr. J. L. Bhardwaj, Advocate.
For the respondent Ms. Ranjana Parmar, Senior Advocate, with Ms. Rashmi Thakur, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

This contempt petition has been filed against the respondent for his alleged willful disobedience of the directions passed by this Court in LPA No. 4053 of 2013 whereby according to them the members of the petitioner-Union were held entitled to the service benefits at par with the regular employees of the H. P. State Cooperative Marketing and Consumers Federation Ltd., Shimla (for short the 'Federation'). However, before adverting to the directions passed by this Court, it would be necessary to recapitulate the facts.

CWP No. 342 of 2008

2. The petitioner-Union comprises of the employees of the erstwhile Central Cooperative Consumers Store, Shimla (for short 'Consumer Store'), which currently is under liquidation. The Consumer Store requested the H.P. State Cooperative Marketing and Consumers Federation Ltd. Shimla (for short 'Federation') to take up the services of the members of the petitioner-Union for procurement and distribution of control articles vide letter dated 10.6.1994. The Federation vide its letter dated 18.6.1994 agreed to utilize 12 shops only for management purpose alongwith 18 workers (10 salesmen and 8 helpers). Condition No.4 of the aforesaid letter stipulated as under:

> *"4. The workers employed in the running of these 12 shops will remain on your roll and Himfed will make payment of their salaries through you at the present pay scale being drawn by each worker."*

3. Aggrieved by the aforesaid condition, the members of the petitioner-Union raised a dispute by invoking Section 72 of the Himachal Pradesh Cooperative Societies Act, 1968 (hereinafter referred to as 'Act'). The same came to be decided by the Deputy Registrar (Administration) vide his order dated 26.7.2003 wherein it was held that there was no clause in the letter dated 18.6.1994 (supra) by virtue of which the financial benefits to the petitioners could be frozen. Meaning thereby, he held the members of the petitioner-Union to be entitled to revised pay scale without arrears of revised pay scales.

4. The employer i.e. Federation assailed this order by filing an appeal before the Additional Secretary (Cooperation), who allowed the payment of arrears and allowances to the members of the petitioner-Union in the existing running pay scale from 25.9.1998. The plea of the Federation that the arrears of pay be restricted to three years was also rejected vide order dated 3.12.2005. This order of Additional Secretary (Cooperation) was assailed by the Federation by means of CWP No. 272 of 2006. The same was decided on 21.6.2007 and the matter was remanded back to the Additional Secretary (Cooperation) for adjudication. The Joint Secretary (Cooperation) decided the appeal on 3.12.2007 whereby he held that the emoluments of pay under the then pay scales could not be withheld to the members of the petitioner-Union and directed the payment of dearness allowance and other consequential benefits which these members were already getting on the date of agreement to be continued to be paid to them. However, they were not entitled to future dearness allowance etc. at par with the employees of the Federation. The prayer of the petitioner-Union to their entitlement of revised pay scale was also rejected.

5. Aggrieved by the aforesaid decision, the petitioner filed CWP No. 342 of 2008 claiming therein the regular pay scale at par with the employees of the Federation with arrears of consequential benefits like arrears of dearness allowance and other benefits etc.

CWP No. 1001 of 2008

6. This writ petition was filed by the Federation wherein it too assailed the order passed by the Joint Secretary (Cooperation) on 3.12.2007 on the ground that the petitioners were only entitled to the rates as per agreement dated 18.6.1994 (supra) and were not entitled to annual increments.

CWP No. 5030 of 2010

7. The petitioner-Union had earlier raised an industrial dispute vide Reference No. 32 of 2001 wherein they laid claim to their entitlement to new pay scales with effect from 1.10.1999 at par with the employees of the Federation alongwith all admissible benefits. The same was answered in their favour vide award dated 15.6.2010, which was assailed by the Federation by way of CWP No. 5030 of 2010. .

8. All the three petitions came to be decided by learned writ Court by way of common judgment dated 3.4.2012. CWP No. 342 of 2008 and CWP No. 1001 of 2008 were ordered to be dismissed, whereas CWP No. 5030 of 2010 was allowed and the award passed by the learned Labour Court dated 15.6.2010 was ordered to be set-aside. However, it was clarified that the petitioners would be entitled to all the monetary benefits which were being paid to them on 18.6.1994 including increments and other emoluments.

9. The aforesaid decision was challenged by the Federation in two separate appeals being LPA No.477 of 2012 and LPA No. 4053 of 2013 and by the petitioner by filing LPA No. 107 of 2015. All the three LPAs were disposed of on August 5, 2015 in the following terms:

> *"4. Today, the learned Senior Advocate stated at the Bar that her client is ready to do the needful in terms of para-15 of the impugned judgment. Her statement is taken on record.*
>
> *5. In the given circumstances, the impugned judgment is modified by providing that all the three writ petitions are disposed of by directing the Himachal Pradesh State Cooperative Marketing and Consumers Federation Limited, Shimla to do the needful and take follow up action in terms of para-15 of the impugned judgment, within eight weeks from today."*

10. Evidently, all these appeals were disposed of in terms of para-15 of the judgment passed by the learned writ Court and, therefore, it becomes necessary to reproduce herein this paragraph in its entirety, which reads thus:

> *"15. The Joint Secretary (Cooperation) in his order dated 3.12.2007 has held the workmen, as noticed above, entitled to annual increments. However, he has denied the D.A and A.D.A. etc. to the workmen at par with the regular employees of the federation. It is made clear by way of abundant precaution that the workmen will get the benefits, which were payable to the workmen on 18.6.1994. Rather, Mrs. Ranjana Parmar has undertaken at the Bar that the monetary benefits to which the workmen were entitled on 18.6.1994 will be paid to them. She has also stated that the workmen have also been paid `1,000/- due to rise in price index. There is merit in the contention of Mrs. Ranjana Parmar and Mr. K.D. Sood, Sr. Advocate that there was no master-servant relationship between the workmen and federation. The federation has merely agreed to help the workmen after the winding up proceedings were initiated. The Liquidator, legally speaking, could not order the federation to engage the workmen after the financial crises in the Central Cooperative Consumers Stores Limited (Super Bazar), Shimla. The Workmen were being paid what was agreed as per letter dated 18.6.1994. There is neither any illegality or perversity or procedural impropriety in order dated 3.12.2007. The same is upheld."*

11. Mr. J.L. Bhardwaj, learned counsel for the petitioner would vehemently argue that the respondent despite having undertaken before this Court to pay the monetary benefits to

the workmen, has failed to do so. Whereas, Mrs. Ranjana Parmar, Senior Advocate, assisted by Ms. Rashmi Thakur, Advocate, would vehemently argue that the undertaking as given by her client is being strictly adhered to both in letter as well as in spirit.

We have heard learned counsel for the parties and have gone through the records carefully and meticulously.

12. At the outset, it may be observed that it is more than settled that the power of contempt has to be exercised not casually or lightly, but with great care and circumspection. This aspect of the matter has already been considered by us in ***COPC No. 753 of 2015 titled Uma Dutt*** vs. ***Shri Srikant Baldi***, decided on 9th December, 2015, wherein it was observed as under:

> *"9. While it is duty of the Court to punish a person who tries to obstruct the course of justice or brings to disrepute the institution of judiciary. However, this power has to be exercised not casually or lightly, but with great care and circumspection. Contempt proceedings serve a dual purpose of vindication of the public interest by punishment of the contumacious conduct and coercion to compel the contemnor to do what the law requires of him.*
>
> *10. A question whether there is contempt of Court or not is a serious one. The Court is both the accuser as well as the judge of the accusation. It behoves the Court to act with as great circumspection as possible making all allowances for errors of judgment and difficulties arising from inveterate practices in Courts and tribunals. It is only when a clear case of contumacious conduct not explainable otherwise, arises that the contemnor must be punished. Punishment under the law of Contempt is called for when the lapse is deliberate and in disregard of one's duty and in defiance of authority.*
>
> *11. While dealing with the contempt petitions, the Courts are not required to travel beyond the four corners of order, which is alleged to have been disobeyed or disregarded deliberately and willfully. In this connection, it shall be apposite to make a fruitful recapitulation of a recent judgment of the Hon'ble Supreme Court in Ram Kishan Vs. Tarun Bajaj and others 2014 AIR SCW 1218, wherein it was held that:-*
>
> > *"9. Contempt jurisdiction conferred onto the law courts power to punish an offender for his willful disobedience/contumacious conduct or obstruction to the majesty of law, for the reason that respect and authority commanded by the courts of law are the greatest guarantee to an ordinary citizens that his rights shall be protected and the entire democratic fabric of the society will crumble down if the respect of the judiciary is undermined. Undoubtedly, the contempt jurisdiction is a powerful weapon in the hands of the courts of law but that by itself operates as a string of caution and unless, thus, otherwise satisfied beyond reasonable doubt, it would neither fair nor reasonable for the law courts to exercise jurisdiction under the Act. The proceedings are quasi- criminal in nature, and therefore, standard of proof required in these proceedings is beyond all reasonable doubt. It would rather be hazardous to impose sentence for contempt on the authorities in exercise of contempt jurisdiction on mere probabilities. (Vide: V.G. Nigam & Ors. v. Kedar Nath Gupta & Anr., AIR 1992 SC 2153; Chhotu Ram v. Urvashi Gulati & Anr., AIR 2001 SC 3468; Anil Ratan Sarkar & Ors. v. Hirak Ghosh & Ors., AIR 2002 SC 1405; Bank of Baroda v. Sadruddin Hasan Daya & Anr., AIR 2004 SC 942; Sahdeo alias Sahdeo Singh v. State of U.P. & Ors., (2010) 3 SCC 705; and National Fertilizers Ltd. v. Tuncay Alankus & Anr., AIR 2013 SC 1299).*
>
> *10. Thus, in order to punish a contemnor, it has to be established that disobedience of the order is wilful. The word wilful introduces a mental element and hence, requires looking into the mind of person/contemnor by gauging his actions, which is an indication of ones state of mind. Wilful means knowingly*

intentional, conscious, calculated and deliberate with full knowledge of consequences flowing therefrom. It excludes casual, accidental, bonafide or unintentional acts or genuine inability. Wilful acts does not encompass involuntarily or negligent actions. The act has to be done with a bad purpose or without justifiable excuse or stubbornly, obstinately or perversely. Wilful act is to be distinguished from an act done carelessly, thoughtlessly, heedlessly or inadvertently. It does not include any act done negligently or involuntarily. The deliberate conduct of a person means that he knows what he is doing and intends to do the same. Therefore, there has to be a calculated action with evil motive on his part. Even if there is a disobedience of an order, but such disobedience is the result of some compelling circumstances under which it was not possible for the contemnor to comply with the order, the contemnor cannot be punished. Committal or sequestration will not be ordered unless contempt involves a degree of default or misconduct. (Vide: S. Sundaram Pillai, etc. v. V.R. Pattabiraman; AIR 1985 SC 582; Rakapalli Raja Rama Gopala Rao v. Naragani Govinda Sehararao & Anr., AIR 1989 SC 2185; Niaz Mohammad & Ors. etc.etc. v. State of Haryana & Ors., AIR 1995 SC 308; Chordia Automobiles v. S. Moosa, AIR 2000 SC 1880; M/s. Ashok Paper Kamgar Union & Ors. v. Dharam Godha & Ors., AIR 2004 SC 105; State of Orissa & Ors. v. Md. Illiyas, AIR 2006 SC 258; and Uniworth Textiles Ltd. v. CCE, Raipur, (2013) 9 SCC 753).

11. In Lt. Col. K.D. Gupta v. Union of India & Anr., AIR 1989 SC 2071, this Court dealt with a case wherein direction was issued to the Union of India to pay the amount of Rs. 4 lakhs to the applicant therein and release him from defence service. The said amount was paid to the applicant after deducting the income tax payable on the said amount. While dealing with the contempt application, this Court held that withholding the amount cannot be held to be either malafide or was there any scope to impute that the respondents intended to violate the direction of this Court.

12. In Mrityunjoy Das & Anr. v. Sayed Hasibur Rahaman & Ors., AIR 2001 SC 1293, the Court while dealing with the issue whether a doubt persisted as to the applicability of the order of this Court to complainants held that it would not give rise to a contempt petition. The court was dealing with a case wherein the statutory authorities had come to the conclusion that the order of this court was not applicable to the said complainants while dealing with the case under the provision of West Bengal Land Reforms Act, 1955.

13. It is well settled principle of law that if two interpretations are possible, and if the action is not contumacious, a contempt proceeding would not be maintainable. The effect and purport of the order is to be taken into consideration and the same must be read in its entirety. Therefore, the element of willingness is an indispensable requirement to bring home the charge within the meaning of the Act. (See: Sushila Raje Holkar v. Anil Kak (Retd.), AIR 2008 (Supp-2) SC 1837; and Three Cheers Entertainment Pvt. Ltd. & Ors. v. C.E.S.C. Ltd., AIR 2009 SC 735): (2008 AIR SCW 7951)."

Similar view has been taken by this Bench in Contempt Petition No. 415 of 2014, Rulda Ram Vs. Rakesh Kanwar, decided on 28th February, 2015.

13. It would be evidently clear from para-15 of the judgment passed by learned writ Court (supra) that the order passed by the Joint Secretary (Cooperation) dated 3.12.2007 was upheld in its entirety. Meaning thereby, the petitioners were only held entitled to get the benefits which were payable to them on 18.6.1994 and were specifically held disentitled to the D.A. and A.D.A. etc. at par with the regular employees of the Federation. This conclusion can be further gathered from a perusal of paragraph 13 of the judgment of the learned writ Court, which reads thus:

"13. *It is evident that the HIMFED has only agreed to pay the salary to the workmen of their present pay scale as on 18.6.1994.It cannot be read in condition No.4 that the HIMFED has ever agreed to pay the workmen revised pay scales which were to be paid to its regularly appointed employees. The terms and conditions are to be read as they are. Joint Secretary (Cooperation) has correctly interpreted clause 4 of the letter dated 18.6.1994 by coming to a conclusion that the workmen were only entitled to annual increments and other consequential benefits, which were available to them on this date. His findings that the workmen were not entitled to regular pay scale at par with the employees of federation are justifiable."*

14. At this stage, Mr. J.L.Bhardwaj, learned counsel for the petitioner would bank upon the letter issued by the Liquidator of the erstwhile employer of the petitioner-Union on 31.7.2012 setting out therein the bill including increments and other emoluments to be paid to the petitioner w.e.f. June, 1994 which according to him have been calculated on the basis of the order passed by learned writ Court.

15, We have gone through the calculations and find that the same are based on complete misreading of the judgment rendered by the learned writ Court as has been affirmed by this Court in LPAs, referred to above. The plea of entitlement of revised pay scales at par with the employees of the Federation was never upheld by this Court. To the contrary, a specific finding negating this plea has not only been recorded in paras 13 and 15 of the impugned judgment (supra), but a detailed discussion is also found in para 16 of the judgment rendered by learned writ Court, which reads thus:

"16. Now, the court will advert to the challenge laid to award dated 15.6.2010. The workmen had raised the industrial dispute, which led to reference to the Industrial Tribunal-cum-Labour Court. The precise reference which has been made to the Industrial Tribunal-cum-Labour Court is that whether the workmen were entitled for grant of pay scales, annual increment, additional dearness allowances, interim relief and other regular allowances admissible to them on the basis of revision of pay scale with effect from 1.1.1996. The learned Industrial Tribunal-cum-Labour Court has taken into consideration the statement of PW-1 Deep Ram. According to him, their counter-parts working in the federation were getting regular pay scale. PW-2 Sanjeev Sharma has deposed that the salesmen appointed on the regular roll of federation were getting salary of ``9,673/- and `7,899 and the workmen were getting only 2,424/-,` 3,183/- and ` 2,604/-. PW-3 Mehar Chand has testified that he was working as Sales Supervisor in the Super Bazar since 7.6.1966 to 28.4.1994 and used to get the salary on the State Government pattern. RW-1 Ramesh Bhaik has admitted in his cross-examination that the workmen were not getting the revised pay scale alongwith increments and other benefits. According to him, the fair price shops, which were earlier functioning under Super Bazar were now functioning under the control of HIMFED. <u>The learned Industrial Tribunal-cum-Labour Court has misconstrued the letter dated 18.6.1994. It has already been noticed hereinabove that what was agreed by the HIMFED to be paid to the workmen was the existing pay scale drawn by them. The learned Industrial Tribunal-cum-Labour Court has read something in condition No.4, which was not there. It was never agreed by the HIMFED that the workmen would get revised pay scale at par with the employees of the federation. The learned Industrial Tribunal could not apply the principle of 'equal pay for equal work' in view of specific terms and conditions used in letter dated 18.6.1994. The workmen have never become the employees of the federation. Even as per clause 4, they had to remain the employees of the Central Cooperative Consumers Store, Shimla</u>. The learned Industrial Tribunal has further erred in law by relying upon the deliberations which had taken place on 28.9.1999. As far as proceedings dated 28.9.1999 are concerned, the Additional Secretary (Cooperation) wrote a letter to the Managing

Director on 29.1.2000 to inform him about the follow up action which was taken pursuant to the meeting held on 28.9.1999. The Managing Director of the federation apprised the competent authority on 15.2.2000 that it was running into losses and it could not accede to the demands of the employees of the Super Bazar. He also informed that the proceedings were also placed before the Board of Directors/Management of the federation wherein it was decided that in view of continuous losses being sustained by the federation, the business of Super Bazar be transferred to Kailash District Federation. This information was supplied by the Managing Director of the federation on 15.2.2000 vide Annexure R-3 to Additional Registrar (Mont.), Cooperative Societies, Himachal Pradesh. Thereafter, the matter was reported by the Registrar Cooperative Societies to the State Government on 23.2.2000. Thus, the fact of the matter is that no final decision was taken on the basis of proceedings dated 28.9.1999. The learned Labour Court has erred in law by giving undue weightage to the proceedings dated 28.9.1999 while allowing the claim of the workmen. Thus, the Learned Labour Court has erred in law and has also not correctly appreciated the oral as well as documentary evidence; the award is liable to be set aside."

16. From the aforesaid discussion, it is abundantly clear that the members of the petitioner-Union were never granted any benefit at par with the regular employees of the Federation and rather the writ petition (CWP No. 342 of 2008) filed by them was dismissed and the award passed by the learned Labour Court-cum-Industrial Tribunal in their favour was specifically set-aside in the writ petition filed by the Federation (CWP No. 5030 of 2010. Therefore, the members of the petitioner-Union cannot claim any benefit over and above to what they were held entitled to in para-15 of the judgment passed by learned writ Court as affirmed by learned Division Bench in LPA No. 4053 of 2013 alongwith other connected cases.

17. Even otherwise, the petitioner has placed no material on record whereby it can be gathered that they are not being paid an amount as specifically undertaken by the respondents before the learned writ Court and before the learned Division Bench in LPA.

18. Having said so, we find no merit in this petition and accordingly the notice issued to the respondent is ordered to be discharged. Petition stands disposed of.

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

Harbans Singh .....Petitioner

Versus

M/s Alembic Ltd. .....Respondent

CMPMO No. 309 of 2016
Decided on: 6th March, 2017

Industrial Disputes Act, 1947-Section 36 (4)- A reference was made by the Competent Authority on the demand raised by the petitioner- the reference was initially answered in favour of the petitioner ex-parte- however, the award was set aside on an application moved by the respondent-- an application under Section 36(4) was filed, which was dismissed-held, that the petitioner and respondent were initially represented by legal practitioner - neither the petitioner nor the Labour Court had objected to the appearance by the Advocate – the representation is not onlyat the state of appearance but during subsequent stages as well- the application was rightly dismissed by the Labour Court- writ petition dismissed. (Para-2 to 4)

For the petitioner: Mr. Pritam Singh Chandel, Advocate.
For the respondents: Mr. Rahul Mahajan, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)

Challenge herein is to the order, Annexure P-1 passed in an application under Section 36(4) of the Industrial Disputes Act, whereby the prayer that the petitioner-workman is appearing in person before Labour Court-cum-Industrial Tribunal below, therefore, the respondent-management be also to directed appear in person has been declined and the application dismissed.

2. A reference registered as Reference Petition No. 10/2006 made by the competent authority on the demands raised by the petitioner is pending disposal before learned Labour Court-cum-Industrial Tribunal, Shimla. The reference initially was answered in favour of the petitioner-workman *ex-parte*, however, on an application moved by the respondent-management, the ex-parte award was set-aside and the Reference Petition ordered to be decided on merits. The order passed by the Labour Court was assailed in this Court in CWP No. 1910 of 2009. The writ petition was dismissed with a direction to the Labour Court to take the Reference Petition to its logical end. Even LPA No. 69/2011 filed by the petitioner-workman was also dismissed vide judgment dated 25.5.2016. The matter after its remand has now been landed in the Labour Court. The petitioner-workman after remand of the case intends to conduct the proceedings in Reference Petition in person. Since the respondent-management is represented by legal practitioner, therefore, this has led in filing the application under Section 36(4) of the Act by the petitioner-workman, which has been considered by learned Labour Court and dismissed vide the order under challenge.

3. Admittedly, initially not only the respondent-management but the petitioner-workman was also represented by legal practitioner, they engaged on their behalf right from the institution of the Reference Petition till the disposal thereof by the Labour Court and during the course of proceedings in Civil Writ Petition as well as LPA aforesaid in this Court. Section 36(4), no doubt, provides for representation of a party in pending proceedings before a Labour Court or Industrial Tribunal by a legal practitioner, however, with the consent of opposite party to the proceedings and with the leave of Labour Court, Tribunal or National Tribunal as the case may be. In the case in hand, the respondent-management when served with the notice in Reference Petition had put in appearance through Mr. Rahul Mahajan, Advocate before learned Labour court. Neither the petitioner-workman nor learned Labour Court had objected to appearance by the management in this manner in the pending Reference Petition. Therefore, not only the petitioner-workman has consented for representation of the respondent-management by the counsel but the Labour Court has also permitted it to do so. Being so, at this stage, when the Reference Petition has been remanded by this Court for fresh disposal in accordance with law, the respondent-management cannot be relegated to the stage i.e. entering of appearance by it initially on its service in the Reference Petition because the provisions contained under Section 36(4) of the Act in the matter of appearance through a legal practitioner postulates to that stage and not any subsequent stage like in the case in hand. The arguments that after remand of the case by this Court, it has to be treated as a fresh case addressed on behalf of the petitioner-workman cannot be accepted nor persuade this Court to form an opinion that the remand of the case has relegated the same to the initial stage when the respondent-management had put in appearance. Now the pleadings are complete and the case after its remand shall proceed further from that stage onwards. The submissions made by Mr. Chandel, learned counsel that the petitioner-workman is a poor person, hence not in a position to engage a legal practitioner to conduct the case on his behalf are duly considered, however, are without any substance for the reason that the petitioner, if otherwise eligible may approach the concerned District Legal Services Authority/State Legal Services Authority for providing free legal aid to him.

4. With these observations, this petition is dismissed. Pending application(s), if any, shall also stand disposed of.

5. The parties through learned counsel representing them are directed to appear before learned Labour Court, Shimla on ***29th March, 2017***. The record be sent back forthwith so as to reach in the Court below well before the date fixed.

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

Sh. Jai Pal and others .....Appellants

Versus

The State of HP and others .....Respondents

OSA No. 1 of 2017

Date of decision: 6th March, 2017.

Code of Civil Procedure, 1908- Order 7 Rule 11- Plaintiffs/appellants filed a suit for recovery of Rs. 29 lacs and Rs. 5 lacs as interest – single Judge held that the suit did not fall within the pecuniary jurisdiction and ordered return of the plaint – held, that the plaintiffs had claimed a decree of Rs. 34 lacs – Rs. 5 lacs was not pendente lite interest but was an interest till the filing of the suit – the matter falls within the pecuniary jurisdiction of the Court- order set aside- plaintiffs directed to deposit the deficient court fees within eight weeks. (Para-2 to 5)

For the appellants: Mr. G.D. Verma, Sr. Advocate with Mr. B.C. Verma, Advocate.

For the respondents: Mr. Shrawan Dogra with M/s Anup Rattan, and Varun Chandel, Additional Advocate Generals.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Subject matter of this appeal is the order dated 20th November, 2016, made by the learned Single Judge of this Court, whereby it has been held that the valuation of the suit does not fall within the pecuniary jurisdiction of this Court and accordingly, the plaint was returned to the plaintiffs/appellants herein, for short "the impugned order".

2. Plaintiffs/ appellants had filed suit before this Court for recovery of Rs.29 lacs and Rs. 5 lacs, as interest till filing of the suit. Thus, the claim of the plaintiffs has to be gathered while reading the plaint and it is the averments contained in the plaint which determines the jurisdiction of the Court.

3. While going through all paras of the plaint, one comes to an inescapable conclusion that the plaintiffs have claimed a decree for recovery of Rs.34 lacs in *toto* till filing of the suit. The amount of Rs.5 lacs is not *pendente* but is interest till filing of the suit, as observed by the learned Single Judge. Having said so, the amount claimed by the plaintiffs in the suit falls within the pecuniary jurisdiction of this Court.

4. Accordingly, the impugned order is set aside.

5. Plaintiffs/appellants to deposit the deficient Court fees, within eight weeks.

6. List the suit before the learned Single Judge having the Roster. Accordingly, the appeal is disposed of, alongwith pending applications, if any.

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

New India Assurance Company Ltd. .....Appellant.
Versus
Smt. Bhim Chhring Maghar & ors. .....Respondents.

FAO(WCA) No. 169 of 2008.
Date of decision: March 6, 2017.

Employees Compensation Act, 1923- Section 4- Deceased was working as a beldar - a boulder slided from the hill side and hit the deceased on his head- he died on the spot- a compensation of Rs.2,58,336/- was awarded by the Commissioner- a sum of Rs.1,52,313 was awarded as interest- Insurer was directed to deposit the amount with interest within a period of one month from the date of the award or to pay the penalty- held, that the terms of the policy were not brought on record to show that insurer was not liable to pay the interest- the liability to pay the penalty is that of the insured and not of the insurer- hence, award modified to the extent that liability to pay the penalty imposed upon the insurer is quashed and set aside. (Para-7 to 9)

Case referred:
Ved Prakash Garg versus Premi Devi and others, (1997) 8 Supreme Court Cases 1

For the appellant: Mr. B.M. Chauhan, Advocate.
For the respondents: Mr. Bhoop Singh, Advocate, for respondent No. 1.
Mr. Ankur Sood, Advocate, court guardian, for minor respondents No. 2 and 3.
None for respondent No. 4.

The following judgment of the Court was delivered:

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

In this appeal, award dated 6.9.2007 passed by learned Commissioner under Workmen's Compensation Act in case No. 2(2)Comp./2006 is under challenge. This appeal has been preferred by the insurer-New India Assurance Company.

2. The grounds of challenge in a *nut shell* are that learned Commissioner below has erred in law while directing the insurer respondent No. 2-appellant to pay the awarded amount together with interest @9% per annum from the date of accident. Also that no liability to pay the interest could have been fastened upon the insurer/respondent No. 2-appellant in violation of the terms and conditions of Workmen's Compensation Insurance Policy in which the liability to pay interest and penalty by the insured is not covered. Learned Commissioner below as such also stated to have erred in law in imposing the penalty upon the insurer-appellant under Section 4-A of the Workmen's Compensation Act.

3. Respondent No. 1 herein is the widow, whereas respondents No. 2 and 3 minor son and daughter (hereinafter referred to as petitioners-claimants) respectively, of deceased workman Dhaba Babu Rana. The deceased was employed as a labourer by respondent No. 4 Des Raj, a Government contractor. On 11.5.2005 the deceased was working as Beldar on Harsar-Kugti road in district Chamba at Hulanni Nallah. A boulder slided from hill side and hit the deceased on his head. As a result thereof he died on the spot itself. The deceased was 26 years of age and earning Rs. 2400/- per month by way of his wages at the relevant time. Since he died during the course of his employment, therefore, Rs. 10,00,000/- was claimed as compensation by petitioners-claimants.

4. Learned Commissioner below on the basis of the pleadings of parties had framed the following issues:

i) What was the monthly wages of the deceased.

ii) What was the age of the deceased at the time of death?

iii) Whether the deceased was comprehensively with the opposite party?

iv) If yes, the amount of compensation to be paid by the respondent No. 2.

5. All the issues were answered in favour of the claimants-petitioners and as a result thereof a sum of Rs. 2,58,336/- awarded as compensation to them. Besides, a sum of 1,52,313/- was also awarded towards interest on the awarded amount as directed by learned Commissioner below. On failure of the insurer-appellant to deposit the awarded amount together with interest within a month from the date of award, to pay the penalty as provided under Section 4-A of the Act.

6. This appeal has been admitted on the following substantial questions of law:

1. Whether the ld. Commissioner below has erred in law in fastening the liability of payment of interest upon the appellant from the date of accident. Have not the ld. Commissioner below overlooked the Workmen's Compensation Insurance Police-(law)(s) 1(i) clause wherein the interest and penalty is not covered.

2. Whether the ld. Commissioner has erred in law in directing the appellant to pay penalty as per Section 4-A of the Workmen Compensation Act in its failure to deposit the awarded amount within thirty days from the date of announcement of award.

7. On hearing Mr. B.M. Chauhan, Advocate, learned counsel for insurer-appellant and Mr. Bhoop Singh, Advocate on behalf of respondent-claimant No. 1 and Mr. Ankur Sood, Advocate, Court guardian on behalf of minor respondents No. 2 and 3 and on perusal of the entire record, the first substantial question of law not at all arise for determination in this appeal for the reason that the so called terms and conditions of Workmen Compensation Insurance Policy exempting the insurer respondent No.2-appellant from its liability to pay the interest on the awarded amount has not been seen the light of day being not produced in evidence during the course of trial of the claim petition before learned Commissioner below. Therefore, when there is no material available on record, it cannot be said that appellant-respondent No. 2 is not liable to pay the interest as awarded by learned Commissioner on the awarded amount.

8. If coming to the second substantial question of law the same is covered in favour of the insurer-appellant by the judgment of Apex Court in ***(1997) 8 Supreme Court Cases 1***, titled ***Ved Prakash Garg*** *versus* ***Premi Devi and others*** as it has been held in this judgment that the liability to pay the amount of penalty under Section 4-A(3) of the Act is that of the insured and not that of the insurer. Therefore, the impugned order qua imposition of penalty though vague and cryptic as the Commissioner below has not determined the percentage and extent of penalty, is not legally sustainable. Even if any penalty was to be imposed in this case, the same should have been imposed upon the insured respondent No. 4 and not against the insurer-appellant. Therefore, that part of the impugned award is not legally sustainable, hence quashed.

9. In view of the foregoing reasons, this appeal partly succeeds. The impugned award to the extent of holding insurer-appellant liable to pay the amount of penalty is quashed and set aside. The same shall stand modified accordingly. The appeal is disposed of.

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

Raj Kumar ...Petitioner.

Versus

Bharat Sanchar Nigam Limited and others ...Respondents.

CWP No. 1423 of 2016
Decided on: 06.03.2017

Constitution of India, 1950- Article 226- Petitioner had not approached the Tribunal within a reasonable time and had invoked the jurisdiction of the Tribunal after the lapse of ten years- held, that a person who is a fence sitter cannot claim any benefit after noticing that the same had been granted to similarly situated persons- Tribunal had rightly dismissed the original application- writ petition dismissed. (Para-3 to 6)

Cases referred:

Nadia Distt. Primary School Council vs. Sristidhar Biswas, AIR 2007 SC 2640
Ghulam Rasool Lone vs. State of J & K, 2009 AIR SCW 5260
State of Uttar Pradesh & Ors. v. Arvind Kumar Srivastava & Ors., JT 2014 (12) SC 94

For the petitioner: Mr. V.D. Khidtta, Advocate.
For the respondents: Mr. Rajiv Jiwan, Advocate.

The following judgment of the Court was delivered:

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

Subject matter of this writ petition is order, dated 3rd March, 2016 (Annexure P-3), made by the Central Administrative Tribunal, Chandigarh Bench, Circuit at Shimla (for short "the Tribunal") in OA No. 1683/HP/2013, titled as Raj Kumar versus Bharat Sanchar Nigam Ltd. and others, whereby the OA filed by the writ petitioner came to be dismissed (for short "the impugned order").

2. We have gone through the impugned order. It appears that the writ petitioner had not approached the Tribunal within a reasonable time and invoked the jurisdiction of the Tribunal after ten years, that too, after noticing that the benefits have been granted by the Tribunal to the similarly situated persons.

3. It is beaten law of the land that delay takes away the settings of law and a person, who is fence-sitter cannot claim any benefit after noticing that the same has been granted to the similarly situated persons, is caught by delay and laches, as held by the Apex Court in the case titled as **Nadia Distt. Primary School Council vs. Sristidhar Biswas,** reported in **AIR 2007 SC 2640**. It is apt to reproduce the relevant portion of para 4 herein:

> *"4. We have heard learned counsel for the parties. Learned counsel for the appellants submitted that the persons who had not approached the Court in time and waited for the result of the decision of other cases cannot stand to benefit. The Court only gives the benefit to the persons who were vigilant about their rights and not who sit in fence. Mallick's case was decided in 1982, in 1989 Dibakar Pal filed the petition and thereafter in 1989 respondents herein filed the writ petition. Thereafter petition filed by Dibakar Pal challenging the panel of 1980 was hopelessly belated. Likewise the present writ petition filed by the respondents herein. The explanation that the respondents waited for the judgment in Mallick's case of Dibakar's case, is hardly relevant……"*

4. The Apex Court in another case titled as **Ghulam Rasool Lone** vs. **State of J & K,** reported in **2009 AIR SCW 5260,** laid down the same principles of law. It is apt to reproduce relevant portion of paras 14 and 18 herein:

> *"14. The discretionary jurisdiction under Article 226 of the Constitution may, however, be denied on the ground of delay and latches. It is now well settled that who claims equity must enforce his claim within a reasonable time.....*
>
> *18. While considering the question of delay and latches on the part of the petitioner, the court must also consider the effect thereof. Promotion of Hamidullah Dar was effected in the year 1987. Abdul Rashid Rather filed his writ petition immediately after the promotion was granted. He, therefore, was not guilty of any delay in ventilating his grievances. It will bear repetition to state that the petitioner waited till Abdul Rashid Rather was in fact promoted. He did not consider it necessary either to join him or to file a separate writ petition immediately thereafter, although even according to him, Abdul Rashid Rather was junior to him. The Division Bench, therefore, in our opinion rightly opined that the petitioner was sitting on the fence."*

5. The same principles of law have been laid down by the Apex Court in the case titled as **State of Uttar Pradesh & Ors. v. Arvind Kumar Srivastava & Ors.,** reported in **JT 2014 (12) SC 94**, wherein it has been held as under:

> *"23. .....*
>
> *1 .....*
>
> *(2) However, this principle is subject to well recognized exceptions in the form of laches and delays as well as acquiescence. Those persons who did not challenge the wrongful action in their cases and acquiesced into the same and woke up after long delay only because of the reason that their counterparts who had approached the Court earlier in time succeeded in their efforts, then such employees cannot claim that the benefit of the judgment rendered in the case of similarly situated persons be extended to them. They would be treated as fence-sitters and laches and delays, and/or the acquiescence, would be a valid ground to dismiss their claim."*
>
> *24. Viewed from this angle, in the present case, we find that the selection process took place in the year 1986. Appointment orders were issued in the year 1987, but were also cancelled vide orders dated June 22, 1987. The respondents before us did not challenge these cancellation orders till the year 1996, i.e. for a period of 9 years. It means that they had accepted the cancellation of their appointments. They woke up in the year 1996 only after finding that some other persons whose appointment orders were also cancelled got the relief. By that time, nine years had passed. The earlier judgment had granted the relief to the parties before the Court. It would also be pertinent to highlight that these respondents have not joined the service nor working like the employees who succeeded in earlier case before the Tribunal. As of today, 27 years have passed after the issuance of cancellation orders. Therefore, not only there was unexplained delay and laches in filing the claim petition after period of 9 years, it would be totally unjust to direct the appointment to give them the appointment as of today, i.e. after a period of 27 years when most of these respondents would be almost 50 years of age or above."*

6. Viewed thus, the Tribunal has rightly made the discussion in para 10 of the impugned order and dismissed the OA, needs no interference.

7 Having said so, the impugned order is upheld and the writ petition is dismissed alongwith all pending applications.

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

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

Cr. Appeal No. 70 of 2009
Decided on : 6.3.2017

Indian Penal Code, 1860- Section 307 and 323- Complainant had asked his brother to take the cattle for drinking water- when brother of the complainant reached near the old house, his parental uncle (accused) asked as to why he had come there and started abusing him – brother of the complainant objected, on which accused inflicted a blow of axe on the forehead – when the complainant tried to lift his brother, accused pelted stones due to which complainant sustained injuries – the accused was tried and convicted by the Trial Court- held in appeal that PW-4 is an interested witness and independent witnesses were not examined by the prosecution – witness to the recovery resiled from his testimony- further, no disclosure statement was recorded prior to effecting recovery - axe was not sent to FSL for examination and is, therefore, not connected to the accused – the defence version is made probable by the injury sustained by the accused- the victims were the aggressors and accused was in possession – the Trial Court had wrongly convicted the accused - appeal allowed- judgment passed by the Trial Court set aside.

(Para-9 to 24)

For the Appellant: Mr. Ashwani K Sharma, Sr. Advocate with Mr. Ishan Thakur, 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 impugned judgment of 28.3.2009 rendered by the learned Additional Sessions Judge (1) Kangra at Dharamshala in sessions Case No. 25-K /2002 H.P., whereby he convicted the appellant (hereinafter referred to as "accused") for his committing an offence punishable under Sections 307 and 323 of IPC also sentenced him as follows:-

> *" the accused is convicted and sentenced under Section 307 IPC for rigorous imprisonment for three years and fine of Rs.20,000/- (Twenty Thousand Only) and in default to the payment of fine he shall further undergo simple imprisonment for 6 months. The accused is further convicted and sentenced under Section 323 IPC for simple imprisonment for 1 years and the fine of Rs.5000/- (Rs.Five thousand only) and in default of payment of fine he shall further undergo simple imprisonment for 2 months. The fine if realized is ordered to be awarded as compensation under Section 357 Cr.P.C to the injured Gian Singh to the extent of Rs.20,000/- and to the injured Waryam Singh to the extent of Rs.5000/ ."*

2. Brief facts of the case are that on 18.5.2001 a telephonic information was received in the police station from Medical Officer Sub Divisional Hospital, Kangra in which it was informed that the injured had been brought to the hospital and after incorporating the entry into the daily diary the police party headed by ASI Sunita Thakur went to the hospital where the statement of Baryam Singh was recorded under Section 154 Cr.P.C., who disclosed that he being resident of village Daka Palera and his elder brother Gian Singh who is being in Military service and on leave had come over to his house and on the same day i.e. 18.5.2001 at about 9 a.m. when he was working in the fields and instructed his elder brother to take the cattle for drinking

water as the cattle were grazing over the vacant land and when his brother started collecting cattle for taking drinking water and when reached near the old house where his parental uncle Rasal Singh asked his brother as to why he had come there and started calling bad names as well as challenged him as to why he had come there and when his brother objected to his parental uncle then his parental uncle gave Axe blow to his brother over his forehead and thereby his elder brother fell-down and when he tried to lift his brother then his parental uncle pelted stones which hit him and after raising hue and cry the other people gathered on the spot and he lifted his brother for medical assistance to Sub Divisional Hospital, Kangra. The police after recording the statement of the complainant under Section 154 Cr.P.C sent the same to the police station for registration of the FIR and thereafter on medical examination of the injured the injuries were found to be grievous with sharp edged weapon. During investigation the blood stain towel, Banyan and blood stain soil were taken into possession and the weapon of offence an Axe blood stained was also taken into possession and these were sent to State FSL and the report of the State FSL opined the human blood over these articles. On completion of the investigation the police comes to the conclusion that the accused committed offence under Section 307 and 323 IPC and thereafter put up the final report under Section 173 Cr.P.C. before Judicial Magistrate first Class, Kangra on 4.3.2002 and the case has been committed for sessions trial vide order dated 9.8.2002 by the Judicial Magistrate 1st Class, Kangra.

3. The accused stood charged by the learned trial Court for his committing an offence punishable under Section 307 and 323 IPC to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 18 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 chose to lead evidence in defence and examined one DW.

5. On an appraisal of the evidence on record, the learned trial Court returned findings of conviction against the accused for his committing offences punishable under Sections 307 and 323 of IPC.

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

7. The learned Deputy Advocate General has with considerable force and vigor contended qua the findings of conviction recorded by the Court below standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating interference rather 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. Injured complainant Gian Singh as pronounced by MLC Ext. PW1/A proven by PW1, suffered on his person, the hereinafter extracted injuries. Injury No.1 stands testified by PW1 to be grievous in nature. In his testification he has made communications holding echoings qua injury No.1 being causable with the user of Axe Ex.P1 recovered under Memo Ex. PW-3/C.

> *"Injury cut wound over forehead extending to right parietal region, 4-1/2" x ¾" in size, margins clean cut, underlying skull found fractured, dura and brain tissue visible from wound. Fresh bleeding present. He was advised X-Ray skull, AP and lateral and CT Scan for head and was referred to surgical specialist for opinion and further management.*

He was seen by Dr. R.K Abrol, Surgeon, whose findings are noted on the MLC. Ex.PW-1/A. He referred the patient to Neuro Surgeon at P.G.I Chandigarh for further management.

As per PGI Chandigarh, out door slip No. C.R. 255495 X-ray skull shows fracture frontal bone and C.T Scan shows fracture frontal bone with underlying contusions. As per that record he remained admitted at P.G.I from 18.5.2001 to 20.5.2001 . As per this opinion, injury No.1 is grievous in nature. The injury No.1 is grievous in nature caused by a sharp weapon with alleged duration probable."

10. Also PW1 in his deposition has made vivid underscorings therein in cogent proof of MLC PW1/B wherewithin reflections stood encapsulated qua the existence on the person of Waryam Singh, the hereinafter extracted injuries.

"*Contusion on the dorsum of left forearm at the junction of middle and lower 1/3rd over lying abrasion reddish in colour. I issued MLC Ex.PW-1/B which bears my signature. These injuries can be possible with kick and fist blows."*

11. He testifies qua the injuries observed by him to be occurring on the person of waryam Singh standing sequelled on his standing belaboured by kick and fist blows. Importantly, he has also disclosed in his testification qua the injury(s) noticed by him to be existing on the person of Gian Singh, endangering the latter's life. With PW1 vividly proclaiming in his testification qua the injuries noticed by him to be occurring on the person of victims aforesaid standing caused at a stage besides at a time contemporaneous to the eruption of the ill-fated occurrence thereupon the learned trial Court had recorded a firm conclusion qua hence the testification of PW1 proving the factum of the injuries as stood sustained by the aforesaid victims in the ill-fated occurrence hence standing also proven to stand sustained by them in the manner pronounced in the apposite FIR.

12. Moreover, both the victims/injured (PWs 5 and 11) testified a version qua the ill-fated occurrence bereft of any taint of any gross inter-se contradictions standing encapsulated in their respective examinations-in-chief vis-à-vis their respective cross-examinations also their respective testifications qua the relevant occurrence are free from any taint of stark embellishments besides improvements upon the version enunciated in the FIR. Consequently with the testimonies of the injured/victims standing bereft of any visible taint of any inter-se or intra-se contradictions nor their respective testimonies making any unearthings qua theirs improving or embellishing vis-à-vis their previous statements recorded qua the occurrence by the Investigating Officer concerned, imperatively constrains this Court to conclude qua their respective testimonies warranting imputation of credence thereon significantly when Gian Singh stood inflicted with injuries in the ill-fated occurrence by purported user of axe Ex.P-1 by the accused on his person besides co-victim Waryam Singh sustained injuries on his standing belaboured by the accused with kick and fist blows. Furthermore with PW-1 as unfolded hereinabove testifying qua the existence of injuries noticed by him to be occurring on the person of the victim Gian Singh standing caused by user thereon of "axe" besides his testifying qua the existence of injuries noticed by him to occur on the person of co-victim /injured Waryam Singh being ascribable to his standing belaboured by fist and kick blows, gives succor to the prosecution case.

13. Be that as it may, despite the testifications of injured/victims for the reasons aforesaid warranting imputation of credence also despite a purported eye witness to the occurrence who testified as PW-4 (Munshi Ram) deposing with intra-se harmony with the injured/complainant, wherein he ascribes an incriminatory role to the accused, does give leverage to an inference qua the prosecution thereupon invincibly succeeding in proving the charge against the accused.

14. However, the testifications of injured/victims, support whereof stands purveyed by PW-4, all loose their respective probative sinew, conspicuously with PW-4 being an interested witness, interestedness whereof of PW-4 spurs from in his holding a relationship of father of the

victims, whereupon his testimony acquires a taint of active interestedness. Even though the interestedness of a prosecution witness, does not perse render his testification to warrant its ouster yet the testification hereat of a purported independent witnesses, does stand stained with a vice of active interestedness, conclusion whereof gathers galvanization from the factum of his in his cross-examination testifying qua at the stage when he arrived at the site of occurrence 9-10 persons already recording their presence thereat, however with the Investigating officer omitting to cite as prosecution witnesses any of the persons, who apart from PW-4 besides apart from the injured were evidently available at the site of occurrence, persons whereof holding no relation with either the accused or the victim/injured could obviously hence narrate an impartisan version qua the occurrence, whereas the omission of the investigating Officer to either record their statements or to cite them as prosecution witnesses has hence necessarily precluded the emergence of truth qua the occurrence rather has sequelled eruption of a smothered version qua the occurrence thereupon the testifications of the injured/complainant besides of PW-4 are rendered incredible, theirs hence purveying a colored version qua the incident.

15. The learned trial Court while pronouncing an order of conviction upon the accused had relied upon the purported efficacious recovery of weapon of offence i.e. Axe (Ex. P-1), recovery whereof stood effectuated under recovery memo Ex. PW-3/C. However, a witness to recovery memo (PW-3 Satish Kumar) reneged from his previous statement recorded in writing. Nonetheless the factum of a witness qua the apposite recovery memo reneging from his previous statement recorded in writing would not erode the factum of user of axe Ex.P-1 by the accused on the person of the victim/injured Gian Singh, importantly when the defence acquiesces qua the factum of a scuffle occurring inter-se the victims vis-à-vis the accused, in sequel whereto the apposite injuries stood sustained by them also with PW-3 admitting the existence of his signatures on the apposite recovery memo renders attractable the provisions of Sections 91 and 92 of the Indian Evidence Act, 1872 provisions whereof stand extracted hereinafter, wherein stands encapsulated the trite principle qua his orally digressing from the recorded recitals held in the apposite memo whereon he admits the occurrence of his signatures thereon, hence being inconsequential, corollary whereof is qua thereupon the recitals occurring therein dehors PW-3 orally reneging therefrom standing hence proven. However the mere factum of acquiescence, if any, of the defence qua the factum of a scuffle occurring on the relevant date, at the site of occurrence, would not perse constrain any conclusion from this Court qua thereupon the prosecution also proving the factum qua an efficacious recovery of axe at the instance of the accused by the investigating Officer standing effectuated under an apposite memo nor it would foster any conclusion qua the prosecution proving its user by the accused upon the victim/injured Gian Singh, conspicuously evidently when preceding the purported efficacious recovery of axe Ex.P-1 under an apposite memo no disclosure statement stands recorded by the Investigating Officer concerned. The Investigating Officer concerned stood enjoined with a dire legal necessity to prior to effectuating recovery of weapon of offence, his during the course of holding the accused to custodial interrogation his recording the disclosure statement of the accused, holding unfoldments therein qua the place of its concealment or hiding by him, necessity whereof stands cornered within the domain of Section 27 of the Indian Evidence Act, 1872 provisions whereof stand extracted hereinafter also therein it stands propounded qua thereupon an admissible besides a relevant custodial confessional statement of accused assuredly making its emergence in sequel whereto the subsequent recovery of the weapon of offence at the instance of the accused would hold immense evidentiary clout, contrarily when without preceding thereto, the apposite statutorily warranted custodial confessional disclosure statement of the accused remained unrecorded, thereupon any bald recovery of any weapon of offence by the investigating Officer at the instance of the accused would be hence wholly naked nor would it be construable to be an admissible besides a relevant piece of incriminatory evidence vis-à-vis the accused, significantly when the mandate of law warrants effectuation of the relevant recovery at the instance of the accused not under a composite recovery memo rather warrants recording prior thereto an admissible custodial disclosure statement of the accused. In other words, the recording of a disclosure statement of the accused by the Investigating officer prior effectuating any recovery at the instance of the accused, is preemptory, its embodying the

custodial confessional statement of the accused, omission to record whereof renders inconsequential besides inadmissible any recovery under a naked bald recovery memo.

> " 91. **Evidence of terms of contracts, grants and other dispositions of property reduced to form of documents**- When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, an in all case in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained…".
>
> 92. **Exclusion of evidence of oral agreement-** When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms:
>
> Proviso (1) Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, [want of failure] of consideration, or mistake in fact or law;
>
> Proviso (2).- The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document:
>
> Proviso (3).- The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved:
>
> Proviso(4).- The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents:
>
> Proviso (5). Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved:
>
> provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of contract:
>
> Proviso(6).- Any fact may be proved which shows in what manner the language of a document is related to existing facts."
>
> "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 proven."

16. Hereat, tritely with the Investigating Officer concerned prior to his effectuating recovery of weapon of offence not recording the apt custodial admissible disclosure statement of the accused renders the indispensable canon held within the domain of Section 27 of the Indian Evidence Act qua the accused prior to his facilitating the Investigating Officer to effectuate recovery of the purported weapon of offence, his making an admissible relevant custodial confessional statement remains wholly un-satiated hence rendering recovery, if any, at the instance of the accused, of the purported weapon of offence to hold no probative vigor nor also it

can be concluded qua the prosecution thereupon proving qua “axe” with purported user whereof injuries stood sustained by the victim standing used thereon by the accused.

17. The learned Deputy Advocate General has contended qua with the defence during the course of PW-4 standing subjected to cross-examination putting an affirmative suggestion to PW-4 Munshi Ram, qua an axe standing handed over to the police by the wife of the accused, whereat the Investigating Officer visited the house of the accused, suggestion whereof evoking an answer in the affirmative from PW-4, qua its thereupon acquiescing qua, for the reasons aforesaid, the inefficacious recovery of axe standing hence rendered inconsequential besides its adversial effect vis-à-vis the prosecution, also hence standing effaced. However the aforesaid submission addressed by the learned defence counsel, founders in the face of (a) axe standing undispatched by the investigating Officer to the FSL whereupon it is befitting to conclude qua the omission aforesaid standing prodded by the factum of its not holding any blood stains. Concomitantly, the “axe” as stood delivered by the wife of the convict Rasal Singh to the Investigating Officer whereat the latter visited the abode of convict accused Rasal Singh, cannot constrain any conclusion qua thereupon the defence acquiescing qua the factum, of the accused/convict conceding to the factum of “axe” standing used by him for delivering, a blow on the head of victim/injured Gian Singh. Contrarily with the defence putting an affirmative suggestion to PW-4 holding echoings therein qua the collection of “axe” standing made by the Investigating Officer from the house of accused Rasal Singh whereto it obtained an affirmative answer thereto from him, yet thereupon the learned PP concerned not proceeding to seek the permission of the learned trial Court, to proceed to cross-examine him qua his deposing a version contrary to the one enunciated in the apposite recovery memo wherein reflections are held qua the accused handing over axe to the Investigating Officer also constrains a conclusion qua the pronouncements occurring in the apposite recovery memo holding no sanctity of truth whereupon the recovery of weapon of offence by the investigating officer concerned is construable to be an invented recovery bereft of holding tandem with the statutory mandate.

18. The accused/convict in his statement recorded under Section 313 of Cr.P.C had therein proclaimed qua, his too, while exercising the right of private defence of property besides for thwarting an imminent threat emanating to his person arising from the factum of the victim(s) respectively wielding dandas, hence sustaining injuries in the relevant scuffle, especially when the relevant endangerments on remaining unconcerted to be repulsed, an invasion upon his property by the victim besides imminent danger to his body would stand sequelled. Even though the aforesaid propagation made by the accused/convict in his defence does hold his acquiescence qua his purportedly striking the head of the victim injured with an axe blow nonetheless the aforesaid acquiescence perse would not render him penally inculpable.

19. The reason for this Court concluding qua the accused succeeding in propagating his exculpatory defence in the relevant scuffle which occurred inter-se him with the victims/injured, wherein he, too, received a blow on his head, spurs from the factum of the investigating officer concerned merely for benumbing his defence hence, holding an impartisan, skewed besides a slanted investigation. An inference qua the investigating Officer concerned muting the defence of the accused visibly emerges, from the reasons ascribed hereinafter (a) PW-1 in his testification making underscorings qua his examining the accused/convict in sequel whereto he testifies qua his noticing the injuries occurring on the person of the accused standing sequelled with user thereon, of dandas; (b) the aforesaid factum pronounced by PW-1 in his testification stands espoused by the learned Deputy Advocate General to, in the absence of the accused/convict lodging an FIR with the Investigating Officer concerned besides with the defence not concerting to belie a dis-affirmative answer purveyed by the I.O qua a suggestion put to him by the defence qua the accused lodging an FIR qua the relevant occurrence thereupon standing hence unrelatable to the ill-fated occurrence. However, the espousal of the Deputy Advocate General suffers emasculation.

20. Preeminently when DW-1 (Rajinder Singh), a witnesses adduced in propagation of the aforesaid defence reared by the accused had emphatically in his examination-in-chief

deposed qua on the relevant day injured/victims Waryam Singh besides Gian Singh standing respectively armed with an axe and a danda. He has also proven in his testification comprised in his examination in chief qua his also noticing oozing of blood from the injuries delivered on the head of the accused/convict Rasal Singh by user thereon respectively of axe and danda by the aforesaid. The testification qua the aforesaid factum occurring in the examination-in-chief of DW-1 remained un-concerted by the learned PP concerned to be shred of truth.

21. The factum of the learned PP concerned also while holding DW-1 to cross-examination putting suggestion to him couched in an affirmative phraseology qua his standing cited as a prosecution witness, suggestion evoked an alike affirmative answer from DW-1 also holds visible echoings qua the prosecution thereupon acquiescing qua the factum of DW-1 being an eye witness to the occurrence. However he stood un-examined by the prosecution. Construing the aforesaid non-examination of DW-1 as a PW, in conjunction with the Investigating Officer omitting to join in his investigations other eye witnesses to the occurrence despite their availability thereat, evident availability whereof stood evidently proven by PW-4, constrains a conclusion qua the investigating Officer actively contriving a smothered version qua the occurrence. Even if DW-1 has made underscorings in his deposition contrary to the one held in his previous statement recorded in writing nonetheless when the relevant factum probandum qua Waryam Singh standing armed with an axe and Gian Singh standing armed with a Danda whereby he dispels factum of user of "axe" by the accused on the head of victim Gian Singh, factum whereof stood failingly concerted to be torn of its truth by the learned PP during the course of his holding him to an exacting cross-examination rather in course thereof affirmative suggestions stood purveyed to him holding therein communications qua his eye witnessing the occurrence suggestions whereof evoked from DW-1 an affirmative response also foments an inference qua with the prosecution hence acquiescing qua the underscorings made by DW-1 in his examination–in-chief qua Waryam Singh holding an axe and Gian Singh holding a danda also its thereupon acquiescing qua the underlinings made by DW-1 qua theirs with their respective user delivering blows on the head of the accused in sequel whereof the accused sustaining injuries thereon whereupon the testification of DW-1 warrants imputation of credence.

22. The learned Deputy Advocate General contended qua DW-1 not eye witnessing the occurrence given his testifying qua his at the relevant time breaking stones besides with DW-1 in his cross-examination deposing qua his at the relevant time standing lodged inside a ditch, holding a depth of 5/6 feet wherefrom the learned Deputy Advocate General submits qua hence it being impossible for him to eye witness the occurrence hence rendering his testimony to be incredible. A wholesome reading of the testimony of DW-1 comprised in his examination-in-chief contrarily underscores qua his breaking stones whereafter in sequel to his hearing cries, he arose from his position inside the ditch whereat he noticed qua blood oozing from the head injury sustained by Rasal Singh also he therein underlines qua his noticing blood oozing from the head injury of Gian Singh, underscorings occurring therein rendered uneroded of the tenacity. Consequently the factum of his fragmentarily acquiescing qua a suggestion put to him by the learned PP qua his standing lodged inside a ditch, holding a depth of 5/6 feet, whereupon he stood incapacitated to eye witness the occurrence hence looses its entire tenacity. The eliciting of the aforesaid acquiescence by the PP concerned from DW-1, acquiescence whereof stands engendered by a pointed apposite suggestion standing purveyed to him by the PP concerned, perse would benumb the credibility of the relevant echoings qua the afore-stated factum probandum embodied in his examination-in-chief, whereupon the espousal of the defence stands anchored, conspicuously when the PP concerned also to his apposite suggestions to DW-1 elicited acquiescences from DW-1 qua throughout the ongoing scuffle inter-se the accused vis-à-vis the victim, his remaining inside a ditch, omission whereof nurses a derivative qua DW-1 intermittently remaining inside the ditch whereupon it is befitting to conclude qua at the relevant juncture his standing not lodged inside the ditch rather his standing therein, sequel whereof is qua his relevant testification wherein he ascribes an inculpatory role qua the victim(s) wielding weapons of offence, with user whereof they struck the head of the accused hence holding an aura of truth. Moreso when the unfoldments made by him in his examination-in-chief qua his noticing

injuries on the person of the convict and also on the person of the victim(s), remain un-shattered, during the course of his standing held to an exacting cross-examination, thereupon his testimony embodied in his examination-in-chief stands construable to be holding a truthful ocular account, predominantly with the prosecution conceding qua the Investigating Officer recording his previous statement in writing, acquiescence whereof stems from the PP concerned while holding DW-1 to cross-examination, his eliciting an affirmative answer from him to his apposite suggestion qua the Investigating Officer recording his statement under Section 161 Cr.PC, statement whereof stood reneged by DW-1 nonetheless wherefrom an unflinching conclusion stands nursed qua thereupon his deposition holding a sacrosanct pedestal of truth.

23. Moreover when for the reasons aforesaid DW-1, an eye witness to the occurrence, has vividly disclosed qua the factum of the victims/injured initiating an aggression upon the accused besides with both DW-1 and the Investigating Officer deposing in tandem qua the accused holding possession of the disputed site of occurrence, boosts, in coagulation with the aforesaid discussion, an inference, qua the accused in exercising his right of private defence of property besides for baulking an imminent threat to his body, reared from the victims evidently standing armed with weapons of offence also theirs holding a higher numerical strength vis-à-vis him his thereupon with "any" sharp edged weapon purportedly delivering blows on the head of Gian Singh, delivering whereof by him stands hence proven to fall within the statutory exceptions to criminal liability also significantly when this Court concludes qua the investigating officer concerned contriving the genesis of the case.

24. In view of above discussion, the appeal is allowed and the impugned judgment of 28.3.2009 rendered by the learned Additional Sessions Judge (1), Kangra at Dharamshala is set aside. The accused is acquitted of the offences charged. The fine amount, if any, deposited by the accused is ordered to be refunded to him. Bail bonds, if any, furnished by the accused are discharged. Records be sent down forthwith.

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

Tula Ram ...Petitioner.
Versus
Prem Singh ...Respondent.

Cr. Revision No. 317 of 2015.
Date of Decision: 6.3.2017.

Negotiable Instruments Act, 1881- Section 138- Complainant advanced a sum of Rs.60,000/- to the accused- the accused issued a postdatedcheque for Rs.60,000/- the cheque was dishonoured for want of sufficient funds- the amount was not paid despite the receipt of the notice – the accused was tried and convicted by the Trial Court- an appeal was filed, which was dismissed- held in revision that the complainant had categorically supported the prosecution version- the defence version was not proved – the complainant had successfully proved the basic ingredients of the offence punishable under Section 138 of N.I. Act – the accused had failed to rebut the presumption under N.I Act- he was rightly convicted by the Trial Court- revision dismissed.(Para-10 to 16)

Cases referred:
State of Kerala Vs. Puttumana Illath Jathavedan Namboodiri (1999) 2 Supreme Court Cases 452
Krishnan and another Versus Krishnaveni and another, (1997) 4 Supreme Court Case 241

For the petitioner: Mr. Raman Prashar, Advocate.
For the respondents: Mr. Ravinder Singh Jaswal, Advocate, for respondent No.1.
Mr. P.M. Negi, Additional Advocate General for respondent. No.2.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Instant criminal revision petition filed under Section 397 read with Section 401 of the Cr.PC, is directed against the judgment dated 02.06.2015, passed by the learned Additional Sessions Judge (II), Shimla, District Shimla, HP, in Criminal Appeal No. RBT-230-S/10 of 2014, affirming the judgment and order of conviction dated 21.7.2014/27.10.2014, passed by the learned Additional Chief Judicial Magistrate, Court No. (2), Shimla, H.P., in Case No. 966-3 of 2014/11, whereby the accused-petitioner ("the accused" for short) has been sentenced to undergo simple imprisonment for six months for the offence punishable under Section 138 of the Negotiable Instruments Act (in short "the Act") and to pay compensation of Rs. 75,000/- to the complainant.

2. Briefly stated facts as emerge from the record are that the respondent (herein after referred to as the complainant) filed a complaint under Section 138 of the Act, in the court of learned Additional Chief Judicial Magistrate, Court No. (2), Shimla, H.P., against the present petitioner stating therein that since parties (the accused and the complainant) were known to each other, the accused requested the complainant to arrange Rs. 60,000/- for his personal and business requirement. Accordingly, the complainant on the aforesaid request advanced him an amount of Rs. 60,000/- in September, 2010. The accused with a view to discharge his liability issued a post dated cheque bearing No. 318635 dated 10.1.2011, (Ext.CW1/A) amounting to Rs. 60,000/-, of his account maintained in Punjab National Bank, Kunihar. However, fact remains that on presentation, cheque in question was dishonored vide memo dated 17.1.2011 (Ext.CW1/B) for want of sufficient funds in the account of the accused.

3. After receipt of the aforesaid memo, the complainant got legal notice (Ext.CW1/C) issued on 22.1.2011 to the accused through registered post as well as UPC on 24.1.2011 calling upon him to make the payment good but since no payment was made within the stipulated period, he was compelled to initiate proceedings under Section 138 of the Act. Learned Courts below on the basis of material adduced on record by the respective parties, held the accused guilty of having committed offence punishable under Section 138 of the Act and accordingly convicted and sentenced him as per the description already given above.

4. The accused being aggrieved with the judgment of conviction passed by the learned trial Court, filed an appeal under Section 374 of Cr.PC, before the Court of learned Additional Sessions Judge (II), Shimla, District Shimla, HP, who vide judgment dated 02.06.2015, dismissed the appeal preferred by the accused, as a result of which judgment of conviction passed by the learned trial court came to be upheld. In the aforesaid background, the present petitioner approached this Court seeking his acquittal after setting aside the judgment of conviction recorded by the courts below.

5. Mr. Raman Prashar, Advocate, representing the petitioner, vehemently argued that the judgments of conviction and sentence recorded by the courts below, are not sustainable as the same are not based upon the correct appreciation of evidence available on record and, as such, same deserve to be quashed and set-aside. While referring to the impugned judgments passed by the courts below, Mr. Prashar strenuously argued that bare perusal of the judgments suggests that courts below failed to appreciate the evidence in its right perspective, which has led to recording of erroneous findings to the detriment of the petitioner and as such, same cannot be allowed to sustain. Mr. Prashar further contended that order of learned trial Court is not in conformity with the law because admittedly, the complaint was filed before the expiry of statutory period of fifteen days from the receipt of notice by the accused and as such, the complaint filed by the complainant ought to have been dismissed by the court below being premature. He also stated that bare perusal of the evidence suggests that the courts below overlooked the evidence of material witnesses and failed to return contingent and satisfactory finding qua that effect. While inviting attention of this Court to the statement given by the witnesses, Mr. Prashar, contended that courts below ignored the deposition made by the defendant who categorically stated that the

complainant had not returned cheque and that was lying with his Advocate. He also stated that learned court placed undue reliance upon the report of handwriting expert, who in his opinion gave no detailed reasons for the findings given by him and as such, same could not be taken into account by the courts below while recording conviction of the petitioner accused. He further stated that opinion of handwriting expert was not conclusive but it could be corroborative. In the aforesaid background, Mr. Prashar prayed for acquittal of the petitioner accused after setting aside the judgment of conviction recorded by the courts below.

6. Per contra, Mr. Ravinder Jaswal, Advocate and P.M. Negi, learned Additional Advocate General, representing respondent No.1 and respondent No.2-State, respectively, supported the impugned judgments passed by the courts below. Mr. Jaswal vehemently argued that bare perusal of the impugned judgments suggests that same are based upon the correct appreciation of the evidence available on record and courts below have very meticulously dealt with each and every aspect of the matter. Mr. Negi, reminded this Court of its limited powers while exercising its revisionary powers under Section 397 of the Cr.PC, to re-appreciate the evidence, especially, when it stands duly proved on record that the courts below have dealt with each and every aspect of the matter very meticulously. In this regard, reliance is placed upon the judgment passed by Hon'ble Apex Court in cas*e* ***"State of Kerala Vs. Puttumana Illath Jathavedan Namboodiri"*** *(*1999) 2 Supreme Court Cases 452, wherein it has been held as under:-

> ***"In its revisional jurisdiction, the High Court can call for and examine the record of any proceedings for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order. In other words, the jurisdiction is one of supervisory jurisdiction exercised by the High Court for correcting miscarriage of justice. But the said revisional power cannot be equated with the power of an appellate court nor can it be treated even as a second appellate jurisdiction. Ordinarily, therefore, it would not be appropriate for the High Court to re-appreciate the evidence and come to its own conclusion on the same when the evidence has already been appreciated by the Magistrate as well as Sessions Judge in appeal, unless any glaring feature is brought to the notice of the High Court which would otherwise tantamount to gross miscarriage of justice."***

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

8. True, it is that this Court has very limited powers under Section 397 Cr.PC while exercising its revisionary jurisdiction but in the instant case, where accused person has been convicted and sentenced, it would be apt and in the interest of justice to critically examine the statements of the prosecution witnesses solely with a view to ascertain that the judgments passed by learned courts below are not perverse and same are based on correct appreciation of the evidence on record.

9. 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."

10. This Court with a view to ascertain the genuineness and correctness of the submissions having been made by the learned counsel for the petitioner carefully perused the entire record, perusal whereof nowhere suggests that there is any illegally and infirmity in the judgments passed by the courts below, rather same appear to be based on correct appreciation of evidence adduced on record. The complainant Prem Singh (CW1) categorically deposed before the Court that he knew the accused for last 15 years and in the year September, 2011, the accused had taken Rs. 60,000/- from him and for the purposes of repayment, issued a cheque Ext.CW1/A. CW1 also stated that on presentation, cheque is question was dishonoured vide memo Ext.CW1.B. He also proved on record demand notice Ext.CW1/C, got issued to the accused through his counsel by registered post and UPC. The complainant also proved on record the aforesaid receipts (Ext.CW1/D and Ext.CW1/E). It has also come in his statement that the accused had received notice vide receipt Ext.CW1/F, which was duly replied by him vide Ext.CW1/G. In his cross examination, CW1 specifically denied the suggestion put to him that he had only taken Rs. 20,000/- and in lieu of this, he had repaid Rs. 60,000/- qua which receipt was also issued. Similarly, he admitted that cheque was not filled by the accused but he categorically denied that the accused returned the amount taken by him and he filed false complaint against the accused, whereas accused in his statement recorded under Section 313 Cr.PC, admitted having borrowed Rs. 20,000/- only and claimed that his blank cheque was taken as security. He also stated that he had paid Rs. 60,000/- including interest in installments vide receipt dated 27.7.2011 and his blank cheque was misused.

11. The accused in his defence examined two witnesses namely Sh. Padam Chauhan, DW1 and Sh. Om Parkash DW2. Sh. Padam Chauhan, DW1 stated before the Court that in July 2011, the accused had given Rs. 60,000/- to the complainant vide receipt Ext.DW1/A, which bears his signatures at Mark-B. He also stated that receipt was scribed by the brother of the accused and Mark-A bears signature of the complainant. He also stated that when cheque was demanded by the accused, the complainant stated that cheque is with the Advocate and he shall return the same within 7-8 days, however, in cross examination, this witness stated that he is not aware as to whether the accused had taken money from the complainant. He also denied the suggestion put to him that the Ext.DW1/A was prepared wrongly.

12. Sh. Om Parkash DW2, who happened to be younger brother of the accused, stated that one year back, accused called him in the shop with an amount of Rs. 30,000 and he visited the shop of the accused with Rs. 30.000/-. He also stated that at the instance of the complainant, Ext.DW1/A was written and he had paid Rs. 30,000/- to the accused and accused had paid amount of Rs. 60,000/- to the complainant. He also stated that at the time of scribing of the Ext.DW1/A, the accused, complainant and the witness Padam Chand were present. He also stated that when the accused demanded his cheque, the complainant told him that the same is with the advocate and shall return the same within 4-5 days. He also in his cross examination stated that he cannot say that when the accused received notice of complainant.

13. It emerge from the record of the court below that writing Ext.DW1/A was sent to the handwriting expert on the request of the accused for comparison of signature in 'Q1' along with other admitted specimen signatures/handwriting and report of the expert was received in

the matter as per which Q1 on Ext.DW1/A was not written by the person, who admitted signatures A1 to A7 and specimen writing S1 to S44. The accused also filed objection to the report of expert stating therein that the expert, nowhere stated that handwriting can vary, if the posture of a person is different.

14. In the instant case, as clearly emerge from the record, the complainant successfully proved on record the basic ingredients of proving the offence punishable under Section 138 of the Act against the accused. The complainant while appearing as CW1 categorically proved on record that he had advanced an amount of Rs. 60,000/- to the accused, in lieu whereof cheque amounting to Rs. 60,000/- was issued by the accused. Ext.CW1/B clearly suggests that cheque in question was presented for encashment but same was dishonored. Similarly by proving Ext.CW1/C, CW/D and CW/E , the complainant successfully proved on record that after dishonouring of the cheque, he got legal notice issued calling upon the accused to make the payment good within the stipulated period. Ext.CW1/F as well as Ext.CW1/G clearly suggest that notice as referred above, was duly received by the accused. Cross examination conducted on the complainant, nowhere suggests that the defence was able to shatter the testimony of the complainant, who in no certain terms, stated before the Court that he had advanced amount of Rs. 60,000/- to the accused on return basis. He also denied that the accused had only taken Rs. 20,000/-, in lieu whereof, he had paid Rs. 60,000/-, qua which receipt was issued.

15. True it is, in cross examination, the complainant admitted that the cheque was not filled by the accused but same cannot be sufficient to hold that the cheque was not issued by the accused in lieu of amount taken by him from the complainant until the counter is proved. As per Section 118 of the Act, it shall be presumed, until the contrary is proved, that every negotiable instrument was made or drawn for consideration. Similarly, Section 139 provides that unless the contrary is proved, it shall be presumed that holder of the cheque received the cheque, for the discharge of whole or part of any debt or liability. As per provisions of Section 20 of the Act, it is open for the person to sign and deliver blank and incomplete instrument and it is equally open for the holder to fill up blank instrument and specify amount therein. Hence, there is no force in the defence taken by the accused that he had given a blank cheque to the complainant as a security. Similarly, there is no dispute that accused can rebut the presumptions as referred supra, by preponderance of the probabilities and is not required to rebut the presumptions beyond reasonable doubt. But in the instant case, as has emerged from the record, the accused failed to take consistent defence, if any, qua the issuance of cheque by him. In his statement recorded under Section 313 Cr.PC, the accused, on one hand stated that he only took Rs. 20,000/- from the complainant and has already returned Rs. 60,000/- with interest. In his cross examination, he stated that he issued cheque Ext.CW1/A for security. He also stated that he has repaid Rs. 60,000/- with interest. If statement made by accused under Section 313 is read juxtaposing his statement, especially, cross examination before the Court, it can be safely concluded that the accused had issued cheque Ext.CW1/A. Hence, there cannot be any dispute with regard to the issuance of cheque by him in favour of the complainant. Accused with a view to prove that he paid Rs. 60,000/ to the complainant also produced DW1 Padam Chauhan, who claimed that he signed on Ext.DW1/A. Similarly, Om Parkash DW2, who claimed that he scribed the receipt Ext.DW1/A happened to be the brother of the accused . DW2 in his deposition made before this Court stated that he gave Rs. 30,000/- to the accused, who gave Rs. 60,000/- to the complainant. Even aforesaid defence witnesses adduced on record by the accused proves on record that an amount of Rs. 60,000/- was taken by the accused from the complainant, who unequivocally stated that he advanced an amount of Rs. 60,000/- to the accused. Since, there is ample evidence on record as has been discussed above, that accused had taken Rs. 60,000/- from the complainant, there is strong presumption of truth attached to the version put forth by the complainant that accused in order to discharge his liability issued cheque amount of Rs. 60,000 Ext.CW1/A, perusal whereof, clearly suggests that accused issued cheque dated 1.10.2011 amounting to Rs. 60,000/- in favour of the complainant, which was ultimately dishonored on 17.1.2011. At the cost of repetition, it may be stated that after

dishonoring of the cheque, the complainant took all measures to get the amount recovered as required under Section 138 of the Act and as such, there is sufficient compliance on the part of the complainant as far as Section 138 of the Act is concerned. Similarly, this court sees that pursuant to the demand notice issued by the complaint, accused sent reply i.e. Ext.CW1/G wherein he admitted having taken Rs. 60,000/- from the complainant, but in aforesaid communication, he claimed that he already repaid entire amount but interestingly, no receipt was executed. Perusal of contents of the reply, clearly falsify the defence taken by the accused under Section 313 Cr.PC as well as statement before the Court that he had only taken Rs. 20,000/- from the complainant. In reply to the demand notice, accused claimed that he had returned entire amount, whereas defence witnesses stated before the Court that amount was paid vide Ext.DW1 by the accused to the complainant in lieu of amount i.e. Rs. 20,000/- taken by him. It may be noticed that Ext.DW1/A is dated 28.7.2011, which suggests that amount was paid in the presence of witnesses. Perusal of Ext.DW1/A, which is dated 28.7.2000 falsify the earlier stand taken by the accused wherein he in his reply dated 11.1.2011 to the demand notice categorically stated that entire amount of Rs. 60,000/- stands paid to the complainant. If accused had already paid the amount prior to sending his reply dated 11.1.2007 to the legal notice Ext.CW1/G, where was the occasion for him to repay the entire amount as reflected in Ext.DW12/A. Hence, this court sees all reasons to draw adverse inference against the petitioner accused, who apparently in his desperation to defeat the genuine claim of the complainant took contradictory defenses/pleas as well as placed on record contrary documentary evidence. As per the report of the handwriting expert, signature on Ext.DW1/A, were not found to be same as per admitted specimen signatures and writing and as such, version put forth by DW2 i.e. brother of the accused was rightly not taken into consideration by the courts below being interested witness. Perusal of demand notice Ext.CW1/C, nowhere suggests that it was not issued within the stipulated period. Perusal of Ext.CW1/D i.e. postal receipt clearly suggests that same was posted on 24.1.2011, whereas Ext.CW1/E and Ext.CWF clearly suggests that same was received and replied by the accused vide letter Ext.CW1/G as, such, there is nothing on record to suggest that the complaint was filed before the expiry of the stipulated date.

16. After bestowing my thoughtful consideration, I see no reason to differ with the well reasoned finding returned by the courts below which are based upon the proper appreciation of the evidence available on record. Accordingly, present petition is dismissed and judgments passed by the Courts below are upheld. Petitioner accused is directed to surrender himself before the learned trial Court forthwith to serve the sentence as awarded by learned trial Court. Needless to say that order dated 17.9.2015, passed by this Court, whereby sentence imposed by the Court below was suspended, shall stand vacated automatically.

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

Anju Thakur .....Petitioner.

Versus

State of H.P. & ors. .....Respondent.

Cr.MMO No. 211 of 2016.
Decided on: 07.03.2017.

Code of Criminal Procedure, 1973- Section 320- An application was filed for compounding the offences punishable under Sections 406, 420, 506 read with Section 120-B of I.P.C. on the ground that matter has been compromised between the parties- the charge was framed for the commission of offence punishable under Section 420 of I.P.C read with Section 120-B and 506 of I.P.C., which is compoundable with the permission of the Court, however,the application was dismissed on the ground that offence punishable under Section 120-B of I.P.C is not compoundable- held, that the offence punishable under Section 120-B of I.P.C is not an independent and substantive offence – the substantive offences are punishable under Sections

506 and 420 of I.P.C. – the matter has been compromised between the parties and there is every possibility that it will result in acquittal – therefore, the petition allowed- FIR and further proceedings pending against the petitioner are ordered to be quashed. (Para- 3 to 7)

For the petitioner: Mr. Anil Thakur, Advocate, vice counsel.
For the respondents: Mr. Neeraj K. Sharma, Dy. Advocate General for the respondent-State.
Mr. Vikas Chandel, Advocate for respondent No. 2.
Mr. Vinit Thakur, Advocate, vice counsel for respondent No. 3.

The following judgment of the Court was delivered:

Justice Dharam Chand Chaudhary, J (Oral).

Complaint herein is that learned Chief Judicial Magistrate, Shimla has erroneously dismissed the application filed under Section 320 Cr.P.C. seeking permission to compound the offence punishable under Sections 406, 420, 506 read with Section 120-B of the Indian Penal Code, vide impugned order dated 21.1.2016, Annexure P-3.

2. Petitioner herein is the accused in Cr. Case No. 198-2 of 13/11. The complainant (respondent No. 2 herein) has filed an application under Section 320 Cr.P.C. for withdrawal of the case FIR No. 29/2010 registered against her under Sections 406, 420, 506 and 120-B IPC. The impugned order reveals that the charge against the accused-petitioner has only been framed under Section 420 read with Sections 120-B and 506 IPC. In view of the provisions contained under Section 320 Cr.P.C., an offence punishable under Section 506 IPC can be compounded by the person intimidated i.e. the complainant even without the permission of the Court. Further, an offence punishable under Section 420 IPC can only be compounded by the person cheated but with the permission of the Court. Learned trial Court, however, has dismissed the application for the sole reason that the offence punishable under Section 120-B IPC is not compoundable either with the permission of the Court or otherwise.

3. It is significant to note that an offence under Section 120-B IPC is not an independent and substantive offence and rather its commission can be inferred only in those cases where the offender was a party to criminal conspiracy and the conspiracy so hatched led to the commission of an offence punishable with death or rigorous imprisonment for a term over two years or upwards. Now, if coming to the punishment for the commission of an offence punishable under Section 120-B IPC, an offender has to be punished in the same manner as if he had abetted the commission of substantive offence consequent upon such conspiracy. The substantive offences in the case in hand for which the accused-petitioner has been charged with are punishable under Sections 506 and 420 IPC. As noticed supra, the same are compoundable with and without the permission of the Court by the person intimidated and the person cheated, viz. the complainant.

4. There seems to be some settlement arrived at between the parties, as is apparent from the perusal of the contents of the application Annexure P-2. It is consequent upon such settlement, an application under Section 320 Cr.P.C. was filed for compounding of the offence, the accused-petitioner allegedly committed. When the complainant intends to compound the offence and there being settlement between him and the accused petitioner, it cannot be believed by any stretch of imagination that he would be going to depose against her during the course of trial of the case. Therefore, in these circumstances, allowing criminal proceedings to continue against the accused-petitioner, otherwise would also amount to abuse of process of law.

5. Learned trial Judge seems to have been influenced on account of the fact that the offence punishable under Section 120-B IPC does not find mention in the table below Section 320 Cr.P.C. However, he has omitted to take note of Section 320(3) Cr.P.C. which provides that when the substantive offence is compoundable under this Section, the abetment of such an offence or intention to commit such offence or when the accused is liable with the aid of Section 34 or 149

IPC, the same may also be compounded in the like manner. Since there is a provision under Section 120-B IPC to punish an offender for the commission of offence in the capacity of an abettor of a substantive offence and as such substantive offence is compoundable under Section 320 Cr.P.C as in the case in hand, the offence under Section 120-B IPC should have also been allowed to be compounded, as provided under Section 320(3) Cr.P.C.

6. For all these reasons and also that there being amicable settlement arrived at between the parties, there is every possibility of the trial ending in acquittal, the pending criminal proceedings against the accused-petitioner deserves to be quashed.

7. Consequently, the FIR and further proceedings in criminal case No. 198-2 of 13/11 pending disposal against the accused-petitioner before learned Chief Judicial Magistrate, Shimla are ordered to be quashed. The petition is accordingly allowed and stands disposed of.

8. An authenticated copy of this judgment be sent to learned trial Court for being taken on record and compliance.

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

Savita ....Petitioner

Versus

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

Civil Writ Petition No. 9187 of 2011
Date of Decision 7th March 2017

Constitution of India, 1950- Article 226- Petitioner was appointed as Anganwari worker in the month of August, 2007 – an appeal was preferred against the appointment on the ground that petitioner is not resident of survey area of Anganwari center – the appeal was allowed and the appointment of the petitioner was set aside- the petitioner preferred a second appeal before Divisional Commissioner, which was dismissed- direction was issued to conduct fresh interview to select eligible candidate strictly in accordance with the scheme/guidelines issued by the department – a writ petition was filed, which was disposed of with a direction to the Appellate Authority to consider the case afresh – again it was held that petitioner is not a resident of survey/feeding area and her appointment was against the guidelines – the present writ petition has been filed against the order passed by Appellate Authority – held, that it was specifically held in the writ petition that the person should be resident of Village/ward, where the Center is located – it was specifically stated in the affidavit of respondent No. 4 that part of the Village where house of the petitioner is situated does not fall under the feeder area of Anganwari, where she was appointed- patwari had also reported the same fact- no document was placed on record to show that the house of the petitioner falls within the feeder area – the Appellate Authority had rightly set aside the appointment of the petitioner – petition dismissed. (Para-9 & 10)

For the Petitioner: Ms. Anjali Soni Verma, Advocate.
For Respondents Nos. 1 to 4: Shri P.M. Negi, Additional Advocate General.
For Respondent No.5: Ms. Seema Guleria, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J. (oral)

Petitioner being aggrieved and dissatisfied with order dated 26.9.2011 passed by Additional Deputy Commissioner, Kangra at Dharamshala, exercising the powers of Appellate Authority under the Scheme for engagement of Anganwari Workers/Helpers under ICDS, whereby her appointmnet as Anganwari Worker at Anganwari Centre, Bhurlahad was set aside,

approached this Court by way of instant writ petition filed under Article 226 of Constitution of India, seeking therein following reliefs:-

(i) That writ in the nature of certiorari may kindly be issued by quashing impugned order dated 26.9.2011, Annexure P-4, passed by the learned Additional Deputy Commissioner, Kangra at Dharamshala, i.e. respondent No.3, being illegal and arbitrary.

(ii) That the respondents may further be directed to continue the petitioner to work as Anganwari worker in Anganwari Centre, Bhurlahad, District Kangra, H.P.

(iii) That the respondents may very kindly be directed to produce the entire record pertaining to the case of the petitioner for the kind perusal of this Hon'ble Court.

(iv) That the petition may kindly be allowed with costs throughout.

(v) Any other order, which this Hon'ble Court deems just and proper in the facts and circumstances of the case may also kindly be passed in favour of the petitioner."

2. Briefly the facts, as emerged from record, are that petitioner, persuant to interview conducted by respondents, was appointed as Anganwari Worker in the month of August 2007 at Anganwari Centre Bhurlahad, District Kangra H.P. vide Annexure P-1. Respondent No.5, being aggrieved with appointment of petitioner, preferred an appeal before Appellate Authority under the Scheme for engagement of Anganwari Workers/Helpers, which came to be registered as appeal No. 110/Kangra. However, Appellate Authority accepted the appeal of respondent No.5 on the ground that petitioner is not resident of survey area of Anganwari Centre, Bhurlahad and accordingly, quashed the selection of petitioner. Being dissatisfied with aforesaid order passed by Appellate Authority, petitioner preferred second appeal before the Divisional Commissioner, Kangra at Dharamshala bearing No. 112 of 2009. Learned Divisional Commissioner, Kangra at Dharamshala, vide order dated 21.6.2010, dismissed the appeal having been preferred by petitioner and directed the authorities concerned to conduct fresh interview to select an eligible candidate as Anganwari Worker for Anganwari Centre in question strictly in accordance with Scheme/Guidelines issued by the Social Justice and Empowerment Department.

3. It further emerge from the record that petitioner being dissatisfied with rejection of her appeal by Divisional Commissioner preferred a civil writ petition bearing No. 4051 of 2010 before this Court seeking quashment of orders dated 21.6.2010 and 24.2.2009 passed by Divisional Commissioner, Kangra at Dharamshala as well as Additional Deputy Commissioner, Kangra at Dharamshala respectively. However, the fact remains that aforesaid petition, having been preferred by petitioner, was disposed of by the Division Bench of this Court vide judgment dated 26.7.2010, strictly in terms of its earlier judgment rendered in CWP No. 1096 of 2010 on 17.5.2010. Perusal of judgment dated 17.5.2010, passed in CWP No. 1096 of 2010, clearly suggests that Court, while delivering judgment considered various issues and directed the Appellate Authority to consider the case afresh, in the light of clarification/directions/observations made in judgment. It would be profitable to reproduce relevant paras of aforesaid judgment, which directly deal with proposition/question involved in present case.

"10. Another dispute pertains to the feeding area. Clause 4(a) of the Guidelines provides for the same, which reads as follows:-

"Resident of the village (in case of Rural Area)/ward (in case of Urban Area) where Anganwadi Centre is located or belongs to the feeding villages/wards of the Anganwadi area."

11. A contention is raised by some of the petitioners that the feeding area has to be understood as the survey area. We are afraid the contention as per the policy as it stood at the relevant time cannot be accepted. The policy at that time only

prescribed that the person should be the resident of the village/ward, depending upon the rural or the urban area, as the case may be, where the centre is located. It is sufficient if the applicant belongs to the feeding villages/wards of the Anganwadi area. The eligibility has to be understood as on the date of the application, in terms of the policy, which ruled the field at the relevant time. Needless to say, that in case there is no candidate available from the respective feeding areas, prescribed under clause 4(a), it is open to the authorities to exercise its power under Clause 11 of the Policy Guidelines for appropriate relaxation."

4. In the aforesaid background, matter was taken up afresh for consideration by Additional Deputy Commissioner, Kangra at Dharamshala. It emerges from order dated 26.9.2011 that persuant to aforesaid jdugment passed by Division Bench of this Court, respondents No. 5 and 6 preferred afresh appeal before Additional Deputy Commissioner, Kangra at Dharamshala, which came to be registered as appeal No. 30 of 2011, laying therein challenge to the appointment of petitioner herein. It also emerges from order, referred above, that respondent No. 5, who happened to be appellant in appeal, referred above, failed to put in appearance despite several opportunities and accordingly, appeal on her behalf was ordered to be filed, whereas respondent No. 6, who happened to be appellant No. 2 before the Additional Deputy Commissioner, raised issues of survey/feeding area and income.

5. Learned Additional Deputy Commissioner, vide order dated 26.9.2011, came to conclusion that petitioner is not resident of survey/feeding area and village also and as such, her appointment is against the guidelines for appointment of Anganwari Workers/Helpers and accordingly, set aside the appointment given to petitioner. Appellate Authority also held respondent No. 6, Raksha Devi, who was next in the merit, ineligible for appointment. In the aforesaid background, petitioner being aggrieved and dissatisfied with aforesaid order dated 26.9.2011 passed by Additional Deputy Commissioner preferred instant writ petition seeking reliefs, as have been mentioned hereinabove.

6. Ms.Anjali Soni Verma, learned counsel representing the petitioner, vehemently argued that impugned order dated 26.9.2011 passed by Additional Deputy Commissioner purportedly in compliance of order dated 26.7.2010 passed in CWP No. 4051 of 2010, deserves to be quashed and set aside being contrary to very spirit of judgment referred hereinabove. With a view to substantiate her aforesaid argument, she made this Court to travel through para 10 of judgment dated 17.5.2010 passed in CWP No. 1096 of 2010 to demonstrate that candidates belonging to feeding villages/wards of Anganwari area were held to be eligible for appointment to the post of Anganwari Worker. She further stated that as per policy, in vogue at that relevant time, person should be the resident of village/ward, depending upon the rural or urban area, as the case may be, where the Centre is located. She further stated that Additional Deputy Commissioner, while passing impugned order, again placed reliance on survey register to conclude that petitioner resides out of feeding area of Anganwari Centre, Bhurlahad and as such, impugned order being contrary to law laid down by this Court is not sustainable in the eyes of law and as such, same deserves to be quashed and set aside.

7. Mr.P.M. Negi, learned Additional Advocate General, supported the impugned order dated 26.9.2011 passed by Additional Deputy Commissioner. He vehemently argued that bare perusal of aforesaid order clearly suggests that case of petitioner was considered afresh in the light of judgment passed by Division Bench of this Court and authority concerned, after summoning the report of concerned Patwari, proceeded to hold that appointment of petitioner was against the guidelines for appointment of Anganwari Workers/Helpers. He also supported the appointment of respondent No.5, Sudesh Kumari, by stating that she was rightly held to be entitled for appointment as Anganwari Worker at Anganwari Centre Bhurlahad, because she was resident of Bhurlahad, which was feeding area/village of Anganwari Centre, Bhurlahad.

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

9. The Division Bench of this Court specifically in paras No. 10 and 11 of judgment passed in CWP No. 1096 of 2010 held that as per policy, in vogue at that relevant time, person should be resident of village/ward, depending upon the rural or urban area, as the case may be, where Centre is located. Learned Division Bench further held that it is sufficient, if the candidate belongs to feeding villages/wards of Anganwari area. While perusing record of the case during proceedings, this Court could lay its hand to supplementary affidavit filed by respondent No.4, in compliance to order dated 9.10.2012 passed by this Court. (Page 42 of Paper Book) and it would be apt to reproduce following paras of supplementary affidavit:-

> *"1. I, Chanderlekha Kapoor wife of Shri Joginder Paul Kapoor, Aged 56 years, posted as Chief Development Project Officer, Kangra, District Kangra do hereby solemnly affirm and declare on oath as under:-*
>
> *That the present petition was listed before the Hon'ble Court on 9.10.2012 when the Hon'ble Court passed the following order " Smt. Chanderlekha Kapoor, the 4th respondent is present in person and had produced the record. The petitioner is resident of Balol, in that village there existed three Anganwari center, namely Bhurlahad, Degarlahad and Balol Khas. The record produced by the 4th respondent does not specifically pinpoint the feeder area under each Anganwari center. The 4th respondent to file supplementary affidavit stating as to whether that point of village Balol, where the house of petitioner is situated, falls under the feeder area of Anganwari Center Bhurlahad or not. If not, under feeder area of which Anganwari Center that part of the village falls."*
>
> *2. That in this regard it is respectfully submitted that, that part of village Balol where the house of the petitioner is situated does not fall under the feeder area of Bhurlahad. It is further respectfully submitted that, that part of village falls under the Anganwari center Balol Khas."*

Perusal of aforesaid affidavit clearly suggests that this Court had directed respondent No. 4, who had come along with record, specifically to pinpoint the feeder area under which Anganwari Centre is situated. Respondent No. 4, in aforesaid affidavit, has specifically stated that part of village Balol, where house of petitioner is situated, does not fall under feeder area of Bhurlahad. She further stated that that part of village falls under Anganwari Centre Balol Khas. Though petitioner, by way of rejoinder, made an attempt to rebut the aforesaid assertion made by respondent No. 4 in her supplementary affidavit but interestingly placed no document on record suggestive of fact that her residence/village falls within feeder area of Anganwari Centre Bhurlahad. Mr.Anjali Soni Verma, with a view to refute aforesaid contention of respondent No. 4, invited attention of this Court to Annexure P-6 i.e. certificate issued by Pardhan, G.P. Balol, Block Development Office, Tehsil Baroh, District Kangra (H.P.) to demonstrate that village Balol Khas, to which petitioner belongs falls under Gram Panchayat Balol and as such, she was rightly offered appointment as Anganwari Worker at Bhurlahad. This Court, after carefully examining the material adduced by respective parties, is not inclined to accept aforesaid contention raised by learned counsel representing the petitioner, because it clearly emerge from the impugned order passed by Additional Deputy Commissioner that with a view to verify the residence of petitioner herein and location of Anganwari, report of Shri Rakesh Kumar, Patwari at Patwar Circle Balol was summoned, who categorically stated that Anganwari Centre Bhurlahad situates in Mohal Bhurlahad, whereas residence of present petitioner falls in Mohal Mahulahad. At the cost of repetition, it may again be stated that respondent No. 4, in her supplementary affidavit, has specifically stated that house of petitioner does not fall under feeder area of Bhurlahad and as such this Court sees no reason to interfere in impugned order, having been passed by Additional Deputy Commissioner, which otherwise appears to be based upon correct appreciation of evidence adduced by respective parties as well as observations made by this Court in CWP No. 4051 of 2010.

10. Consequently, in view of above, this Court sees no merit in present petition and accordingly, same is dismissed being devoid of any merit. Petition stands dispiosed of including all pending miscellaneous application(s) if any.

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

United India Insurance Ltd. .....Appellant.

Versus

Fulan Devi and others .....Respondents.

FAO No.: 58 of 2013
Date of Decision : 07/03/2017

Employees Compensation Act, 1923- Section 4- Deceased was employed under respondent No.1- he died in the accident – it was contended that the insurer is not liable as the vehicle was transferred by respondent No.1 to respondent No.4 and there is no privity of contract between respondent No.1 and the insurer– held, that it was proved that deceased was employed as driver by respondent No.4 and the insurer was rightly held liable – the deceased was drawing wages of Rs.3,000/- per month and daily expenses of Rs. 100/- - the compensation of Rs.3,14,880/- cannot be said to be excessive – appeal dismissed and penalty of Rs.1 lac imposed upon the respondent No.4. (Para- 3 to 5)

For the Appellant: Mr. Vivek Negi, Advocate.
For the respondents: Mr. Pawan Gautam, Advocate, for respondents No. 1 and 2.
Mr. Ajay Sharma, Advocate for respondents No. 3 and 5.

The following judgment of the Court was delivered:

Sureshwar Thakur, *Judge (oral)*

The Insurer/appellant herein stands aggrieved by the apposite pronouncement recorded by the learned Civil Judge (Jr. Division)-cum-Commissioner Employee's Compensation Barsar, District Hamirpur, wherefrom it for reversing the apposite verdict has instituted the instant appeal herebefore.

2. This Court admitted the instant appeal on 11.3.2014 on the hereinafter extracted substantial questions of law:-

a) "Whether the impugned award against the appellant is sustainable in the face of the fact that there was no employer-employee relationship between the deceased (Karam Chand) and owner of the vehicle in question and the insured (Ms. Rishika), whom alone appellant had undertaken to indemnify under the contract of insurance.

b) Whether the impugned award against the appellant is sustainable in the face of specific admissions on the part of respondents No. 1 and 2 in the claim petition that deceased Sh. Karam Chand was employed with respondent No.3 Sh. Chander Shekher, whom the appellant had never undertaken to indemnify and with whom appellant had no privity of contract?

c) Whether impugned award is a result of collusion between respondents No. 1 and 2 on one hand and respondent No.4 on the other (who intentionally chose not to contest the claim petition).

d) Whether the impugned award can be sustained in view of the violation of provisions of Section 4(a) of the Workmen's Compensation Act, 1923?"

3. The learned counsel for the insurer has with vigour alluded to the pleadings comprised in the apposite claim petition wherewithin the claimants voice qua their predecessor-in-interest standing employed as a driver under respondent No.1, on the relevant ill-fated vehicle, driver seats whereof stood manned by him at the time contemporaneous to the occurrence of the ill-fated mishap. He hence contends qua the aforesaid pointed pleading constituting an estoppel against the claimants especially when they tantamount qua theirs acquiescing qua the aforesaid factum whereupon he contends with there existing no privity of contract inter se the insurer vis.a.vis respondent No.1 renders the insurer to be unamenable for any order standing pronounced upon it, qua its indemnifying the claimants qua the compensation amount as stands adjudged vis.a.vis them. However, the aforesaid submission does not warrant its standing accepted significantly when any ouster thereupon of the claim petition preferred by the claimants also *stricto sensu* thereupon discarding oral evidence contrary thereto voiced by RW-1 wherein he testified qua predecessor in interest of the claimants at the relevant time holding the apposite employment under respondent No.4, would be grossly unjustifiable conspicuously, when it would render redundant the effect of documentary evidence contradictory thereto wherewithin pronouncements occur whereupon the effect if any, as occurs in the claim petition qua the facet of deceased holding employment under respondent No.1, hence stands countervailed. The learned counsel for the insurance, has not contested the factum qua the relevant vehicle under an agreement recorded on 15.06.2001 standing thereupon transferred from Rishika to Dalip. Nonetheless even in pursuance to an agreement standing recorded on 15.06.2001 inter se Rishika with Dalip Kumar, no insurance cover qua the relevant vehicle stood executed inter se respondent No.4 vis.a.vis the insurance company. Contrarily, as manifested by Ext.R-2 the apposite insurance cover with respect to the relevant vehicle remained alive upto 19/10/2003 vis.a.vis Rishika. The aforesaid factum of the insurance cover embodied in Ext.R-2 thereupto remaining alive inter se Rishika vis.a.vis insurer also unfolds qua at the time contemporaneous to the ill-fated mishap dehors the transfer of the relevant vehicle occurring from Rishika to Dalip yet no valid contract of insurance in sequel thereto standing entered inter se the Insurer vis.a.vis respondent No.4. It apparently surfaces qua Dalip Kumar, who under an agreement recorded on 15.06.2001 purchased the relevant vehicle from Rishika, omitted to, within the ambit of the peremptory mandate of sub section 2 of Section 157 of the Motor Vehicles Act, provisions whereof stand extracted hereinbelow:

> "The transferee shall apply within fourteen days from the date of transfer in the prescribed form to the insurer for making necessary changes in regard to the fact of transfer in the certificate of insurance and the policy described in the certificate in his favour and the insurer shall make the necessary changes in the certificate and the policy of insurance in regard to the transfer of insurance."

apply to the insurer, for the apposite certificate of insurance standing transferred to him from its hitherto owner Rishika. Consequently, the omission of respondent No.4 to beget compliance with the peremptory mandate of sub section 2 of Section 157 prods this Court to conclude qua the relevant transferee thereupon not holding any leverage to fasten any liability upon the insurer, for indemnifying him qua the compensation amount as stands hereafter determined by this Court, significantly when he failed to entail upon the insurance company to make the necessary changes in the apposite certificate of insurance whereupon with no valid or subsisting contract of insurance hence ever coming into existence inter se Dalip Kumar vis.a.vis the insurance company, concomitantly, begets an inference qua their obviously occurring no privity of contract inter se Dalip Kumar with the insurance company, whereupon any fastening of liability qua defrayment of compensation amount upon the insurer is grossly untenable.

4. However, before proceeding to adjudicate qua whether the apposite liability qua defrayment of compensation amount, determined by the learned Commissioner under the impugned award, is after reversal of the impugned verdict herebefore amenable to warrant its devolution upon respondent No.1 or upon respondent No.4 conspicuously when the claimants voiced in the apposite claim petition qua deceased standing engaged as a driver in the relevant

vehicle by respondent No.1, it is imperative to allude to the testification of PW-1 wherein he has voiced with firm equivocality qua his predecessor in interest, at the time contemporaneous to the occurrence of the ill-fated mishap, performing his employment as a driver on the ill-fated vehicle. Though, in his testification he has omitted to in tandem with the averments constituted in the apposite petition divulge therein the respondent No. 1 to be the employer of his deceased son Karam Chand whereupon also with the learned counsel for the respondent(s) while holding him to cross-examination omitted to put any affirmative suggestions to him qua the deceased Karam Chand standing employed by respondent No.1 whereupon an inference stands filliped qua the reflections occurring in the apposite petition qua deceased Karam Chand performing his relevant employment under RW-1 hence not warranting any imputation of any relevance thereto nor theirs estopping the petitioner(s) to claim compensation from respondent No.4 latter whereof had under an agreement purchased the relevant vehicle from its previous owner. Also with PW-1 in his deposition not underscoring with specificity the name of the employer of his deceased son does not hence stir any inference qua the deposition of RW-4 qua the relevant facet of deceased Karam Chand holding employment under respondent No.4 warranting dis-imputation of credence nor it would be apt to thereupon conclude qua the deposition of PW-1 qua the relevant facet while standing rendered beyond pleadings hence warranting its standing discarded, imperatively when RW-4 the brother of respondent No.1 in his affidavit embodied in Ext.RW-1/A has made underscorings therein qua at the relevant time, his brother respondent No.4 soliciting as and when required the services of deceased Karam Chand for the relevant purpose of driving the ill-fated vehicle. The testification of Chandershekhar qua the factum of his brother Dalip Kumar intermittently soliciting the services of deceased Karam Chand to drive the relevant vehicle remains unconcerted thereat to be bereft of its efficacy rather the counsel(s) for the respondent(s) while holding respondent No.1 to cross-examination therein merely put a stray disaffirmative suggestion to him qua deceased Karam Chand not performing any employment in the relevant vehicle, suggestion whereof evinced a compatible disaffirmative response from RW-1 wherefrom it may stand tentatively concluded qua the respondent No.1 belying his deposition existing in his examination in chief qua his brother intermittently soliciting the services of deceased Karam Chand for performing the avocation of a driver on the ill-fated accident, contrarily thereupon no conclusion can stand reared qua at the relevant time of occurrence the deceased not manning the driver's seat of the relevant vehicle significantly when the deposition occurring in the examination in chief of RW-1 qua respondent No.4 purchasing the relevant vehicle from Rishika remains unbelied qua the apposite factum rather sinewed proof qua the relevant factum also stands marshalled from the relevant agreement whereunder RW-4 purchased the relevant vehicle from Rishika significantly when its execution remained unconcerted to stand belied**.** Moreover with the F.I.R. lodged qua the occurrence disclosing qua deceased Karam Chand manning the drivers' seat of the relevant vehicle, constrains a conclusion qua thereupon its standing firmly proven qua deceased Karam Chand standing employed as a driver by respondent No.4 in the ill-fated vehicle also thereupon for reiteration the effect of acquiescence besides admissions constituted in the claim petition qua deceased Karam Chand standing employed by respondent No.1 also hence suffer complete effacement.

5. While determining the quantum of compensation amount, it is imperative to refer to the testimony of PW-1 wherein he has articulated qua his deceased son, drawing wages constituted in a sum of Rs.3,000/- per mensem also his drawing daily expenses quantified at Rs.100/-. Though the aforesaid factum stands contradicted by RW-1, who contrarily has deposed qua deceased Karam Chand standing casually employed by respondent No. 4, however, thereupon alone the testimony of PW-1 cannot suffer emasculation significantly when the learned counsel appearing for the insurance while holding him to cross-examination has though purveyed to him suggestions holding communications qua his deceased son, standing casually engaged by respondent No. 4, suggestion whereof sequelled an answer in the negative. Importantly also the best evidence to underscore qua the testimony of PW-1 holding worth for settling the controversy qua deceased Karam Chand holding a casual employment as a driver in the ill-fated vehicle under respondent No. 4 stood comprised in respondent No.4 on his stepping into the witness box, his making apposite pronouncements qua the relevant facet. However, Dalip Kumar did not step into

the witness box nor the insurance besides respondent No.1 concerted to elicit his standing requisitioned as a witness for hence setting at rest the controversy qua deceased Karam Chand performing a casual employment under him or his holding a regular employment under him wherefrom he drew Rs.100 per diem besides a salary of Rs.3000/- per mensem. For omission on the part of either respondent No.1 or of the insurance to solicit through the apposite mode the presence before the learned Commissioner of respondent No.4 for thereupon facilitating his rendering a testimony for resting the aforesaid controversy hence nails a conclusion qua respondent No.4 who stood proceeded against ex-parte thereupon concerting to smother the factum of the manner of his employing deceased Karam Chand whereupon also an adverse inference is drawable against respondent No.4 wherefrom it is apt to conclude qua the deposition of PW-1 qua his deceased son holding employment under respondent No.4 on a salary of Rs.3000/- per mensem holding credence. Consequently, the sum(s) aforesaid whereupon the apt statutory principle stood applied by the learned Commissioner does not warrant any interference. However, for the reasons aforesaid when respondent No.4 did not execute any valid contract of insurance qua the relevant vehicle with the insurer thereupon the fastening of liability qua defrayment of compensation amount adjudged qua the claimants under the impugned verdict, upon the insurer, is grossly unwarranted. In sequel thereto the liability to defray the apposite compensation amount determined under the impugned verdict stands fastened upon respondent No.4. Also the fastening of liability of interest on compensation amount upon the insurer is concomitantly untenable thereupon the liability of interest at the rate of 12% per annum levied on a sum of Rs.3,14,880/- determined as compensation amount by the learned Commissioner qua the claimants, shall also be borne by respondent No.4. Moreover, with the respondent No.4 begetting infraction of the mandate Section 4-A of the Workmens' Compensation Act, he is also directed to pay penalty qua the claimants comprised in a sum of Rs.1 lacs. Accordingly the appeal is allowed. Substantial questions of law are answered in favour of the Insurance Company and against respondent No.4.

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

Bhoop Ram Garg .... Petitioner

Versus

United India Insurance Company Ltd. and others ... Respondents

CWP No. 3639 of 2011.
Reserved on : 01.03.2017.
Date of decision: 08.03.2017.

Constitution of India, 1950- Article 226- A memo was issued to the petitioner intimating that the respondent proposed to hold an inquiry against him- the petitioner was directed to submit his written statement whether he admitted or denied all the articles of charge – the petitioner accepted the allegation in the articles of charge and Inquiry Officer was appointed – the petitioner appeared before Inquiry Officer and admitted all the articles of charge – the Inquiry Officer submitted a report holding that the charges against the petitioner stood proved – the petitioner was called upon to submit his representation against the findings recorded by Inquiry Officer – the petitioner submitted a representation and admitted all the allegations – the disciplinary authority imposed a penalty of removal, which shall not be disqualification for future employment – the petitioner filed an appeal in which he stated that he was forced to confess the charges to save the other officers of the Company – the appeal was dismissed by the Appellate Authority- aggrieved from the order of the disciplinary authority, present writ petition was filed- held, that three communications of guilt were submitted by the petitioner on different dates- there is no material on record to show that the confession was not voluntary but on account of coercion or duress exercised by his senior officers – the officers asking the petitioner to confess have not been impleaded as parties – no violation of the procedure was pointed out – the penalty was imposed

on the basis of confession- the order passed by Appellate Authority is self speaking and does not suffer from any infirmity, irregularity or illegality – Writ Court does not act as the Appellate Court - principles of natural justice were followed – the order was passed on the basis of material on record- writ petition dismissed.(Para-19 to 22)

Cases referred:
State Bank of Bikaner and Jaipur vs. Nemi Chand Nalwaya (2011) 4 Supreme Court Cases 584
Allahabad bank and Ors. v. Krishna Narayan Tewari, JT 2017(1) SC 51

For the petitioner: Ms. Bhavna Datta, Advocate.
For respondents No. 1 to 4 Mr. Lalit K. Sharma, Advocate.
For respondent No. 5 : Mr. Rajiv Jiwan, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge

By way of this writ petition, the petitioner has prayed for the following reliefs:

"a) That to issue writ of certiorari or direction in nature thereof directing the respondents to reinstate the petitioner in the service from dated 7.8.2007 with all consequential service benefits and the impugned order vide annexure P-12 dated 7.8.2007, Annexure P-13 vide office order dated 12.2.2009, Annexure P-15 vide office order dated 1.9.2009 may kindly be quashed in favour of the petitioner and against the respondent company.

b) That to issue writ of certiorari or direction in nature thereof to the respondents to release arrears of salary from the date of dismissal of the petitioner i.e. 7.8.2007 till the petitioner is reinstated in the service by the direction of this Hon'ble Court.

c) That the respondents be directed to produce the service record of the petitioner before this Hon'ble Court.

d) That any other relief which deem fit and proper in the facts and circumstances of the case may kindly be issued in favour of the petitioner and against the respondent company in the interest of justice and fair play."

2. Brief facts necessary of the adjudication of the present case are that a memorandum dated 04.05.2006 was issued to the petitioner by the respondent-Company intimating the petitioner that the respondent- Company proposed to hold an inquiry against him under Section 25 of the General Insurance (Conduct, Discipline and Appeals) Rules 1975 and that the substance of imputation of the misappropriation in respect of inquiry so proposed to be held was set out in enclosed statement of articles of charge and a statement of allegations in support of articles of charge was also enclosed alongwith list of documents and a list of witnesses. The petitioner was directed to submit his written statement to the said memorandum as to whether he admits or denies any or all the articles of charge.

3. There were in all eight articles of charge framed against the petitioner and primarily the allegations against him were that the petitioner while working as Sub Staff in Divisional Office, Shimla of the respondent- Company during the period w.e.f. 1999 to 2003 was entrusted with the function of depositing daily cash collections of the office handed over to him into the bank for which he was paid a cash allowance and that it had come to light that during the period 1999 to 2003, the petitioner did not either deposit amount in full or had not deposited at all the amount into the bank and tampered/generated counterfoils of the cash pay-in-slips so as to given an impression that whatever cash premium collections amount was received by him from the office stood deposited in account No. 251 maintained with Canara Bank, The Mall, Shimla.

4. Before proceeding further, it is pertinent to mention that this Court had directed the respondent- Company to produce the record of the disciplinary proceedings vide its order dated 30.11.2016 and the said record was made available during the course of arguments on 01.03.2017 which was gone into by this Court with the assistance of the learned counsel for the parties. The necessity to call for records arose as all the relevant documents were not appended alongwith the petition.

5. Original record demonstrates that in response to memorandum dated 04.05.2006 (Annexure P-6) by way of his reply dated 18.05.2006, the petitioner accepted the allegations contained in the articles of charges dated 04.05.2006. This was followed by appointment of one Sh. Vivek Sharma, Senior Branch Manager, BO III, Chandigarh, as Inquiry Officer by the Manager-cum-Disciplinary Authority vide letter dated 24.05.2006 to inquire the charges leveled against the present petitioner.

6. Record further demonstrates that in response to a communication dated 26.06.2006, petitioner appeared before the Inquiry Officer on 11.07.2006 i.e. the date so fixed, at Chandigarh and vide communication dated 11.07.2006 he again admitted the article of charges framed against him and wrote therein that his admission was without coercion or duress and appropriate action be taken against him. Order sheet dated 11.07.2006, (Annexure P-8), which is duly signed by the Presenting Officer, Inquiry Officer and the present petitioner, reads as under:

> *"The inquiry was fixed for today for preliminary hearing at 11:00 a.m. at BO III, Chandigarh. The P.O and CSE are present as directed. The charges leveled in the chargesheet were read over to the CSE and he was specifically asked whether he admitted or denied the charges mentioned in the chargesheet. The CSE was further told that since the chargesheet against him was for a major penalty, the Company could take any action as deemed fit. After hearing the charges leveled in the chargesheet, the CSE has admitted the charges unconditionally and also tendered letter (Annexure I) in his own writing in this regard.*
>
> *As the charges have been admitted unconditionally, further inquiry is not required and the inquiry is hereby concluded. The inquiry report shall be submitted to the Disciplinary Authority in the due course.*
>
> *A copy of this ordersheet is supplied to both P.O. and the CSE."*

7. Thereafter the inquiry Officer submitted his report (Annexure P-9) to the Disciplinary Authority in which it was mentioned by the Inquiry Officer that as the charges had been admitted by the petitioner unconditionally and unambiguously, therefore the charges stood proved.

8. This was followed by communication dated 23.10.2006 addressed by the Disciplinary Authority to the present petitioner vide which petitioner was called upon to submit his representation, if any, against the findings returned by the Inquiry Officer in his inquiry report.

9. Original record demonstrates that in response to communication dated 23.10.2006, petitioner submitted his written reply dated 09.11.2006 in which he again admitted his guilt and requested the Disciplinary Authority to deal with his case expeditiously.

10. This was followed by the Disciplinary Authority passing order dated 07.08.2007, Annexure P-12, vide which, Disciplinary Authority imposed penalty of "*removal from service which shall not be a disqualification for future employment*" upon the present petitioner in terms of Rule 23 (g) of the General Insurance (Conduct, Discipline and Appeals) Rules 1975 and also ordered recovery of Rs. 1,11,999/- from the petitioner being the amount misappropriated by him in terms of Rule 23 (g) of the General Insurance (Conduct, Discipline and Appeals) Rules 1975.

11. The order so passed by the Disciplinary Authority was challenged by way of an appeal. In his appeal the stand taken by the petitioner was that he was forced to confess/admit the charges leveled against him in order to save other Officers/ officials of the respondent-

Company. Besides other grounds, it was also mentioned in the appeal that as the charges were not proved in accordance with law and the amount allegedly embezzled by him was not proved on record to have been collected by him, the order passed by the Disciplinary Authority be set aside. Petitioner also prayed in his appeal that Appellate Authority may take a lenient view in the matter keeping in view of the fact that he had a wife and four minor children to look after.

12. The Appeal so filed by the petitioner was dismissed vide order dated 12.02.2009 by the learned Appellate Authority by holding as under:

> *"Thus, there are no merits in the appeal dated 23.08.2007 preferred by Shri Bhup Ram Garg. It is observed that the enquiry was conducted as per prescribed procedure and the conclusions of the Inquiring Authority are well reasoned and in order. It is also observed that the misconduct of tampering/altering/interpolating the counterfoils of the pay-in-slips and thereby misappropriating the premium to the tune of Rs. 1,11,999/- is very grave in nature and the penalty imposed is commensurate with the gravity of misconduct committed by him. Hence, I find no reason to interfere with the order dated 07.08.2007 of the Disciplinary Authority and therefore in exercise of powers conferred on me, I hereby reject the appeal dated 23.08.2007 of Shri Bhup Ram Garg in terms of Rule 37 (2) (c) of GI (CDA) Rules 1975".*

13. Representation filed by the petitioner against the order passed by the Appellate Authority was rejected vide communication dated 12.03.2009 on the ground that there was no such provision under the CDA Rules to reconsider the fresh appeal which did not include any fresh grounds and mitigating factors.

14. Feeling aggrieved by the major penalty so imposed by the Disciplinary Authority upon him which stands confirmed by the Appellate Authority, the petitioner has filed this appeal.

15. Ms. Bhavna Datta, learned counsel for the petitioner has argued that the disciplinary proceedings initiated against the petitioner and the orders passed by the Disciplinary Authority as well as by the Appellate Authority respectively are void abinitio because the authorities below have failed to appreciate that no case for holding any disciplinary proceedings against the petitioner was at all made against the petitioner and further that the confession which was given by the petitioner was not out of his free volition but was under coercion and duress from his senior officers who had assured him that in case he confessed his misconduct, then neither any criminal complaint etc. shall be lodged against him nor any action shall be initiated against him on the administrative side. She has further argued that the senior officers of the petitioner have in fact made the petitioner a scapegoat as it was not the petitioner who was guilty of misappropriation of the funds but the said misappropriation was done by the senior officers and they took advantage of the petitioner being an illiterate person. It is on these grounds that learned counsel for the petitioner has argued that the impugned orders are liable to be set aside. No other ground was agitated.

16. On the other hand, Dr. Lalit K. Sharma, learned counsel for the respondent-Company has vehemently argued that the contentions raised by the learned counsel for the petitioner besides being totally incorrect were also without any basis or genesis because there was no material produced on record by the petitioner to demonstrate or substantiate that his admission of misconduct was not out of free will but was under coercion. Dr. Sharma further argued that the petitioner was not put under duress by any of the Officers of the respondent-Company and the allegations so leveled and made in the writ petition were baseless, cryptic and totally vague. He further argued that the disciplinary proceedings were held against the petitioner strictly as per the provisions of General Insurance (Conduct, Discipline and Appeals) Rules 1975 and as per him learned counsel for the petitioner could not point out any infringement of the said Rules in the matter while holding all the disciplinary proceedings. He further submitted that penalty imposed upon the petitioner by the Disciplinary Authority was reasonable and justified in the facts and circumstances of the case especially in view of the fact that the petitioner had

admitted his misconduct and that too not on one or two occasions but on three different occasions. It was further urged by him that even the order passed by the Appellate Authority could not be faulted with because order passed by the Disciplinary Authority had to be considered by the Appellate Authority on the basis of records of the inquiry proceedings and not on the basis of grounds taken in appeal by the petitioner which were totally alien to the stand taken by the petitioner during the course of disciplinary proceedings. On these bases, it was urged by Dr. Sharma that there was no merit in the present petition and the same be dismissed.

17. Mr. Rajiv Jiwan, learned counsel for respondent No. 5 has adopted the arguments made by Dr. Lalit Sharma, learned counsel for respondents No. 1 to 4.

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

19. It is not disputed that there are three communications of confession of his guilt on record submitted by the petitioner. All these three communications are of different dates and there is considerable time gap in the date of submissions of these three communications. There is no material on record from which it can be inferred that the confessions of his misconduct which were made by the petitioner on three different occasions were not out of his free will and volition but were on account of coercion and duress exercised upon him by his senior officers. None of the so called officers of the petitioner who allegedly coerced him to confess the misconduct alleged against him have been impleaded as party respondent in the writ petition. In my considered view, there is no merit in the contention of learned counsel for the petitioner that the confession of his guilt/ misconduct made by the petitioner on three different occasions was under coercion or under duress. The petitioner has miserably failed to substantiate this averment with any cogent material. Similarly, there is no merit in the contention of learned counsel for the petitioner that the disciplinary proceedings initiated against the petitioner and the orders passed by the Disciplinary Authority and the Appellate Authority are *non est* and liable to be set aside. During the course of arguments, learned counsel for the petitioner could not point out that the disciplinary proceedings conducted against the petitioner were in violation of the procedure laid down under General Insurance (Conduct, Discipline and Appeals) Rules 1975. She also could not point out any infirmity or illegality in the mode and manner in which the proceedings were conducted by the Inquiry Officer. Records demonstrate that the petitioner was duly associated with the disciplinary proceedings by the Inquiry Officer and the petitioner admitted his misconduct before the Inquiry officer. Similarly, even when the Disciplinary Authority called upon the petitioner to put forth his response to the inquiry report, the petitioner admitted his guilt. It was on this basis that the Disciplinary Authority imposed major penalty upon the petitioner, as is contained in Annexure P-12, dated 07.08.2007. Therefore, in my considered view, it cannot be said that the proceedings were not conducted by the Inquiry Officer in consonance with the provisions laid down in General Insurance (Conduct, Discipline and Appeals) Rules 1975 or that the order passed by the Disciplinary Authority is not sustainable in law. Similarly, the order passed by the Appellate Authority is also self speaking and learned Appellate Authority has spelled out reasons in the appellate order as to why the appeal filed by the petitioner against the order of major penalty passed by the Disciplinary Authority was being dismissed. This order also, in my considered view, does not suffer from any infirmity, irregularity or illegality.

20. It is settled law that the Courts will not act as an appellate Court and reassess the evidence led in the domestic enquiry, nor interfere on the ground that another view is possible on the material on record. If the inquiry has been fairly and properly held and the findings are based on evidence, the question of adequacy of the evidence or the reliable nature of the evidence will not be grounds for interfering with the findings in departmental enquiries. The Courts will not interfere with findings of fact recorded in departmental enquiries, except where such findings are based on no evidence or where they are clearly perverse.

21. Hon'ble Supreme Court in ***State Bank of Bikaner and Jaipur*** vs. ***Nemi Chand Nalwaya*** (2011) 4 Supreme Court Cases 584 has held that the test to find out perversity is to see whether a tribunal acting reasonably could have arrived at such conclusion or finding, on the

material on record. The courts will however interfere with the findings in disciplinary matters, if principles of nature justice or statutory regulations have been violated or if the order is found to be arbitrary, capricious, malafide or based on extraneous considerations. Recently, Hon'ble Supreme Court in ***Allahabad bank and Ors***. v. ***Krishna Narayan Tewari***, JT 2017(1) SC 51 has held that the writ court will certainly interfere with disciplinary enquiry or the resultant orders passed by the competent authority on that basis if the enquiry itself was vitiated on account of violation of principles of natural justice, non-application of mind by the Inquiry Officer or Disciplinary Authority and non-recording of reasons in support of conclusions arrived at by them.

22. In the present case, it is amply clear that principles of natural justice were adhered to. Learned counsel for the petitioner has not been able to demonstrate that statutory regulations were violated or that the order passed by the Disciplinary Authority or the Appellate Authority is either arbitrary or capricious or is the result of malafide or is based on extraneous considerations. The conclusions arrived at by the Disciplinary Authority and the Appellate Authority are borne out from the material on record and, therefore, there is no reason to interfere with the findings arrived at by the said authorities, by this Court.

23. Therefore, I find no merit in the writ petition and the same is dismissed. Pending miscellaneous application(s), if any, also stand disposed of. No order as to costs.

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

Chet Ram (died through his LRs) and others ..Appellants/Defendants

Versus

Dola Ram and others ..Respondents/plaintiffs.

RSA No. 208 of 2003
Reserved on : 27.2.2017
Date of decision: 08/3/2017

Indian Succession Act, 1925- Section 63- S was the owner in possession of the suit land – he died intestate- the defendants forged a bogus Will stated to have been executed by S–defendants pleaded that the Will was executed by the deceased in his sound disposing state of mind and the plaintiff not being the son of the deceased has no locus standi to file the suit – the suit was dismissed by the Trial Court- an appeal was preferred, which was allowed- held, that the plaintiff is not proved to be son of the deceased and hence, he has no locus standi to file the present suit- the Will was shrouded in suspicious circumstances, which were not explained- the Appellate Court had wrongly allowed the appeal – appeal allowed- judgment of Appellate Court set aside and that of the Trial Court restored.(Para-7 to 10)

For the appellants: Mr. Bhupender Gupta, Sr. Advocate with
Mr. Ajit Kumar Jaswal, Advocate.
For the respondent No.1: Mr. K.D.Sood, Sr. Advocate with Mr. Sanjeev Sood, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J:

The instant appeal stands directed by the defendants whereby they assailed the judgement and decree recorded by the learned First Appellate Court whereby it reversed the verdict recorded by the learned trial Court whereby the latter had dismissed the suit of the plaintiff.

2. The facts necessary for rendering a decision on the instant appeal are that Sarnu was the owner in possession of the land comprised in Khasra No. 1809, 1812, 1815, 1817, 1627, two houses and a water mill. The said Sarnu died intestate and his estate was succeeded by the plaintiff and defendants 1 to 4 by way of succession, but the defendants forged a bogus will allegedly executed by Sarnu excluding the plaintiff. The defendants were asked to admit the claim of the plaintiff in the suit property but of no avail, hence the suit.

3. The defendants have resisted and contested the suit. The defendants No. 1,2, 3 and 5 in their joint written statement have taken preliminary objections vis.a.vis cause of action. In reply on merits they have alleged that the Will propounded by the defendants is genuine, validly executed by Sarnu and the plaintiff being not the son of Sarnu has no locus standi to file the suit. It is replied by them that the plaintiff is Pichhlag son, as his mother Naru was married to one Naru and son of Rattu. It is alleged that after the death of Naru, the mother of the plaintiff married Sarnu. It is also alleged that the plaintiff is also known as Dhebu. Defendant No.4 has admitted the suit of the plaintiff and has set up the claim on basis of intestate succession of the suit property.

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

1. Whether the plaintiff is son of the deceased Sh. Sarnu? OPP.
2. Whether the deceased Sarnu executed a Will dated 7.12.1996 in favour of the defendants, as alleged? OPD.
3. Whether the plaintiff has no cause of action? OPD.
4. Whether the suit is not maintainable? OPD.
5. Whether the plaintiff has not come with clean hands? OPD.
6. Relief.

5. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court dismissed the suit of the plaintiff whereas the learned First Appellate Court allowed the appeal preferred therefrom before it by the plaintiff.

6. Now the defendants/appellants herein has instituted before this Court the instant Regular Second Appeal wherein they assail the findings recorded by the learned first Appellate Court in its impugned judgment and decree. When the appeal came up for admission on 16.04.2004, this Court admitted the appeal on the hereinafter extracted substantial questions of law:-

> "1. Whether the lower appellate Court wrongly proceeded to reverse the findings of the trial Court on issue No. 1 by holding the plaintiff respondent to be son of Shri Sarnu when there was no evidence led by the plaintiff-respondent in consonance with the provisions of Section 60 of the Evidence Act and there was overwhelming evidence available on the record led by the defendants-appellants in consonance with such provisions of Evidence Act? Are not the lower Appellate Court on this count illegal erroneous and perverse which ignore the material evidence and raise the presumption under law with respect to such document/facts which would be held to be inadmissible to prove the relationship between the parties.
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> 2. Whether the lower Appellate Court has acted with material illegality and irregularity in ignoring the well established principles of law and various pronouncements of this Hon'ble Court and the Hon'ble Supreme Court of India in reversing the findings of the Trial Court on issue No.2 by holding the Will be shrouded by suspicious circumstances? Has not the lower Appellate Court acted in a highly perverse manner in taking into consideration such circumstances which were of trivial nature to hold that the Will was shrouded by suspicious circumstances?

Substantial questions of law.

7. Through a testamentary disposition embodied in Ext.DW-7/A, the deceased testator, one Sarnu bequeathed his estate upon the legatees disclosed therein wherein with the plaintiff standing not constituted as a legatee constrained him to assail the testamentary disposition embodied in Ext.DW-7/A. Since the disinheritance of the plaintiff by the deceased testator stood espoused by the defendants to arise from the factum of his standing not born from the loins of one Naru on hers cohabitating with Sarnu rather his standing begotten from the loins of the previous husband of Naru also known as Naru, thereupon the disinheritance of the plaintiff by the deceased testator under his testamentary disposition comprised in Ext.DW-7/A, stood concomitantly espoused to render it tenable. On the aforesaid contentious factum an apposite issue stood struck by the learned trial Court whereupon, it, on consideration of the apposite evidence adduced by the plaintiff also on consideration of the apposite evidence in rebuttal thereto adduced by the defendants, concluded qua the plaintiff standing begotten from the loins of Naru on his cohabiting with his mother also known as Naru, latter whereof on demise of Naru evidently contracted a marriage with the father of the defendants, during subsistence whereof the defendants stood begotten from the loins of Sarnu and from the womb of Naru. The learned trial Court hence concluded qua the plaintiff holding no locus standi to challenge Ext.DW-7/A. The learned First Appellate Court, in an appeal standing carried therebefore by the aggrieved plaintiff, proceeded to reverse the findings pronounced by the learned trial Court qua the contentious issue qua the plaintiff standing begotten from the loins of Sarnu and from the womb of Naru, his natural mother. Moreover, the learned First Appellate Court for reasons expostulated therein overruled the findings recorded by the learned trial Court qua dehors its returning finding vis.a.vis the defendants upon issue No.1, the testamentary disposition of deceased testator Sarnu held in Ext.DW-7/A standing in consonance with the statutory parameters engrafted in Section 63 of the Indian Succession Act hence proven to be validly and duly executed. The learned first Appellate Court while pronouncing qua the plaintiff standing born from the loins of Sarnu and from the womb of Naru, on the latter on demise of her previous husband evidently contracting a marriage with Sarnu depended upon Ext.DW-7/A wherewithin reflections are held qua the plaintiff standing fathered by Sarnu, the deceased testator. Apparently birth certificate(s) embodied in Ext.P-6,7,8,9,10 and Ext.P.11 issued at the time contemporaneous to the subsistence of a lawful wedlock inter se Naru with Sarnu, the deceased testator, though reflect qua a male child fathered by the deceased testator standing born on 13.04.1948. Nonetheless with non-reflection of the name of the plaintiff in the apposite column thereof, cannot, as untenably inferred by the learned first Appellate Court, mobilize any inference qua it pertaining to the name and identity of the plaintiff. Consequently, any reliance thereupon by the learned First Appellate Court, to conclude qua the plaintiff standing fathered by the deceased testator Sarnu was wholly unwarranted. The learned First Appellate Court had also relied upon Ext.P-7 to P-11, birth certificates of other issues of Naru and Sarnu besides also on mutation Ext.P-19, entries in Jamabdi Ext.P-12, voters list Ext.P-20 and copy of the family register Ext.P-22 and Ext.PW-3 holding reflections therein qua the plaintiff standing fathered by Sarnu, the deceased testator. Even though the aforesaid documentary evidence enjoys a presumption of truth arising from it comprising public records prepared during the discharge of official duties by a public officer nonetheless the presumption aforesaid enjoyed by it, is rebutable also is dislodgable. The learned First Appellate Court had imputed sacrosanct solemnity to the apposite reflections held therewithin, imputation of sanctity thereon by it visibly arose from its remaining grossly unmindful qua the reflections occurring therein wanting in legal efficacy especially given the factum of presumption of truth carried by the relevant entries held therein, standing repudiated, by sale deed Ext.DW-5/A wherein the plaintiff stands reflected to be Dhebu besides stands reflected to stand fathered by Naru. A witness to sale deed Ext.DW-5/A had with utmost aplomb disclosed in his testimony qua the plaintiff also holding as alias of Dhebu, factum whereof also stands enunciated in Ext.DW-5/A, yet his testimony stood discarded by the learned First Appellate Court rather it pronounced qua it not leveraging any inference qua the plaintiff holding any alias of Debu nor it filliping any conclusion qua as disclosed in Ext.DW-5/A, his standing fathered by Naru, whereas it constituted the best documentary evidence, to rebut also to

evidently countervail the presumption of truth carried by the apposite entries held in the relevant public record, amplifyingly the plaintiff for rebutting the testimony of DW Alam Chand wherein the portrayals stand embodied qua the plaintiff also holding an alias of Debu, factum whereof also stands depicted in Ext.DW-5/A, hence standing enjoined to adduce evidence comprised in his producing Dhebu for delinking Dhebu enunciated in Ext.DW-5/A vis.a.vis his identity besides parentage also stood enjoined to in case Dhebu had died at the time when the relevant issue stood put to trial, to produce a certificate holding unveilings qua Dhebu no longer surviving. However, the aforesaid evidence for rebutting the evidence of DW Alam Chand remained unadduced by the plaintiff. Therefore, the testimony of DW-8 in linking the paternity of the plaintiff marked as Dhebu in Ext.DW-5/A vis.a.vis Naru, remained undislodged. As a corollary, with the relevant disclosures occurring therein qua the facet aforesaid standing undisplaced, rendered the reflections carried therein to enjoy an aura of enhanced critical sanctity also when it constituted the best documentary evidence to marshal a firm conclusion qua the plaintiff standing fathered by one Naru, the apposite reflections held in Ext.DW-5/A also concomitantly dispelled the presumption of truth held by the apposite reflections carried in the afore referred exhibits, wherewithin reflections contrary thereto find occurrence, reflections whereof hence stood fastened grossly untenable reliance by the learned Appellate Court for concluding qua the plaintiff standing fathered by Sarnu hence his enjoying the capacity to challenge the testamentary disposition of the deceased testator embodied in Ext.DW-7/A.

8. Dehors the lack of locus in the plaintiff to assail the contentious testamentary disposition of Sarnu embodied in Ext.DW-7/A, the learned trial Court, on an incisive discerning of the testimony of DW-7 besides of a marginal witnesses thereto concluded therefrom qua hence Ext.DW-7/A, standing, in consonance with the enshrined parameters encapsulated in Section 63 of the Indian Succession Act, hence proven to be validly and duly executed. However, the learned first Appellate Court depended upon the factum of DW-7, the scribe of the Will, articulating in his testification, qua the deceased testator at the time of his scribing Ext.DW-7/A disclosing to him qua the plaintiff also standing fathered by him also it depended on his testifying qua at the time of his scribing Ext.DW-7/A at the instance of the deceased testator Sarnu, the legatee(s) thereunder dissuading him to bequeath his estate vis.a.vis. the plaintiff, for its concluding therefrom qua the aforesaid testification(s) rendered by DW-7 comprising suspicious circumstances surrounding the execution of the contentious Will, suspicious circumstances whereof remaining inexplicated by the plaintiff hence it standing constrained to invalidate Ext.DW-7/A. However, the bed rock of the aforesaid reason anvilled upon the factum aforesaid, as stands assigned by the learned First Appellate Court for invalidating Ext.DW-7/A, is per se not convincing arising from the factum aforesaid qua there occurring invincible evidence qua the plaintiff standing not fathered by the deceased testator thereupon even if no explanation qua the aforesaid purported suspicious circumstance purportedly surrounding the execution of Ext.DW-7/A stood unpurveyed by defendant No.1 thereupon no conclusion is garnerable qua Ext.DW-7/A losing its sanctity.

9. Be that as it may, dehors the above, clinching evidence in consonance with the provisions of Section 63 of the Indian Succession Act encapsulated in the testimony of DW-7 stands enunciated in the testification of a marginal witness to Ext.DW-7/A, marginal witness whereto deposed as DW-8. DW-8 in his testimony, has unequivocally deposed qua after deceased testator Sarnu thumb marking Ext.DW-7/A in his presence his thereafter thereat in the presence of the deceased testator putting his signatures thereon. Even though, the arrival of the marginal witnesses at the relevant location of scribing of Ext.DW-7/A, occurred on its scribing standing completed nonetheless at the apposite stage of the deceased testator embossing his thumb impressions thereon, their exists convincing evidence qua DW-8 recording his presence thereat. Also with his testification unequivocally disclosing qua the deceased testator embossing his thumb impressions thereon in his presence whereupon hence with the requisite enshrined statutory parameter qua a marginal witness standing enjoined to testify qua the deceased testator embossing on the relevant testamentary disposition his thumb impressions in his presence hence standing fully satiated. Also DW-8 testified qua his thereafter in the presence of the deceased

testator signaturing it whereupon the further statutory ingredient qua a marginal witness to a testamentary disposition standing enjoined to convincingly bespeak qua the factum of his signaturing it, after completion of its execution in his presence by the deceased testator also achieving omnibus accomplishment. Consequently, with the apt evidence adduced by a marginal witness to Ext.DW-7/A satiating all the statutory parameters thereupon an apt inference stands drawn qua his holding the requisite *animus attestandi*. Furthermore the factum of the deceased testator holding the requisite *compos mentis ab testamentaria* also his volitionally executing the relevant testamentary disposition embodied in Ext.DW-7/A stands accentuately proven, proof whereof stems from the factum of after proven completion of its pre registration execution in consonance with the enshrined parameters engrafted in Section 63 of the Indian Succession Act, it, thereafter standing carried to the office of Sub Registrar concerned whereat also it stood thumb marked by the deceased testator also thereat it stood signatured by the marginal witnesses thereto. A formidable inference of its standing volitionally executed by the deceased testator also spurs from the factum of it holding thereon an endorsement bearing the seal and signatures of the Sub Registrar concerned, endorsement whereof marks the factum of the deceased testator embossing his thumb impressions thereon in the presence of the Sub Registrar concerned besides the occurrence of the apposite endorsement ensuing, on Ext.DW-7/A standing readover and explained to him by the Sub Registrar concerned, endorsement whereof enjoys a critical degree of sanctity, sanctity whereof when remains uneroded by adduction of potent evidence, constrains a conclusion qua the testamentary disposition of the deceased testator standing proven to be validly and duly executed dehors suspicious circumstances if any of a trivial besides a nebulous worth purportedly gripping it.

10. Consequently, the appeal preferred by the defendants/appellants herein is allowed. The judgement and decree rendered by the learned first Appellate Court is set-aside and the judgement and decree rendered by the learned trial Court is maintained and affirmed. Consequently, the suit of the plaintiff is dismissed. Substantial questions of law stand answered in favour of defendants/appellants herein and against the plaintiff/respondent herein. Decree sheet be prepared accordingly. The parties are left to bear their own costs. All pending applications also stand disposed of accordingly. Records be sent back forthwith. No costs.

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

Shri Het Ram & others. .....Appellants.

Versus

Partap Singh & others. ....Respondents.

RSA No. 587 of 2006
Reserved on : 27.2.2017
Decided on : 8/3/2017

Specific Relief Act, 1963-Section 34- Plaintiff filed a Civil suit seeking declaration with consequential relief of permanent prohibitory injunction – the suit was opposed by pleading that Civil Court had no jurisdiction as the proprietary rights were conferred regarding the suit land - Trial Court returned the plaint for presentation before Competent Forum as the Civil Court did not have jurisdiction to adjudicate upon the dispute – an appeal was preferred and the findings of Trial Court were reversed – held in appeal that mutation conferring the proprietary rights was attested on 30.1.1977 – Appellate Court held that the mutation was null and void – there is no proof of the payment of rent and mere entry of gairmaurusi is not sufficient to confer proprietary rights upon a person – therefore the mutation was illegal and the Civil Court will have jurisdiction- the Trial Court had wrongly returned the plaint - appeal dismissed. (Para-9 to 16)

Cases referred:
Daulat Ram versus State of H.P ILR 1978 HP 741
Chunia Devi versus Jindu Ram 1991(1) Sim. L.C 223

For the Appellants: Mr. Ramakant Sharma, Sr. Advocate with Mr. Jagat Paul, Advocate.
For the Respondents: Mr. Sanjeev Kuthiala, Advocate for respondents No. 1 to 5, 7 to 13.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

Through the instant appeal, the appellants challenge the verdict recorded by the learned first Appellate Court whereby it reversed the verdict recorded by the learned Sub Judge (Nalagarh) whereby, he, on account of lack of jurisdiction to decide the lis embodied in the plaint, returned it, for its presentation before the appropriate Court.

2. The brief facts of the case are that the respondents herein (for short "the plaintiffs") instituted a suit for declaration with consequential relief of permanent prohibitory injunction and in alternative for possession against the appellants herein (for short "the defendants"). The case of the plaintiffs is that the land bearing Khewat/Khatauni No. 73/127/69 bearing khasra Nos. 277, 453, 1075, 1518 measuring 12 bighas 18 biswas situated at village Bhatauli Kalan, Had Bast No. 214, pargana Dharampur, Tehsil Nalagarh, District Solan, H.P. was bearing old Khasra Nos. 1460/202 min & 1461/202, 1454/264, 880, 1477/1263 which is the subject matter of the dispute. One Mr. Chaina was the common ancestor of the parties to the suit who had five sons namely Balayati Ram, Bhagat Ram, Samunda, Nihaloo and Hazarro. The plaintiffs are progeny/successors-in-interest of one Shri Nihaloo. The defendants are the progeny/successors-in-interest of Bilayati Ram, Bhagat Ram, Samunda and Hazaroo. Earlier to coming to village Bhatauli Kalan the defendants had come from village Madhala and they have their landed property situated at village Madhala, pargana Doon, Thsil Kasuali, District Solan, H.P. Similarly the plaintiffs have also their landed property at village Bhatauli Kalan and the plaintiffs were owners in possession of the suit land. The predecessor-in-interest of the plaintiffs and the defendants came to an understanding to exchange their lands inter-se and the predecessor-in-interest of the defendants proposed that their land situated at village Madhala should be exchanged with the land situated at village Batauli Kalan with Ram Chand and Gian Chand. But this proposal of exchange could not be finalized although an entry in the revenue records came qua this exchange in 1961/1962 but this exchange could not become operative and no mutation of exchange could take place. However arrangements regarding this exchange between the predecessor-in-interest of the parties remained and the defendants entered into permissive possession of the suit land owned by Gian Chand and Ram Chand situated in village Bhatauli Kalan and similarly said Gian Chand and Ram Chand remained in permissive possession of the land of the defendants situated at village Madhala. That the suit land was being acquired by the State Government and notice to this effect was issued and the plaintiffs also came to know about this notification and were eager to get the compensation and when they approached the Land Acquisition Collector, Nalagarh for the purpose of getting compensation, they came to know that the defendants have got this land mutated in their favour vide mutation No. 955 of 30.1.1977 and on the basis of which the defendants have been recorded and shown as owners of the suit land. The plaintiffs have challenged the said mutation sanctioned behind their back arbitrarily without serving notice upon them. They have also challenged the subsequent revenue entries qua the suit land where it is shown in the ownership and possession of the defendants. As such, suit for declaration with consequential relief of permanent prohibitory injunction and in the alternative for possession has been instituted by the plaintiffs against the defendants.

3. The suit stands contested by the defendants by filing written-statement wherein they have taken preliminary objections regarding maintainability, jurisdiction as the proprietary

rights of the suit land have been conferred upon the defendants vide mutation No. 955 of 30.1.1977 under the H.P Tenancy and Land Reforms Act (for short " the Act") and the Civil Court has no jurisdiction to try the dispute inter-se the parties and that the plaintiffs have no cause of action to file the present suit. On merits, they have refuted the allegations delineated in the plaint. The defendants emphatically denied whether any exchange between the parties took place therefore the question that it could not be materialized does not arise. They further alleged that no mutation on the basis of this exchange was sanctioned and revenue entries of exchange are illegal, null and void as there was no exchange whichever took place inter-se the parties. They also denied whether their predecessors-in-interest entered into permissive possession of the suit land of Gian Chand and Ram Chand of village Bhatauli Kalan and that said Gian Chand and Ram Chand the predecessor-in-interest of the plaintiffs also remained in permissive possession of the land of the defendants situated at village Madhala. They stated that no exchange ever took place between the parties and their predecessor-in-interest and that the defendants from the time of their predecessor-in-interest remained in self cultivation of the land situated at village Madhala. They alleged that the Predecessor-in-interest of the defendants entered into possession of the suit land since July, 1930 and they remained in exclusive possession of the same till their death and thereafter the defendants came in possession of the suit land and their possession is open, peaceful and hostile to the knowledge of the plaintiffs and as such they have become owners of the same by way of adverse possession. They have also alleged that they have acquired title of the suit land by way of adverse possession. No doubt they stated that the mutation of proprietary rights under section 104 of the Act qua the suit land was sanctioned in their favour but the said mutation was sanctioned by the Revenue officer without their knowledge and said sanctioning of mutation qua the suit land does not displace the defendants from acquiring ownership over the suit land by way of adverse possession. Therefore they have also disputed the conferment of the proprietary rights qua the suit land upon them on the basis of the tenancy and exchange as such they pray that the suit of the plaintiff be dismissed.

4. In the replication, the plaintiffs controverted the contention of the defendants and reiterated their stand taken in the plaint.

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

> "1. Whether the plaintiffs are owner in possession of the suit land, as alleged? OPP
>
> 2. Whether mutation No. 955 of 30.1.1997 sanctioned in favour of the defendants is wrong, illegal, null and void ?OPP
>
> 3. Whether this suit is not maintainable in the present form? OPD
>
> 4. Whether this Court has no jurisdiction to try this suit? OPD
>
> 5. Whether the plaintiffs have no locus-standi to file the present suit? OPD
>
> 6. Whether the plaintiffs have no cause of action? OPD
>
> 7. Whether the defendants have become owner of the suit land by way of adverse possession? OPD
>
> 8. Relief.

6. On an appraisal of the evidence adduced before the learned trial Court, the learned trial Court returned the plaint to the plaintiffs for its presentation by them before the competent forum. An appeal therefrom stood preferred by the aggrieved plaintiffs before the learned first Appellate Court. On an appraisal of evidence adduced before it, the learned first Appellate Court set aside the findings recorded by the learned trial Court. In sequel, the appeal preferred by the plaintiffs before the learned first Appellate Court, hence succeeded.

7. The defendants/appellants herein standing aggrieved by the judgment and decree rendered by the learned first appellate Court have therefrom instituted herebefore the instant Regular Second Appeal.

8. Since the appeal stood admitted on 14th July, 2008 by this Court on the following substantial questions of law, consequently this Court would decide the instant appeal by rendering answers thereto.

> "1. Whether the impugned judgment and decree is the result of non-consideration of the provisions of Article 65 of the Limitation Act.
>
> 2. Whether the impugned judgment and decree is the result of non-consideration of Exhibit P3 Jamabandi for the year 1987-88 Ex.P-4 Khatani istemal Ex.P-7 Ex.P-11 and Ex.P-12.
>
> 3. Whether the learned lower appellate Court is right in holding that the Civil Court has no jurisdiction without considering the categorical findings recorded on issue No.4 by the learned trial Court."

Substantial questions of law:-

9. Under mutation No. 955 comprised in Annexure P-6, recorded on 30.1.1977, proprietary rights qua the suit land stood conferred upon the defendants, mutation whereof stood assailed by the plaintiffs. In the impugned verdict recorded by the learned first Appellate Court, a conclusion stood reared by it, qua the entries qua the suit land held in the relevant Jamabandis for the reasons delineated therein holding no sanctity whereupon it declared the contentious mutation to be null and void.

10. The analysis of the relevant jamabandis, by the learned first Appellate Court whereupon an inference stood garnered by it qua the contentious mutation conferring propreitary rights qua the suit land upon the defendants suffering invalidation stands contended by the learned counsel appearing for the appellants, to suffer from a gross infirmity, contention whereof stands anvilled upon the factum qua with the reflections occurring therein magnificatory qua the predecessor-in-interest of the defendants holding the suit land as a *gair marusi,* hence rendered the apposite order attesting/conferring propreitary rights qua the suit land upon the defendants to not suffer from any vice of invalidation. However, the aforesaid contention holds no weight in the apparent factum, of the relevant jamabandis qua the suit land not holding therein any enunciation in the relevant column of 'rent' personificatory qua the predecessor-in-interest of the defendants while purportedly holding the suit land, as a *Gair Marusi,* his paying rent to the land owners, contrarily reflections therein pronounce the factum of his holding the suit land under a mutual exchange standing entered inter-se the parties thereto, exchange whereof stands denied by the plaintiffs, nor any document in support thereto exists besides no order attesting mutation of exchange stands proclaimed in the apposite revenue records for thereupon supporting the aforesaid reflections borne in the apposite column of 'rent' held in the relevant jamabandis whereupon the apposite entry in the column of 'rent' stands rendered to be construable to be an invented besides a stray entry whereupon no sanctity is imputable. Also reflections in the apposite revenue records qua the predecessor-in-interest of the defendants holding the suit land as a 'Gair marusi' without payment of rent, does strip the tenacity of the aforesaid recorded entry. Moreover, reflections occurring therein pronouncing the factum qua the predecessor-in-interest of the defendants holding the suit land as a 'gair marusi', do not also acquire any hue of validation conspicuously when the entry of his holding the suit land as a "Gair Marusi" for it thereupon to hold omnibus vigor, reiteratedly enjoins existence of corresponding entries in the apposite column of rent, for thereupon an inference standing erectable qua a valid contract of tenancy standing entered qua the suit land inter-se the land owner vis-à-vis the predecessor-in-interest of the defendants or qua it thereupon hence coming into existence, contrarily the entry in the column of rent pronouncing qua the predecessor-in-interest of the defendants holding it under an exchange, qua exchange whereof no mutation evidently stands proven to stand attested, thereupon the reflections in the apposite jamabandis qua the predecessor-in-interest of the defendants holding the suit land as a "Gair Marusi" stand rendered to be bereft of any hue of validation.

11. Moreover, the apposite column of rent held in the apposite jamabandis proclaims qua the predecessor-in-interest of the defendants holding the suit land under an exchange,

whereas in preceding column thereof enunciates his status qua the suit land as a "*Gair Marusi",* reflections whereof occurring therein are antithetical to the salient nuance of a contract of tenancy, contract whereof warrants rent evidently standing paid by the predecessor-in-interest of the defendants qua the plaintiffs, factum whereof being wholly amiss, renders the analysis of the relevant jamabandis by the learned first Appellate Court to not suffer from any gross infirmity or perversity.

12. Be that as it may, the learned trial Court pronounced an order returning the plaint to the plaintiffs for its presentation by them before the appropriate forum conspicuously on account of its lacking the apposite jurisdiction, to pronounce a verdict thereon whereas the learned first Appellate Court concluded qua the aforesaid findings warranting interference. The learned trial Court ordered for the return of the plaint to the plaintiffs for its presentation by them before the competent forum, order whereof spurred from its concluding qua its not holding any jurisdiction to test the legality qua the attestation of mutation No. 955 whereupon proprietary rights stood conferred qua the suit land upon the defendants, besides stood rested upon judgments reported in ***Daulat Ram versus State of H.P*** ILR 1978 HP 741 and ***Chunia Devi versus Jindu Ram*** 1991(1) Sim. L.C 223.

13. In making the aforesaid conclusion, the learned trial Court has visibly omitted to impute an apposite appreciation qua the exceptions carved therein qua the predominant proposition propounded therein, qua Civil Courts lacking jurisdiction to pronounce any verdict upon a lis hinged upon the validity of an order rendered by a revenue officer concerned exercising apposite powers under the Act whereupon he confers proprietary rights upon a "tenant", exception whereof spurs on evident non-participation of the aggrieved in the apposite proceedings rendering hence a suit constituted by the aggrieved on the aforesaid facet before the Civil Court concerned wherein a challenge is cast upon aforesaid order rendered by the Revenue Officer concerned to hence stand rendered maintainable thereat. The learned trial Court omitted to mete the enjoined reverence qua the plaintiffs averring qua theirs acquiring knowledge only in the year 1997 qua the contentious order conferring proprietary rights upon the defendants wherein an obvious tacit implied engraftment stood encapsulated qua the contentious order attesting mutation whereupon proprietary rights qua the suit land stood conferred upon the defendants standing prior thereto unknown to them besides its rendition ensuing without the participation of the aggrieved in the apposite proceedings whereupon hence it stands afflicted with a vice of its infracting the mandate of "*Audi Alteram Partem",* thereupon the salient exception, to the predominant principle encapsulated in the citations qua a Civil Court standing jurisdictionally barred to entertain a lis challenging an order of mutation recorded by a revenue officer concerned exercising powers under the apposite Act whereupon proprietary rights stand conferred upon a "gair marusi" also held therein qua evident non-participation of the aggrieved in the apposite proceedings vesting jurisdiction vis-à-vis a Civil Court qua the aforesaid facet. Moreover with the apposite order of mutation evidently not holding reflections therein in portrayal qua the plaintiffs recording their presence before the Revenue Officer concerned at the time contemporaneous to his recording an order conferring proprietary rights qua the suit land upon the defendants rendered the apposite order to amplifyingly stand stained with a salient vice of its infracting the principle of the "*Audi Alteram Partem"* whereupon also the predominant expostulations of law held in the citations aforesaid relied upon by the learned trial Court to thereupon non-suit the plaintiff stood inappositely attracted by it vis-à-vis the defendants despite citations propounding exceptions thereto, exceptions whereof stand comprised in evidence displaying the trite factum of the aggrieved standing condemned unheard, expostulated exceptions thereto carved therein also stood vigorously underscored by a display in the relevant order qua at the stage of its recording, the aggrieved not marking their presence or attendance before the revenue officer concerned, thereupon the aforesaid manifestations held therein constituted vivid proof qua the exceptions qua the preponderant principle propounded in the citations relied upon by the learned first Appellate Court whereupon the suit of the plaintiff assailing the order attesting mutation no. 955 whereupon proprietary rights qua the suit stood

conferred upon the defendants stands rendered maintainable before the Civil Court, as aptly concluded by the learned first Appellate Court.

14. The learned first Appellate Court had dwelt upon the testimonies of the defendants witnesses. An incisive perusal whereof by this Court underscores qua no communication occurring therein in portrayal qua commencement with precision in timing of possession with an *animus possidendi* upon the suit land, by the predecessor-in-interest of the defendants nor also there occurs any articulation therein holding bespeaking qua any overt act in personification qua the predecessor-in-interest adversely proclaiming his title qua the suit land vis-à-vis the plaintiffs, thereupon the oral evidence as stands adduced by the defendants to succor their claim qua theirs perfecting their title by prescription qua the suit land is abysmally wanting in probative weight, contrarily the factum of the defendants on anvil of reflections in the relevant Jamabandis portraying their predecessor-in-interest to be holding possession qua the suit land as a "*gair marusi"*, hence obtaining an order whereupon proprietary rights qua the suit land stood conferred upon them, effect of reflections whereof stands pronounced by this Court to not afford any formidable leverage to the Land Reforms Officer to pronounce an order conferring proprietary rights qua the suit land upon the defendants also thereupon does ipso facto countervail the assertion(s) of the defendants qua theirs acquiring prescriptive title qua the suit land ensuing from efflux of the statutorily mandated period, conspicuously when the contentious order of mutation stood rendered in their presence thereupon an apt conclusion ensues qua theirs emphatically acquiescing qua theirs solitarily on anvil of an order of mutation conferring proprietary rights upon them hence espousing qua theirs thereupon acquiring title to the suit land whereupon they stand estoppel to contend qua theirs perfecting their title thereon by prescription.

15. This Court while dwelling upon the entries held in the apposite jamabandi, has concluded qua the entry in the column of rent holding reflections therein qua the predecessor-in-interest of the defendants holding the suit land as a "*Gair Marusi"* being antithetical vis-à-vis the subsequent reflections in the column of "rent" pronouncing the factum qua their predecessor-in-interest holding it under an exchange, exchange whereof stands unproven to stand preceded by any order attesting mutation in respect thereto, also for want of any corresponding entry in the apposite Colum of rent for hence proving a valid contract of tenancy, renders the entry recording the predecessor-in-interest of the defendants to be wanting in legal efficacy, entry whereof also capitalizes an inference qua the predecessor-in-interest permissively holding the suit land under a contentious purported exchange. Acquiescence qua the aforesaid factum gets immense boost from the factum of reflections held in the apposite jamanandis standing not assailed by the defendants, failure whereof of the defendants garners a derivative qua the presumption of truth aforesaid carried by the apposite reflections held in the relevant jamabandis qua the suit land hence for want of rebuttal thereto hence acquiring conclusivity.

16. In aftermath with conclusivity standing imputed by this Court qua reflections in the apposite jamabandis pronouncing the factum of the predecessor-in-interest of the defendants holding the suit land under a contentious exchange entered with the concerned thereupon with the defendants permissively holding the suit land renders the propagation made by the defendants qua theirs since their predecessor-in-interest holding the suit land with an *animus possidendi* whereupon they espoused qua theirs perfecting their title thereto, to get withered.

17. In view of the above, there is no merit in the appeal and the same is accordingly dismissed. The impugned judgment rendered by the learned first Appellate Court is maintained and affirmed. Substantial questions of law are answered accordingly in favour of the plaintiffs/respondents herein. Records be sent back.

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

Leela Dutt and another ...Appellants
Versus
State of H.P. and others ...Respondents.

RFA No. 80 of 2005
Reserved on : 1.03.2017
Date of decision: 08/03/2017

Code of Civil Procedure, 1908- Section 96- Plaintiffs applied for felling trees and selling them to defendants – 98 pine trees were marked for felling- it was found subsequently that permission was obtained for felling 18 trees, whereas 98 trees were marked and felled – plaintiffs sought the damages – the suit was dismissed by the Trial Court- held in appeal that the best documentary evidence for proving that 98 trees were marked and felled was not led – further, felling more trees than permitted would be an illicit act for which the individual official would be liable and not the State- the suit was wrongly filed against the government – the appeal dismissed.(Para-7 to 9)

For the appellants: Mr. Bimal Gupta, Sr. Advocate with Ms. Kusum Chaudhary, Advocate.

For the respondents No. 1 and 2.: Mr. M.L.Chauhan, Addl. A.G. with Mr. Neeraj Kumar Sharma, Dy. A.G.
Mr. Shikha Chauhan, vice counsel, for respondent No.3.

The following judgment of the Court was delivered:

Sureshwar Thakur, J:

The plaintiffs' suit for recovery of Rs.5,50,000/- constituting the price of trees illegally cut by the defendants stood dismissed by the learned trial Court whereupon the plaintiffs standing aggrieved are hence constrained to through the Regular First Appeal assail it herebefore.

2. The brief facts of the case are that the plaintiffs are owners of the land comprised in Khasra No. 5,6,9,11,83,99, 126, 146, 269, 220, 277, 278, 298 in which some pine trees were standing. They moved an application for demarcation of their land and the marking of the trees for the purpose of their felling and selling to the defendants. It is alleged that 98 pine trees were marked in their land for the purpose of felling. Hammer mark was put on these trees. All these trees were felled. A complaint regarding such demarcation and felling was made by someone to the Chief Minister upon which an investigation was conducted. The investigation revealed that 98 pine trees were marked with hammer and were actually felled, but in fact permission for felling of 18 trees only had been given. The plaintiff alleged that defendants hatched a conspiracy to cause damage to them.

3. As per written statement filed by defendants No. 1 and 2, the factum of the felling of 98 trees from the land of the plaintiffs has not been denied. Their case is that permission for felling of 18 trees only was granted but the plaintiffs in connivance with the officials of the Forest Corporation defendant No. 3 also felled the disputed 80 trees. The employees of the Forest Corporation are facing trial for this illegal act. The defendants No. 1 and 2 denied their liability to pay any price of the trees, illegally felled. On the other had defendant No.3 stated that permission to fell only 18 trees were given.

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

1. Whether the plaintiffs are entitled for damage, as alleged? OPP.
2. Whether suit is barred by limitation, as alleged? OPD 1,2,3.

3. Whether the plaintiffs cut the Chil trees illegally in collusion with the defendant No.3, as alleged. OPD 1 & 2.

4. Whether plaintiffs have indulged in unlawful activities to seal timber of 80 chil trees by using unfair means in violation of H.P.Forest Act, as alleged? OPD 1 & 2.

5. Whether defendants No. 1 and 2 have discharged the statutory duties, as per law, as alleged, if so its effect? OPD 1 & 2.

6. Whether present suit is not properly verified as per provision of law, as alleged? OPD-3.

7. Whether present suit is not maintainable, as alleged? OPD. 3.

8. Whether suit is liable to be dismissed under Order 7 Rule (d) of the CPC, as alleged? OPD-3.Whether no cause of action accrued to the plaintiffs, as alleged? OPD 1 to 3.

9. Relief.

5. On an appraisal of evidence adduced before the learned trial Court, the learned trial Court dismissed the suit of the plaintiff.

6. Now the plaintiffs/appellants instituted the instant Regular First Appeal before this Court, assailing the findings, recorded by the learned trial Court.

7. 98 trees purportedly standing on the land owned by the plaintiffs, stood felled. However, only 18 trees stood hammered. The plaintiffs espoused qua the unhammered trees numbering 80 standing illegally felled by the official(s) of the defendants' concerned whereas price only qua 18 trees standing defrayed to them by the defendants concerned. A circumspect reading of the plaint unveils qua the plaintiff(s) echoing therein qua 98 trees purportedly growing over the lands standing hammer marked. However, the best documentary evidence in consonance therewith stood comprised in adduction into evidence of the relevant sanction order holding reflections qua 98 trees purportedly growing upon the lands of the plaintiffs, standing hammered. Nonetheless the aforesaid best evidence remained unadduced. Consequently, for lack of adduction of best evidence qua 98 trees purportedly growing upon the lands of the plaintiffs standing hammered also theirs thereupon standing felled by the official(s) concerned of the defendant concerned hence incapacitates the plaintiffs to claim the price of 80 pine trees purportedly growing upon their lands.

8. Dehors the above, the plaintiffs stand entitled to recover the amount claimed in the suit hence only from the official(s) concerned of the relevant department of Government of Himachal Pradesh who despite not holding the relevant sanction for felling 98 trees proceeded to fell the aforesaid number of pine trees purportedly growing upon the land of the plaintiffs. Since pine trees numbering 98 purportedly growing upon the land of the plaintiffs stood felled by the official(s) concerned of the relevant department of the Government of Himachal Pradesh also when the felling of 80 trees by the official(s) concerned of the relevant department of the Government of Himachal Pradesh ensued from theirs not holding the apposite sanction, rendered the official(s) concerned to not attract any vicarious pecuniary liability qua the department concerned whereunder they rendered employment conspicuously when their act of felling trees beyond the number sanctioned by the competent authority concerned, was in its entirety an illicit act, rendering them alone liable to pay damages. However, neither the official(s) concerned of the relevant department of the Government stand arrayed as party(s) to the suit nor their names with specificity stands pronounced in the respective depositions of the plaintiffs' witnesses. Consequently, the suit as constituted against the defendants is mis-constituted.

9. Moreover, the evidence on record as alluded to by the learned trial Court graphically unearths qua the felling of un-hammered pine tress purportedly growing on the land of the plaintiffs standing sequelled by consent standing purveyed by the plaintiffs to the official(s) concerned of the defendant No.3 thereupon for reiteration price thereof was claimable by the

plaintiffs only from the official(s) concerned, obviously it was un-indemnifiable qua the plaintiffs by the defendants hereat.

10. Accordingly, I find no merit in this appeal, which is accordingly dismissed and the impugned judgement and decree of the learned Additional District Judge, Fast Track Court, Solan, is upheld. All pending applications stand disposed of accordingly. No costs.

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

Nageshwar Mehto .....Appellant.
Versus
State of Himachal Pradesh .....Respondent.

Cr. Appeal No. 208 of 2008
Decided on : 08/03/2017

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 3 kgs. Ganja- he was tried and acquitted by the Trial Court- held in appeal that there is discrepancy in the description of the seal impressionson the sample parcels analyzed in the laboratory and those prepared at the spot – R.C. was not proved to explain this discrepancy – bulk parcel produced in the Court was not connected to the parcel prepared at the spot – independent witnesses had not supported the prosecution version- trial Court had rightly acquitted the accused- appeal dismissed.

(Para-8 to 14)

For the Appellant: Mr. K.B.Khajuria, Advocate.
For the Respondent: Mr. Vivek Singh Attri, Dy. A.G.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral)

The instant appeal stands directed against the impugned judgement of conviction besides qua sentence(s) in sequel thereof as stood pronounced upon the accused/convict for his committing an offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act.

2. The brief facts of the case are that on 15.6.2007 at about 4.30 p.m H.C. Subhash Chand was present in his office and received a secret information that accused deals in Ganja in huts near Kushat Ashram, Una and on that day he was seen there in search of customers. Thereafter, after completing codal formalities he formed a raiding party consisting of constables Anil Kumar, Surinder Singh, Gurdial Singh and Rajesh Kumar and proceeded towards Kushat Ashram. Near Kushat Ashram, Una he joined Surinder Kumar and Sukhdev Singh as independent witnesses. At about 6.10 p.m when they were present there, the accused came from the side of railway track with the bundle hanging on his right shoulder. He was intercepted by the police and informed that he was suspected to be possessing Ganja and his search was to be conducted. The accused was informed of his right to be searched before the Gazetted Officer or the Magistrate but the accused stated that he wanted to give his search to the police party present at the spot. So the search of the accused was conducted by the police. Before this search the police officials present at the spot gave their search to the accused regarding which memo Ext.PW-1/B was prepared and nothing incriminating was recovered. Thereafter the search of the accused as well as bundle in his possession was conducted and a polythene envelope was recovered from the bundle. The polythene envelope was containing Ganja which on weighing was found to be 3 K.gs. Thereafter two samples of 250 grams each were separated from it and the samples as well as bulk were sealed with seal having impression of English alphabet 'S' and the seal after use was handed over to PW Surindr Kumar. Thereafter, the accused was arrested and

grounds of his arrest were communicated to the accused and information of his arrest was given to his wife. Thereafter, the accused alongwith case property was produced before the SHO, who resealed the case property with seal bearing impression of English alphabet "D" and deposited the same with the MHC. 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 20 of the NDPs Act 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 any evidence in defence.

5. The accused stands aggrieved by the findings of conviction recorded upon him by the learned trial Court for his committing an offence punishable under Section 20 of the NDPS Act. The learned counsel appearing for the accused has concerted to vigorously contend qua the findings of conviction 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 conviction warranting reversal by this Court, in the exercise of its appellate jurisdiction and theirs being replaced by findings of acquittal.

6. On the other hand, the learned Deputy Advocate General appearing for the State has with considerable force and vigour, contended qua the findings of conviction recorded by the Court below standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating any interference rather 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. Ganja holding a weight of 3 K.G. stood recovered under recovery memo Ext. PW-1/C from a 'Gathari', Gathari whereof stood, at the apposite time, slung on the shoulder of the accused/convict. The aforesaid manner of effectuation of recovery of Ganja renders un-attractable besides uncompliable the statutory mandate engrafted in Section 50 of the Narcotic Drugs and Psychotropic Substances Act. PW-9 and PW-10 appended their signatures thereon as witnesses thereto. A reading of recovery memo held in Ext.PW-1/C underscores the trite factum qua the Investigating Officer concerned separating from the bulk of 3 K.G. of ganja, two samples, holding a weight of 250 grams each, for their onward dispatch to the FSL, for facilitating the latter to record an opinion qua theirs holding the ingredients/constituents of Ganja. The apposite NCB form comprised in Ext.PW-4/B unveils, qua the Investigating Officer concerned embossing on two sample parcels separated from the bulk of Ganja, three seal impressions of English alphabet 'S'. The aforesaid memo(s) makes a disclosure qua the SHO concerned reembossing, on parcels holding a weight of 250 gram each, seal impressions of English alphabet 'D'. A perusal of recovery memo comprised in Ext.PW-1/C, marks the factum qua the Investigating Officer, at the relevant site of occurrence in the presence of witnesses detailed therein subsequent to his effectuating from the conscious and exclusive possession of the convict recovery of bulk of Ganja holding a weight of 3 K.G., his therefrom separating two samples of 250 grams each, samples whereof stood enclosed in two cloth parcels whereon he embossed three seal impressions of alphabet 'S', whereafter he enclosed in a cloth parcel the remaining bulk of 'Ganja' holding a weight of 2.50 Kg., whereon he embossed three seal impressions of English alphabet 'S'.

9. The apt connectivity inter se the recovery of Ganja holding a weight of 3 KGs from the alleged conscious and exclusive possession of the accused under memo Ext.PW-1/C vis-à-vis the production of the relevant case property before the learned trial Court, is visibly emanable for the reasons alluded hereinafter:-

(a) Imminently, the prosecution stood enjoined by adducing cogent evidence to secure a firm conclusion qua the trite factum qua the apposite reflections held in the report of the FSL comprised in Ext.PW-4/F rendered on Ext.P-3 holding a weight of 250 grams whereon the Investigating Officer as disclosed in the NCB form proceeded to at the site of occurrence emboss three seal impressions of alphabet 'S' whereafter the SHO concerned re-embossed thereon two seal impressions of alphabet 'D' therewithin holding upsurgings bespeaking qua synonymity qua the relevant recovery effectuated under memo Ext.PW-1/C. The apt connectivity inter se the affirmative opinion recorded on the sample parcel borne on Ext.P-3 by the FSL concerned vis.a.vis the relevant factum probandum borne on Ext.PW-4/F would ensue from clinching evidence qua the seal impressions reflected in NCB form to stand borne on Ext.P-3 holding a weight of 250 gram holding congruity with the apposite reflections in respect thereto manifested in the report of the FSL concerned, embodied in Ext.PW-4/F. A perusal of the report of the FSL comprised in Ext.PW-4/F unveils qua the apposite congruity inter se the narrative therein qua the seal impression(s) embossed thereon vis.a.vis the apposite narrative qua the seal impression(s) reflected in Ext.PW-1/C to stand embossed thereon at the site of occurrence, manifestly surgingforth, significantly with paragraph 7 thereof underscoring qua the singular sample parcel of Ganja held in Ext.P-3 sent to it for analyses standing sealed with three seals impressions holding English alphabet 'S' and also with two reembossed seal impression(s) of English alphabet 'D', factum whereof holds visible synonymity with reflection(s) occurring in Ext.PW-4/F. Also Ext.PW-4/F underscores qua sample parcel of Ganja held in Ext.P-3 standing delivered to the FSL concerned by an authorized official, who stands named therein to be one HHC Jeet Singh. The aforesaid authorized official who had carried the singular parcel of 'Ganja' to the FSL concerned, has stepped into the witness box as PW-6 wherein he has unveiled qua the relevant sample parcel standing handed over to him by HHC concerned for its standing carried by him for its onward transmission to the FSL concerned, besides he underscores therein qua his delivering it thereat on 18.06.2007 whereafter he echoes qua on his returning to the Police Station concerned, his handing over the apposite RC to the HHC. The counsel for the accused has contended with vigour qua the non adduction by the prosecution, of the apposite RC would constrain an inference qua the prosecution failing to rely upon the report of the FSL concerned also he contends qua the aforesaid factum denuding the effect of congruity emerging inter se the seal impression(s) embossed on the sample parcel by the I.O at the time contemporaneous to his effectuating recovery of Ganja under memo Ext.PW-1/C at the site of occurrence from the conscious and exclusive possession of the accused vis.a.vis the seal impressions reflected in Ext.P-4/F to stand borne thereon besides the effect of the relevant synchronity occurring inter se reembossed seal impressions thereon vis.a.vis the apposite reflection in Ext.PW-1/C also standing belittled**.** However, the aforesaid submission does not hold any tenacity imperatively when the reflections qua the embossing at the site of occurrence of sample seal impression(s) on sample parcel(s) drawn by the Investigating Officer from the bulk of Ganja, holds utmost congruity besides alignment with the apposite reflections occurring in the report of the FSL concerned, efficacy whereof stood unconcerted to stand eroded by the defence, comprised in its adducing cogent evidence personifying qua the sample parcel of Ganja held in Ext.P-3 whereon a report held in Ext.PW-4/F stood prepared, standing tampered with, efficacious concert whereof stood comprised in the relevant sample parcel Ext.P-3 whereon the apposite opinion comprised in Ext.PW-4/F stood purveyed by FSL concerned standing demonstrated to not hold the signatures of the accused and of the witnesses thereto. However, want of apposite efforts qua the facet aforesaid by the defence renders erectable an inference qua its espousal hereat being wholly unfounded besides surmisal.

(b) Evidence qua connectivity emerging inter se the recovery of Ganja under memo Ext.PW-1/C from the conscious and exclusive possession of the accused by the Investigating Officer vis.a.vis the production of the incriminating seized contraband before the learned trial Court also stands enjoined to surge forth, evidence qua the aforesaid connectivity ensues from the factum of PW-1 in his examination in chief during course whereof the relevant case property stood shown to him, his underlining therein with unequivocality qua the bulk parcel holding analogity with the one which stood seized at the site of occurrence from the conscious and

exclusive possession of the accused also he underscores therein qua it thereat holding synonymity with the apposite reflections occurring in recovery memo Ext.PW-1/C. He in his examination in chief during course whereof the sample parcel comprised in Ext.P-3 stood shown to him also testified qua it likewise holding analogity with the 'one' which stood prepared at the site of occurrence by the Investigating Officer concerned. Moreover, thereupon he tacitly underscores in his examination in chief qua sample parcel held in Ext.P-3 whereupon an affirmative opinion comprised in Ext.PW-4/F stood recorded by the FSL concerned qua its contents holding the constituents of Ganja also holding similarity with the apposite descriptions in respect thereof occurring in Ext.PW-4/F and in Ext.PW-1/C, latter exhibit whereof stood prepared by the Investigating Officer concerned at the site of occurrence. The aforesaid communication made by PW-1 in his examination in chief wherewithin he had made unfoldments qua the relevant seizure(s) made at the site of occurrence by the Investigating Officer from the conscious and exclusive possession of the accused holding the apt connectivity with the case property which stood shown to him in Court remained during the course of his standing cross-examined by the learned defence counsel apparently unconcerted to be shred of tenacity. The apposite concerted efforts of the learned counsel to erode the effect of the aforesaid testification of PW-1 qua the relevant facet aforesaid stood comprised in his while holding PW-1 to cross-examination his putting apposite suggestions to PW-1, holding therewithin visible bespeaking qua both the bulk besides sample parcel in respect wheret**o** PW-1 in his examination in chief on theirs standing shown to him at the stage contemporaneous to his deposition standing recorded before the learned trial Court made loud echoings qua theirs holding the apt connectivity with the relevant seizure made from the conscious and exclusive possession at the site of occurrence by the Investigating Officer qua hence the apt connectivity being amiss or theirs standing tampered with or the seal impressions borne thereon holding graphic inter se incongruity with the seal impressions manifested in NCB form Ext.PW-4/F. However, the aforesaid suggestion remaining unpurveyed to PW-1 by the learned defence counsel. Omission of the aforesaid assays by the learned counsel for the accused for his thereupon belittling the effect of the communications made by PW-1 in his examination in chief wherewithin he unequivocally deposed qua the relevant connectivity emerging inter se the relevant case property shown to him in Court by the PP vis.a.vis reflections occurring in Ext.PW-1/C, Ext.PW-4/B and Ext.PW-4/F concerned, fillips an obvious conclusion qua the defence unavailing the apposite mode to erode the apposite unfoldments made by PW-1 in his examination in chief whereupon the apposite unfoldments made by PW-1 in his examination in chief wherein he testifies qua the relevant connectivity existing inter se the seized property vis.a.vis the property as shown to him in Court, hence acquires truth.

(c) The learned counsel appearing for the accused has contended with vigour qua with PW-5 in his cross-examination acquiescing to the suggestion purveyed to him by the learned counsel for the accused qua his omitting to with specificity mention qua how many samples of seal(s) stood deposited before him, hence giving an immense leeway qua the accused qua PW-6 who had carried the sample parcel Ext.P-3 to the FSL for the latter analyzing it for facilitating it to thereupon record an opinion thereon, whereon an apposite affirmative opinion stood recorded by it, hence not holding the apposite connectivity inter se Ext.PW-4/F, vis-à-vis Ext.P-3 whereat it stood produced in Court. However, the aforesaid submission is legally frail conspicuously when the effect of the aforesaid acquiescence does not as contended by the learned counsel for the accused either convey qua PW-5 after the FSL concerned recording its apposite opinion on Ext.PW-4/F, the FSL not transmitting it to the Police Station concerned nor it conveys qua his not receiving it besides it also does not convey qua his not storing Ext.P-3 in the apposite Malkhana. The aforesaid inference would ensue only upon the learned counsel for the accused while holding PW-5 to cross-examination his putting apposite suggestions to him for thereupon hence his concerting to elicit communications from him qua Register No. 19 not holding any apposite reflections in portrayal, of PW-5 after receiving Ext.P-3 from the FSL concerned in sequel to the latter recording an affirmative opinion qua the contents held therewithin, his thereupon yet omitting to reflect the apposite fact therein. However, the aforesaid apposite effort for securing the aforesaid apposite elicitation from PW-5 remained unassayed by the learned counsel for the

accused whereupon it is befitting, to, in coagulation with the omission of the learned defence counsel to belittle the apt testimony of PW-1 held in his examination in chief wherein he has echoed qua the case property as stood shown to him in Court, it, thereat holding synonymity with the relevant seizure(s), hence conclude qua the defence acquiescing qua the factum qua the relevant incriminating 'seizure' holding an apt alignment qua "it" at the apposite stage of 'its' production in Court. The learned counsel for the accused has contended with vigour qua the absence of production in Court the apposite Malkhana Register with portrayals therein qua PW-5 Incharge of the Malkana concerned, at the stage contemporaneous to the transmission of the case property to the P.P. concerned for its standing shown to PW-1, his retrieving it from the Malkhana concerned also in-contemporanity thereof his making apposite reflections in the apposite register, rendering hence the apposite connectivity qua the factum probandum inter se the aforesaid exhibits to hence stand denuded or thereupon a conclusion standing earned qua the apposite connectivity inter se the apt seizure made under Ext.PW-1/C vis.a.vis its purported production in Court whereat it stood shown to PW-1 not standing convincingly established. However, it is not an unfailing obligation cast upon the prosecution to always for securing an unflinching qua an imminent connectivity emerging inter se the relevant 'seizure' vis.a.vis its production in Court, to compulsorily produce in Court abstract of Malkhana with portrayals qua its standing retrieved from the Malkhana concerned by its Incharge also in contemporanity thereof his making apposite entries in the apposite register. Contrarily hereat with the case property standing produced in Court in a sealed condition also when it stands concluded qua at the time of its production in Court, it, holding synonymity with seal impressions occurring thereon and as stand reflected in Ext.PW-1/C and Ext.PW-4/F, factum whereof also stands inevitably unearthed from the learned defence counsel while holding PW-1 to cross-examination his omitting to put apposite suggestions to him for hence eroding the tenacity of the aforesaid deduction nor his making concerted efforts to evince from him qua the relevant parcel holding the sample(s) of Ganja also the parcel holding the bulk of ganja both not holding the signatures of the accused nor any anlaogity inter se the seal impression borne thereon vis.a.vis the seal impression in respect thereto reflected in Ext.PW-1/C and Ext.PW-4/F emerging therefrom, concomitantly thereupon with the defence failing to rebut the efficacy of the testimony rendered qua the relevant facet by PW-1 in his examination-in-chief also with the defence while holding PW-5 to cross-examination not concerting to make an allusion to the apposite Malkhana register, for thereupon its making unveilings from PW-5 qua his neither retrieving the case property from the Malkana concerned for its onward dispatch by him to the PP concerned nor his incontemporanity thereof making apposite reflections in the Register concerned, failure whereof of the defence counsel renders nugatory the omission of the PP concerned to place on record, the abstract of the Malkhana register holding therewithin the aforesaid apposite portrayals. Moreover, during the course of recording of the deposition of PW-1, the relevant exhibits holding therewithin the apposite seized contraband, stood exhibited by the learned trial Court, exhibition whereof occurred in the presence of the learned defence counsel, yet the latter despite holding the opportunity thereat to visualize the exhibits shown to PW-1 by the P.P. concerned also to visualize other exhibits wherefrom the hereinabove apt inference qua the imperative intra se connectivity occurring intra se each hence stands drawn, for his thereupon deciphering each exhibit(s) for unearthing therefrom intra se contradictions for hence enfeebling the aforesaid inference whereas his rather palpably omitting to protest thereat qua their exhibition, contrarily manifests his acquiescence qua thereat intra se congruity qua the factum probandum standing unflinchingly underscored whereupon the defence holds no leverage to hereat espouse qua no apt intra se connectivity ensuing or occurring inter se relevant reflections held in each exhibit(s) predominantly when thereat the learned defence counsel held the opportune moment to elicit the espoused unearthings, moment whereof standing not seized by him whereupon reiteratedly his espousal hereat stands frustrated.

10. The official witnesses to the relevant exhibits also qua the genesis of the prosecution case in their respective examinations in chief unfolded articulations bereft of any taint of any inter se contradictions occurring inter se their respective examinations in chief vis.a.vis their respective cross-examinations besides their respective depositions unveil qua theirs

rendering an account qua genesis of the prosecution case with intra se harmony whereupon it would be sagacious to place implicit reliance upon their respective testimonies, dehors the fact qua theirs being officials of the police department

11. Nowat, the effect of independent witnesses PW-9 and PW-10 to recovery memo Ext.PW-1/C reneging from their previous statements recorded in writing, is to stand construed alongwith the factum of theirs respectively in their respective cross-examinations to which they stood subjected to by the learned PP on theirs standing declared hostile, admitting the factum of theirs signatures occurring thereon. Consequently, when they admit the occurrence of their signatures on the relevant memo(s) thereupon the mandate of Section 91 and 92 of the Indian Evidence Act whereupon they on admitting the occurrence of their signatures thereon hence stood statutorily estopped to renege from the recitals borne thereon, thereupon the effect of theirs orally deposing in variance or in detraction to the recitals which occur therein gets statutorily belittled rather when they naturally emphatically hence statutorily prove the recitals comprised in the apposite memo(s), their orally reneging from the recitals borne thereon holds no evidentiary clout nor it is legally apt to outweigh the creditworthiness of the testimonies of the official witnesses qua the recovery of Ganja under recovery memo Ext.PW-1/C standing effectuated from the conscious and exclusive possession of the accused, contrarily the uncontroverted factum qua their signatures occurring in the relevant exhibits, concomitantly renders the apposite recitals borne thereon to hold grave probative worth. The ensuing sequel thereof is qua with the statutory estoppel constituted in Section 91 and 92 of the Indian Evidence Act, barring PW-9 and PW-10 to orally resile from the contents of Ext.PW-1/C Ext.PW-11/B and Ext.PW-11/C especially when they admit the signatures occurring thereon to belong to them renders unworthwhile besides insignificant the factum qua theirs orally deposing in variance of its recorded recitals, thereupon per se an inference stands enhanced qua dehors their reneging from their previous statement(s) recorded in writing, a deduction standing capitalized qua thereupon theirs proving the genesis of the prosecution case.

12. For the reasons which have been recorded hereinabove, this Court holds that the learned Special Judge, Fast Track Court, Una, 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 Judge 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.

13. In view of the above, I find no merit in this appeal, which is accordingly dismissed. In sequel, the impugned judgement and sentence is affirmed and maintained. Record of the learned trial Court be sent back forthwith. Committal warrants be prepared accordingly.

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

Satya Devi .... Petitioner

Versus

Jagir Singh and others .....Respondents

CMPMO No. 248 of 2015
Date of decision:08.03.2017

Code of Civil Procedure, 1908- Order 26 Rule 9- An application for appointment of Local Commissioner to demarcate the land was filed by the plaintiff, which was dismissed by the Trial Court- held, that on the one hand, the plaintiff has sought the relief of injunction for restraining the defendants from getting the suit land demarcated and on the other hand he has filed an

application for demarcation, which is not permissible – a person seeking equity must do equity – the application was rightly dismissed by the Trial Court - revision dismissed. (Para-5 & 6)

For the petitioner: Mr. Dheeraj K.Vashisht, Advocate.
For the respondents: Mr. Surender Saklani, Advocate, vice Mr. Rahul Verma, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)* :

By way of this petition filed under Article 227 of the Constitution of India, the petitioner has challenged order dated 02.05.2015 passed by the Court of learned Civil Judge (Junior Division)-II, Amb in Civil Suit No. 306 of 2009, vide which learned Court below has dismissed an application filed by the present petitioner (who is plaintiff before the learned trial Court) under Order 26 Rule 9 of the Code of Civil Procedure for appointment of a revenue expert as Local Commissioner to carry out the demarcation of the land mentioned in the application so filed under Order 26 Rule 9 of the Code of Civil Procedure.

2. On record, as Annexure P-1 is the copy of the plaint filed by the present petitioner, which demonstrates that the suit stands filed before the learned trial Court praying for the following reliefs:

> *"It is therefore prayed that decree for permanent injunction restraining the defendants from interfering in any manner, from raising any sort of construction, taking forcible possession, cutting and removing the Safeda trees, taking any demarcation, uprooted the old boundary and changing the nature of the land measuring 1-16-89 Hects bearing Khewat No. 200 min Khatoni No. 298 Khasra Nos. 2128, 2131, 2134, 2135, 2138,2140,2141,2178,2254 and 2257 Kitas 10 and old Khasra Nos. 747, 742 and 737 as entered in Nakal Jamabandi for the year 1998-1999 situated in Village Kharoh, Tehsil Amb, Distt. Una (H.P.) may please be passed in favour of the plaintiff and against the defendants in the interest of justice."*

3. Learned trial Court while dismissing the application so filed by the present petitioner under Order 26 Rule 9 of the Code of Civil Procedure has held that the petitioner/applicant has filed the suit for permanent injunction *inter alia* for restraining the defendants/respondents from interfering, raising any sort of construction, taking forcible possession, cutting and removing eucalyptus, dark trees and taking any demarcation of the suit land and on the other hand, the petitioner/applicant herself has filed an application for appointment of revenue expert for demarcation of the suit land. On these bases, it has been held by the Court below that the applicant in fact is estopped from filing the application in the present case as she has herself prayed for "not taking any demarcation over the suit land". Learned trial Court has further held that otherwise also it is well established principle of law that Court cannot create any evidence in favour of any of the parties.

4. I have heard the learned counsel for the parties and have also gone through the documents appended with the present petition.

5. It is settled law that in exercise of its jurisdiction under Article 227 of the Constitution of India, this Court primarily has to see as to whether learned Court below has committed any jurisdictional error by way of order which is under challenged under Article 227 of the Constitution of India. This Court is not to interfere in the order so passed by the learned trial Court on the basis of merit, if the learned trial Court whose order otherwise is under challenge is competent to pass the said order and the conclusion arrived at is borne out from records. During the course of arguments, learned counsel for the petitioner could not point out any jurisdictional error committed by the learned Court below while passing the impugned order. His contention is that in case the application so filed under Order 26 Rule 9 of the Code of Civil Procedure for

appointment of a revenue expert as Local Commissioner is in fact allowed, this will settle the matter *inter se* the parties for all times to come.

6. Be that as it may, it is also well settled principle of law that one who seeks equity also has to do equity. In the present case, on one hand, the petitioner/plaintiff has prayed in the Civil Suit that the respondents/defendants be restrained from getting the suit land demarcated and by way of an application filed under Order 26 Rule 9 of the Code of Civil Procedure, the petitioner/plaintiff is calling upon the Court for appointment of a revenue expert as Local Commissioner for demarcation of the suit land.

7. In view of above discussion, I do not find any infirmity or jurisdictional error in the order passed by the learned trial Court in dismissing the application filed under Order 26 Rule 9 of the Code of Civil Procedure. Accordingly, the petition is dismissed, so also the miscellaneous applications, if any. Registry is directed to forthwith send back the records of the case to the learned trial Court and the parties through their respective counsel are directed to appear before the learned Court below on ***27th March, 2017.***

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

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

Cr. Appeal No. 684 of 2008
Decided on : 8/03/2017

Indian Penal Code, 1860- Section 325, 341, 504- P was filling water by the side of the road – accused B came and told P that P had got his name registered in Antyodya scheme, whereas he was not eligible for the same- B started abusing P – he picked up a bamboo stick and inflicted injury on the head of P – K and A rescued the complainant - accused was tried and acquitted by the Trial Court- held in appeal that the accused had also lodged an FIR regarding the incident prior to FIR lodged by the complainant – accused had sustained injuries – there are discrepancies in the testimonies of the complainant and his mother –the stick was not connected with the commission of offences- the Trial Court had rightly acquitted the accused- appeal dismissed.(Para-9 to 13)

For the Appellant: Mr. Vivek Singh Attri, Dy. A.G.
For the Respondent: Ms. Sheetal Vyas, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal stands directed against the impugned judgement of acquittal recorded by the learned Chief Judicial Magistrate, Hamirpur, H.P. whereby it pronounced an order of acquittal qua the accused qua the offences allegedly committed by him.

2. The brief facts of the case are that Pawan Kumar was filling water by the side of road adjacent to his cow shed when Bhag Singh came and told Pawan Kumar that latter had got his name registered in Antodaya, whereas he was not eligible for the same. Pawan Kumar replied that he was a poor person and working as a labourer. Bhag Singh started abusing Pawan Kumar and said that he was depriving the other eligible persons of their rights. The accused picked up a bamboo stick and inflicted injuries on the head of Pawan Kumar. Kunti Devi and Asho Devi

rescued the complainant from the accused. The injured was carried to the hospital and an intimation was given to the police to which an entry in the daily diary was recorded. Medical examination of Pawan Kumar was conducted by doctor Parveen Kumar who found injuries on his person. The nature of injuries was stated to be grievous and on the basis of this opinion MLC was issued. F.I.R Ext.PW-6/A was registered on the basis of the entry in the daily diary. Investigations were conducted by PW-6 Guler Chand. Statement of witnesses were recorded as per their version 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 325, 341, 504 of IPC to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 8 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 chose to lead evidence in defence.

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 Deputy Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned trial Court standing not based on a proper appreciation of 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 standing replaced by findings of conviction.

7. 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.

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. With user of Danda recovered under memo Ext.PW-3/A, the accused allegedly delivered blows on the person of the victim. In sequel thereto as pronounced in Ext.PW-8/A, the victim sustained injuries. PW-8 in his deposition has therein underscored qua the injuries occurring on the person of the victim/injured, injuries whereof thereon stand testified by him to be causable by user of Danda. Also the victim/injured deposing in conformity with the genesis of the prosecution case embodied in the apposite F.I.R held in Ext.PW-6/A constrains the learned Deputy Advocate General to contend with vigour qua the prosecution proving charges against the respondent.

10. However, the submission addressed herebefore by the learned Deputy Advocate General stands enfeebled by the factum of (a) the accused in his defence depending upon Ext.DW-1/A wherewithin unfoldments stand held qua the occurrence qua which he faced trial. (b) His under Ext.DW-1/A hence also lodging an F.I.R. with the Police Station concerned qua it, time of lodging whereof, is, palpably earlier vis.a.vis the time of lodging of the F.I.R by the complainant. The aforesaid factum when stands blended with the factum of the accused respondent, as reflected in Ext.DW-3/A sustaining six injuries on his person, injuries whereof stand pronounced by DW-3 to be causable thereon by user of Danda and fist blows fillips, hence galvanizes an imminent inference qua in the scuffle occurring inter se the accused/respondent with the victim/complainant in course thereof each inflicting injuries on the person of the other. However, apparently the Investigating Officer despite his receiving an information qua the relevant incident from the accused/respondent apposite information whereof held in Ext.DW-1/A stood purveyed at a stage earlier than the victim/complainant lodging an F.I.R, qua the incident,

did not thereupon proceed to hold a fair investigation comprised in the factum of his proceeding to take the accused herein before the doctor concerned for facilitating the latter to hold his medical examination whereupon it appears qua his holding a collusion with the victim/complainant herein for facilitating the success of the F.I.R. lodged by the latter also for benumbing the success of the F.I.R lodged earlier qua the relevant occurrence by the accused vis.a.vis the F.I.R. lodged by the victim with him. The aforesaid factum stands vividly marked by the Investigating Officer ultimately as submitted by the learned Deputy Advocate General, on concluding investigation with respect to F.I.R borne in Ext.DW-1/A, his furnishing an apposite report before the Magistrate concerned wherewithin he proposes qua the F.I.R borne on Ext.DW-1/A warranting its standing cancelled. The further effect of the Investigating Officer not holding a fair and an impartisan investigation qua the occurrence is qua hence a smothered version qua the occurrence propounded in the F.I.R hence whereon alone the Investigating Officer held investigations, hence holding no creditworthiness.

11. Be that as it may, the Investigating Officer for securing success qua the prosecution case apparently appears to invent an independent witness (PW-4) to the relevant occurrence, PW-4 the mother of the victim/injured perse is construable to be an invented or a contrived witness to the occurrence imperatively when the cause qua eruption of the relevant scuffle inter se the victim with the accused stands communicated by her in terms discordant with the one propounded by the victim injured. Discordance inter se the version of the complainant vis.a.vis the version of PW-4 qua the cause qua the eruption of a scuffle inter se the victim and the accused emerges from the factum of the complainant in his deposition disclosing therein qua at the relevant site of occurrence, the accused/respondent approaching him whereat his making a protest qua the victim injured while holding no eligibility to secure the enlistment of his name in the Antodaya Pariwar Register, his yet ensuring his name standing enlisted therein, protest whereof of the accused qua the aforesaid factum though stands communicated by PW-2 to stand replied by him qua his relevant enlistment ensuing from the factum of his being a poor person whereas in stark discordance thereof PW-4 underlines in her deposition qua her making an inquiry from the accused qua the reason prevailing upon him for deleting the name of the complainant from the list prepared under the IRDP scheme, in sequel thereto, she deposes qua the accused proceeding to inflict an injury on the person of the accused whereupon an inference stands enhanced qua the Investigating Officer for hence ensuring the success of F.I.R borne on Ext.PW-6/A his inventing a purported independent witness thereto whereupon the entire genesis of the prosecution case comes under a cloud rendering it to be unbelievable.

12. Nowat, even though a bamboo stick stood recovered under memo Ext.PW-3/A yet the efficacy of its recovery thereunder besides its user on the person of the victim stands benumbed preeminently when PW-4 a purported eye witness to the occurrence at the stage contemporaneous to the recording of her deposition whereat Ext.P-1 stood shown, hers denying qua it constituting the purported weapon of offence, with user whereof the accused inflicted injuries on the person of the victim. Also thereupon it stands concomitantly concluded qua her deposition holding a purported ocular account qua the occurrence being not amenable for its standing construed to contain an inviolable ocular account thereof.

13. For the reasons which stand 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 material on record by the learned trial Court 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 whereupon its judgement warrants no interference.

14. 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 H.P. .....Appellant.
Versus
Sanjiv Kumar .....Respondent.

Cr. Appeal No. 158 of 2008
Decided on: 8.3.2017

Indian Penal Code, 1860- Section 279, 337 and 338- Accused was driving a motor cycle with the high speed- the motor cycle hit the bus – accused and pillion rider sustained injuries - the accused was tried and acquitted by the Trial Court- held in appeal thatbus was moved after the accident and no reliance can be placed upon the site plan – the presence of eye-witnesses was not established as the tickets were not collected by the Investigating Officer from them to show their presence- pillion rider did not support the prosecution version – the Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed. (Para-9 to 13)

For the Appellant: Mr. R.K Sharma, Deputy Advocate General.
For the Respondent: Mr. Bhuvnesh Sharma, Advocate,

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The instant appeal stands directed against the impugned judgment of 26.11.2007 rendered by the learned Judicial Magistrate, 1st Class, Nadaun District Hamirpur, H.P. in Criminal Case No.108-II-2005, whereby he acquitted the respondent (for short "accused") for the offences charged.

2. Brief facts of the case are that on 16.6.2005 Shri Ravinder Kumar was driving bus bearing registration No. HP-36-5325 enroute from Dharamshala to Hamirpur and Shri Pawan Kumar was Conductor in the said bus. Around 2.45 p.m. when the aforesaid bus reached ahead of Jol Sapar near B.Ed college, accused came from Hamirpur side on a motor cycle bearing No. HP-22A-0250 in an excessive speed and on seeing the vehicle in an excessive speed, the complainant stopped his bus, but the accused could not control the same and struck it against the complainant's bus. Shri Suresh Kumar was also occupying the offending vehicle and as a result of accident, accused and pillion rider fell down on the road and suffered injures on their person. Rapat No. 16 Ex. PW-8/A was entered into the Daily Diary on the same day. On this, HC Amar Nath the, Investigating officer got the accused and pillion rider medically examined at Zonal Hospital, Hamirpur and their MLCs were procured. Accused was found to have suffered simple and grievous injuries on his person whereas the simple injuries were found on the person of the pillion rider. 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. Notice of accusation stood put to the accused by the learned trial Court qua 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 12 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 claimed false implication. However, he did not choose to lead any evidence in defence.

5. On an appraisal of evidence on record, the learned trial Court returned findings of acquittal qua the accused.

6. The learned Additional Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned trial Court standing not based on a proper appreciation of 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 standing replaced by findings of conviction.

7. The learned counsel appearing for the respondent/accused has with considerable force and vigor contended qua the findings of acquittal recorded by the Court below standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating 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 a collision which occurred inter-se the bus driven by the complainant vis-à-vis the motorcycle driven by the accused, the pillion rider of the latter vehicle sustained injuries. The FIR qua the occurrence encloses therein ascription of a penally inculpable negligence qua the accused, comprised in his, despite the complainant who at the relevant time manned the steering wheel of the relevant bus, halting it, for facilitating the accused to, while driving the motorcycle at a high speed proceed ahead, his yet striking it against the stationary bus.

10. No reliance can stand imputed to site plan comprised in Ex.PW-10/A, inference whereof arises from the factum of there occurring evident display qua immediately subsequent to the relevant collision, the complainant carrying in the bus driven by him both the accused and the pillion rider who, at the relevant time of mishap, was atop, the offending vehicle, to Zonal Hospital, Hamirpur, for theirs receiving treatment thereat. Since immediately subsequent to the occurrence hence the bus driven by the complainant stood removed from the relevant site of mishap thereupon the reflections occurring in Ex.PW-10/A stand rendered to stand construable to be both invented and contrived.

11. Be that as it may, the prosecution had depended upon the testifications of ocular witnesses qua the occurrence who in their respective testifications rendered with utmost intra-corroboration with the deposition of the complainant, made echoings therein in tandem with ascription of a penally inculpable role qua the accused, as embodied in the notice of accusation. However, the testifications of the purported ocular witnesses to the occurrence may not gain any credence evidently with the complainant in the apposite FIR not enunciating therein, the trite factum qua theirs occupying the bus at the relevant time nor obviously his disclosing their names therein. Moreover, for erecting a firm conclusion qua theirs occupying the bus driven by the complainant significantly when the defence espouses qua theirs neither occupying the relevant vehicle driven by the complainant nor hence theirs holding the apposite capacity to render an ocular version thereto, thereupon the prosecution was also under a solemn obligation, for dispelling the aforesaid factum, to adduce on record the relevant tickets collected from them, by the investigating Officer. However with the investigating Officer, evidently not collecting the tickets from the aforesaid PWs, who purportedly eye witnessed the occurrence, thereupon enhances the espousal of the defence qua theirs not occupying the vehicle driven by the complainant nor obviously thereupon theirs holding any capacity to render a vivid ocular account thereto. Since the espousal of the defence anchored on the aforesaid omission(s) of the investigating Officer, thereupon attains vigor contrarily an inference stands constrained qua the prosecution not adducing clinching and best evidence comprised in its leading into the witness box any eye witness(s) to the occurrence. Also the purported eye witnesses qua the occurrence led into the witness box by the prosecution for succoring the genesis of the prosecution case cannot for the reasons aforesaid hold any creditworthiness rendering any reliance thereupon to be wholly unwarranted.

12. The best evidence in proof of the notice of accusation whereto the accused stood subjected to, stands embodied in the testification of PW-7 (Suresh) pillion rider of the offending vehicle. However, he, too omitted to support the prosecution case. In his deposition he has made

communications wherein he has contrarily exculpated the ascription of penally inculpable negligence vis-à-vis the accused/respondent. His reneging from his previous statement recorded in writing also with the learned APP while holding him to cross-examination neither putting any apposite suggestion to him nor hence evoking any elicitations from him for thereupon belying his testification occurring in his examination-in-chief wherein he exculpated the guilt of the accused, conspicuously when he held the capacity to adduce the best clinching evidence in support of notice of accusation, fosters an inference qua the prosecution case hence faltering.

13. A wholesome analysis of evidence on record portrays qua the appreciation of evidence as done by the learned trial Court does not suffer from any perversity and absurdity nor it can be said qua the learned trial Court in recording findings of acquittal hence committing any legal misdemeanor, in as much, as, its mis-appreciating the evidence on record or its omitting to appreciate relevant and admissible evidence. In aftermath this Court does not deem it fit and appropriate qua the findings of acquittal recorded by the learned trial Court meriting any interference.

14. In view of the above discussion, I find no merit in this appeal, which is accordingly dismissed and the judgment of the learned trial Court is maintained and affirmed. Record of the learned trial Court be sent back forthwith.

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

State of Himachal Pradesh ....Petitioner.
Versus
Mohinder Singh and others ... Respondents.

Cr.R. No. 101 of 2008.
Reserved on: 01.03.2017.
Decided on: 08.03.2017.

Code of Criminal Procedure, 1973- Section 227- A challan was filed for the commission of offence punishable under Section 147 of I.P.C. and Section 3(X) of Scheduled Caste and Scheduled Tribe (Prevention of Atrocities Act), 1989 – the Trial Court discharged the accused holding that there was a dispute regarding the passage between the parties, there was delay in lodging the FIR and the official witnesses have not supported the prosecution version – held, that the Court has to see a prima facie case at the time of framing of charge and is not to dissect the evidence- strict standard of proof is not to be applied at that time – the Court is not to hold a mini trial at the time of framing of charge- complainant and his witnesses had duly supported the prosecution version in their statements recorded by the police - a prima facie case was made out against the accused on the basis of the police challan – revision accepted and the order of the Trial Court set aside. (Para-8 to 12)

Case referred:
State of M.P. v. Sheetla Sahai, 2009 Cr. LJ 4436 (4449):2009 AIR SCW 5514:2009 (10) SCALE 632

For the petitioner Mr. V.S. Chauhan, Additional Advocate General.
For the respondents Mr. T.S. Chauhan, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge

By way this revision petition, petitioner-State has challenged the order dated 11.03.2008 passed by the Court of learned Special Judge, Bilaspur in Sessions Trial No. 41 of

2006, under Section 3(10) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred as 'Act, 1989'), vide which learned trial Court discharged the accused under Section 227 of the Code of Criminal Procedure (hereinafter referred as 'Cr.P.C.') by holding that from the facts narrated in the first information report, there was no sufficient ground for presuming that the accused had committed the offence alleged against them.

2. The case of the prosecution in brief was that statement of complainant Shri Bhagwan Dass (hereinafter referred to as 'complainant') was recorded on 08.11.2005 by the then Additional Superintendent of Police, Bilaspur and on the basis of statement so recorded, F.I.R. No. 255/2005 was registered on 02.12.2005. As per complainant, he was a resident of Barmana, Tehsil Sadar, District Bilaspur, H.P. and was employed in ACC Factory at Barmana and on 28.09.2005, when he alongwith his brother was present at his house, Kanungo and Patwari Halqua came there for the purpose of demarcation of land and started demarcating the same without informing them. Further, as per complainant at the same time 60-70 persons from the village also gathered there. When he asked the revenue officials to demarcate the land later on as crop was standing on the land, the opposite party started abusing the complainant and his family members on caste lines. The opposite party also threatened to do away with the lives of the complainant and his family members. Further as per the complainant, accused Asha Devi, Pappu @ Balbir Singh, Balbat Singh and Ana caught hold of the nephew of the complainant namely Prittam Singh from his neck and he (Prittam Singh) was also slapped by Ana and Pappu. Besides this, Mohinder was instigating said persons to beat the complainant and his family members. As per the complainant, he reported the occurrence of the incident to the Superintendent of Police and expressed his apprehension qua danger to himself and his family members from the accused persons. Further as per the complainant, complainant party went to police station Barmana on the same day for the purpose of lodging FIR, but no FIR was lodged. Even after more than one month and 13 days from the occurrence of the alleged incident, no FIR was registered and thereafter statement of the complainant was recorded by the Additional Superintendent of Police, on the basis of which FIR was registered. As per the complainant, on 28.02.2005 an application was submitted by him in the police Station in which names of accused persons had been mentioned.

3. As per prosecution, during the course of investigation which was carried out by the then S.D.P.O. Ghumarwin, site plan was prepared and statements of the witnesses were also recorded. Besides this, revenue papers were also obtained and after the completion of the investigation as it was found that accused had committed offences punishable under Section 147 of Indian Penal Code (hereinafter referred as 'IPC' for short) as well as under Section 3 (10) of the Act, 1989 challan was put in the court.

4. Vide order dated 03.11.2006 passed by learned JMIC, Bilaspur, challan was committed to the Court of learned Special Judge, Bilaspur.

5. Learned trial Court vide its order dated 11.03.2008 discharged the accused. While discharging the accused, it was held by the learned trial Court that record disclosed that there was a dispute regarding a passage between the parties and for the purposes of said reason, revenue officials were to carry out demarcation and the said demarcation could not be carried out on account of occurrence of the alleged incident. Learned trial Court held that record demonstrated that relations between the parties were not cordial and though the alleged incident took place on 28th September, 2005, formal FIR was lodged only on 02.12.2005. It was further held by the learned trial Court that the alleged occurrence of the incident was not supported by the official witnesses and it was clear from the statements of the official witnesses that neither any offence punishable under Section 147 of IPC or under Section 3 (10) of the Act was made out against the accused. Learned trial Court further held that it was evident from the FIR which was registered on the statement of complainant that when Kanungo and Patwari halqua came for the purpose of demarcation of the land, there were 60-70 persons gathered on the spot and it was in their presence that accused persons abused the complainant party on caste lines. Learned trial Court further held that statement of Patwari Brij Lal recorded under Section 161 of Cr.P.C did not

support the version of the complainant, as it was not so recorded in the statement of Patwari under Section 161 of Cr.P.C that accused persons had either caught hold of nephew of the complainant Shri Prittam Singh from the neck or had abused him on caste lines. Learned trial Court also held that statement of Kanungo Madan Lal also did not corroborate the version of the complainant. Learned trial Court also held that evidence demonstrated that besides Patwari Halqua and Kanungo, even ASI Bhim Singh was on the spot and the statement of ASI Bhim Singh recorded under Section 161 of Cr.P.C demonstrated that he had not been informed by the complainant or other persons on the spot about the alleged occurrence of the incident. Learned trial Court also held that statement of Tehsildar, Circle Sadar, Bilaspur demonstrated that on the said date i.e. on 28.09.2005, as per the orders of Deputy Commissioner, Bilaspur, he had gone to village Punahan for the purpose of demarcation of a passage and as per the version of said witness (Tehsildar) there had been exchange of words between rival parties and because of the same demarcation was stopped and the same was not carried out. Learned trial Court further held that under Section 227 of the Criminal Procedure Code, the Court while considering the question of framing the charges has undoubted power to sift and weigh the evidence though for the limited purpose with the object to find out whether or not a prima facie case is made out against the accused or not. Learned trial Court also held that the Judge has to consider the broad probabilities of the case and the total effect of the evidence as well as documents produced before it though the Court is not to make out a roving inquiry into the pros and cons of the matter and weigh the evidence as if it was conducting a trial. On these bases, it was held by the learned trial Court that there was a dispute between the parties pertaining to a passage and it was in the course of demarcation of the said passage by the revenue staff that the alleged altercation/incident took place but as the version of the complainant was not supported by the statements of the official witnesses recorded under Section 161 of Cr.P.C., accordingly, learned trial Court discharged the accused. While discharging the accused, learned trial Court also took note of the fact that there was delay in lodging of the FIR.

6. Feeling aggrieved by the said order of discharge, the state has filed the present revision petition.

7. I have heard the learned Additional Advocate General as well as Mr. T.S. Chauhan, learned counsel for the respondents and also gone through the records of the case as well as the order passed by the learned trial Court.

8. Before proceeding further, it is pertinent to take note of the provisions of Section 227 of the Code of Criminal Procedure wherein it is provided that if on consideration of records of the case and documents submitted therewith and after hearing the submissions of the accused and the prosecution, the Judge considers that there was not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for doing so.

9. In the present case, learned trial Court on the basis of records of the case and documents submitted therewith and after hearing the submissions of the accused as well as the prosecution has come to the conclusion that there are not sufficient grounds for proceeding against the accused. It is a settled legal position that for the purpose of determining as to whether there are sufficient grounds for proceeding against the accused, Court possesses a comparatively wider discretion in the exercise of which it can determine the question as to whether the material on record, if un-rebutted, is such on the basis of which a conviction can be said reasonably to be possible. In other words, at the stage of framing of charges, only prima facie case has to be seen and it is not to be seen that the case is beyond reasonable doubt or not. The strict standard of proof, while evaluating the material to ascertain whether there is a prima facie case against the accused or not, is not to be applied. It is further settled legal position that at the time of framing of the charge it is not necessary for the prosecution to establish beyond all reasonable doubt that the accusation which they are bringing against the accused person is bound to be brought home against him. At the stage of framing of charge, the court has to see if there is sufficient ground for presuming that the accused has committed an offence. If the answer is in affirmative, the order of discharge cannot be passed and the accused has to face trial. The Court is not required to hold

mini trial and to come to the conclusion that material adduced in the case warrant conviction. Defect in investigation cannot be a ground for discharge of the accused. It has been held by the Hon'ble Supreme Court in ***State of M.P. v. Sheetla Sahai, 2009 Cr. LJ 4436 (4449):2009 AIR SCW 5514:2009 (10) SCALE 632*** that if on perusal of the entire material on record, the Court arrives at an opinion that two views are possible, charges can be framed but if only one and one view is possible to be taken, the Court shall not put the accused to harassment by asking him to face a trial. At the stage of framing of charge, Court cannot analyze or dissect evidence of prosecution and defence or points of possible cross-examination of defence. Case of the prosecution presented before the Court has to be accepted as it is. Thus, where from the statements of complainant and his witnesses, a prima facie case is made out, framing of charges cannot be said to be illegal and the same is not required to be interfered with. The standard of test and judgment which has to be finally applied before recording the guilt or otherwise of the accused is not exactly applied at the stage of framing charges.

10. By applying the touchstone of what has been discussed above, in my considered view, the order of discharge passed by the learned trial Court in favour of accused is not sustainable in law. It has come in the impugned order that the complainant as well as the other witnesses of the complainant have duly supported and corroborated the case of the complainant/prosecution. In other words, while discharging the accused, the findings returned by the learned trial Court are not to this effect that neither the complaint nor the statement of complainant and other witnesses recorded by the prosecution in support of its case corroborate the case of the complainant. Finding returned by the learned trial Court is that though the complainant and his witnesses have duly corroborated the case of the prosecution, however, the official witnesses have not corroborated the same as per their statements recorded under Section 161 of Cr.P.C. In my considered view, this is where learned trial Court has erred in discharging the accused. Learned trial Court has erred in not appreciating that it was not dissecting views on record for the purpose of recording acquittal or guilt in favour of or against the accused but it was perusing the material on record to see as to whether a prima facie case was made against the accused in order to made them face trial or not. In my considered view, the record of the case as well as the documents produced on record prima facie demonstrate that prosecution has been able to make out a prima facie case against the accused and it is not as if the statements of complainant and other witnesses who have supported the version of the complainant do not make out any case against the accused. On the other hand, a perusal of the statements of official witnesses recorded under Section 161 of Cr.P.C., which have been relied upon by the learned trial Court, prima facie appear to have been made to favour the accused as is apparent and evident from the language used in the same. Be that as it may, it is not for this Court to adjudicate on the veracity or the credibility of the said witnesses and their credibility and veracity will be seen by the Court concerned once they depose in the Court of law during the course of trial. All that this Court can say at this stage is this that the record of the case and documents produced on record prima facie do demonstrate that the prosecution has been able to make out a prima facie case against the accused and learned trial Court has erred in passing the order of discharge in favour of accused.

11. Accordingly, in view of findings returned above, the revision petition is allowed and the impugned order of discharge passed by the learned trial Court in Sessions Trial No. 41 of 2006, dated 11.03.2008 is set aside and the case is remanded back to the learned trial Court for adjudication strictly in accordance with law. Parties through their counsel are directed to appear before the learned trial Court on 10.04.2017. It is made clear that this Court has not expressed any opinion on the merits of the case and learned trial Court shall proceed with the matter strictly as per the merits of the case and shall not in any manner be influenced by any observation made by this Court in the present petition.

12. Revision petition is disposed of accordingly. Pending miscellaneous application(s), if any, also stand disposed of.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

The Himachal Pradesh State Co-operative Milk Producers' Federation Limited ...Petitioner.

Versus

Shri Sudhir Chand Katoch ...Respondent.

CWP No. 1062 of 2016
Decided on: 08.03.2017

Constitution of India, 1950- Article 226- Departmental inquiry was drawn against the writ petitioner after his retirement – held, that departmental inquiry cannot be drawn against the employee after his retirement – The Tribunal had rightly allowed the application- writ petition dismissed. (Para-5 to 8)

For the petitioner: Mr. M.R. Verma, Advocate.
For the respondent: Mr. J.L. Bhardwaj, Advocate.

The following judgment of the Court was delivered:

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

De-linked from LPA No. 505 of 2011.

2. By the medium of this writ petition, the writ petitioner has questioned order, dated 23rd September, 2015 (Annexure P-5), made by the learned Himachal Pradesh Administrate Tribunal at Shimla (for short "the Tribunal") in TA No. 5869 of 2015, titled as Shri Sudhir Chand Katoch versus Himachal Pradesh State Co-op. Milk Producers Federation Limited, whereby the Transferred Application filed by the applicant-respondent herein came to be allowed (for short "the impugned order"), on the grounds taken in the memo of the writ petition.

3. Respondent has filed the reply and resisted the writ petition on the grounds taken therein.

4. Learned counsel for the writ petitioner stated at the Bar that he does not intend to file rejoinder. Accordingly, the right of the petitioner to file rejoinder is closed.

5. The only question for determination in this writ petition is – whether departmental enquiry can be drawn against an employee after his retirement?

6. It is beaten law of the land that departmental enquiry cannot be drawn against an employee after his retirement.

7. The learned Tribunal has rightly made the discussions in paras 8 to 11 of the impugned order, need no interference.

8. In view of the above, the impugned order is upheld and the writ petition is dismissed alongwith all pending applications.

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

Bihari Lal ...Appellant.
Versus
State of H.P. ...Respondent.

Criminal Appeal No. 200 of 2016
Reserved on : March 4, 2017
Date of Decision : March 9, 2017

Indian Penal Code, 1860- Section 363, 366, 120-B and 376- Prosecutrix was studying in 9th standard – she went with PW-20 and spent the night in the house of PW-2 – accused finding the prosecutrix alone at bus stand took her to Bilaspur on the allurement of marriage – she was subjected to sexual assault – the prosecutrix was taken by accused S – accused were tried and convicted by the Trial Court- held in appeal that prosecutrix was proved to be minor at the time of incident – prosecutrix had not disclosed the details of the accused – names of the parents of the accused S or his residence were also not disclosed – she had altered the core story regarding the sexual assault- she stated that she was assaulted by R but B was arrested for which no explanation was provided – no test identification parade was conducted to establish that B was R- the prosecution version did not inspire confidence – delay in reporting the matter was not also explained- the evidence was not properly appreciated – the judgment of the Trial Court set aside and the accused acquitted.(Para-8 to 57)

Cases referred:
Satwantin Bai v. Sunil Kumar and another, (2015) 8 SCC 478
Shamshul Kanwar v. State of U.P., (1995) 4 SCC 430
Sidhartha Vashisht alias Manu Sharma v. State (NCT of Delhi), (2010) 6 SCC 1
Kamla Kant Dubey v. State of Uttar Pradesh and others, (2015) 11 SCC 145
State of Karnataka v. Suvarnamma and another, (2015) 1 SCC 323
V.K. Mishra and another v. State of Uttarakhand and another, (2015) 9 SCC 588.

For the Appellant : Mr. Satyen Vaidya, Senior Advocate, with Mr. Vivek Sharma, Advocate.
For the Respondent : Mr. V.S. Chauhan, Additional Advocate General.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

Accused Bihari Lal (Accused No.1), with the allurement of marriage, took the prosecutrix (PW-14) from Thoeg to Bilaspur (H.P.), where in a hotel he subjected her to criminal assault and thereafter entrusted her custody to accused Suresh Kumar (Accused No.2 and accused Bindra Devi (accused No.4), for solemnization of her marriage with their son Sandeep Kumar (accused No.3) (residents of Hamirpur, H.P.). In crux, this is the case of prosecution.

2. All the accused were charged for having committed offences punishable under Sections 363, 366, read with Section 120-B of the Indian Penal Code. Additionally, accused Bihari Lal was charged for having committed an offence punishable under Section 376 of the Indian Penal Code.

3. Finding the prosecution not to have fully established its case, through the testimonies of 22 prosecution witnesses, while acquitting accused Suresh Kumar (accused No.2), Sandeep Kumar (accused No.3) and Bindra Devi (accused No.4), on all counts, trial Court

convicted only accused Bihari Lal (accused No.1), for having committed offences under Sections 363, 366 and 376 of the Indian Penal Code and sentenced him as under:

Accused Bihari Lal

Offence	Sentence
Section 363 IPC	Rigorous imprisonment for a period of two years and fine of Rs. 5,000/- and in default thereof to further undergo simple imprisonment for a period of six months.
Section 366 IPC	Rigorous imprisonment for a period of two years and fine of Rs. 5,000/- and in default thereof to further undergo simple imprisonment for a period of six months.
Section 376 IPC	Rigorous imprisonment for a period of ten years and fine of Rs. 40,000/- and in default thereof to further undergo simple imprisonment for a period of one year.

Amount of fine, on realization, has been ordered to be paid to the prosecutrix, as compensation.

4. Undisputedly, no appeal against the judgment of acquittal stands filed by the State or the complainant.

5. Convict Bihari Lal alone has assailed the findings of his conviction as also sentence, so rendered by the trial Court, in terms of impugned judgment dated 20.1.2016/25.2.2016, passed by Additional Sessions Judge-cum-Special Judge (CBI), Shimla, Himachal Pradesh, in Sessions Trial No.33-T/7 of 2013/12, titled as *State of H.P. v. Bihari Lal and others.*

6. Having carefully perused the entire evidence, we find the prosecution case resting on the following circumstances:

(a) As on the date of commission of offence, prosecutrix, resident of village Hulli, was a minor and studying in the 9th standard at a school at Gumma.

(b) On 4.4.2012, on the asking of Sanjay Kumar (PW-20), she travelled from Gumma to Theog, where she spent some time with him.

(c) There she spent the night, in the house of Khema Nand Brakta (PW-2).

(d) In the morning of 5.4.2012, accused Bihari Lal, finding the prosecutrix alone at the Bus Stand, Theog, on the allurement of her marriage, made her travel with him to Bilaspur, where they spent the night in Hotel Banyal. There he subjected her to sexual assault.

(e) On 6.4.2012, Bihari Lal telephonically contacted accused Sandeep Kumar, who alongwith his parents, accused Suresh Kumar and Smt. Bindra Devi, came to Bilaspur, where custody of the prosecutrix was entrusted to them.

(f) Thereafter, she remained with them till 12.4.2012, when they dropped her at Gumma, on the pretext of procuring her school leaving certificate.

(g) Information that prosecutrix had returned was passed on to her parents on 12.4.2012, on whose asking, the following day, i.e. 13.4.2012, prosecutrix lodged a report at Police Station, Kotkhai.

(h) On 6.4.2012, Mehboob (PW-15), father of the prosecutrix had lodged a missing report with the police.

(i) During the course of investigation, so conducted by ASI Chering Dorje (PW-22), (i) prosecutrix and accused Bihari Lal were got medically examined, (ii) prosecutrix identified the accused and place(s) of occurrence of the incident, (iii) proof of her age and other incriminating material pertaining to telephonic conversation inter se the accused were taken on record.

7. Trial Court convicted the accused, holding (a) the testimonies of the prosecutrix (PW-14), her father Mehboob (PW-15) and uncle Roshan Deen (PW-3) to be inspiring in confidence; (b) prosecution to have established the factum of accused Bihari Lal and the prosecutrix having spent the night of 5.4.2012, in a hotel by the name of Banyal Hotel, Bilaspur, owned by Vijay Kumar (PW-19); (c) despite there being no corroborative medical evidence, testimony of the prosecutrix per se establishing the case against accused Bihari Lal, more so with regard to his identity, and despite the prosecutrix having named Rajinder in her initial version so recorded by the police, to have been subjected to sexual assault; and (d) the prosecutrix having no reason to falsely implicate the accused.

8. From the perusal of the material so placed on record and the evidence, ocular and documentary, so led by the parties, certain undisputed facts have emerged on record:

(a) On the date of alleged commission of crime, prosecutrix was a minor. She was less than 15 years of age.

(b) Prosecutrix, a resident of village Hulli, was studying in the 9th standard in a School, at place known as Gumma.

(c) On 4.4.2012, prosecutrix travelled from Gumma to Theog, where she spent the night in the house of Khema Nand Brakta (PW-2).

(d) Both, the prosecutrix and her parents, were having mobile phones. Also she was independently using her mobile phone.

(e) Accused Bihari Lal (accused No.1) did not indulge in the trade of human trafficking.

(f) No money ever came to be passed on by the other accused to Bihari Lal.

(g) Both, the prosecutrix and accused Bihari Lal, were subjected to medical examination.

9. From the medical evidence, corroborative in nature, it is evidently clear that Dr. Anita Negi (PW-7), affirmatively, did not opine that prosecutrix was subjected to sexual assault. In the MLC (Ex.PW-7/A), she opined that:

> "From above finding there is nothing to suggest that recent sexual intercourse has taken place. However there was evidence of fresh rupture of Hymen."

However, in Court, it stands clarified that the word "fresh" would mean within 24-48 hours.

10. It is a settled position of law that in a case of sexual assault, medical evidence is only corroborative in nature. And in a given case may not be even relevant.

11. Also, there is no other evidence of scientific nature, on record, establishing the factum of sexual assault.

12. Hence, under these circumstances, one has to only look into the ocular evidence. Before we deal with the same, we find that in the instant case, there is one disturbing feature, with regard to the conduct of investigation. But then, it is also a settled principle of law that faulty investigation or any irregularity would not itself vitiate the trial, entitling the accused for an acquittal.

13. In the instant case, Investigating Officer, who incidentally is no more in the land of living, which fact we got ascertained from the learned Public Prosecutor, did not take into

possession the mobile phone of the prosecutrix. Also, he did not place on record the call details of the conversation, which the prosecutrix had had, if any, during the course of occurrence of the incident(s). Also, he only took into possession the cell phone alongwith the SIM used by accused No.1 (Bihari Lal), but did not obtain the call details and the tower locations. Well, what is its effect, we shall consider herein later.

14 . Record reveals that on 13.4.2012, prosecutrix, in the presence of her father (PW-15) and uncle (PW-3) got recorded her statement under Section 154 of the Code of Criminal Procedure (Ex. PW-14/A), disclosing that on 4.4.2012, while she was on way to her school at Gumma, Sanjay Kumar (PW-20) called her on phone and asked her to meet him at Theog. After leaving her school bag with a shopkeeper, at Gumma, she travelled to Theog, where she spent the night with "someone known to her". In the morning of 5.4.2012, at about 6 am, while she was alone at the bus stand, "one person" by the name of "Rajinder", "aged about 40 years", after enquiring her whereabouts, on the pretext of getting her married, took her in a bus to "Hamirpur", where after reaching at about 10 pm, they spent the night in a "hotel", where she was subjected to sexual assault by him. The following morning, i.e. 6.4.2012, said "Rajinder" spoke to someone on telephone and soon "one boy" and "two other persons", "one of whom was a lady", came to the hotel, whereafter "Rajinder" entrusted her custody to them. "Rajinder" informed that within 2-3 days these two persons, i.e. the parents would get her marriage solemnized with their son Sandeep. By swindling, "Rajinder Kumar" handed over her custody to Sandeep and his parents. She spent 5/6 days at Hamirpur, but lateron was asked by the parents to get school leaving certificate. Hence, on 12.4.2012 they brought her in a vehicle to Gumma and left, after sending her to school.

15. Now significantly, at this point in time, she does not disclose full particulars of Rajinder. There is neither any description nor any detail of place of his residence. She also does not disclose the names of parents of accused Sandeep or their address. She also does not disclose the name of the shop keeper. She does not state that accused extended any threats. She readily agreed to travel with accused Bihari Lal.

16. However, in Court, we find the witness to have disclosed the facts differently. To us, it does not appear to be a mere improvement or exaggeration. The core story of sexual assault qua Bihari Lal (convict) stands altered.

17. In her statement, so recorded on oath, on 19.5.2014, she states that on 4.4.2012, after receiving a call from Sanju, she went to Theog. Prior thereto, she left her school bag with a shopkeeper – identity not disclosed- at Gumma. Same day, she spent the night with "one uncle at Theog". Next day, at about 6 am, when she came to the Bus Stand, she met the accused (Bihari Lal), who stated his name as Rajinder Kumar. On the pretext that he would get her married, he took her to "Bilaspur", where she spent the night with him in a hotel, where he subjected her to sexual assault. Following morning, Bihari Lal spoke with one boy on telephone and soon he came with his parents, when Bihari Lal asked her to leave with them. Next six days, she spent with them but was brought to Gumma and asked to obtain the school leaving certificate, but soon they went away. Accused Bihari Lal took her with himself by alluring that he would get her married and handed her custody to Sandeep and his parents. During investigation, police took her to Bilaspur, for identification of the place, where she had spent the night with accused Bihari Lal and thereafter to Hamirpur for identification of the house of accused Sandeep. She claims to have identified the accused before the police. Well, that is all she states in her examination-in-chief part of the testimony.

18. She is categorical that though she was called by the police several times, but her statement was recorded only once. Now significantly, except for statement (Ex.PW-14/A) there is no other proven statement of the prosecutrix on record.

19. The question, which arises for consideration is as to how did the police reach to Bihari Lal and who disclosed that he in fact is Rajinder Kumar. The answer, to some extent, lies

in the cross-examination part of the testimony of the prosecutrix and that of the Investigating Officer (PW-22).

20. Prosecutrix states that she identified the accused before the police. The Investigating Officer states that at the time of such identification, accused Bihari Lal was already in the Police Station. Again, the question needs to be reiterated is how is it that police reached to this accused and called him to the Police Station, for it is nobody's case that Rajinder/Bihari was otherwise present in the Police Station.

21. Events unfurling from the testimony of the Investigating Officer are to the effect that with the lodging of the complaint by the prosecutrix on 13.4.2012, he took over the investigation. By tracing the location of the prosecutrix from her call records, which are not placed on record, he travelled first to Bilaspur and then to Hamirpur. Investigation revealed that Bihari Lal had subjected the prosecutrix to sexual assault in Hotel Banyal at Bilaspur. As such, Bihari Lal was called to Police Station, Kotkhai, where he was identified by the prosecutrix on 15.4.2012, and arrested same day. But the version about the date of such identification stands materially contradicted by the father of the prosecutrix (PW-15), who, in no uncertain terms, states that on 12.4.2012, when prosecutrix was brought home, matter was immediately reported to the police at Police Station, Kotkhai and that prosecutrix identified accused Bihari Lal on 12.4.2012 at 6 p.m., in the Police Station. Such version also stands materially corroborated by Roshan Deen (PW-3), uncle of the prosecutrix.

22. To be doubly sure that there is no typographical error in the recording of the date as 12.4.2012, we cross-checked the statements of the witnesses so recorded in the vernacular language. It is certainly not a typographical error. In any event, the fact that prosecutrix identified the accused in the Police Station on 12.4.2012 also stands corroborated by Roshan Deen as also Mehboob, who, in no uncertain terms, state that it was the police who brought the prosecutrix from the school and the very same day, the matter was reported to the police, by visiting the Police Station.

23. It is a settled principle of law that if the testimonies of the witnesses were to inspire confidence, identity of the accused in the Court itself can be considered to be an established fact. (*Satwantin Bai v. Sunil Kumar and another,* (2015) 8 SCC 478).

24. However, in the instant case, one cannot forget that no Test Identification Parade was ever got conducted by the police. It may not have been necessary, but for the fact that the name of the person and his description, in terms of age, so disclosed by the prosecutrix in her statement (Ex.PW-14/A), is totally different and other than the present accused. Record does not reveal as to whether "Rajinder Kumar" and "Bihari Lal" are one and the same person. That "Bihari Lal" impersonated himself as "Rajinder" is only the stand of the Investigating Officer and he admits that prosecutrix was personally not known to the accused.

25. The issue, therefore, which arises for consideration is as to how did the police reach to accused Bihari Lal, by concluding that he and Rajinder are one and the very same person.

26. It is a matter of record that the Investigating Officer had not obtained the tower location of the phone used by Bihari Lal. Why so? is not clear. Be that as it may, his admission is also categorical to the effect that the tower location of the cell phone used by the prosecutrix did not reflect any presence at Bilaspur. Judicial notice can be taken of the fact that Bilaspur and Hamirpur are two distinct and different places and at a distance of approximately 60 kms. None of the witnesses have disclosed, in Court, the relationship or proximity of Bihari Lal with the other accused persons. Also, who disclosed the identity of Bihari Lal to be the very same person who took the prosecutrix from Theog to Bilaspur/ Hamirpur is not clear. It has also not come in the testimony of the Investigating Officer, prosecutrix and her father, that during the course of investigation on way to Bilaspur and then Hamirpur, either of the co-accused had first disclosed that Bihari Lal is the very same person, who handed over custody of the prosecutrix to them. One cannot ignore the version of the Investigating Officer as also the prosecutrix that from

Kotkhai, police first went to Bilaspur and then to Hamirpur and only on return from there did they collect papers from the owner of the hotel.

27. On the basis of case diaries of the Investigating Officer, it is vehemently contended by the Learned Additional Advocate that the accused were in touch with each other. Since Sandeep was to get married, his parents had requested accused Bihari Lal to look for a suitable match. Finding the prosecutrix, he got in touch with them and handed over her custody to them. But, significantly there is no evidence to such effect. It is also not the prosecution case. Witnesses are conspicuously silent with regard to the same.

28. It is a settled principle of law that case diary is per se not evidence. It is no more than an aid and that too for a limited purpose, which in the instant case would be of no use, for the simple reason that the Investigating Officer never came to be confronted with the same, nor was any opportunity afforded to the accused, for confronting the Officer with the same. (*Shamshul Kanwar v. State of U.P.*, (1995) 4 SCC 430; and *Sidhartha Vashisht alias Manu Sharma v. State (NCT of Delhi)*, (2010) 6 SCC 1).

29. At this juncture, we may only observe that record pertaining to the telephonic conversation inter se the accused, so produced through the testimony of Minoo Rana (PW-10) and Shashi Kant Verma (PW-11), is without proper authorization, as is so required under Section 65A of the Indian Evidence Act. It is not admissible evidence. In any event, it only establishes link between accused No.1 (Bihari Lal) and accused No.3 (Sandeep Kumar). There is no record pertaining to the call log of the phone used by the prosecutrix, her parents or Sanju.

30. As on 13.4.2012, prosecutrix had not revealed the description of the place or the hotel, where she spent the night with the accused on 5.4.2012. The Investigating Officer states that he reached Bilaspur in the morning of 15.4.2012 at 8.30. Prior to this date, no supplementary statement of the prosecutrix, ever came to be recorded. It is not the case of prosecution or that of the prosecutrix, that she was familiar with the area or terrain. Then how is it that police first went to Bilaspur, for in the complaint (Ex.PW-14/A), prosecutrix had stated the name of the place as "Hamirpur". It is also not their case that on way to Hamirpur, prosecutrix was able to identify the place, i.e. Bilaspur or the hotel.

31. But then, these factors have not totally weighed with us in arriving at a conclusion, other than the one trial Court has held.

32. To us, version of the prosecutrix itself is found to be uninspiring in confidence. No doubt, she is minor but then, to us she appears to be a courageous, bold and socially compatible person. She does not appear to be a rustic, gullible villager. She fully understands the consequences of her actions.

33. Her version that she went to Theog, on the asking of Sanju, whom she claims to be her classmate and known to her for the last 3-4 months, stands materially contradicted by the very same person, i.e. Sanjay Kumar @ Sanju (PW-20), who is categorical that prosecutrix is not known to him, save and except for one single conversation, which he had had with a girl, on 1.4.2012, who had disclosed her name as Priya, whom, in any case, he had not known. This girl had told him that she was in love with him, to which he responded that he was not even known to her, hence where was the question of any love. The very same girl, again contacted him on 4.4.2012, desiring to meet him at Theog Bus Stand, where he went. The girl is the prosecutrix. After meeting her, he asked her to go home.

34. Further, version of the prosecutrix that she spent the night in the house of her uncle at Theog is not only self contradictory, but also stands materially contradicted by the person, namely Khema Nand Brakta (PW-2), with whom she had spent the night of 4.4.2012. In her examination-in-chief, she refers to him as her uncle, but in the cross-examination states that he was known to her. Yet lateron, she goes on to state that he was not her relative and that he was a Hindu. On the other hand this witness (PW-2) states that on 4.4.2012 at about 7.15 p.m., when he enquired from a girl sitting alone on the bench at Bus Stand, Theog, she disclosed that

she was waiting for her brother who was to come from Shimla. On her request, he made her spend the night with him in his house and the following day, she left at 6 a.m. Further, when we peruse her first statement, which the prosecutrix got recorded with the police, she is categorical of having spent the night with "someone known to her", which fact stands materially contradicted by Khema Nand Brakta, who, in no uncertain terms, states that he was not knowing the girl from before. In fact, uncontrovertedly he deposes of having learnt from the police that the girl (prosecutrix) had not only disclosed her name incorrectly but also lied that her brother, purportedly staying at Shimla, was to come to Theog that evening.

35. At this juncture, we may take note of admission of the prosecutrix that she was in the company of Sanju till 5 O'clock and that even thereafter, buses to her village were available. But, why is it that she did not return home, more so when advised, remains unexplained. All these, not being minor contradictions, render her version to be absolutely uninspiring in confidence.

36. Her further version of accused Bihari Lal having induced her to travel with him, on the pretext of getting her marriage solemnized, cannot be said to be inspiring in confidence. Firstly, she disclosed the name of the person as Rajinder, aged 40 years, whereas age of the accused at the time of commission of alleged offence was approximately 70 years. She does not state as to with whom the marriage was to be solemnized. Her version of having travelled with a stranger, whose particulars are also not known to her, appears to be unbelievable, more so in the light of her earlier version of having travelled to Theog, on the asking of her alleged acquaintance, who was a young boy of 27 years, to whom she had already expressed her affection and love. Hence, her statement on this count is also uninspiring in confidence.

37. It is not the case of the prosecution that accused was indulging in the trade of human trafficking or made any material promise, alluring the prosecutrix of getting her married to a person of particular standing or stature in the society.

38. Her further version that in the night of 5.4.2012, she was subjected to sexual assault by accused Bihari Lal in a hotel at Bilaspur is also uninspiring in confidence. It is not her case that threats of any nature were ever extended to her or that she was frightened or under intimidation or fear. She is categorical that the hotel is located in a residential area. She raised no hue and cry. She chose not to resist the alleged overt acts. She wants the Court to believe that in the hotel workers were present, yet chose not to report the incident to anyone of them. Her version that she was not allowed to leave the hotel is only an exaggeration, for such fact not to have been recorded in her previous statement (Ex.PW-14/A), with which she was confronted.

39. It is not a case of consent, but that of the testimony of witness, on this count, not worthy of credence, rendering her testimony to the uninspiring in confidence.

40. Further, she chose not to disclose the incident either to the boy, with whom her marriage was to be solemnized, or his parents. She spent more than 5/6 days with them and travelled all the way back to Gumma for obtaining the school leaving certificate, yet remained silent, not revealing anything. She herself, as is so revealed by her father, had taken the school leaving certificate, establishing proof of age. Even in school she did not reveal anything. Also, her father is categorical that she did not narrate the incident of rape to him, but to his wife, who incidentally remains unexamined in Court.

41. At this juncture, we may also take into account testimony of Roshan Deen (PW-3), who states that prior to 15.4.2012, prosecutrix never disclosed to him that she had been subjected to sexual assault, nor was he aware of such fact. However, one cannot ignore the fact that presence of this very person is recorded in statement (Ex.PW-14/A) dated 13.4.2012, which led to the registration of the FIR, the very same day, wherein it is categorically recorded that one "Rajinder" "aged 40 years" had subjected her to sexual assault in a hotel at "Hamirpur".

42. Further, in her initial complaint, prosecutrix did not disclose that she spent 5/6 days in the house of relative of accused Sandeep. It came to be disclosed by her only in Court.

To such effect, there is testimony of Chanchala Devi (PW-21), who simply states that one girl, who disclosed her name as 'X' (real name not revealed), aged 16-17 years, spent 5/6 days with her. It is not the case of prosecution that in fact prosecutrix is 'X'. Also, prosecutrix was not got identified from this witness.

43. While contending that the evidence, more particularly that of the prosecutrix, with dissection, totally inspiring confidence and corroborating the prosecution version, on the aspect of guilt of Bihari Lal, learned Additional Advocate General invites our attention to the decisions rendered by the apex Court in *Kamla Kant Dubey v. State of Uttar Pradesh and others*, (2015) 11 SCC 145; and *State of Karnataka v. Suvarnamma and another*, (2015) 1 SCC 323.

44. We have carefully gone through the ratio of law laid down therein. As a proposition of law, there cannot be any dispute, but the whole question which arises for consideration, is as to whether testimony of the prosecutrix vis-à-vis conduct of accused Bihari Lal is inspiring in confidence or not. We have already, in detail, discussed the manner in which we have found her version to be otherwise.

45. Prosecutrix got identified the hotel where she was subjected to sexual assault, but then, save and except her testimony, which we do not find to be worthy of credence, there is nothing on record to prove such fact.

46. Also, for establishing the fact that Bihari Lal spent the night with the prosecutrix in the hotel at Bilaspur, attention is invited to the testimony of Vijay Kumar (PW-19), owner of the hotel, where the alleged sexual assault took place. Significantly, he does not identify the prosecutrix to be the very same girl, by the name of 'X' (real name not revealed), who allegedly spent the night with one Bihari Lal, entry pertaining to which is recorded in Register (Ex.PW-15/A), so maintained by him. His testimony as also the record, allegedly maintained by him, is also not free from blemish. His version of maintaining six rooms hotel, all by himself, by not employing anyone else, stands materially contradicted by the prosecutrix. That apart, whether 'X' (real name not revealed), whose name is reflected at Serial No.13 of the entry, is the prosecutrix, remains unproven. Initially, he claims to have himself recorded the entries in the register, but when confronted, admitted entries No.8 to 12 to have been made by someone else. Hence, it cannot be said, with certainty, that the entry in question, is either scribed by this witness or that signatures of the hirer of the room are that of accused Bihari Lal.

47. On this issue, while relying upon *Paulmeli and another v. State of Tamil Nadu through Inspector of Police*, (2014) 13 SCC 90, it is contended on behalf of the State that no question about the same came to be put to the prosecution witnesses by the accused. Well, then it is for the prosecution to have established its case, beyond reasonable doubt, and not the other way round. Prosecution has to link all the established facts. Observation made by the Court in Para-16, to which our attention is invited, is, entirely in a different context, where the accused wanted the Court to believe a fact which never came to be put to the expert in the witness box.

48. Significantly, father of the prosecutrix had himself lodged a missing report. This was on 6.4.2012. Outcome of such report and the investigation conducted, if any, thereupon remains a shrouded mystery. Though such fact shall have no bearing, but the fact of the matter, is as is so disclosed by Roshan Deen that police got to know about the whereabouts of the prosecutrix, for they brought her back from the school at Gumma.

49. It has come in the testimony of the prosecutrix that her father was literate. Undisputedly, when there was no pressure on the prosecutrix or her parents or uncle from any quarter, then what was the reason for lodging the FIR after a gap of one day, remains unexplained on record. Such fact acquires significance in view of uncontroverted and clear version of Mehboob (PW-15) that the accused stood identified by the prosecutrix in the police station on 12.4.2012 at 6 p.m. Significantly, on 13.4.2012, she did not disclose the name of the accused as Bihari Lal. Mehboob admits the name of the person disclosed to him by the prosecutrix was Rajinder. Certainly, it was not Bihari Lal.

50. It is a settled principle of law that delay cannot be a ground for disbelieving the testimony of the prosecutrix. The apex Court in *State of Himachal Pradesh v. Sanjay Kumar alias Sunny*, (2017) 2 SCC 51 has elaborately dealt with the manner in which testimony of the prosecutrix and that too a minor, is required to be appreciated by the Courts. Entire matter is to be examined in the backdrop in which the offence came to be committed, by taking into consideration the realities of life, which prevail in the Indian social milieu. Testimony of the victim, in cases of sexual assault itself inspires confidence. And unless there are compelling reasons, which necessitate corroboration, Courts should find no difficulty in accepting such version in convicting the accused on such solitary evidence. Only if Court finds it difficult to accept her version, it can seek corroboration from some evidence, lending assurance to the same. It further clarified that seeking corroboration to an otherwise inspiring statement would only amount to adding insult to an injury. Victim of rape is not an accomplice and her evidence can be acted upon without corroboration. She stands at a higher pedestal than any other injured witness. But then, it stands clarified that "no doubt, her testimony has to inspire confidence".

51. In the instant case, on several counts and for various reasons, assigned supra, we have found the testimony of prosecutrix to be wholly and fully uninspiring in confidence, even qua the alleged acts attributed to accused Bihari Lal. Even otherwise, by way of corroboration, there is nothing on record to substantiate such fact.

52. It is next contended that defect in the investigation would ipso facto not vitiate trial and singularly, be a reason good enough, to acquit the accused. To such effect, our attention is invited to the decisions rendered by the apex Court in. *Suvarnamma (supra)*; and *V.K. Mishra and another v. State of Uttarakhand and another*, (2015) 9 SCC 588.

53. Even on this proposition of law, there cannot be any dispute. We have, in our earlier part of the judgment, already observed that our view, in arriving at a different conclusion, is not based on the illegality or irregularities committed by the Investigating Officer during the course of investigation, more particularly with regard to non-conduct of the Test Identification Parade or not placing on record the call details of the mobile phones so taken into custody by the Investigating Officer, or not taking into possession the mobile phone of the prosecutrix, but on the fact that the genesis of the prosecution story remains unproven on record by leading evidence worthy of credence.

54. It is in this backdrop, we find the Court below not to have correctly and completely appreciated the testimony of the prosecution witnesses. The Court below seriously erred in coming to the conclusion that testimony of the prosecution witnesses remained unshattered during the course of cross-examination. In fact, we find the Court below not to have discussed the evidence at all. It presupposed and presumed correctness of the prosecution story and as such proceeded with such assumption. Testimony of the witnesses was accepted as a gospel truth. There is no appreciation or analysis. The Court below erred in holding the abstract of register (Ex.PW-15/A) to have been proven as evidence, worthy of credence. It presumed the signatures hereupon were that of accused Bihari Lal and 'X' (identity not revealed) was the prosecutrix, who spent the night in the hotel. The court below found the version of the witnesses against the other accused to be not "much serious". It did not deal with the aspect of proper identity of the person who allegedly took the prosecutrix from Theog. It did not deal with the contradictions in the version of the prosecutrix. Perhaps, what weighed with the Court was the fact that prosecutrix had no reason to falsely implicate the accused, but then, this fact alone cannot be a reason to convict the accused, on the basis of mere suspicion, more so in the absence of any credible evidence.

55. Yes, prosecutrix is a minor and the Courts while dealing with cases of sexual assault have to deal with the statements of the witnesses with sensitivity, but then Court also cannot ignore the contradictions which are glaring, rendering the version to be absolutely uninspiring in confidence, bordering falsehood.

56. Thus, findings of conviction and sentence, returned by the Court below, cannot be said to be on the basis of any clear, cogent, convincing, legal and material piece of evidence, leading to an irresistible conclusion of guilt of accused Bihari Lal.

57. Hence, for all the aforesaid reasons, the appeal is allowed and the judgment of conviction and sentence, dated 20.1.2016/25.2.2016, passed by Additional Sessions Judge-cum-Special Judge (CBI), Shimla, Himachal Pradesh, in Sessions Trial No.33-T/7 of 2013/12, titled as *State of H.P. v. Bihari Lal and others* is set aside and accused Bihari Lal is acquitted of the charged offences. He be released from jail, if not required in any other case. Amount of fine, if deposited by the accused, be refunded to him accordingly. Release warrants be immediately prepared. Appeal stands disposed of, so also pending application(s), if any.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

General Manager, Northern Railway. ...Appellant.

Versus

Surinder Kumar & others. ...Respondents.

RFA No. 599/2011 & CO No.150/2012 a/w RFAs No.601/2011, 602/2011, 603/2011 & CO No.151/2012 and RFA No.604/2011 & CO No. 152/2012.
Date of Decision: March 9, 2017.

Land Acquisition Act, 1894- Section 18- Land was acquired for the construction of Railway Line – collector determined the market value – a reference was made and reference Court re-determined the market value at the rate of Rs.75,000/- per kanal irrespective of classification and category – aggrieved from the award, present appeal has been filed- held, that exemplar award pertains to the same acquisition wherein the reference court had re-determined the market value @ Rs.75,000/- per kanal irrespective of classification – the acquired land is similar to the land forming the subject matter of the exemplar award – exemplar sale deeds also pertain to the sale of land in the same Village and can be taken into consideration for determining the market value- hence, the compensation enhanced from Rs.75,000/- per kanal to Rs. 82,500/- per kanal– appeal allowed. (Para-7 to 16)

Cases referred:

Ravinder Narain and another versus Union of India (2003) 4 SCC 481

Rishi Pal Singh and others versus Meerut Development Authority and another, (2006) 3 SCC 205

For the Appellants: Mr. Rahul Mahajan, Advocate, for the appellant(s)-Northern Railways/Non objector.

For the Respondents: Mr.Ajay Kumar, Sr. Advocate with Mr.Dheeraj K. Vashista, Advocate, for the private respondent(s)-Objector.

M/s R.S. Verma and R.M. Bisht, Additional Advocate Generals for the respondent-State/Non objector.

The following judgment of the Court was delivered:

Sanjay Karol, J (oral).

In all these five appeals, so filed under Section 54 of the Land Acquisition Act, 1894 (hereinafter referred to as the Act), beneficiary seeks review of award dated 28.02.2011, passed by Additional District Judge, Fast Track Court, Una, District Una H.P., in L.A.C. Petition

No.14/2005 RBT 33/05/05, titled as *Sat Parkash (deceased through L.Rs) Versus The Land Acquisition Collector, Railways & others,* alongwith other connected matters, filed by the various claimants under Section 18 of the Act.

2. It is a matter of record that in terms of common impugned award, seven land reference petitions, came to be decided. It is also a matter of record that claimants, aggrieved of the impugned award, have also filed cross-objections.

3. Certain facts are not in dispute. For public purpose, namely, construction of Nangal-Talwara railway line, land situate in village Basal, Tehsil and District Una, came to be acquired. In the instant case, acquisition proceedings for 5-62-01 hectares of land came to be commenced with the publication of notification dated 15.02.2001, so issued under Section 4 of the Act. The Collector Land Acquisition determined the market value, in terms of its award dated 14.09.2001, so issued under Section 11 of the Act, in the following terms:-

Sr.No.	Kind of land	Cost per Kanal.
1.	Chahi	49216-00
2.	Do Fasli Abbal	45500.00
3.	Ek Fasli Abbal & Do Fasli Doam	28219.00
4.	Ek Fasli Doam	18156.00
5.	Banjar Kadim Jadid	1313.00
6.	Kharkana	5460.00
7.	Gair Mumkin Abadi	-
8.	Other Gair Mumkin	1313.00

4. Land owners, dissatisfied with the determination of correct and true market value of the land filed reference petitions under Section 18 of the Act, which came to be decided in terms of the impugned award. The Reference Court, while rejecting the exemplar sale deeds, so produced on record by the land owners as also the beneficiary, re-determined the market value of the acquired land, by taking into account the exemplar award (Ex.PX), @ 75,000/- per Kanal irrespective of its classification and category. [1 Kanal = 0.049 hectares = 12010 square yards].

5. The challenge to the award, respectively, is two fold: (a) compensation determined is on the higher/lower side; and (b) Reference Court erred in ignoring the exemplar sale deeds. In any case, award (Ex.PX) could not have been made basis for determining the market value.

6. It is a matter of record that entire land stands fully utilized for the public purpose.

7. Award (Ex.PX) pertains to the land acquired for the very same acquisition purpose, commencing in the year 2001. 0-17-56 hectares of land situate in Up-Mohal Kaswa, Mohal Basal, District Una, came to be acquired with the issuance of notification dated 09.07.2001. Noticeably, market value of this land came to be determined by the Collector Land Acquisition classification wise ranging from Rs. 1558/- to Rs. 58,413/-. However, the Reference Court re-determined the market value @ Rs. 75,000/- per Kanal irrespective of its classification and category.

8. Now when one examines the testimonies of the claimants' witnesses, and more specifically that of Naresh Kumar (PW.5) and Sada Ram (PW.6), one finds them to have deposed that the market value of the acquired land was much more and in any case, their land is somewhat similar to that of the exemplar land. Hence, Reference Court could have relied upon the said exemplar award.

9. It is a matter of record that beneficiary had also produced another exemplar award (Ex.RX) which rightly stands rejected by the Reference Court, for market value in terms thereof, came to be determined @ Rs. 25000/- per Kanal, which in any event is far less than what stands determined by the Collector Land Acquisition in the instant case.

10. This now takes us to the issue as to whether Reference Court was right in rejecting the exemplar sale deed so produced on record by the beneficiary. The only reason assigned for not considering the same, being that they pertain to "very small piece of land". The issue as to whether small transaction can be factored for determining the true and correct market value of the acquired land or not now stands well settled. It is no longer *res integra.*

11. The Apex court has reiterated that there is no bar for considering exemplars pertaining to small transactions of sale subject however the Court takes into account the various attending plus and minus factors. [*Ravinder Narain and another versus Union of India* (2003) 4 SCC 481 and *Rishi Pal Singh and others versus Meerut Development Authority and another,* (2006) 3 SCC 205]

12. Of course Court has to consider the evidence, so led by the parties with regard to its genuineness and similarity vis-a-vis its nature, use and potential.

13. Now exemplar sale deeds (Ex.PW.1/B, Ex.PW.1/C, Ex.PW1/D & Ex.PW.1/E) pertain to the very same village whereby land came to be sold for a sum of Rs. 70,000/- to Rs. 1,00,000/-. It has come on record that through the testimonies of the vendor and the vendee (Lekh Raj, PW-7, Kehar Singh, PW-8, Ganesh Chand, PW-9 and Mool Raj, PW-10) as also the scribe (Nanak Chand, PW-2, Rajinder kumar, PW-3 and Kamal Nabh, PW-4) that the exemplar lands and more particularly that of sale transaction (Ex.PW.1/C), so executed on 10.8.1998 is similar to that of the acquired land.

14. At this stage learned counsel for the claimants contends that even if amount to the extent of 10%, than what stands awarded by the Reference Court, is enhanced, their clients shall not press for any higher claim(s).

15. No doubt, exemplar sale deed (Ex.PW.1/C) is a small parcel of land and such factor is to be considered while determining the market value, for necessary deduction is required to be made, by taking into account the entire attending circumstances, peculiar to the instant case, as is borne out from the evidence led by the parties, it would be only just, fair and reasonable that the amount in question is enhanced from Rs. 75,000/- per kanal to Rs. 82,500/- per kanal. Noticeably the extent of the acquired land is not much and the amount enhanced, including the component of interest, would not be substantial, effecting the outcome of other land reference cases, which may be pending before various Courts, for it stands clarified that enhancement in the instant case, is based on the evidence available on record and the peculiar facts and circumstances of the case.

16. As such, impugned award dated 28.02.2011, passed by Additional District Judge, Fast Track Court, Una, District Una H.P., in L.A.C. Petition No.14/2005 RBT 33/05/05, titled as *Sat Parkash (deceased through L.Rs) Versus The Land Acquisition Collector, Railways & others,* alongwith other connected matters, is modified only to the extent that true and correct market value of the acquired land stands re-determined @ Rs. 82,500/- instead of Rs. 75,000/- per Kanal, as awarded by the Reference Court.

17. In view of the above, these appeals as also the cross-objections, stand disposed of accordingly, so also pending application(s), if any.

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

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

Cr. Appeal No. 760 of 2008
Decided on : 9.3.2017

Indian Penal Code, 1860- Section 353-Complainant was working as Conductor in HRTC and was deputed on Kaza-Shimla route – the accused boarded the bus at Tapri – the complainant asked the accused for a ticket on which the accused started abusing the complainant and thereafter slapped him- the accused was tried and convicted by the Trial Court- an appeal was preferred, which was allowed- held that complainant and other witnesses had supported the prosecution version – the occurrence was not disputed in the cross-examination and it was suggested that the accused had apologized, which apology was accepted by the complainant – the prosecution case was proved beyond reasonable doubt and the Appellate Court had wrongly acquitted the accused- appeal allowed – judgment of Appellate Court set aside and accused convicted of the Commission of offence punishable under Section 353 of I.P.C. (Para-9 to 12)

For the Appellant: Mr. Vivek Singh Attri, Deputy Advocate General.
For the Respondent: Mr. Debinder Ghosh, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The instant appeal stands directed against the impugned judgment of 8.8.2008 rendered by the learned Sessions Judge, Kinnaur at Rampur Bushehar, H.P camp at Reckongpeo in Criminal Appeal No. 02 of 2007 whereby he while reversing the verdict recorded by the learned Chief Judicial Magistrate, Kinnaur at Reckongpeo, acquitted the respondent (for short "accused").

2. Brief facts of the case are that the Complainant Shri Khojeshwar Singh is the conductor with HRTC and on 30.11.2003 he was deputed to cater Kaza-Shimla Bus bearing No. HP-25-0763. Shri Neel Kamal was the driver of the bus. At about 9.00 p.m when the aforesaid bus was reached Tapri stop accused boarded the bus. When the bus reached near Piwa Stone Crusher plant the complainant asked the accused for tickets, the accused started quarrelling with him and then slapped him. In this assault, the bag containing cash and tickets held by the complainant fell down. The driver of the bus drove the vehicle back to the Police Post, Tapri where the complainant informed the Choki incharge about the incident. On the complaint, the matter was sent to the police station, Bhawanagar for registration of the case and FIR stands registered. 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. Notice of accusation stood put to the accused by the learned trial Court qua his committing an offence punishable under Section 353 of the Indian Penal Code to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 6 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 claimed false implication. However, he did not choose to lead any evidence in defence.

5. On an appraisal of evidence on record, the learned trial Court returned findings of conviction qua the accused. In an appeal preferred therefrom by the respondent herein before

the learned First Appellate Court, the latter Court while reversing the verdict recorded by the learned Chief Judicial Magistrate, Kinnaur at Reckongpeo, acquitted the respondent.

6. The learned Deputy Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned first Appellate 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 standing replaced by findings of conviction.

7. The learned counsel appearing for the respondent/accused has with considerable force and vigor contended qua the findings of acquittal recorded by the learned first Appellate Court 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. The accused occupied bus bearing registration No.HP-25-0763 bound from Kaza to Shimla. The FIR embodied in PW-6/A encloses therewithin a narrative qua the relevant bus whereon, the complainant stood engaged as a conductor, arriving at Tapri bus stop at 9 p.m. whereat some passengers on board the relevant bus alighted therefrom also thereat others boarded it, whereupon the complainant proceeded to distribute tickets to the passengers who had boarded the bus at Tapri and on his reaching seat No.2, his request to the accused to produce before him the tickets for facilitating his traveling in the bus as a passenger stood responded to by the accused by the latter proceeding to slap him.

10. The driver of the relevant bus drove it to police post Tapri whereat the complainant informed the Incharge, Police Post concerned about the incident also thereat the accused stood produced by the complainant.

11. The learned first Appellate Court on anvil of the hereinafter recorded reasons had dispelled the testimonies of the ocular witnesses to the occurrence:

(a) There occurring a delay in the lodging of the apposite FIR arising from the factum qua despite the complainant on 30.11.2003 under an application comprised in Ex.PW-1/A reporting the relevant incident to the police post concerned, the latter registering upon the version encapsulated therein, the apposite FIR embodied in Ex.PW-6/A whereupon it construed the version occurring therein to be construable to be antitimed also constrained an inference from it qua the version embodied therein standing afflicted with a vice of active premeditation or prevarication whereupon it concluded qua it standing bereft of credence especially when the illaqua Magistrate wheretowhom the apposite FIR under the provisions held in Section 157(1) Cr.P.C, provisions whereof stand extracted hereinafter, stood hence enjoined to forthwith besides with utmost promptitude since its lodging, transmitted, for thereupon constraining an inference qua it standing bereft of any taints whereas with enunciations made by the Illaqua Magistrate in Ex.PW-6/A reflecting qua his impromptly beyond 24 hours vis-à-vis the application of the complainant qua the occurrence embodied in Ex.PW-1/A, receiving a copy thereof belatedly on 2.12.2003 at 10.00 a.m., obviously stemming a derivative qua the version held therein being construable to be ante timed hence concocted thereupon rendering jettisoned the entire genesis of the prosecution case.

"157. Procedure for investigation- (1) If, from information received or otherwise, an officer in charge of a police station has reason to suspect the commission of an offence which he is empowered under Section 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report and shall proceed in person, or shall depute one of his

subordinate officers not being below such rank as the State Government may, by general or special order prescribe in this behalf, to proceed, to the spot, to investigate the facts and circumstance of the case, and, if necessary, to take measures for the discovery and arrest of the offender:

Provided that-

(a) When information as to the commission of any such offence is given against any person by name and the case is not of a serious nature, the officer in charge of a police station need not proceed in person or depute a subordinate officer to make an investigation on the spot;

(b) If it appears to the officer in charge of a police station that there is no sufficient ground for entering on an investigation, he shall not investigate the case."

The aforesaid reason, as propounded by the learned First Appellate Court, to sap the vigor of the genesis of the prosecution embodied in PW-6/A apparently staggers conspicuously with a visible display qua the defence acquiescing qua the occurrence embodied in Ex.PW-6/A, acquiescence whereof, palpably stands unfolded in the latter part of the cross-examination to which the complainant stood subjected to by the defence counsel, wherewithin upsurgings occur qua in course thereof the learned defence counsel purveying to him a suggestion couched in an affirmative phraseology holding unveilings qua the accused tendering an apology to the complainant also his beseeching him to record a compromise with him qua the relevant occurrence, suggestion(s) whereof elicited from PW-1 a response in the affirmative. With the defence hence acquiescing to the inculpatory role of the accused in the alleged occurrence thereupon the factum of any delay in recording of the apposite FIR on 1.12.2003 qua an incident which occurred on 30.11.2003 also effect(s), if any, of the apposite delay, if any, on the part of the investigating Officer to "forthwith" since the preferment by the complainant of an application held in Ex.PW-1/A, register an FIR besides in sequel thereto "forthwith" make dispatch of its copy to the Illaqua Magistrate besides concomitant taints beclouding the version encapsulated in the FIR, are all in their entirety rendered inconsequential. Also thereupon the identity of the accused in the relevant occurrence stands invincibly established. Moreover, an inference qua the identity of the accused standing firmly established stands enhanced by the factum of the learned defence counsel while holding to PW-1 to cross-examination not concerting to falsify the version embodied in the FIR qua after the relevant inculpatory incident occurring inside the bus wherein an incriminatory role stands ascribed qua the accused, the driver of the relevant bus, maneuvering it to police Post Tapri also thereat the informant producing the respondent before the Incharge of the Police post concerned.

Be that as it may, even if minimal contradictions or embellishments sprout inter-se the version embodied in application borne on Ex.PW-1/A vis-à-vis PW-6/A also with PW-1 deposing qua in the relevant incident, his coat begetting tearing whereas the torn coat of the informant remained un-produced before the police thereupon rendering purportedly prevaricated the version propounded in the FIR also cannot ipso facto belie the effect of the relevant acquiescence(s) aforesaid made by the defence.

(b) The learned First Appellate Court pronounced an order of acquittal upon the respondent for lack of proof qua his at the relevant time of occurrence standing not proven to be inebriated. Even though proof qua the aforesaid factum remains un-adduced, comprised in the apposite report pronouncing upon the inebriated condition of the accused at the relevant time, standing not adduced by the P.P concerned before the learned trial Court, nonetheless insistence of proof qua the

aforesaid factum was neither necessary nor warranted its elicitation from the prosecution, nor proof or non proof thereof weans the effect of the aforesaid acquiescences made by the defence qua the accused slapping the complainant significantly when it stood not reared as a defence within the ambit of the statutory exceptions to criminal liability.

12. The crux of the above discussion is that the appeal is allowed and the impugned judgment rendered by the learned first Appellate Court whereby it recorded findings of acquittal qua the accused stands reversed and set aside and the judgment of conviction and sentence pronounced by the learned trial Court is maintained and affirmed. Accordingly, the respondent/accused stands convicted for the offence punishable under Section 353 of the Indian Penal Code. The judgment of the learned trial Court in its entirety be forthwith put into execution. Records be sent back forthwith.

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

Dila Ram ...Appellant.

Versus

Rekha Devi and others ...Respondents.

FAO No. 119 of 2012
Reserved on: 03.03.2017
Decided on: 10.03.2017

Motor Vehicles Act, 1988- Section 166- Deceased was a driver by profession- he was earning Rs.6,000/- per month – claimants are three in number- 1/3rd is to be deducted towards personal expenses of the deceased- thus, the claimants have sustained loss of dependency of Rs. 4,000/- per month- the deceased was aged 29 years at the time of accident – Tribunal had wrongly applied multiplier of 17 and multiplier of 16 was applicable- thus, claimants are entitled to Rs. 4,000 x 12 x 16= Rs. 7,68,000/- under the head loss of dependency – the deceased was taken to CHC, Ratti, thereafter to Zonal Hosiptal, Mandi from where he was referred to PGI– he succumbed to his injuries- the compensation awarded towards cost of attendant to the tune of Rs. 21,000/-, cost of medicine and transportation to the tune of Rs. 40,000/- is meager but is maintained – claimants are also held entitled to Rs. 10,000/- each under the heads loss of consortium, loss of estate, loss of love and affection and funeral expenses- thus, claimants are entitled to Rs. 7,68,000 +21,000 + 40,000 + 10,000+ 10,000 + 10,000+ 10,000 = Rs. 8,69,000/- along with interest. (Para- 28 to 35)

Cases referred:

Dulcina Fernandes and others vs. Joaquim Xavier Cruz and another, (2013) 10 Supreme Court Cases 646

Bimla Devi & Ors. versus Himachal Road Transport Corpn. & Ors., 2009 AIR SCW 4298

N.K.V. Bros. (P.) Ltd. versus M. Karumai Ammal and others etc., AIR 1980 Supreme Court 1354

Vinobabai and others versus K.S.R.T.C. and another, 1979 ACJ 282

Himachal Road Transport Corporation and another versus Jarnail Singh and others, Latest HLJ 2009 (HP) 174

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

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

For the appellant: Mr. Neeraj Gupta, Advocate.

For the respondents: Mr. Bimal Gupta, Senior Advocate, with Mr. Vineet Vashisht, Advocate, for respondents No. 1 to 3.
Mr. G.R. Palsra, Advocate, for respondent No. 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

Subject matter of this appeal is award, dated 15th December, 2011, made by the Motor Accident Claims Tribunal-II, Mandi, District Mandi, H.P. (for short "the Tribunal") in MACT No. 21 of 2005, titled as Rekha Devi and others versus Dila Ram and another, whereby compensation to the tune of ₹ 8,97,000/- with interest @ 7.5% per annum from the date of filing of the claim petition till its realization came to be awarded in favour of the claimants and the respondents in the claim petition were saddled with liability (for short "the impugned award").

2. The claimants and the driver of the offending vehicle have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

3. The appellant-owner-insured of the offending vehicle has called in question the impugned award on the grounds taken in the memo of the appeal.

4. Heard learned counsel for the parties.

5. Mr. Neeraj Gupta, learned counsel for the appellant-owner-insured, argued that the vehicle in question was not involved in the accident and the claimants have failed to prove the factum of rash and negligent driving by the driver of the offending vehicle. Further argued that the amount awarded is excessive.

6. In order to determine this appeal, it is necessary to give a brief resume of the facts of the case, which have given birth to the instant appeal.

7. The claimants invoked the jurisdiction of the Tribunal under Section 166 of the Motor Vehicles Act, 1988 (for short "MV Act") for grant of compensation to the tune of ₹ 15,00,000/-, as per the break-ups given in the claim petition, on the ground that they became the victim of the vehicular accident, which was caused by the driver, namely Shri Inder Dev, while driving tractor, bearing registration No. HP-33-2405, rashly and negligently on 28th July, 2002, at place Garkotha and hit the stationary motorcycle, on which deceased-Ram Lal was travelling as a pillion rider, due to which he sustained injuries, was taken to CHC Ratti, from where he was referred to Zonal Hospital, Mandi and thereafter, was referred to PGI, Chandigarh, where he remained admitted upto 16th September, 2002. Further averred that deceased-Ram Lal again remained admitted at Zonal Hospital, Mandi, with effect from 14th October, 2002 to 22nd October, 2002, and was taken to PGI, Chandigarh on 1st November, 2002, and ultimately, he succumbed to the injuries on 14th March, 2003.

8. The claim petition was resisted by the respondents on the grounds taken in the memo of the objections.

9. On the pleadings of the parties, following issues came to be framed by the Tribunal:

> *"1. Whether late Sh. Ram Lal died on account of injuries sustained by him due to the rash and negligent driving of tractor No. HP-33-2405 at about 10.30 P.M. at place Garkotha, falling within the jurisdiction of PS Balh, being driven by respondent No. 2 as alleged? OPP*
>
> *2. If issue No. 1 is proved in affirmative, to what amount of compensation the petitioners are entitled to and from whom? OPP*
>
> *3. Whether this petition is bad for non joinder and mis-joinder of necessary parties? OPR*

4. Relief."

10. The claimants examined Shri Sanjeev Kapoor as PW-1; Dr. Harish Behl as PW-2; Dr. D.R. Sharma as PW-3, Shri Suresh Kumar as PW-4; Shri Yogender Thakur as PW-5; Shri Baldev Chand as PW-6 and one of the claimants, namely Smt. Niki Devi, herself stepped into the witness box as PW-7. The driver and owner-insured of the offending vehicle have not examined any witness, however, they themselves have appeared in the witness box as RW-1 and RW-2, respectively.

11. The Tribunal, after scanning the evidence, oral as well as documentary, has awarded compensation in favour of the claimants and saddled the owner-insured and the driver of the offending vehicle with liability in terms of the impugned award.

12. Being aggrieved, the owner-insured of the offending vehicle has filed the instant appeal.

Issue No. 1:

13. The Tribunal has held that the claimants have proved that driver, namely Shri Inder Dev, had driven the offending vehicle rashly and negligent at the relevant point of time and caused the accident. FIR, Ext. PW-4/A, was also lodged against him. He has faced the trial before the Judicial Magistrate 1st Class, Court No. 4, Mandi, H.P. (for short "the trial Court") and after facing trial, he was acquitted on the ground of benefit of doubt.

14. The standard of proof in the claim petitions is different than that of the criminal cases. It is beaten law of land that the Tribunal has to conduct the trial of the claim petitions and determine the same by adopting summary procedure.

15. The Apex Court in a case titled **Dulcina Fernandes and others vs. Joaquim Xavier Cruz and another**, reported in (**2013) 10 Supreme Court Cases 646** has laid down the same principle and held that strict proof and strict links are not required.

16. The same principle has been laid down by this Court in a series of cases.

17. A Single Judge of this Court in FAO No. 127 of 1999, titled as Bimla Devi and others versus Himachal Road Transport Corporation and others, decided on 22.08.2005, held that the claimants have to prove the case by leading cogent evidence and applied the mandate of CPC read with the Evidence Act, was questioned before the Apex Court by the medium of Civil Appeal No. 2538 of 2009, titled as **Bimla Devi & Ors. versus Himachal Road Transport Corpn. & Ors.,** reported in **2009 AIR SCW 4298,** and the Apex Court set aside the said judgment and held that strict proof is not required. It is apt to reproduce paras 2 and 12 to 15 of the judgment herein:

> *"2. This appeal is directed against a judgment and order dated 22.8.2005 passed by the High Court of Himachal Pradesh, Shimla in FAO No. 127 of 1999 whereby and whereunder an appeal preferred against a judgment and award dated 28.10.1998 passed by the Motor Accident Claims Tribunal-II [MACT (I), Nahan] in MAC Petition No. 21-NL/2 of 1997, was set aside.*
>
> *xxx xxx xxx*
>
> *12. While dealing with a claim petition in terms of Section 166 of the Motor Vehicles Act, 1988, a Tribunal stricto sensu is not bound by the pleadings of the parties; its function being to determine the amount of fair compensation in the event an accident has taken place by reason of negligence of that driver of a motor vehicle. It is true that occurrence of an accident having regard to the provisions contained in Section 166 of the Act is a sine qua non for entertaining a claim petition but that would not mean that despite evidence to the effect that death of the claimants predecessor had taken place by reason of an accident caused by a motor vehicle, the same would be ignored only on the basis of a post mortem report vis-a-vis the averments made in a claim petition.*

> *13. The deceased was a Constable. Death took place near a police station. The post mortem report clearly suggests that the deceased died of a brain injury. The place of accident is not far from the police station. It is, therefore, difficult to believe the story of the driver of the bus that he slept in the bus and in the morning found a dead body wrapped in a blanket. If the death of a constable has taken place earlier, it is wholly unlikely that his dead body in a small town like Dharampur would remain undetected throughout the night particularly when it was lying at a bus stand and near a police station. In such an event, the court can presume that the police officers themselves should have taken possession of the dead body.*
>
> *14. The learned Tribunal, in our opinion, has rightly proceeded on the basis that apparently there was absolutely no reason to falsely implicate the respondent Nos. 2 and 3. Claimant was not at the place of occurrence. She, therefore, might not be aware of the details as to how the accident took place but the fact that the First Information Report had been lodged in relation to an accident could not have been ignored. Some discrepancies in the evidences of the claimant s witnesses might have occurred but the core question before the Tribunal and consequently before the High Court was as to whether the bus in question was involved in the accident or not. For the purpose of determining the said issue, the Court was required to apply the principle underlying burden of proof in terms of the provisions of Section 106 of the Indian Evidence Act as to whether a dead body wrapped in a blanket had been found at the spot at such an early hour, which was required to be proved by the respondent Nos. 2 and 3.*
>
> *15. In a situation of this nature, the Tribunal has rightly taken a holistic view of the matter. It was necessary to be borne in mind that strict proof of an accident caused by a particular bus in a particular manner may not be possible to be done by the claimants. The claimants were merely to establish their case on the touchstone of preponderance of probability. The standard of proof beyond reasonable doubt could not have been applied. For the said purpose, the High Court should have taken into consideration the respective stories set forth by both the parties."*

18. The claimants have, *prima facie,* proved that the driver of the offending vehicle had driven the same rashly and negligently at the relevant point of time, hit the same with stationary motorcycle, due to which deceased-Ram Lal sustained injuries and succumbed to the same.

19. Moreover, the findings recorded by the Criminal Court in acquittal cannot be a ground to defeat the rights of the claimants. Even if the driver is acquitted in the criminal proceedings, that may not be a ground for dismissal of the claim petitions.

20. My this view is fortified by the judgment rendered by the Apex Court in **N.K.V. Bros. (P.) Ltd. versus M. Karumai Ammal and others etc.,** reported in **AIR 1980 Supreme Court 1354,** wherein a bus hit an over-hanging high tension wire resulting in 26 casualties. The driver earned acquittal in the criminal case on the score that the tragedy that happened was an act of God. The Apex Court held that the plea that the criminal case had ended in acquittal and that, therefore, the civil suit must follow suit, was rightly rejected by the Tribunal. It is apt to reproduce para 2 of the judgment herein:

> *"2. The Facts: A stage carriage belonging to the petitioner was on a trip when, after nightfall, the bus hit an over-hanging high tension wire resulting in 26 casualties of which 8 proved instantaneously fatal. A criminal case ensued but the accused-driver was acquitted on the score that the tragedy that happened was an act of God. The Accidents Claims Tribunal which tried the claims for compensation under the Motor Vehicles Act, came to the conclusion, affirmed by the High Court, that, despite the screams of the passengers about the dangerous overhanging wire ahead, the rash driver sped towards the lethal spot. Some lost their lives instantly;*

several lost their limbs likewise. The High Court, after examining the materials, concluded:

> *"We therefore sustain the finding of the Tribunal that the accident had taken place due to the rashness and negligence of R.W.1 (driver) and consequently the appellant is vicariously liable to pay compensation to the claimant."*

The plea that the criminal case had ended in acquittal and that, therefore, the civil suit must follow suit, was rejected and rightly. The requirements of culpable rashness under Section 304A, I.P.C. is more drastic than negligence sufficient under the law of tort to create liability. The quantum of compensation was moderately fixed and although there was, perhaps, a case for enhancement, the High Court dismissed the cross-claims also. Being questions of fact, we are obviously unwilling to re-open the holdings on culpability and compensation."

21. It is also profitable to reproduce relevant portion of para 8 of the judgment rendered by the High Court of Karnataka in a case titled **Vinobabai and others versus K.S.R.T.C. and another,** reported in **1979 ACJ 282:**

> *" 8. ..... Thus, the law is settled that when the driver is convicted in a regular trial before the Criminal Court, the fact that he is convicted becomes admissible in evidence in a civil proceeding and it becomes prima facie evidence that the driver was culpably negligent in causing the accident. The converse is not true ; because the driver is acquitted in a criminal case arising out of the accident, it is not established even prima facie that the driver is not negligent, as a higher degree of culpability is required to bring home an offence."*

22. Reliance is also placed on the judgment made by this Court in **Himachal Road Transport Corporation and another versus Jarnail Singh and others,** reported in **Latest HLJ 2009 (HP) 174,** wherein it has been held that acquittal of the driver in the criminal trial will have no bearing on the findings to be recorded by the Motor Accident Claims Tribunal whether the driver was negligent or not in causing the accident. It is apt to reproduce relevant portion of para 15 of the judgment herein:

> *"15. In view of the definitive law laid down by their Lordships of the Hon'ble Supreme Court and the judgments cited hereinabove, it is now well settled law that the acquittal of the driver in the criminal trial will have no bearing on the findings to be recorded by the Motor Accident Claims Tribunal whether the driver was negligence or not in causing the accident. ....."*

23. Learned counsel for the appellant-owner-insured argued that there was delay in lodging the FIR, thus, the claim petition was not maintainable. The argument is not tenable for the reason that the MV Act has gone through a sea change in the year 1994 and sub section (6) to Section 158 and sub section (4) to Section 166 of the MV Act have been added, whereby the Claims Tribunal can treat report of accident forwarded to it under Section 158 (6) of the MV Act as an application for compensation.

24. In the instant case, FIR was lodged, investigation was conducted and after completion of the investigation, the Investigating Officer presented the report under Section 173 of the Code of Criminal Procedure (for short "CrPC") before the Court of competent jurisdiction. After conducting the trial, the driver was acquitted on the basis of benefit of doubt.

25. Having said so, the Tribunal has rightly made the discussions in paras 20 to 22 of the impugned award. Accordingly, the findings returned by the Tribunal on issue No. 1 are upheld.

26. Before dealing with issue No. 2, I deem it proper to determine issue No. 3.

Issue No. 3:

27. Learned counsel for the appellant-owner-insured has not argued issue No. 3. However, I have gone through the record. The claim petition is not suffering from non-joinder or mis-joinder of necessary parties. Accordingly, the findings returned by the Tribunal on issue No. 3 are upheld.

Issue No. 2:

28. The claimants have pleaded that deceased-Ram Lal was a driver by profession and was earning ₹ 6,000/- per month. They have examined Shri Baldev Chand as PW-6, who has categorically stated that he has employed deceased-Ram Lal as driver with his JCB and was paying ₹ 6,000/- to him as salary. Thus, the Tribunal has rightly held that the income of the deceased was ₹ 6,000/- per month.

29. The claimants are three in number. Therefore, one-third is to be deducted towards the personal expenses of the deceased, in view of the ratio laid down by the Apex Court in the case titled as **Sarla Verma (Smt) and others versus Delhi Transport Corporation and another,** reported in **(2009) 6 Supreme Court Cases 121,** which was upheld by a larger Bench of the Apex Court in **Reshma Kumari & Ors. versus Madan Mohan & Anr.,** reported in **2013 AIR SCW 3120.** Thus, it can be safely held that the claimants have suffered loss of dependency/income to the tune of ₹ 4,000/- per month.

30. The copy of matriculation certificate of deceased-Ram Lal is on record as Mark-Y, which depicts the date of birth of deceased-Ram Lal to be 8th September, 1972. Thus, the claimants have proved that the deceased was 29 years of age at the time of the accident. The Tribunal has wrongly applied the multiplier of '17' as the multiplier of '16' is just and appropriate in view of the ratio laid down by the Apex Court in **Sarla Verma's** and **Reshma Kumari's cases (supra)** read with the Second Schedule appended with the MV Act.

31. Having said so, it is held that the claimants are entitled to compensation to the tune of ₹ 4,000/- x 12 x 16 = ₹ 7,68,000/- under the head 'loss of dependency/income'.

32. The perusal of the record does disclose that after the accident, deceased-Ram Lal was taken to CHC Ratti, from where he was referred to Zonal Hospital, Mandi and thereafter, was referred to PGI, Chandigarh, where he remained admitted upto 16th September, 2002. Further averred that deceased-Ram Lal again remained admitted at Zonal Hospital, Mandi, with effect from 14th October, 2002 to 22nd October, 2002, and was taken to PGI, Chandigarh on 1st November, 2002, and ultimately, he succumbed to the injuries on 14th March, 2003. The amount of compensation awarded towards cost of attendant to the tune of ₹ 21,000/-, cost of medicine and cost of transportation to the tune of ₹ 40,000/- is meagre, but, is maintained, as the claimants have not questioned the same.

33. The claimants are also held entitled to ₹ 10,000/- each under the heads 'loss of consortium', 'loss of estate', 'loss of love and affection' and 'funeral expenses'.

34. Viewed thus, it is held that the claimants are entitled to compensation to the tune of ₹ 7,68,000/- + ₹ 21,000/- + ₹ 40,000/- + ₹ 10,000/- + ₹ 10,000/- + ₹ 10,000/- + ₹ 10,000/- = ₹ 8,69,000/- with interest as awarded by the Tribunal and the respondents in the claim petition have to satisfy the impugned award.

35. The awarded amount be deposited within eight weeks. On deposit, the same be released in favour of the claimants strictly as per the terms and conditions contained in the impugned award after proper identification through payee's account cheque or by depositing the same in their respective bank accounts.

36. Having glance of the above discussions, the impugned award is modified, as indicated hereinabove, and the appeal is disposed of accordingly.

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

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

Gulab Singh Shandil ....Petitioner
Versus
Vidya Sagar Sharma ....Respondent

Cr. Revision No. 394 of 2015
Date of Decision 10th March 2017

Negotiable Instruments Act, 1881- Section 138- Accused had taken Rs.4 lacs for his personal requirement- he issued two cheques, which were dishonourd- a complaint was filed and the accused was convicted by the Trial Court- an appeal was filed, which was also dismissed- held, that complainant had supported his version - the dishonour was proved by the bank officials- accused admitted the issuance of cheques but stated that these cheques were issued as security – defence taken by the accused was not probablized – the Court had rightly convicted the accused and the appeal was also rightly dismissed- revision dismissed. (Para-10 to 14)

Case referred:
State of Kerala Vs. Puttumana Illath Jathavedan Namboodiri" (1999)2 Supreme Court Cases 452

For the Petitioner: Shri Vikas Chandel, vice Advocate.
For the Respondent: Shri Hamender Chandel, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J.(oral)

Instant criminal revision petition filed under Sections 397 and 401 Cr.P.C. is directed against judgment dated 7.9.2015, passed by learned Sessions Judge, Solan in criminal appeal No. 1-S/10 of 2015, affirming judgment of conviction dated 27.11.2014 recorded by learned Judicial Magistrate 1st Class, Solan, District Solan in criminal complaint No. 193/3 of 2014/10, whereby learned Court below, while holding accused/petitioner guilty of having committed an offence punishable under Section 138 of the Negotiable Instruments Act, (hereinafter referred to as the Act) convicted and sentenced him to undergo simple imprisonment for three months and to pay fine amount of Rs. five lacs as compensation to the complainant.

2. Briefly stated the facts, as emerged from record, are that respondent (hereinafter referred to as the complainant) filed a complaint under Section 138 of the Act in court of learned Judicial Magistrate 1st Class, Solan, District Solan H.P. alleging therein that since accused/petitioner had friendly relations with complainant, therefore, he, on his request, advanced Rs. four lacs to petitioner on account of his personal requirement. Complainant further alleged that accused promised the complainant that amount would be repaid in the month of January, 2010 and accordingly, with a view to discharge his liability, accused/petitioner issued two cheques bearing Nos. 964173 dated 6.1.2010 and 964172 dated 7.1.2010 amounting to Rs.2 lacs each drawn on UCO Bank, Solan Branch. However, the fact remains that on presentation of the aforesaid cheques, having been issued by accused, the same were dishonoured by Bank of Baroda vide memo dated 7.1.2010 on account of insufficient funds. Complainant, on receipt of aforesaid memo, got a legal notice issued to accused/petitioner calling upon him to make payment good qua cheques but since no payment was made by accused, complainant was compelled to initiate proceedings under Section 138 of the Act against the accused.

3. Learned trial Court, on the basis of material adduced on record by respective parties, held the accused/petitioner guilty of having committed an offence punishable under

Section 138 of the Act and accordingly, convicted and sentenced him as per description given hereinabove.

4. Accused/petitioner being aggrieved and dissatisfied with judgment of conviction recorded by learned Court below, preferred an appeal in the Court of learned Sessions Judge, Solan which came to be registered as Cr. Appeal No. 1-S/10 of 2015. Learned Sessions Judge, Solan vide judgment dated 7.9.2015 dismissed the appeal, as a result of which conviction recorded by learned Court below came to be upheld.

5. In the aforesaid background, accused/petitioner approached this Court in instant proceedings seeking his acquittal after setting aside the judgment of conviction recorded by learned Courts below.

6. This Court vide order dated 4.11.2015 suspended the substantive sentence subject to the petitioner's furnishing a personal bond to the tune of Rs.50,000/- (Rupees fifty thousand only) with two sureties in the like amount to the satisfaction of learned trial Court. Vide aforesaid order, accused/petitioner was also directed to deposit fine amount to the tune of Rs.5 lacs but same was not deposited by accused/petitioner with learned trial Court. However, the fact remains that despite order having been passed qua suspension of sentence, accused/petitioner neither furnished bail bonds nor deposited the amount of fine. Subsequently, on 18.10.2016 learned counsel representing the petitioner stated before the Court that there is possiblity of amicable settlement between the parties and accordingly, matter was adjourned for 8.11.2016 with direction to parties to remain present in Court. However, the accused/petitioner failed to appear before the Court but this Court, on vehement request having been made by learned counsel representing the petitioner, adjourned the matter for 8.11.2016 directing the petitioner to come present but he failed to appear before the court. Therefore, matter was again listed on 29.11.2016, on which date neither accused/petitioner put in appearance nor complied with order dated 4.11.2015 whereby his substantive sentence imposed by learned trial Court was suspended. Accordingly, in view of aforesaid conduct of accused/petitioner, this Court listed the instant matter for admission on 10.3.2017.

7. Mr.Vikas Chandel, learned counsel representing the petitioner, vehemently argued that impugned judgments passed by learned Courts below are not sustainable and same are not based upon correct appreciation of evidence adduced on record by respective parties and as such, same deserve to be quashed and set aside. Mr. Chandel further argued that bare perusal of evidence led by parties clearly suggests that both Courts below have miserably failed to appreciate the evidence in its right perspective. Mr. Chandel, learned counsel representing the petitioner, further contended that there is no evidence led on record by complainant that amount, if any, was advanced to accused on account of some lawful consideration. He also stated that cheques, as alleged by complainant, were issued on account of security as agreement was entered upon between the parties for sale of land. In the aforesaid background, learned counsel representing the petitioner prayed that petitioner may be acquitted from charges framed against him under Section 138 of the Act, after setting aside the judgments recorded by learned Courts below.

8. Mr. Hamender Chandel, learned counsel representing the respondent/complainant, supported the impugned judgments passed by both Courts below. While inviting the attention of this Court to judgments of conviction recorded by learned Courts below, Mr. Hamender Chandel, learned counsel, strenously argued that same are based upon proper appreciation of evidence and there is no scope of interference in the aforesaid judgments, especially in view of the concurrent findings of facts as well as law given by both Courts below. To refute the arguments addressed by learned counsel representing the petitioner, Mr. Hamender Chandel, learned counsel, invited the attention of this Court to Ext.D1 i.e. agreement to sell, allegdly executed between the parties, to demonstrate that steps, if any, for execution of sale deed, were to be taken by accused/petitioner not by complainant, who admittedly advanced Rs. four lacs to accused/petitioner after obtaining the loan from the Bank. Mr. Hamender Chandel,

learned counsel, also invited the attention of this Court to statement having been made by accused, wherein he has stated that he had issued two cheques worth Rs. two lacs each. Mr. Chandel further stated that petitioner/accused has admitted that he had accepted the amount as per Ext.D1. While concluding his argument, Mr. Hamender Chandel, learned counsel, forcefully contended that all the material points have been dealt with meticulously by learned Courts below and as such, present proceedings be dismissed and quashed. He also placed reliance on "***State of Kerala Vs. Puttumana Illath Jathavedan Namboodiri" (1999)2 Supreme Court Cases 452***, to state that this Court has very limited scope to re-appreciate the evidence especially while exercising the revisionery powers under Section 397 Cr.P.C.

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

10. During proceedings of the case, this Court had an occasion to peruse pleadings as well as evidence adduced on record by respective parties, perusal whereof clearly suggest that learned Courts below while holding petitioner guilty of having committed an offence under Section 138 of the Act have dealt with each and every subject of the matter meticulously and there is no misappreciation of evidence as alleged by learned counsel for the petitioner. Rather, this Court is convinced and satisfied that complainant by leading cogent and convincing evidence on record successfully proved on record that accused/petitioner had issued two cheques bearing Nos. 964173 and 964172, Ext.CW2/A and Ext.CW2/B amounting to Rs.2 lacs each in lieu of the amount taken by him from complainant. Complainant, while appearing before the learned trial Court as CW2, has categorically stated that he had advanced an amount of Rs. four lacs to accused on his request and accused agreed to return the same within three months in the month of September and in order to discharge such liability, accused issued two cheques Ext.CW2/A and Ext.CW2/B in favour of complainant. He further stated that he presented aforesaid cheques for collection with bank on 7.1.2010 but the same were returned unpaid vide memos Ext.CW2/D and Ext.CW2/E for want of sufficient funds in account of accused. He also successfully proved on record that after dishonouring of the cheques, he had got issued legal notice Ext.CW2/F dated 3.2.2010 calling upon accused to make payment, through registered cover vide postal receipt Ext.CW2/G as well as under receipt of postal certificate Ext.CW2/H. Cross examination conducted on this witness/complainant, nowhere suggests that accused was able to extract anything contrary to what, complainant stated in his examination in chief. CW2 Kamal Kishore official of Bank of Baroda, Solan proved the abstract of cheque returning register Ext.CW1/A and stated before the Court that two cheques were deposited in the bank by complainant for amounting to Rs.two lacs each but same were returned unpaid for want of sufficient funds in the account of accused. Record suggests that there is no cross examination of this witness by accused/petitioner and as such his statement remained unrebutted. Conjoint reading of statements of aforesaid witnesses clearly proves on record that complainant successfully proved all the ingredients of Section 138 of the Act.

11. Accused/petitioner while making statement under Section 313 Cr.P.C. admitted the issuance of cheques but stated that these were issued as a security for performance of agreement Ext.D1. This Court carefully perused Ext.D1. Perusal whereof corroborates the version putforth by complainant that he had advanced an amount of Rs. four lacs to accused/petitioner on his asking. It would be profitable to reproduce following paras of agreement Ext.D1:-

> ***"2. That the first party is in dire of money due to her family circumstances and she contacted second party to obtain loan from any nationalized bank/any financial institution amounting to Rs.4,00,000/- (rupees four lacs only) for a period of 3(three) months from the date of this agreement.***
>
> ***3. That the second party is ready and willing with the first party and he will provide Rs.4,00,000/- (rupees four lacs only) as loan from any bank on today and second party stood guarantor/surety in the said bank. For***

obtaining loan second party will pedge his FDR or any other relevant documents to the bank concerned.

4. That the first party today received Rs.4,00,000/- (rupees four lacs only) from second party/bank and the receipt of which is hereby acknowledged by the first party.

5. That the first party hereby undertakes that she will return Rs.4,00,000/- to second party within three months from the date of agreement or to the bank concerned, failing which the first party shall execute sale deed of above mentioned land in favour of second party immediately."

It clearly emerge from aforesaid affidavit that an amount of Rs. four lacs was advanced to accused/petitioner by complainant after obtaining loan from some bank. Similarly para 4 of affidavit suggests that petitioner/accused received Rs. four lacs from complainant and acknowledged the same by issuing the receipt. Most importantly, para 5 of agreement suggests that accused/petitioner agreed to return an amount of Rs. four lacs to complainant within three months from the date of agreement or to the bank concerned, failing which, reserved right to complainant to get the sale deed executed in his favour. This Court was unable to find out any record adduced by accused/petitioner suggestive of the fact that sale deed, if any, was executed between the parties persuant to agreement Ext.D1. Hence defence as taken by accused/petitioner under Section 313 Cr.P.C. was rightly not taken into consideration by learned Courts below while holding petitioner guilty of having committed an offence punishable under Section 138 of the Act.

12. Accused, while appearing as DW1, reiterated that he had handed over cheques in question to complainant as security for performance of agreement Ext.D1. He also admitted execution of agreement Ext.D1 i.e. of 26.2.2009 and he also admitted that under agreement he had obtained a sum of Rs. four lacs from complainant. However, he further stated that cheques in question were issued in favour of complainant so that complainant may not decline to perform his part of agreement and thus he has no liability to pay cheques amount to complainant.

13. DW2 Sunil Sharma, Notary Public, Solan has stated that agreement Ext.D1 was attested by him. His statement may not be relevant in view of admission of both the parties regarding execution of this agreement Ext.D1. Conjoint reading of evidence and documents placed on record clearly establish on record that complainant had advanced an amount of Rs. four lacs to accused on understanding that he would return the same within stipulated period. Similarly this Court after carefully examining the cheques Ext.CW2/A and Ext.CW2/B is convinced that these were issued by accused/petitioner towards his liability to repay the amount. Careful perusal of Ext.D1, leaves no doubt in the mind of Court, that amount as referred above was paid by complainant to accused and he in discharge of his liability issued cheques, which were ultimately dishonoured. This Court with a view to ascertain the genuineness and correctness of argument having been advanced by learned counsel for the accused/petitioner that there was no lawful consideration, carefully examined the entire evidence, which clearly suggests that there is no merit in aforesaid argument of learned counsel representing the petitioner. Bare perusal of Ext.D1, which was tendered in evidence by petitioner himself, proves on record that he had taken amount from the complainant and had issued two cheques for discharing his liability.

14. Consequently, this Court, after carefully examining the material on record, sees no illegality and infirmity in judgments of conviction recorded by learned Courts below, which are certainly based upon correct appreciation of evidence adduced by parties and as such, present petition is dismissed. Petitioner is directed to surrender himself before learned trial Court to serve out the sentence forthwith. Needless to say that order dated 4.11.2015, whereby substantive sentence was suspended, shall be vacated automatically. Record of learned Courts below be sent back along with a copy of this judgment. Petition stands disposed of including all pending miscellaneous application(s), if any.

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

Karam Singh ...Appellant.

Versus

M/S The Kangra Ex-Serviceman TPT and others ...Respondents.

FAO No. 58 of 2012
Decided on: 10.03.2017

Motor Vehicles Act, 1988- Section 166- Claimant/injured remained admitted in the Zonal Hospital w.e.f. 30th January, 2004 to 11th February, 2004- he had sustained 20% permanent disability- Medical Officer stated that injured will not be able to do heavy manual work- salary certificate shows that the income of the claimant was Rs.6,395/- per month- considering the 20% disability, it can be safely held that claimant had sustained loss of the income to the extent of Rs.500/- per month- keeping in view the age of the claimant, multiplier of 11 is just and appropriate- claimant is entitled to Rs.66,000/- (500 x 12 x 11) - compensation of Rs.6,000/- under the head cost of attendant and Rs.15,000/- under the head cost of transportation is maintained- compensation of Rs.50,000/- awarded under the head loss of amenities of life and Rs.50,000/- awarded under the head pain and suffering- claimant is also entitled to Rs.20,000/- under the head medical expenses already incurred and to be incurred in future- thus, claimant is entitled to Rs.2,07,000/- with interest @ 7.5% per annum from the date of the award till realization. (Para-7 to 19)

Cases referred:

R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others, AIR 1995 SC 755

Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another, 2010 AIR SCW 6085

Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited, 2011 AIR SCW 4787

Kavita versus Deepak and others, 2012 AIR SCW 4771

Sarla Verma and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104

Reshma Kumari and others versus Madan Mohan and another, 2013 AIR SCW 3120

Jakir Hussein versus Sabir and others, (2015) 7 SCC 252

For the appellant: Ms. Leena Guleria, Advocate, vice Mr. G.R. Palsra, Advocate.

For the respondents: Mr. Neeraj Gupta, Advocate, for respondents No. 1 to 8.
Mr. Bhunesh Pal, Advocate, for respondent No. 9.

The following judgment of the Court was delivered:

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

Subject matter of this appeal is award, dated 21st November, 2011, made by the Motor Accident Claims Tribunal-II, Mandi, District Mandi, H.P. (for short "the Tribunal") in Claim Petition No. 38 of 2004, titled as Sh. Karam Singh versus M/S The Kangra Ex-Serviceman TPT and others, whereby compensation to the tune of ₹ 40,290/- with interest @ 7.5% per annum from the date of filing of the petition till its realization came to be awarded in favour of the claimant-injured and the insurer was saddled with liability (for short "the impugned award").

2. The driver, owner-insured and the insurer of the offending vehicle have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

3. The claimant-injured has called in question the impugned award, by the medium of the instant appeal, on the ground of adequacy of compensation.

4. It is apt to record herein that the impugned award was already questioned by the insurer before this Court by the medium of FAO No. 77 of 2012, titled as Oriental Insurance Company Ltd. versus Karam Singh & others, decided on 1st August, 2014, whereby all the issues have been determined against the insurer. After noticing the said judgment, learned counsel for the insurer was directed to seek instructions for settling the claim by paying ₹ 2,00,000/- in lump-sum, failed to do so.

5. Thus, the only dispute in this appeal is – whether the amount awarded is inadequate?

6. I have gone through the record read with the impugned award and am of the considered view that the amount awarded is inadequate for the following reasons:

7. The perusal of the discharge/referral slip, Ext. PW-1/B, does disclose that the claimant-injured remained admitted at Zonal Hospital, Mandi, with effect from 30th January, 2004 to 11th February, 2004 and remained under treatment thereafter also. The disability certificate is also on the record as Ext. PW-1/A, in terms of which the claimant-injured has suffered 20% permanent disability.

8. The claimant-injured has examined Dr. Sanjeev Raj Kapoor as PW-1, who was one of the members of the Medical Board, which has issued the disability certificate, has specifically stated that due to the injury suffered by the claimant-injured, he will not be able to do heavy manual work.

9. It is beaten law of land that in an injury case, the compensation is to be awarded under pecuniary and non-pecuniary heads by making guess work.

10. My this view is fortified by the judgments made by the Apex Court in the cases titled as **R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others,** reported in **AIR 1995 SC 755, Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another,** reported in **2010 AIR SCW 6085, Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited,** reported in **2011 AIR SCW 4787,** and **Kavita versus Deepak and others,** reported in **2012 AIR SCW 4771**.

11. This Court has also laid down the same principle in a series of cases.

12. Admittedly, the claimant-injured was 49 years of age at the time of the accident and was working as a Pump Operator with I&PH Department. Because of the disability, he will not be able to perform heavy manual work. The salary certificate of the claimant-injured is on the record as Mark-A, in terms of which his income was ₹ 6,395/- per month at the relevant point of time. The claimant-injured has suffered 20% permanent disability. Thus, by guess work, it can be safely held that he has suffered loss of income to the tune of ₹ 500/- per month.

13. Keeping in view the age of the claimant-injured, the multiplier of '11' is just and appropriate in view of the Second Schedule appended with the Motor Vehicles Act, 1988 (for short "MV Act") read with the law laid down by the Apex Court in the case titled as **Sarla Verma and others versus Delhi Transport Corporation and another** reported in **AIR 2009 SC 3104,** and upheld in **Reshma Kumari and others versus Madan Mohan and another,** reported in **2013 AIR SCW 3120.**

14. Having said so, the claimant-injured has lost source of future income to the tune of ₹ 500/- x 12 x 11 = ₹ 66,000/-.

15. The Tribunal has rightly awarded compensation to the tune of ₹ 6,000/- under the head 'cost of attendant' and ₹ 15,000/- under the head 'cost of transportation', is maintained.

16. The injury suffered by the claimant-injured has shattered his physical frame and due to the said injury, he will not be able to perform heavy manual work. The Tribunal has fallen in an error in awarding compensation to the tune of ₹ 10,000/- each under the heads 'loss of amenities of life' and 'pain and sufferings'.

17. The Apex Court in its latest decision in the case titled as **Jakir Hussein versus Sabir and others,** reported in **(2015) 7 SCC 252,** while discussing its earlier pronouncements, observed that in injury cases, the compensation would include not only the actual expenses incurred, but the compensation has to be assessed keeping in view the struggle which the injured has to face throughout his life due to the permanent disability and the amount likely to be incurred for future medical treatment, loss of amenities of life, pain and suffering to undergo for the entire life etc. It is apt to reproduce paragraphs 11 and 18 of the judgment herein:

> *"11. With regard to the pain, suffering and trauma which have been caused to the appellant due to his crushed hand, it is contended that the compensation awarded by the Tribunal was meagre and insufficient. It is not in dispute that the appellant had remained in the hospital for a period of over three months. It is not possible for the courts to make a precise assessment of the pain and trauma suffered by a person whose arm got crushed and has suffered permanent disability due to the accident that occurred. The appellant will have to struggle and face different challenges as being handicapped permanently. Therefore, in all such cases, the Tribunals and the courts should make a broad estimate for the purpose of determining the amount of just and reasonable compensation under pecuniary loss. Admittedly, at the time of accident, the appellant was a young man of 33 years. For the rest of his life, the appellant will suffer from the trauma of not being able to do his normal work of his job as a driver. Therefore, it is submitted that to meet the ends of justice it would be just and proper to award him a sum of Rs.1,50,000/- towards pain, suffering and trauma caused to him and a further amount of Rs.1,50,000/- for the loss of amenities and enjoyment of life.*
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> .....
>
> *18. Further, we refer to the case of Rekha Jain & Anr. v. National Insurance Co. Ltd., 2013 8 SCC 389 wherein this Court examined catena of cases and principles to be borne in mind while granting compensation under the heads of (i) pain, suffering and (ii) loss of amenities and so on. Therefore, as per the principles laid down in the case of Rekha Jain & Anr. and considering the suffering undergone by the appellant herein, and it will persist in future also and therefore, we are of the view to grant Rs.1,50,000/- towards the pain, suffering and trauma which will be undergone by the appellant throughout his life. Further, as he is not in a position to move freely, we additionally award Rs.1,50,000/- towards loss of amenities & enjoyment of life and happiness."*

18. In view of the ratio laid down by the Apex Court in the judgment (supra), I am of the considered view that the claimant-injured is entitled to compensation to the tune of ₹ 50,000/- under the head 'loss of amenities of life' and ₹ 50,000/- under the head 'pain and sufferings'. The claimant-injured is also entitled to ₹ 20,000/- under the head 'medical expenses already incurred and to be incurred in future'.

19. Having glance of the above discussions, the claimant-injured is held entitled to total compensation to the tune of ₹ 66,000/- + ₹ 6,000/- + ₹ 15,000/- + ₹ 50,000/- + ₹ 50,000/- + ₹ 20,000/- = ₹ 2,07,000/- with interest @ 7.5% per annum from the date of the impugned award till its realization.

20. In view of the discussions made hereinabove, the amount of compensation is enhanced, impugned award is modified and the appeal is disposed of, as indicated hereinabove.

21. The insurer is directed to deposit the enhanced awarded amount before the Registry within eight weeks. On deposition, the same be released in favour of the claimant-injured strictly as per the terms and conditions contained in the impugned award through payee's account cheque or by depositing the same in his bank account after proper identification.

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

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

Neem Kala and others .....Appellants

Versus

Forest Department through Secretary Forest, to the Government of HP and another ....Respondents.

FAO (MVA) No. 430 of 2012.
Date of decision: 10th March, 2017.

Motor Vehicles Act, 1988- Section 166- Deceased was a government employee drawing monthly salary of Rs.26,886/- per month – Tribunal had deducted the family pension payable after ten years, which is not correct as family pension cannot be deducted while awarding compensation to the claimants – 1/3rd amount was deducted by tribunal towards personal expenses of the deceased, whereas 1/4th amount was to be deducted keeping in view the fact that claimants are five in number -claimants have lost source of dependency of Rs.20,000/- per month – the deceased was aged 48 years at the time of accident- multiplier of 10 was applicable – thus, the claimants have lost source of dependency of Rs.20,000 x 12 x 10= Rs. 24,00,000/- - the claimants are also entitled to Rs.10,000/- each under the heads loss of love and affection, loss of estate, funeral expenses and loss of consortium- thus, claimants are entitled to Rs.24,40,000/- along with interest @ 7.5% per annum from the date of award till realization. (Para-4 and 5)

Cases referred:

Lal Dei and others versus Himachal Road Transport Corporation and another, 2008 ACJ 1107
Sarla Verma and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104
Reshma Kumari and others versus Madan Mohan and another, 2013 AIR SCW 3120

For the appellants: Mr. Raman Sethi, Advocate.
For the respondents: Mr. Parmod Singh Thakur, Additional Advocate General with Mr. Kush Sharma, Deputy Advocate General.

The following judgment of the Court was delivered:

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

This appeal is directed against the judgment and award dated 24.7.2012, passed by the Motor Accident Claims Tribunal Shimla, HP, hereinafter referred to as "the Tribunal", for short, in MAC Petition No. 58-S/2 of 2011, titled *Smt. Neem Kala and others versus Forest Department through Secretary Forest Govt. of HP and another,* whereby compensation to the tune of Rs.10,56,000/- with cost to the tune of Rs.5000/-, came to be awarded in favour of the claimants and the Forest department was saddled with the liability, with direction to deposit the amount of compensation within 45 days from the date of impugned award failing which, respondents were directed to pay interest @ 9% per annum, for short "the impugned award", on the grounds taken in the memo of appeal.

2. Respondents-Forest Department has not questioned the impugned award on any ground, thus the same has attained the finality, so far as it relates to the department.

3. Claimants have questioned the impugned award on the ground of adequacy of compensation. Thus, the only question to be determined in this appeal is-whether the amount awarded is inadequate. The answer is in affirmative for the following reasons.

4. Admittedly, the deceased was a government employee, drawing monthly salary of Rs.26,886/- per month, as per salary certificate Ext. PW5/C, which stands duly proved and accepted by the Tribunal in paras 17 and 18 of the impugned award. The Tribunal, however, has

fallen in an error in deducting the family pension payable after the retirement, that too, after ten years, which is legally not correct. The deceased, at the relevant point of time was in service and was 48 years of age. The family pension cannot be deducted while calculating the compensation awarded to the claimants, in view of the law laid down by the apex Court in ***Lal Dei and others*** **versus** ***Himachal Road Transport Corporation and another*** reported in **2008 ACJ 1107**. It is apt to reproduce para 4 of the said judgment herein.

> *"4. It is contended by learned counsel for the appellants that while calculating the dependency, the Motor Accidents Claims Tribunal as well as the High Court committed an error in deducting the family pension amount. We find that the submission made by the counsel for the appellants is correct. The Motor Accidents Claims Tribunal as well as the High Court could not have deducted the amount of family pension given to the family while calculating the dependency of the claimants. In Helen C. Rebello v. Maharashtra State Road Trans. Corpn., 1999 ACJ 10 (SC), this court has specifically dealt with this question and said that the family pension is earned by an employee for the benefit of his family in the form of his contribution in the service in terms of the service conditions receivable by the heirs after his death. The heirs receive family pension even otherwise than the accidental death. There is no co-relation between the two and, therefore, the family pension amount paid to the family cannot be deducted while calculating the compensation awarded to the claimants. In view of this, the appeal is allowed. The order of deduction of the family pension is set aside. Accordingly, the appellants would be entitled for an amount of Rs. 10,27,000 as compensation with interest at the rate of 9 per cent from the date of the filing of the petition."*

5. The Tribunal has fallen in an error in deducting 1/3rd towards personal expenses of the deceased whereas 1/4th was to be deducted as the claimants are five in number. Thus, the claimants have lost dependency to the tune of Rs.20,000/- per month. The deceased was 48 years of age at the time accident and the multiplier applicable is "10" in view of the 2nd Schedule attached to the Act, read with ***Sarla Verma and others versus Delhi Transport Corporation and another*** reported in ***AIR 2009 SC 3104*** and upheld in ***Reshma Kumari and others versus Madan Mohan and another***, reported in ***2013 AIR SCW 3120***. Thus, it is held that the claimants have lost source of dependency to the tune of Rs.20,000x12x10= **Rs.24,00,000/-.** The claimants are also entitled to compensation under the following four heads:

(i)	*Loss of love and affection:*		*Rs.10,000/-*
(ii)	*Loss of estate*	*:*	*Rs.10,000/-*
(iii)	*Funeral expenses*	*:*	*Rs.10,000/-*
(iv)	*Loss of consortium*	*:*	*Rs.10,000/-*
		Total	***Rs.40,000/-***

In all the claimants are entitled to Rs.24,00,000/-+Rs.40,000/-=Rs.24,40,000/- with interest @7.5% per annum from the date of impugned award till its realization.

6. Accordingly, the appeal is allowed and the impugned award is modified as indicated hereinabove.

7. Respondents-Department is directed to deposit the amount within three months from today and on deposit the Registry is directed to release the same in favour of the claimants, through payees' cheque account or by depositing the same in their bank accounts, after proper identification.

8. Send down the record forthwith, after placing a copy of this judgment.

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

Oriental Insurance Company Limited ...Appellant.
Versus
Smt. Ramku and others ...Respondents.

FAO No. 193 of 2012
Decided on: 10.03.2017

Motor Vehicles Act, 1988- Section 149- Claimant had specifically pleaded and proved that deceased was working as labourer/cleaner in the offending vehicle and was travelling in the said capacity in the vehicle at the time of accident- no evidence was led to prove that the deceased was travelling in the vehicle as a gratuitous passenger – the driver had a valid licence at the time of accident – the insurer was rightly saddled with liability. (Para-8 to 10)

For the appellant: Mr. Pritam Singh Chandel, Advocate.
For the respondents: Mr. Ashok Verma, Advocate, vice Mr. Sanjeev Kuthiala, Advocate, for respondent No. 1.
Name of respondent No. 2 is deleted.
Mr. Ramakant Sharma, Senior Advocate, with Ms. Soma Thakur, Advocate, for respondents No. 3 to 8.
Respondent No. 9 already ex-parte.

The following judgment of the Court was delivered:

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

It is stated that respondent No. 2, one of the legal heirs/representatives of the owner-insured, has died during the pendency of the appeal, but other legal heirs/representatives are already on record. Thus, there is no need to bring legal representatives of deceased-respondent No. 2 on record. Accordingly, name of respondent No. 2 is deleted from the array of respondents.

2. Challenge in this appeal is to award, dated 15th October, 2011, made by the Motor Accident Claims Tribunal-I, Solan, District Solan, H.P. Camp at Nalagarh (for short "the Tribunal") in Petition No. 4-NL/2 of 2007, titled as Smt. Ramku versus Shri Ram Rakha (since deceased) through his LRs and others, whereby compensation to the tune of ₹ 4,33,000/- with interest @ 7.5% per annum from the date of filing of the petition till its realization came to be awarded in favour of the claimant and the insurer was saddled with liability (for short "the impugned award").

3. The driver, the legal heirs of owner-insured of the offending vehicle and the claimant have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

4. The insurer has called in question the impugned award, by the medium of the instant appeal, on the following grounds:

(i) That the claimant has failed to prove that the deceased was travelling in the offending vehicle as labourer/cleaner;

(ii) That the deceased was a gratuitous passenger;

(iii) That the amount awarded is excessive; and

(iv) That the claimant has earlier filed petition under Workmen's Compensation Act, 1923 (for short "WC Act"), which stands withdrawn by her, thus, is now

precluded from filing the claim petition under Motor Vehicles Act, 1988 (for short "MV Act").

5. All the aforesaid grounds are not tenable for the following reasons:

6. The claimant filed claim petition before the Tribunal for grant of compensation, as per the break-ups given in the claim petition, on the grounds taken therein. The claim petition was resisted by the respondents and the following issues came to be framed by the Tribunal:

> *"1. Whether the deceased had died in the accident on account of rash and negligent driving of the tractor by the respondent No. 2? OPP*
>
> *2. If issue No. 1 is proved in affirmative, to what amount of compensation the petitioner is entitled and from whom? OPP*
>
> *3. Whether the respondent No. 2 did not possess a valid and effective driving license at the time of accident, if so, its effect? OPR-3*
>
> *4. Whether the tractor is not a public service vehicle, if so, its effect? OPR-3*
>
> *5. Relief."*

7. Parties were directed to lead evidence. The claimant examined Shri Ramesh Verma as PW-1, Shri Basheer Mohd. as PW-3 and she herself stepped into the witness box as PW-2. It is apt to record herein that the owner-insured, the driver and the insurer of the offending vehicle have not led any evidence. Thus, the pleadings and the evidence led by the claimant have remained unrebutted.

8. The claimant has specifically pleaded and proved that the deceased was working with the offending vehicle as a labourer/cleaner and was travelling in the said capacity in the offending vehicle at the time of the accident. The Tribunal has made discussion in para 8 of the impugned award about the said factum.

9. It was for the insurer or owner-insured and driver of the offending vehicle to plead and prove that the deceased was not travelling in the offending vehicle as a labourer/cleaner, have not led any evidence, thus, have failed to discharge the onus. There is not even a single iota of evidence on record to the effect that the deceased was travelling in the offending vehicle as a gratuitous passenger. Viewed thus, it is held that the deceased was travelling in the offending vehicle as a labourer/ cleaner.

10. It was for the insurer to plead and prove that the driver of the offending vehicle was not having a valid and effective driving licence to drive the same, has not led any evidence, thus, has failed to discharge the onus. However, I have perused the record. The driving licence of the driver is on the record as Ext. RB, the perusal of which does disclose that the driver of the offending vehicle was having a valid and effective driving licence to drive the same.

11. The amount awarded, to me, appears to be too meagre, but, unfortunately, the claimant has not questioned the same, is reluctantly upheld.

12. The claimant has specifically pleaded that the deceased was working as a labourer/cleaner with the offending vehicle. Thus, the claimant was having a legal right to claim compensation in terms of the WC Act, because the deceased was stated to be under employment of the owner-insured, insurer had to indemnify as per the terms and conditions contained in the Policy and the compensation was to be granted as per the Schedule attached with the said Act. Section 167 of the MV Act provides an option to lay a claim petition either before an authority under the WC Act or before the Tribunal. It is apt to reproduce Section 167 of the MV Act:

> *"167. **Option regarding claims for compensation in certain cases**.- Notwithstanding anything contained in the Workmen's Compensation Act, 1923 (8 of 1923) where the death of, or bodily injury to, any person gives rise to a claim for compensation under this Act and also under the Workmen's Compensation Act, 1923, the person entitled to compensation may without prejudice to the provisions*

of Chapter X claim such compensation under either of those Acts but not under both."

13. While going through the provisions of law, one comes to an inescapable conclusion that the claimant being the legal representative of the employee-deceased, has two remedies to claim compensation and in terms of Section 167 of the MV Act, she can seek compensation at higher side. It is not disputed that the claimant is not legal representative/ dependant of the deceased. Thus, the claimant was within her rights to file petition seeking compensation under WC Act. Withdrawal of the said petition by the claimant cannot be made a ground to defeat her right to seek compensation under MV Act in lieu of the death of her deceased son.

14. All the points framed hereinabove are determined accordingly.

15. Having said so, the impugned award is well reasoned, needs no interference.

16. Having glance of the above discussions, the impugned award is upheld and the appeal is dismissed.

17. Registry is directed to release the awarded amount in favour of the claimant strictly as per the terms and conditions contained in the impugned award through payee's account cheque or by depositing the same in her bank account after proper identification.

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

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

Oriental Insurance Company Limited .....Appellant

Versus

Vijay Ram & others .....Respondents

FAO No.341 of 2012
Date of decision: 10.03.2017

Motor Vehicles Act, 1988- Section 166- Claimants have specifically pleaded in the claim petition that the deceased was their brother- he was not having wife and was issueless- it was further pleaded that claimants were dependent upon the deceased – the MACT had rightly held that the claim petition was maintainable – further, the deceased was working as beldar and his gross salary was Rs.10,180/- per month – 50% amount has to be deducted towards personal expenses and the loss of dependency will be Rs. 5,000/- per month – the age of the deceased was 55 years at the time of accident- multiplier of 9 was applied by the Tribunal, which is not correct and multiplier of 8 is applicable- thus, the claimants are entitled to Rs.5,000 x 12 x 8 = Rs. 4,80,000/- under the heads loss of source of dependency- claimants are also held entitled to Rs. 10,000/- each under the heads loss of love and affection and funeral expenses- thus, claimants are entitled to Rs. 4,80,000+ 20,000 = Rs. 5,00,000/- along with interest. (Para-10 to 14)

For the appellant: Mr.Lalit K. Sharma, Advocate.
For the respondents: Mr.Tara Singh Chauhan, Advocate, for respondent No.1.
Mr.Vikrant Chandel, Advocate, for respondent No.3.
Nemo for other respondents.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award, dated 7th May, 2012, passed by the Motor Accident Claims Tribunal, Bilaspur, H.P. (for short, "the Tribunal") in Claim Petition No.28

of 2010, titled Vijay Ram and another vs. M/s Naresh Kumar and others, whereby the claim petition was allowed and compensation to the tune of Rs.7,52,960/-, alongwith interest at the rate of 7.5% per annum, came to be awarded in favour of the claimants and the insurer was saddled with the liability (for short the "impugned award").

2. The claimants, the owner-insured and the driver have not questioned the impugned award on any count. Thus, the same has attained finality so far it relates to them.

3. Feeling aggrieved, the insurer has filed the instant appeal challenging the impugned award.

4. Brief facts of the case are that on 19th January, 2010, at about 8.10 a.m., at village Kallar, deceased Chhota Ram was standing alongside the road on the left side and was waiting for bus, when the offending vehicle bearing No.HP 24A 6444, being driven by its driver namely Jogi Mohammad in a rash and negligent manner, came in a very high speed, could not negotiate the curve, fell into the deep gorge and crushed the deceased resulting into his death. It was averred that the claimants were the brothers of the deceased, as the deceased was not having wife and was issueless. The claimants filed the claim petition claiming compensation to the tune of Rs.15.00 lacs, as per the break-ups given therein.

5. The claim petition was resisted by the respondents and following issues came to be framed by the Tribunal:

> "1. Whether the deceased died in a motor vehicle accident which took place on 19.1.2010 at about 8.10 A.M. at village and P.O. Kallar on NH-21, District Bilaspur, H.P. due to the rash and negligent driving of vehicle Bulker No.HP-24A-6444 by its d river respondent No.2? OPP
>
> 2. If issue No.1 supra is proved in affirmative, to what amount of compensation, the petitioners are entitled and from whom? OPP
>
> 3. Whether the petition is not maintainable? OPR-3
>
> 4. Whether the respondent No.2 was not having any valid and effective driving licence to drive the vehicle in question at the relevant time, as alleged? OPR-3
>
> 5. Whether the vehicle in question was being plied without documents i.e. valid registration certificate, fitness certificate and valid route permit, as alleged? OPR-3
>
> 6. Relief."

6. In order to prove their case, the claimants examined as many as five witnesses. On the other hand, the insurer, the insured/owner and the driver have not led any evidence. Thus, the evidence led by the claimants has remained unrebutted.

7. During the course of hearing, the learned counsel for the appellant/insurer raised two-fold arguments – i) The claim petition was not maintainable; ii) The amount of compensation awarded by the Tribunal is excessive.

8. It is worthwhile to notice that the claimants have specifically pleaded in the claim petition that the deceased was their brother, was not having wife and was issueless. The learned counsel for the appellant/insurer argued that the claim petition, on behalf of the brothers, was not maintainable since they were not dependant upon the deceased. The argument of the learned counsel for the insurer is negatived for the reason that the claimants have pleaded and proved that they were dependant upon the deceased. The Tribunal, after relying upon the decisions of the Apex Court as well as this Court, has rightly made discussion in paragraph 14 of the impugned award and held that the claimants, being brothers, were entitled for compensation.

9. The findings recorded by the Tribunal on issue No.1 are not in dispute and has also not been questioned before me. Accordingly, the findings returned on issue No.1 are upheld.

10. As far as issues No.3 to 5 are concerned, onus to prove the same was on the insurer, has not led any evidence. Accordingly, the findings returned by the Tribunal on these issues are also upheld.

11. Coming to issue No.2, as has been discussed above, the claimants, being brothers, are entitled for compensation. The deceased, as per pleadings in the claim petition, was working as Beldar in PWD/Horticulture Department. The gross salary of the deceased was Rs.10,180/- per month, as is borne out from the salary certificate Ext.PW-3/A. The deceased was issueless and was also not having wife. Thus, after deducting 50% amount from the monthly income of the deceased towards his personal expenses, it can safely be held that the claimants lost source of dependency to the tune of Rs.5,000/- per month.

12. As per the postmortem report Ext.PW-5/A and the pleadings, the deceased, at the time of accident, was 55 years of age. The Tribunal, after examining the record, has rightly taken the age of the deceased as 55 years at the time of death. The Tribunal has fallen in error in applying the multiplier of 9, while multiplier of 8 is just and appropriate in the instant case.

13. In view of the above discussion, the claimants are held entitled to Rs.5,000/- x 12 x 8 = Rs.4,80,000/-, under the head 'loss of source of dependency'. In addition, the claimants are also held entitled to Rs.10,000/- each under the heads 'loss of love and affection' and 'funeral expenses'.

14. Having said so, Rs.4,80,000/- + Rs.20,000/- = Rs.5,00,000/- are awarded as compensation to the claimants alongwith interest as awarded by the Tribunal.

15. The Registry is directed to release the award amount in favour of the claimants strictly in terms of the impugned award by depositing the same in their respective bank accounts or through payees account cheque. Excess amount, if any, be refunded to the appellant/insurer through its bank account or payees account cheque.

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

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

Nand Lal .....Appellant

Versus

Sanjana Sood and others .....Respondents

RSA No. 55 of 2006
Decided on: March 14, 2017

Specific Relief Act, 1963- Section 38- Plaintiff filed a suit pleading that the defendants were interfering with his possession without any right to do so- the suit was partly decreed by the Trial Court- an appeal was preferred, which was dismissed- held in second appeal that the High Court cannot interfere with the concurrent finding of facts unless the findings are perverse- there was no boundary dispute between the parties – plaintiff had filed his case on the basis of Tatima issued by Patwari who did not support the case of the plaintiff – he filed an application for appointment of a Local Commissioner, which was dismissed by the Trial Court after holding that the plaintiff can apply for demarcation to the revenue authorities – the Local Commissioner cannot be appointed to delay the proceedings or to create some evidence – the application was rightly rejected by the Trial Court – appeal dismissed.(Para-12 to 15)

For the appellant Mr. Ramakant Sharma, Advocate.
For the respondents: Mr. G.D. Verma, Senior Advocate with Mr. B.C. Verma, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:

Instant regular second appeal filed under Section 100 CPC is directed against judgment and decree dated 30.9.2005 passed by the learned Additional District Judge, Ghumarwin in Civil Appeal No. 243/13 of 2004/2001, affirming the judgment and decree dated 19.6.2001 passed by the learned Sub Judge 1st Class, Ghumarwin in Case No. 10/1 of 1994, whereby suit for declaration/permanent injunction /possession having been filed by the appellant/plaintiff (herein after referred to as, 'plaintiff') was dismissed.

2. Briefly stated, facts as emerge from the record are that the plaintiff filed a suit for declaration/ permanent injunction and possession claiming himself to be owner-in-possession of the suit land measuring 0-5 Biswa comprising Khasra No. 476/369 situated in Village Dakri Pargana Tiun, Tehsil Ghumarwin, District Bilaspur, HP. Plaintiff further averred in the plaint that the defendant without having any right, title or interest over the suit land started interfering in the same and raised pillars over 7 *Biswansis* shown as Khasra No. 476/369/1. In the aforesaid background, plaintiff sought declaration that he is owner-in-possession of the suit land. Apart from above, plaintiff also prayed for relief of possession qua land measuring 7 Biswansis comprising of Khasra No. 476/369/1 after dismantling the construction of the defendant. Plaintiff also claimed relief of permanent injunction restraining the defendant from interfering in any manner in the suit land.

3. Defendants, by way of written statement, refuted the claim of the plaintiff as put forth in the plaint, on the ground of maintainability, cause of action, jurisdiction of the Court, locus standi, estoppel, valuation of the suit for the purpose of court fee, jurisdiction and limitation etc. On merits also, defendants claimed that they have raised construction over their own land, which was completed in the year 1972 and they have no claim/right over the land of the plaintiff. Defendants also averred in the written statement that they have never intended to interfere in the suit land and as such sought dismissal of the suit of the plaintiff.

4. Plaintiff while reasserting his claim by way of rejoinder, denied the averments contained in the written statement. Learned trial Court, on the basis of pleadings framed following issues:

"1. Whether the plaintiff is owner in possession over the suit land? OPP

2. Whether plaintiff is entitled to the relief of permanent injunction as prayed? OPP

3. Whether the plaintiff is entitled to the relief of possession as alleged? OPP

4. Whether the suit is not maintainable? OPD

5. Whether plaintiff has no cause of action? OPD

6. Whether this court has no jurisdiction to try the suit? OPD

7. Whether the plaintiff has no locus standi to file the suit? OPD

8. Whether the plaintiff is estopped to file the suit due to his act and conduct? OPD.

9. Whether the suit is not properly valued, OPD.

10. Whether the suit is barred by limitation? OPD

11. Relief."

5. Subsequently, vide judgment and decree dated 19.1.2006 learned trial Court partly decreed the suit of the plaintiff to the effect that he was owner-in-possession of the suit land comprising of Khasra No. 476/369 Khata Khatauni No. 220/317 land measuring 0-5 Biswas, situated in Village Dakri, Pargana Tiun, Tehsil Ghumarwin, District Bilaspur. However, suit for permanent injunction and possession qua 7 Biswansis of land was dismissed. Plaintiff

being aggrieved and dissatisfied with dismissal of his suit for injunction and possession, filed an appeal before the Additional District Judge, Ghumarwin, who also dismissed the same and upheld the judgment and decree passed by learned trial Court. Hence, this Regular Second Appeal.

6. Present regular second appeal was admitted on 17.10.2006, on the following substantial question of law:

> "Whether the dismissal of the application moved by the plaintiff for appointment of Local Commissioner for the purpose of carrying out the demarcation has resulted in miscarriage of justice?"

7. Mr. Ramakant Sharma, learned counsel representing the plaintiff vehemently argued that the impugned judgments and decrees passed by the learned Courts below are not sustainable in the eye of law as the same are not passed by the learned Courts below upon correct appreciation of the evidence, as such, deserve to be set aside. Mr. Sharma, while referring to the impugned judgment passed by court below strenuously argued that both the Courts below failed to appreciate ample evidence adduced on record by the plaintiff that the defendants raised construction on the suit land and the *Tatima* prepared by the Patwari (Ext. PW-3/A) was sufficient to prove on record the illegal construction raised on suit land by the defendants. Mr. Sharma, further contended that the learned Courts below wrongly decided issues No. 2 and 3 against the plaintiff, that too, ignoring the specific /sufficient evidence on record adduced by the plaintiff in the shape of the *Tatima* prepared by the Patwari, Ext. PW-3/A. While inviting attention of this Court to the depositions made by Dev Raj and Hira Lal, Mr. Sharma, contended that the plaintiff successfully proved on record that the defendants raised illegal construction on the suit land, as such, learned trial Court ought to have passed decree of permanent injunction calling upon the defendants to restore the possession after dismantling the pillars raised on the suit land. While concluding his arguments, Mr. Sharma, invited attention of this Court to the application having been filed by the plaintiff during the pendency of the trial, under Order 26 Rule 9 CPC for appointment of local commissioner, to demonstrate that the learned Courts below erred in not appointing the local commission, especially when dispute was with regard to boundary. In this regard, he also placed reliance upon **AIR 2003 HP 82** as well as **Chapter X of Land Records Manual**, to suggest that it was incumbent upon the Court below to appoint local commissioner to resolve boundary dispute between the parties. In the aforesaid background, Mr. Sharma, prayed that suit for permanent injunction restraining the defendants from interfering in the suit land as well as possession after dismantling the structure raised by the defendants may be decreed, after setting aside the judgments and decrees passed by learned Courts below.

8. Mr. G.D. Verma, Senior Advocate with Mr. B.C. Verma, Advocate, appearing for the respondents/defendants (hereinafter, 'defendants') supported the judgments and decrees passed by the Courts below. Mr. Verma, while referring to the judgments of the Courts below, strenuously argued that the same are based on correct appreciation of the evidence adduced on record by the respective parties, as such, there is no scope of interference, especially in view of the concurrent findings of fact and law returned by the learned Courts below. While refuting the contentions of the learned counsel representing the plaintiff, Mr. Verma, invited attention of this Court to the plaint having been filed by the plaintiff, to demonstrate that the issue before the learned trial Court was not of boundary dispute, rather plaintiff filed suit for possession and as such there is no illegality or infirmity in the judgments passed by the learned Courts below, whereby application for appointment of local commissioner was rejected. Mr. Verma, further contended that the *Tatima* prepared by Patwari, PW-3, was placed on record by the plaintiff himself, after having demarcation of the land in the year 1990 and as such, it can not be said that any prejudice was caused to him due to dismissal of application filed under Order 26 Rule 9 CPC. While concluding his arguments, Mr. Verma, specifically invited attention of this Court to the averments contained in the aforesaid application, to demonstrate that there was no question of boundary dispute and as such case law cited by the plaintiff, was not attracted in the present case. Mr. Verma, also invited attention of this Court to the statement of PW-3, to suggest that

Tatima Ext. PW-3/A was prepared by Patwari after completion of formalities necessary for carrying out demarcation as laid down in Chapter X of Land Record Manual and *Tatima* Ext. PW-3/A was prepared by Patwari on the instructions of the plaintiff and not on the basis of the revenue record and spot possession. Mr. Verma, further reminded this Court of its limited jurisdiction to re-appreciate the evidence led on record by respective parties while exercising powers under Section 100 CPC, that too, when both the learned Courts below have returned concurrent findings of facts and law. In this regard, he placed reliance upon judgment passed by Hon'ble Apex Court in ***Laxmidevamma and Others vs. Ranganath and Others,*** **(2015)4 SCC 264,** wherein the Hon'ble Supreme Court has held:

> "16. Based on oral and documentary evidence, both the courts below have recorded concurrent findings of fact that the plaintiffs have established their right in A schedule property. In the light of the concurrent findings of fact, no substantial questions of law arose in the High Court and there was no substantial ground for reappreciation of evidence. While so, the High Court proceeded to observe that the first plaintiff has earmarked the A schedule property for road and that she could not have full-fledged right and on that premise proceeded to hold that declaration to the plaintiffs' right cannot be granted. In exercise of jurisdiction under Section 100 CPC, concurrent findings of fact cannot be upset by the High Court unless the findings so recorded are shown to be perverse. In our considered view, the High Court did not keep in view that the concurrent findings recorded by the courts below, are based on oral and documentary evidence and the judgment of the High Court cannot be sustained." ***(p.269)***

9. Perusal of the judgment, referred hereinabove, suggests that in exercise of jurisdiction under Section 100 CPC, concurrent findings of fact cannot be upset by the High Court unless the findings so recorded are shown to be perverse. There can be no quarrel (dispute) with regard to aforesaid observation made by the Court and true it is that in normal circumstances High Courts, while exercising powers under Section 100 CPC, are restrained from re-appreciating the evidence available on record, but as emerges from the case referred above, there is no complete bar for this Court to upset the concurrent findings of the Courts below, if the same appears to be perverse.

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

> "35. The learned counsel for the defendants relied on the judgment of this Court in Hero Vinoth v. Seshammal, (2006)5 SCC 545, wherein the principles relating to Section 100 of the CPC were summarized in para 24, which is extracted below : (SCC pp.555-56)
>
> "24. The principles relating to Section 100 CPC relevant for this case may be summarised thus:
>
> (i) An inference of fact from the recitals or contents of a document is a question of fact. But the legal effect of the terms of a document is a question of law. Construction of a document involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a document or wrong application of a principle of law in construing a document, it gives rise to a question of law.
>
> (ii) The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue. A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the court below has decided the matter,

either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law.

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

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

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

12. During the proceedings of this case, this Court had an occasion to peruse pleadings as well as entire evidence led on record by the respective parties, be it ocular or documentary, perusal whereof nowhere suggests that the Courts below misread and misappreciated the evidence. Rather, this Court is convinced and satisfied that both the learned Courts below have dealt with each and every aspect of the matter meticulously. In the instant case, as emerges from the record, plaintiff filed suit for declaration claiming himself to be owner-in-possession of the suit land as described herein above, as well as for permanent injunction restraining the defendants from constructing any house/ shed or raising any projections or structure /pipe line in the suit land. If averments contained in the plaint are read in their entirety, it nowhere suggests that there was a boundary dispute between the parties. Rather, plaintiff claimed himself to be owner-in-possession of the suit land and in this regard, he sought declaration from the Court that he may be declared to be owner of the suit land. Apart from above, plaintiff also prayed that he be put in possession of the land measuring 0-0-7 Biswa comprising of Khasra No. 476/369/1 Khata Khatauni No. 220/317 after dismantling the construction raised by the defendants, whereas defendants claimed that they laid foundation as well as constructed pillars on the suit land in the year 1972 when their old house/building was constructed. Defendants further claimed that pillars, if any, on suit land were raised prior to the institution of the suit. Though, the defendants in their written statement, specifically stated that no demarcation was ever carried out by Kanungo and as such, *Tatima* relied by the plaintiff was wrong and imaginary, this Court, with a view to explore answer to the substantial question of law, as referred above, carefully perused the application having been preferred by the plaintiff under Order 26 Rule 9 CPC, which itself suggests that the plaintiff filed suit for possession against defendants, wherein he furnished *Tatima* of the encroached land, prepared by Patwari, but since Patwari, who furnished aforesaid *Tatima*, failed to make statement in favour of the plaintiff, plaintiff moved an application before trial Court, praying therein for appointment of local commissioner to demarcate the suit land. Plaintiff, in the application for appointment of local commissioner, stated that Patwari, who had issued *Tatima* in his favour, made statement contrary to the *Tatima* prepared by him, as such, local commissioner be appointed to demarcate the suit land afresh. Perusal of order dated 1.8.2000, passed by learned trial Court suggests that while specifically disposing of application filed by plaintiff under Order 26 Rule 9 CPC, learned trial Court specifically concluded that suit filed by plaintiff is pending since 1985, whereas application for appointment of local commissioner has been filed at the stage of defendants' evidence.

13. Careful perusal of the pleadings as available on record clearly suggests that the entire case of the plaintiff was based on *Tatima* Ext. PW-3/A allegedly issued by Patwari, who later on did not support the case of the plaintiff. It is admitted case of the plaintiff that he himself got land demarcated in the year 1990, on the basis of which, *Tatima* Ext. PW-3/A, was issued by Patwari concerned. Perusal of order dated 1.8.2000 passed by learned trial Court further suggests that learned trial Court, while dismissing application for appointment of local commissioner, specifically observed that it is always open for the plaintiff to apply for demarcation of suit land before competent revenue officer and also for issuance of *Tatima* since there is no bar for revenue officer to demarcate suit land when it is sub judice.

14. There is no illegality in the findings of the Courts below that the local commissioner can not be appointed at this stage i.e. evidence, because it will amount to creation of evidence in favour of plaintiff. Moreover, as emerges from record, there is an attempt on the part of the plaintiff, either to delay the proceedings, or to create some evidence in his favour by moving application under Order 26 Rule 9 CPC. Moreover, *Tatima* Ext. PW-3/A was placed on record by plaintiff himself but no demarcation report was placed on record to substantiate averments contained in the plaint or application for appointment of local commissioner that Patwari concerned, who had issued *Tatima*, connived with the opposite party and issued *Tatima* contrary to the revenue record.

15. Hence, this Court sees no illegality or infirmity in the judgment and decree passed by the learned trial Court, whereby application under Order 26 Rule 9 CPC, having been filed by the plaintiff was dismissed, because, by no stretch of imagination, aforesaid application could be allowed by the learned trial Court, on the basis of averments contained in the application, which clearly suggests that the plaintiff, by moving application, tried to create evidence in his favour, that too at a belated stage.

16. Substantial question of law is answered accordingly.

17. Consequently, in view of the discussion above, there is no merit in the present appeal and the same is dismissed. Pending applications, if any, are disposed of. Interim directions, if any, are also vacated.

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

Tripta Devi. .....Petitioner.

Versus

Sub Divisional Officer (Civil) Kangra & another. .....Respondents.

CWP No. 32 of 2015
Reserved on: 03.03.2017
Decided on: 14.03.2017

Constitution of India,, 1950- Article 226- TehsildarKangra submitted his report to ADM, Kangra, wherein the annual income of the petitioner was shown as Rs.16,742/- and earlier income certificate was cancelled- while computing the income of the petitioner, the income of her mother-in-law received as pension was also considered – the petitioner claimed that her mother-in-law resides separately and she has annexed copy of parivar register to this effect – the petitioner challenged the report by filing an appeal before the Appellate Authority, which was dismissed- aggrieved from the order, present writ petition has been filed – held, that mother-in-law of the petitioner has been shown as family member along with the petitioner – the pension amount goes to the family of the petitioner and is being used for its well-being – the Tehsildar had rightly taken the pension into consideration- writ petition dismissed. (Para-5 to 8)

For the petitioner: Mr. Neel Kamal Sharma, Advocate.
For the respondents: Mr. Virender K. Verma, Addl. AG, with Mr. Pushpinder Jaswal, Dy. AG and Mr. Rajat Chauhan, Law Officer, for respondent No. 1.
Mr. Ashok Kumar Thakur, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The petitioner by way of filing the instant writ petition under Article 226 of the Constitution of India has prayed for the issuance of directions to respondent No. 1 and for granting the following substantive relief to the petitioner:

> *"That the report dated 12.08.2011 contained in Annexure P-1 and decision dated 30.07.2014 passed in Case No. 11 of 2011 by respondent No. 1 contained in Annexure P-4 may kindly be quashed and set aside."*

2. The key facts, as per the petitioner, which are imperative for the adjudication of the present case, are that Tehsildar, Kangra, submitted his report (Annexure P-1), dated 12.08.2011, to ADM, Kangra, wherein he has depicted the annual income of the petitioner as Rs. 16,742/- from the year 2007 and his earlier income certificate was cancelled. It is further averred that while computing the income of the petitioner, the income of her mother-in-law, received as pension, was also considered. As per the petitioner, her mother-in-law resides separately and to this effect she has annexed copy of *Pariwar* register (Annexure P-2). The petitioner challenged the report of the Tehsildar, by way of filing appeal before the learned Appellate Authority (respondent No. 1 herein), wherein the petitioner asserted that her mother-in-law resides separately, she was not heard and no remarks were made qua the income of respondent No. 2. It is further contended by the petitioner herein that respondent No. 2 hails from a rich family. However, the appeal of the petitioner was dismissed by respondent No. 1 on 30.07.2014. Feeling aggrieved and dissatisfied with the decision of respondent No. 1, the petitioner preferred this petition alleging that the decision of the learned Appellate Authority is wrong, illegal, unjust, arbitrary and unconstitutional. Lastly, she has prayed that the report dated 12.08.2011 and the decision of the learned Appellate Authority may be quashed and set aside.

3. Respondent No. 1 did not file any reply to the petition. Respondent No. 2, by filing reply to the petition, has resisted the claim of the petitioner. Precisely, respondent No. 2 averred that mother-in-law of the petitioner lives with her and they have a joint family. The replying respondent has also produced copy of *Pariwar* register (Annexure-R/1). It has also been averred that mother-in-law of the petitioner also draws monthly family pension to the tune of Rs. 2683/- (two thousand six hundred eighty three). As per the replying respondent, the mother-in-law of the petitioner received Rs. 30,246/- and Rs. 32,886/- in the years 2006 and 2007, respectively. To this effect, respondent No. 2 has also annexed copies of family pension and affidavit (Annexures R/3 and R/4). It is further contended that father-in-law of respondent No. 2 is 40% disable and her son is also disable. The replying respondent averred that Tehsildar, Kangra, has rightly computed the annual income of the petitioner and he has also rightly cancelled her previous income certificate. Lastly, it has been prayed that the decisions of Tehsildar, Kangra, and respondent No. 1 are correct and the petition may be dismissed.

4. I have heard the learned counsel/Additional Advocate General for the parties and gone through the record carefully.

5. The learned counsel for the petitioner has argued that the petitioner comes from lower strata of the society and her income has been wrongly calculated by Tehsildar, Kangra, by taking into consideration the pension of her mother-in-law. On the other hand, the learned Additional Advocate General has argued that the scheme for Anganwari Workers has been promulgated to provide employment opportunities to those who really need employment. He has further argued that respondent No. 2 was having very less income and on inquiry it was found

that the income of the petitioner was more, thus the Tehsildar, has rightly cancelled the certificate of the petitioner and the said decision was also upheld by the learned Appellate Authority (respondent No. 1) after correctly appreciating the facts. He has prayed that the writ petition may be dismissed.

6. The learned counsel for respondent No. 2 has argued that she has a handicap son and her father-in-law is also 40% disable. It has been further argued that respondent No. 2 has been rightly appointed after cancelling the income certificate of the petitioner, thus she has a right to continue on the said post.

7. Annexure P-2, that is, copy of *Pariwar* register, the mother-in-law of the petitioner has been shown as family member alongwith the petitioner. So, as per the policy, the mother-in-law of the petitioner is part of the family of the petitioner for calculating the income of the family. Now, I would like to advert to the second question, whether the pension, which is being drawn by the mother-in-law of the petitioner, is to be calculated towards the income of the family or not. The pension amount goes to the family of the petitioner and they use the same for their well being. Therefore, this Court finds no irregularity in the report of the Tehsildar, Kangra, whereby the income of the family of the petitioner was calculated as Rs. 16,742/- per month, which was upheld by the learned Appellate Authority. The income of the family of the petitioner has been rightly ciphered as Rs. 16,742/- per month, which is much more than Rs. 7500/- per month, thus there is no illegality committed by the Tehsildar, Kangra, as well as by the learned Appellate Authority (respondent No. 1). At the same point of time, respondent No. 2, who was having lesser income, is otherwise also most eligible and needy person for being appointed as Anganwari Worker. As far as the action of Tehsildar, Kangra, in cancelling the income certificate of the petitioner, is concerned, this Court, after taking into consideration the income of the mother-in-law of the petitioner, who is member of the family of the petitioner, as per the *pariwar* register, finds that no illegality has been committed by him. Lastly, as the petitioner does not fall within the income criteria for the post of Anganwari Worker, this Court finds no merits in the instant petition, which deserves dismissal and is accordingly dismissed.

8. In view of the above, the petition stands disposed of. All pending application(s), if any, also stand(s) disposed of. No order as to costs.

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

Dilbag Singh .....Petitioner

Versus

Surjeet Singh and another .....Respondents

CMPMO No. 24 of 2017
Decided on: 15th March, 2017

Code of Civil Procedure, 1908- Order 6 Rule 17- An application for amendment was filed pleading that started raising construction near the house of the plaintiff during the course of hearing the defendants and when he objected to the construction being raised by them it transpired that the construction was being raised on the land bearing khasra No.479 – plaintiff was informed by patwari that his house is over khasra No.460 and he was wrongly informed that house is over Khasra No.479 – the application was dismissed on the ground that the amendment was not applied prior to the commencement of trial – held, that amendment is formal in nature to correct an error, which had crept due to the wrong information supplied by Patwari – plaintiff had failed to plead the correct information despite the exercise of due diligence – application allowed subject to the payment of cost of Rs.2,000/- . (Para-5 to 9)

For the petitioner: Mr. Ajay Sharma, Advocate.
For the respondents: Mr. Sanjeev Sood, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)

Heard.

2. The complaint herein is that an application under Order 6 Rule 17 of the Code of Civil Procedure filed by the petitioner (hereinafter referred to as the 'plaintiff') for amendment of the plaint has been dismissed by learned trial court without application of mind.

3. The plaintiff has filed suit for declaration that he is owner in possession of 1/6th share of land comprised in Khata No. 48, Khatauni No. 68, Khasra Nos. 362, 456, 460, 479, 482, 678, 455 and 459 as well as one house comprising three bed rooms, one store, one kitchen, one bathroom, two toilets constructed over Khasra No. 460. The path shown in the site plan as well as 2/7th share in land entered in Khata No. 49, Khatauni No. 71, Khasra No. 483 is also in his ownership and possession. The suit property is situated in Mohal Baryal Behar, Tehsil Rakkar, District Kangra, H.P. The gift deed of the suit land executed by respondent No. 2 in favour of respondent No. 1(defendants in the trial Court) is stated to be illegal, null and void. By way of permanent prohibitory injunction, the defendants have also been sought to be restrained from blocking the path and causing interference in the suit land. Mandatory injunction, directing thereby the defendants to restore the path, in case the same is found to have blocked by them during the pendency of the suit has also been sought.

4. On completion of the pleadings in the suit, learned trial Judge has framed the issues and the same is presently at the stage of recording plaintiffs' evidence. Statements of four witnesses of the plaintiff have already been recorded.

5. In the application, Annexure P-2, it has been urged that during the course of hearing in the suit, when the defendants started raising construction near the house of the plaintiff and when he objected to the construction being raised by them, it transpired that they were raising construction over land bearing Khasra No. 479, whereas, he was under the impression that it is his house, which is in existence over this land. Therefore, he visited the Patwari concerned, who in turn apprised him that he has been wrongly informed about his house in existence over Khasra No. 479 and that the same as a matter of fact is over Khasra No. 460. This development has necessitated the amendment of the plaint.

6. The defendants in reply to the application have come forward with the version that the house of the plaintiff is neither over Khasra No. 479 nor Khasra No. 460. The house of defendant No. 2 is stated to be in existence over Khasra No. 460, which is stated to be in possession of one Surjeet Singh. The plaintiff allegedly added a kitchen, toilet and 'Palli' of his house in the year 2006 by way of encroachment over land bearing Khasra No. 460, despite protest from the side of defendant No.2.

7. Learned trial Judge after having taken into consideration the pleadings of the parties on both sides has dismissed the application on the ground that the plaintiff has failed to approach for amendment in the plaint well before the commencement of trial.

8. True it is that in a normal course amendment in the pleadings can be sought by the parties on either side well before the commencement of trial. In a civil suit, the trial commences with the settlement of issues. Here, in the case in hand, after the settlement of issues, the case presently is at the stage of recording plaintiffs' evidence. As per the proviso to Order 6 Rule 17 of the Code of Civil Procedure, the amendment of the pleadings can even be allowed after commencement of trial also, however, if the Court is satisfied that the party has failed to do so after having due diligence.

9. In the case in hand, the amendment being sought is formal in nature. As a matter of fact, by way of amendment, the plaintiff intends to claim that his house is in existence over land bearing Khasra No. 460 and not over Khasra No. 479. The explanation, therefor as forthcoming is that the Patwari concerned had wrongly supplied wrong Khasra number over which his house is in existence, qua which he was informed by the present incumbent posted as Patwari in their patwar circle. He had an occasion for holding inquiry in this regard when the defendants started raising construction over the land bearing Khasra No. 479. The explanation as forthcoming is absolutely plausible as the plaintiff had nothing to achieve by mentioning wrong khasra number over which his alleged house was in existence in the plaint. The present, as such, is a case where after having due diligence, the plaintiff has failed to mention correct khasra number, over which his alleged house is stated to be in existence. The judgment of a Co-ordinate Bench of this Court in ***CMPMO No. 419/2015***, titled ***Mehar Singh alias Mahant Ram through his LR's Pali Devi and others*** V. ***Gurdev Singh and others, decided on 12th May, 2016*** is distinguishable on facts.

10. Therefore, for all the reasons hereinabove, I allow this petition. Consequently, the plaintiff is permitted to substitute figure '479' in 7th line of head note of the plaint and 10th line of para 3 thereof with figure '460'. The amended plaint, the certified copy whereof is Annexure P-1 to this petition, filed in the trial Court, be taken on record. Learned trial Judge shall proceed further in the matter in accordance with law from the stage of allowing the defendants to file written statement to the amended plaint. The plaintiff shall pay Rs. 2,000/- as costs to the defendants in the trial Court on the next date.

11. The parties through learned counsel representing them are directed to appear in the trial Court on 10th April, 2017.

An authenticated copy of this judgment be sent to learned Court for records and compliance.

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

Om Parkash ... Petitioner

Versus

State of Himachal Pradesh ... Respondent

Cr. Revision No. 22 of 2008
Reserved on: 10.03.2017
Date of decision: 15.03.2017

Indian Penal Code, 1860- Section 379 read with Section 34- C, A and K had gone to Neugal Café in their car- the car was parked outside the café – the accused also parked their van outside the Neugal Café- the accused consumed a bottle of beer and thereafter left the café - when C and his friends came out of the café, they found that their vehicles were missing – the complainant suspected the accused and reported the matter to police – the car was stopped at Bhattu and was found to be driven by accused No.1- O was also sitting in the Car – a fictitious number plate was fixed to the Car – the accused were tried and convicted by the Trial Court – an appeal was preferred, which was dismissed- held in revision the accused were found in possession of the Car- the possession was not explained – there was no error in appreciation of evidence- revisional court can exercise jurisdiction to correct miscarriage of justice and cannot re-appreciate the evidence – judgments passed by Trial Court and upheld by the Appellate Court do not suffer from any infirmity – revision dismissed.(Para-9 to 16)

Case referred:
Shlok Bhardwaj Vs. Runika Bhardwaj and others, (2015) 2 Supreme Court Cases 721

For the petitioner: Mr. Anoop Chitkara, Advocate.
For the respondent: Mr. Vikram Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.:

By way of this revision petition, petitioner/ accused has challenged the judgment passed by the Court of learned Additional Sessions Judge(I), Kangra at Dharamshala, in Criminal Appeal No. 19-P/2003 dated 05.12.2007, vide which learned Appellate Court while dismissing the appeal so filed by the present petitioner, upheld the judgment passed by the Court of learned Addl. Chief Judicial Magistrate, Palampur, in Criminal Case No. 168-II/2001 dated 26.05.2003, whereby learned trial Court while convicting the accused for commission of offence punishable under Section 379 read with Section 34 of Indian Penal Code alongwith co-accused Mehar Singh, sentenced both of them to undergo rigorous imprisonment of two years and to pay fine of Rs.1000/-and in default of payment of fine, both to undergo simple imprisonment of 15 days.

2. At this stage, it may be stated that when this revision petition was filed by the petitioner, he had appended with the revision petition a copy of judgment passed by the Court of learned Addl. Chief Judicial Magistrate, Palampur in Criminal Case No. 176-II/2002 decided on 02.06.2003, vide which also the present petitioner alongwith co-accused Mehar Singh was convicted for commission of offence punishable under Section 379 read with Section 34 of Indian Penal Code. However, as far as the present revision petition is concerned, it arose out of Criminal Case No. 168-II/2001 decided by the Court of learned Additional Chief Judicial Magistrate, Palampur, on 26.05.2003 and a certified copy of the said judgment was later on placed on record vide Cr.M.P. No. 1383 of 2016.

3. Brief facts necessary for the adjudication of present petition are that as per the prosecution, on 04.04.2001 reporter Chander Shekhar alongwith his friends Abhishek Sood and Kapil Sood had gone to Neugal Cafe Palampur in their Esteem Car bearing registration No. HP-37-0054 around 9.15 P.M. The car was parked by Chander Shekhar outside Neugal Cafe and accused persons who were travelling in Van bearing registration No. PCM No. 131 and were following the car of Chander Shekhar, also reached near Neugal Cafe and also parked their Van outside the Neugal Cafe. The accused persons entered Neugal Cafe, consumed a bottle of beer and thereafter, left the Cafe. At about 10.30 P.M. when complainant Chander Shekhar alongwith his friends came outside Neugal Cafe, they found that their vehicle was missing. The complainant apprehended his suspicion on those two persons who were occupants of Van PCM No. 131, which had followed them. As the complainant could not find his vehicle despite searching for it, he lodged a complaint at Police Station Palampur, where his statement under Section 154 Cr.P.C. was recorded. Further, as per the prosecution, in the course of the search of missing car on 05.04.2001 when the police party alongwith complainant Chander Shekhar, Arvind Kumar and Abhishek Sood were present at Bhattoo, one car similar to the stolen car of the complainant came, which was being driven from the side of Bhattoo. This car was stopped for the purpose of inquiry. The same was driven by accused No. 1, whereas present petitioner Om Parkash was also sitting in the said car. The car in issue was having fictitious number plate affixed to it bearing No. DL-2CK-5835. When the said car was checked by the police, number plate of the stolen car of the complainant bearing No. HP-37-0054 as well as registration certificate and insurance of the said car were recovered. The stolen car was produced by the petitioner before the police in presence of the witnesses which was accordingly taken into possession by the police. Maruti Van in which the accused had followed the complainant was also

taken into possession from village Bundla and the said car was also got recovered by the accused.

4. After the completion of investigation, challan was presented in the Court. As a prima facie case was found against the accused, they were charged for commission of offence under Section 379 read with Section 34 of Indian Penal Code, to which, they pleaded not guilty and claimed trial.

5. On the basis of evidence produced on record both ocular as well as documentary by the prosecution, learned trial Court held that the prosecution was able to prove the charges against the accused persons beyond the shadow of reasonable doubt and learned trial Court accordingly convicted the accused persons. While arriving at the said conclusion, it was held by the said Court that statement of PW-1 Chander Shekhar, PW-2 Abhishek Sood as well as Investigating Officer S.I. Balraj Singh, who entered the witness box as PW-3, categorically proved that the car of complainant PW-1 Chander Shekhar bearing registration No. HP-37-0054 was in possession of PW-1 on the material date and the accused persons after following the complainant in Van bearing registration No. PCM-131 upto Neugal Cafe stole the same. Learned trial Court also took note of the fact that the stolen car was recovered from the possession of the accused and even Maruti Van No. PCM-131 was recovered from Bundla-Kandi road on the instance of the accused persons. Learned trial Court further held that the prosecution witnesses were put to lengthy cross-examination by the defence but their testimony remained unshattered and the accused persons had failed to offer any cogent explanation as to how they were in possession of a stolen car. On these basis, it was concluded by learned trial Court that there was direct evidence on point of recovery and circumstantial evidence clearly pointed out towards the guilt of the accused persons qua the commission of theft.

6. In appeal, judgment of conviction so passed by learned trial Court was upheld by learned Appellate Court. While confirming the judgment passed by learned trial Court, learned Appellate Court held that there was sufficient material on record which proved that the accused persons had removed vehicle bearing registration No. HP-37-0054 dishonestly from Neugal Cafe parking without the consent of the owner of the car i.e. PW-1. Learned Appellate Court further held that it stood proved on record that the stolen car was recovered from the possession of the accused and even the van in which the accused had followed the complainant had been recovered at their instance. Learned Appellate Court further held that there was no merit in the contention of learned counsel for the petitioner that the accused had not been properly identified as the accused were found in possession of the stolen property and, therefore, it was for them to justify as to how they came in possession of the same and they had miserably failed to justify as to how they had come in possession of the stolen car and in these circumstances the only conclusion which could be drawn was that they had removed the vehicle and it was for this reason that they were in possession of the vehicle. Learned Appellate Court also held that there was no need of test identification parade as both the accused had been seen by the complainant and other witnesses initially at Neugal Cafe and subsequently they had seen them at Bhattoo when they came there in the stolen vehicle. Learned Appellate Court also did not find merit in the contention of the present petitioner that the prosecution witnesses were interested witnesses on the ground that there was no suggestion put to both these witnesses that they have any enmity with the accused to implicate them in a false case. On these basis, learned Appellate Court upheld the judgment of conviction passed by learned trial Court and dismissed the appeal filed by the present petitioner.

7. Feeling aggrieved by both the said judgments, the petitioner has filed the present petition.

8. I have heard learned counsel for the parties and have also gone through the records of the case as well as judgments passed by both the learned Courts below.

9. The findings returned by both learned Courts below to the effect that stolen car was found in the possession of the accused persons, could not be rebutted during the course of

arguments by learned counsel for the petitioner. Similarly, learned counsel for the petitioner also could not point out that the findings returned by both learned Courts below to the effect that Maruti Van bearing registration No. PCM-131 in which as per the complainant and his friend, accused persons had followed the complainant was a perverse finding. In fact, I have gone through the records of the case and the findings so returned by both learned Courts below for the recovery of the stolen vehicle qua the possession of the accused and the recovery of Maruti Van bearing registration No. PCM-131 at the instance of the accused is totally borne out from the material produced on record by the prosecution. Even during the course of arguments, learned counsel for the petitioner could not point out as to how and under what circumstances, the petitioner was in possession of the stolen vehicle alongwith other co-accused.

10. Therefore, in my considered view, there is no perversity with the findings returned by learned trial Court that the accused in fact had stolen Esteem Car bearing registration No. HP-37-0054 from the possession of its owner i.e. PW-1 on the fateful evening and that the same was recovered from the possession of the present petitioner and his co-accused subsequently. Neither there is any material on record nor during the course of arguments, learned counsel for the petitioner could substantiate that the complainant was either having any enmity or animosity with the accused and that the accused was wrongly implicated by the complainant.

11. The learned counsel for the petitioner was also not able to point out any material particular which had been over-looked by the learned Courts below.

12. It is well settled law that the jurisdiction of High Court in revision is severely restricted and it cannot embark upon re-appreciation of evidence. The High Court in revision cannot in absence of error on a point of law, re-appreciate evidence and reverse a finding of law.

13. It has been held by the Hon'ble Supreme Court that the object of the revisional jurisdiction was to confer power upon superior criminal Courts a kind of paternal or supervisory jurisdiction in order to correct miscarriage of justice arising from misconception of law, irregularity of procedure, neglect of proper precaution or apparent harshness of treatment which has resulted on the one hand, or on the other hand in some undeserved hardship to individuals.

14. It has been reiterated by the Hon'ble Supreme Court in ***Shlok Bhardwaj*** Vs. ***Runika Bhardwaj and others***, (2015) 2 Supreme Court Cases 721, that the scope of revisional jurisdiction of the High Court does not extend to reappreciation of evidence.

15. Accordingly, in view of the discussion held above, in my considered view, judgment of conviction passed against the present petitioner by learned trial Court and upheld by learned Appellate Court does not call for any interference.

16. Therefore, in view of what has been discussed above, I do not find any merit in the present revision petition. As already held above, there is no perversity in the judgments passed by the learned Courts below. These judgments have been passed by appreciating all the material on record and the judgments are neither cryptic nor it can be said that the conclusion arrived at are not borne out from the material placed on record by the prosecution. Therefore, as there is no merit in the present revision petition, the same is accordingly dismissed.

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

State of H.P. .....Appellant.

Vs.

Harbans and others .....Respondents.

RSA No.: 299 of 2000
Reserved on: 10.03.2017
Date of Decision: 15.03.2017

Specific Relief Act, 1963- Section 34- Plaintiffs filed a civil suit for declaration pleading that suit land was mortgaged by them to defendant No.2 and predecessor-in-interest of defendant No.3 to 9 as security for the payment of debt of Rs.55/- - the revenueauthorities recorded the name of the defendants as tenants at Will- the security amount wasre-paid in the month of Jaith, 1965 the names of the defendants as tenants at Will are wrong, illegal, null and void – the mutations were wrongly attested on the basis of these entries in the name of defendant No.2 and P behind the back of the plaintiffs against the statutory provisions of H.P. Tenancy and Land Reforms Act- the suitwas decreed by the Trial Court – an appeal was preferred, which was dismissed – held in second appeal that it was not proved that defendant No.2 and P were inducted as tenantsover the suit land- the entries in the jamabandi are not sufficient to conclude that they were inducted as tenants over the suit land- tenancy is bilateral agreement and tenant has to pay rent to the landlord- there is no evidence that any rent was paid by defendant No.2 and P to the landlord – it was duly proved that the mortgage was redeemed by the plaintiffs on the payment of the mortgage money in the year 1965 – mutations were correctly entered as the defendant No.2 and P were not in possession and could not have relinquished the suit land in favour of defendant No.1- a procedure for relinquishment has to be followed - there is no evidence that the said procedure was followed- the Courts had rightly decreed the suit – appeal dismissed. (Para-16 to 25)

For the appellant:	Mr. V.S. Chauhan, Additional Advocate General, with Mr. Vikram Thakur, Deputy Advocate General.
For the respondents:	Mr. R.P. Singh, Advocate, for respondents No. 2(a) to 2(d). Respondents No. 1(a), 1(b), 3(b) to 3(h), 4(a)(i) to 4(a)(v), 5(c) to 5(h), 8,9,10,11 and 12 ex parte. None for respondent No. 7.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge :

By way of this Regular Second Appeal, the appellant-State has challenged the judgment and decree passed by the Court of learned Additional District Judge (II), Kangra at Dharamshala, Camp at Una in Civil Appeal No. 134/93 (177/94), dated 09.03.2000, vide which learned appellate Court while dismissing the appeal filed by the State, upheld the judgment and decree passed by the learned trial Court as well as the judgment and decree passed by the Court of learned Sub Judge 1st Class (II), Una in Civil Suit No. 17 of 1988, dated 21.04.1993, vide which the learned trial Court had decreed the suit for declaration filed by the plaintiffs therein.

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

"1. Whether the learned Lower Courts below have mis-interpreted and mis-read the documentary evidence particularly D-1 & D-2?

2. Whether the State has become owner in view of the provisions of Section 31 of the H.P. Tenancy and Land Reforms Act."

3. Brief facts necessary for the adjudication of the present case are that a suit for declaration was filed by the predecessors-in-interest of present respondents No. 1 to 4 to the effect that the plaintiffs No. 1 and 2 therein were coming in exclusive *hissedar*i possession of land measuring 3 Kanal 12 Marlas, comprised in Khasra No. 1466 and plaintiffs No. 1 to 4 were coming in exclusive *hissedar*i possession of land measuring 1 Kanal 13 Marlas, comprised in Khasra No. 1465 as co-sharers as per Jamabandi for the year 1980-81, situated in Village Beetan, H.B. 528, Sub Tehsil Haroli, District Una, which land stood mortgaged by the plaintiffs about 20 years ago to defendant No. 2 and Pirthi, predecessor-in-interest of defendants No. 3 to 9 as security for payment of debt, i.e.Rs. 55/- and they entered into possession as mortgagees, but revenue officials customarily entered the names of defendants in revenue records as tenants at will '*Babaza Sood' Mublik* Rs. 55/-. As per the plaintiffs, in the month of Jeth, 1965, plaintiffs No.

1 and 2 had paid the security amount qua the said mortgage and had redeemed land in their favour and thereafter they were coming in actual physical *hissedari* possession of the same in their capacity as co-sharers and entries in revenue records reflecting the name of defendant No. 2 and Pirthi, predecessor-in-interest of defendants No. 3 to 9 as tenants at will were wrong, incorrect as well as null and void. It was further the case of the plaintiffs that Halqa Patwari had wrongly entered mutation Nos. 2257 and 2258 pertaining to the suit land, which was done at the back of the plaintiffs and the mutations so entered were entered on the basis of false and fraudulent entries in the name of defendant No. 2 and Pirthi. It was further the case of the plaintiffs that on 06.11.1981, Assistant Collector 2nd Grade had not only sanctioned the mutations in favour of defendant No. 1 at the back of the plaintiffs, but these were sanctioned against the statutory provisions of Himachal Pradesh Tenancy and Land Reforms Act as well as the Rules framed thereunder. It was on these bases that the suit was filed by the plaintiffs for a decree of declaration to the effect that suit land measuring 3 Kanal 12 Marlas details of which have been given above, was in exclusive *hissedari* possession of plaintiffs No. 1 and 2 and suit land measuring 1 Kanal 3 Marlas, details of which have also been given above, was in *hissedari* possession of plaintiffs No. 1 to 4 as co-sharers and that revenue entries appearing in favour of defendant No. 1 and Prithi predecessor-in-interest of defendants No. 3 to 9 were wrong, incorrect, illegal, fraudulent, null and void and that mutation Nos. 2257 and 2258 sanctioned on 06.11.1981 by Assistant Collector 2nd Grade in favour of defendant No. 1 at the back of plaintiffs were illegal, null and void, with a consequential relief of permanent prohibitory injunction for restraining defendants from claiming any right, title and interest over the suit land on the basis of said fraudulent revenue entries and mutations and from making any interference in the peaceful and lawful possession of the plaintiff over the suit land.

4. The suit was contested by defendant No. 1 on one hand by filing a separate written statement and defendants No. 2, 3 and 5 to 9 on the other hand by filing a separate written statement.

5. In the written statement filed by defendant-State, the stand taken by the State was that plaintiffs were not in possession of the suit land as per entries recorded in revenue record and that Assistant Collector, 2nd Grade has rightly attested the mutation in favour of defendant No. 1 as *"hissedar were not found in possession on spot"*.

6. Defendants No. 2,3, 5 and 9, on the other hand, by way of their written statement, admitted the claim put forth by the plaintiffs in the suit.

7. On the basis of pleadings of the parties, learned trial Court framed the following issues:

"(i). Whether the plaintiffs 1 & 2 have been coming in exclusive hissadari possession of the land measuring 6 K-12 Mls. situated in Khasra No. 1466 and whether the plaintiffs 1 to 4 have been coming in exclusive hissadari possession of land measuring 1 K-13 Mls. comprised in Khasra No. 1465 as alleged? OPP.

(ii) Whether the suit land was redeemed by the plaintiffs 1 & 2 as alleged? OPP.

(iii) Whether the suit is not maintainable as alleged? OPD-I.

(iv) If issues No. 1 & 2 are proved in affirmative, whether plaintiffs are entitled for the relief of declaration as alleged? OPP.

(v) Whether the plaintiffs have no legal and enforceable cause of action? OPD-1.

(vi) Whether the suit is barred by limitation as alleged? OPD.

(vii) Whether the Court has no jurisdiction to try the suit? OPD-1.

(viii) Whether no legal and valid notice has been served on H.P. State as alleged? OPD-1.

(ix) Relief.

8. On the basis of evidence adduced by the respective parties in support of their respective claims, the following findings were returned by learned trial Court on the issues so framed:

"(i)	*:*	*Yes.*
(ii)	*:*	*Yes.*
(iii)	*:*	*No.*
(iv)	*:*	*Yes.*
(v)	*:*	*No.*
(vi)	*:*	*No.*
(vii)	*:*	*No.*
(viii)	*:*	*No.*
(ix)	*:*	*Suit is decreed as per operative part of the judgment.*

9. Learned trial Court decreed the suit of the plaintiffs for declaration to the effect that plaintiffs 1 and 2 were in *hissedari* exclusive possession as co-sharers with regard to suit land measuring 3 Kanal 12 Marlas, comprised in Khasra No. 1466 and that plaintiffs No. 1 to 4 were in exclusive *hissedari* possession of land measuring 1 Kanal 3 Marlas bearing Khasra No. 1465, situated in village Beetan and that entries in revenue record reflecting Pirthi and Gurdass as tenants over the suit land and further the sanction of mutation Nos. 2257 and 2258 on the basis of said entries in favour of defendant No. 1 qua suit land were wrong and illegal. Learned trial Court also granted a decree for permanent prohibitory injunction restraining defendants from interfering in the possession of the plaintiffs over the suit land.

10. While decreeing the suit, it was held by the learned trial Court that the Civil Court was having jurisdiction to adjudicate the issue raised by the plaintiffs in view of the fact that mutations No. 2257 and 2258 were in fact sanctioned behind the back of the plaintiffs and without verifying the possession of the parties on the spot. Learned trial Court also held that Pirthi and Gurdass were in fact not in possession of suit land as tenants, but were in possession of the same as mortgagee and revenue entries reflecting them as tenants over the suit land were thus incorrect. While arriving at the said conclusion, learned trial Court took note of the statement of plaintiff Ashu Ram (PW-1), who deposed in the Court that the suit land was in fact orally mortgaged with Gurdass and Pirthi for an amount of Rs. 550/- about 30 years back. Learned trial Court held that though as per revenue records, Pirthi and Gurdass were recorded as tenants at will in lieu of interest of Rs. 550/-, but ocular evidence produced by plaintiffs was sufficient to rebut the said presumption and that defendant No. 2 had also admitted that he never remained in possession of the suit as tenant, but was in possession of the same only as a mortgagee. Learned trial Court also held that plaintiffs had categorically deposed in the Court that the suit land was in fact redeemed from Pirthi and Gurdass in the year 1965 and this statement of his was supported by the statement of PW-2 Sultana Ram. Learned trial Court further held that Gurdass Ram had also stated on oath that the suit land was redeemed in the year 1965 and possession thereof was handed over to the plaintiffs. On these bases, it was concluded by the learned trial Court that suit land in fact stood redeemed in the year 1965 and possession of the suit land was delivered by mortgagee to the mortgagor in the said year and since then plaintiffs were coming in possession of the suit land as co-sharers and revenue entries to the contrary were thus in correct, null and void.

11. On the issue of limitation, learned trial Court returned the findings that as land of plaintiffs was wrongly mutated in favour of defendant No. 1, therefore, plaintiffs in their capacity as owners of the suit land had cause to file the suit and as it stood established that they were in possession of the suit land, the suit could not be said to be barred by limitation because plaintiffs filed the suit when defendants tried to interfere in the rights of ownership and possession of the plaintiffs.

12. Learned appellate Court while upholding the findings so returned by the learned trial Court held that copy of Jamabandi for the year 1955-56 Ex. P-1 demonstrated that plaintiffs

therein were recorded as co-sharers in *hissedari* possession and these entries continued even in the Jamabandi for the year 1965-66 Ex. P-2 and it was only in the Jamabandi for the year 1970-71 Ex. P-3 that for the first time, defendant No. 2 Gurdas and Pirthi, the predecessor-in-interest of defendants No. 3 to 9 were recorded in possession as tenants at will. Learned appellate Court also held that vide mutation Nos. 2257 and 2258 dated 06.11.1981, Ex. D1 and Ex. D2, suit land was mutated in favour of defendant No. 1 on the ground that defendant No. 2 and Pirthi, predecessor-in-interest of defendants No. 3 to 9 had relinquished their possession over the suit land as tenants. Learned appellate Court further held that as per the evidence on record, it stood proved that the suit land in fact was mortgaged with defendant No. 2 and Pirthi and the same stood redeemed in the year 1965 when plaintiffs returned back the mortgage money and defendant No. 2 and Pirthi in fact were never inducted as tenants at will over the suit land. Learned appellate Court further went on to hold that there was no occasion for Pirthi and Gurdass to have had relinquished their tenancy in favour of the State Government, i.e., defendant No. 1, as Pirthi and Gurdass in fact were never inducted as tenants. It further held that copy of Jamabandi for the year 1970-71, in which Pirthi and Gurdass were reflected to be tenants at will for the first time also did not reflect that they were paying any rent to the owners. Learned appellate Court further held that merely because it was reflected in revenue records that Pirthi and Gurdass were paying interest, this did not mean that they were paying rent as there was lot of difference between the two words 'interest' and 'rent'. Learned appellate Court also held that revenue officers had committed illegality while attesting mutations Ex. D-1 and Ex. D-2 in view of the fact that Clause 8.51 of the Himachal Pradesh Land Records Manual envisaged that in case a non-occupancy tenant wanted to make a voluntary surrender of his tenancy land in favour of Government under Section 31 of the Tenancy and Land Reforms Act, he shall apply to the Collector in Form LR 1 and on receipt of application, Collector shall record statement of tenant and thereafter, after satisfying himself that the said act was in fact a voluntary relinquishment of the land, will pass order that tenant had voluntarily surrendered his tenancy land in favour of the Government and thereafter Collector shall cause taking over of the possession of the land through Tehsildar concerned in favour of the Government. Learned appellate Court further held that the Rule also envisaged that even after taking over the possession under Sub rule (1), Collector is to cause necessary entry to be made in the Land Records substituting rights of the Government on the relinquished tenancy in place of the tenant and has to take possession of the land on behalf of State Government. Learned appellate Court further held that as the mutations entered into by revenue officer were in violation of the said clause, therefore, mutations were wrong and illegal. On these bases, learned appellate Court while dismissing the appeal filed by the State, upheld the judgment and decree passed by the learned trial Court.

13. Feeling aggrieved by the judgments and decrees passed by both the Courts below in favour of the plaintiffs/respondents, the defendant/appellant filed the present appeal.

14. I have heard the learned counsel for the parties and have also gone through the records as well as the judgments and decrees passed by both the Courts below.

15. I will deal with both the substantial questions of law independently.

Substantial Question of Law No. 1:

16. Ex.D-1 and Ex.D-2 are mutations, which were entered into by the revenue officer in favour of defendant No. 1-State, as per which, the suit land was mutated in favour of defendant No. 1 on the count of the same being voluntarily relinquished by defendant No. 2 and Pirthi predecessor-in-interest of defendants No. 3 to 9 in favour of defendant No. 1. There is a concurrent finding returned by both the Courts below that there is no evidence on record to the effect that defendant No. 2 and Pirthi were ever inducted as tenants at will over the suit land. During the course of arguments, learned Additional Advocate General also could not draw the attention of this Court to any cogent evidence on record from which it could be inferred that defendant No. 2 and Pirthi were in fact inducted as tenants at will over the suit land by the plaintiffs or their predecessors-in-interest. As far as entries in Jamabandi for the year 1970-71

are concerned, the same are not sufficient to conclude that defendant No. 2 and Pirthi were in fact inducted as tenants over the suit land.

17. Tenancy as it is understood is a bilateral agreement entered into between the landowner and the tenant and in lieu of tenancy, tenant has to pay rent to the landowner. There is no evidence led by defendant No. 1, from which it could be inferred that any rent in fact was being paid by defendant No. 2 and Pirthi to the plaintiffs in lieu of their allegedly being inducted as tenants at will over the suit land. Similarly, there is no agreement on record placed by the defendants from which it can be inferred that defendant No. 2 and Pirthi were inducted as tenants at will over the suit land.

18. On the contrary, both the learned Courts below have returned concurrent finding in favour of the plaintiffs and against the present appellant on the basis of evidence on record that the suit land in fact stood redeemed by plaintiffs on payment of mortgage money from defendant No. 2 and Pirthi way back in the year 1965. This fact has been duly proved and corroborated by the statements of plaintiffs' witnesses. PW-1 Assa Ram has deposed in the Court that the suit land was mortgaged with Gurdass and Pirthi for an amount of Rs. 550/- about 30 years back and in the year 1965, the said land was redeemed and possession thereof was also re-claimed by the plaintiffs. This witness has also deposed in the Court that Gurdass and Pirthi were never inducted as non-occupancy tenants over the suit land and said persons remained in possession of the suit land for a short span when the same was mortgaged to them. In his cross-examination, he has categorically denied that he was not in possession of the suit land on the spot. Further, this witness has also stated in his cross-examination that though it was correct that at the time of entry of mutation, Tehsildar visits the spot and calls the concerned party, however, plaintiffs were never called at the time of attestation of mutation.

19. Sultana Ram, who has entered the witness box as PW-2, has also categorically stated that the suit land was mortgaged by plaintiffs to Gurdass and Pirthi for an amount of Rs. 550/- and the mortgage stood redeemed and possession thereof was also re-claimed by the plaintiffs. This witness has also categorically stated that neither Gurdass nor Pirthi nor their successors-in-interest were ever inducted as non-occupancy tenants over the suit land. He also stated that he was Numberdar of the village for last 44 years and that as per their custom, mortgage used to be verbal only. Now incidentally, the suggestion which has been given to him in his cross-examination and which he admitted to be correct was that the suit land was with Pirthi and Gurdass as mortgage. He also denied the suggestion that possession of the suit property was not with the plaintiffs.

20. From the said evidence, it is apparent and evident that the mutations which were entered in favour of defendant No. 1 vide Ex. D-1 and Ex. D-2 were incorrectly entered because when defendant No. 2 and Pirthi, predecessor-in-interest of defendants No. 3 to 9 were not in possession of the suit land as tenants at will, there was no occasion for them to have had relinquished the said land in favour of defendant No. 1.

21. Besides this, there is no evidence placed on record by defendant No. 1 either ocular or documentary, from which it can be inferred that defendant No. 2 and Pirthi, predecessor-in-interest of defendants No. 3 to 9 were in fact inducted as tenants over the suit property and they had relinquished the suit land in favour of defendant No. 1 as per the provisions of Section 31 of the Himachal Pradesh Tenancy and Land Reforms Act, 1972. No witness has deposed in favour of the State from amongst the so called relinquishers to prove their case. This substantial question of law is decided accordingly.

Substantial Question of Law No. 2:

22. Section 31 of the Himachal Pradesh Tenancy and Land Reforms Act, 1972 provides as under:

> *"31. Relinquishment.- No relinquishment of a tenancy shall be made by a tenant in favour of landowner. However, if a tenant wants to make a voluntary surrender of his tenancy land, the same shall be in favour of the State Government.*

The State Government shall have right to induct any suitable tenant or landless agricultural labourer to the relinquished land in the manner to be prescribed."

23. In the present case, as has already been held by me above, while deciding substantial question of law No. 1, it has been concurrently held by both the learned Courts below and rightly so that the suit land in fact was mortgaged by plaintiffs in favour of Gurdass and Pirthi for an amount of Rs. 550/- and the mortgage was redeemed in the year 1965 and possession of the suit land was also taken by the plaintiffs from the mortgagees. On the other hand, defendant No. 1 has not been able to either justify or substantiate as to how revenue records, i.e. Jamabandi for the year 1970-71 reflected Gurdass and Pirthi to be as tenants over the suit land without there being any agreement entered into in this regard between the landowner and the tenant and there being any agreement to substantiate that the tenants were inducted as such in lieu of payment of rent and they paid any rent to the land owners. Therefore, in this view of the matter, when defendant No. 2 and Pirthi, predecessor-in-interest of defendants No. 3 to 9 were not having any interest over the suit property either as tenants or in any other capacity at the time when the suit property was relinquished in favour of defendant No. 1, it is not understood as to how they could have had relinquished the same in favour of defendant No. 1. It is settled law that a person pass over only that title over the property which he possesses. In the present case, as defendant No. 2 and Pirthi were not having any title over the suit land as on the date when mutations were attested in favour of defendant No. 1, there was no occasion or right for them to have had relinquished the suit property in favour of defendant No. 1.

24. Besides this, as has also been held by the learned appellate Court, there is a procedure prescribed which has to be followed in case a tenant relinquishes the suit land in favour of the State Government. This procedure is prescribed in Clause 8.51 of the Himachal Pradesh Land Records Manual, which provides as under:

*"**Relinquishment of land under Section 31***

8.51(1) If a non-occupancy tenant wants to make a voluntary surrender of his tenancy land in favour of the Government under Section 31 of the Tenancy & L.R. Act, 1972, he shall apply to the Collector in Form LR 1. On receipt of the application, the Collector shall record the statement of the tenant and after having satisfied himself of the fact of voluntarily relinquishing, pass order that the tenant has voluntarily surrendered his tenancy land in favour of the Government. Thereafter, the Collector shall cause the taking over the possession of the land through the Tehsildar concerned in favour of the Government.

(2) On having taken over the possession of the tenancy land under Sub-Rule (1), the Collector shall cause the necessary entry to be made in the Land Records substituting the right of the Government on the relinquished tenancy in place of the tenant and shall take possession of the land on behalf of the State Government.

(3) The Collector shall sub-let the land to the landless agricultural labourers or to those tenants whose land holding shall fall short of one acre as a result of resumption of tenancy land by the landowners under Sub-Section(1) of Section 104. (Rule 12 of the H.P. Tenancy & L.R. Rules, 1975)."

25. In the present case, there is no material on record placed by the appellant from which it can be inferred that even otherwise at the time when the suit land was allegedly relinquished by defendant No. 2 and Pirthi, predecessor-in-interest of defendants No. 3 to 9 in favour of the State, the said procedure was followed. Be that as it may, the fact of the matter still remains that when Gurdass and Pirthi were not tenants over the suit land at the time when mutations were entered into in favour of appellant/defendant No. 1 vide mutations Ex. D-1 and Ex. D-2, they could not have had relinquished the suit land in favour of the State and attestation of mutation vide Ex. D-1 and D-2 thus cannot be said to have had conferred upon the State any right over the suit land under the provisions of Section 31 of the Himachal Pradesh Land Records Manual. This substantial question of law is decided accordingly.

26. In view of the findings returned above, as there is no merit in the present appeal, the same is dismissed, so also miscellaneous application(s), if any. No order as to costs.

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

State of Himachal Pradesh .....Appellant.
Versus
Bhagat Ram .....Respondent.

Cr. Appeal No.394 of 2008.
Reserved on : 27.02.2017.
Decided on : 15.03.2017.

Indian Penal Code, 1860- Section 325- Complainant and K had gone to pluck walnut from a tree- accused B came to the spot and claimed that walnut tree was in joint owner-ship - the complainant refused to give walnut to the accused on which the accused gave a danda blow on the face of the complainant – one tooth of the complainant was broken – the accused went away – the accused was tried and acquitted by the Trial Court – held in appeal there are contradictions in the testimonies of complainant and his father- recovery of danda is suspicious – the presence of eye-witnesses at the spot was doubtful – two views are possible and Trial Court had taken a reasonable view while acquitting the accused – appeal dismissed. (Para- 7 to 12)

Cases referred:
K. Prakashan vs. P.K. Surenderan (2008) 1 SCC 258
T. Subramanian vs. State of Tamil Nadu (2006) 1 SCC 401

For the appellant Mr. Virender Kumar Verma, Addl. AG,Mr. Pushpinder Singh Jaswal, Dy. Advocate General with Mr. Rajat Chauhan, Law Officer.
For the respondent Mr. Naveen K. Bhardwaj, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present appeal is maintained by the appellant-State of Himachal Pradesh against the judgment of acquittal of the accused in a case under Section 325 of the Indian Penal Code passed by the learned Chief Judicial Magistrate, Kullu, District Kullu, dated 25.2.2008, in Criminal Case No.2-I/2005/162-II/2007.

2. Briefly stating facts giving rise to the present appeal are that on 10.9.2004, at about 7:00 am, at village Oshan, Tehsil and District Kullu, complainant Nup Ram (PW-1) and Kirat Ram (PW-3) had gone to pluck walnut from tree, in the meantime, accused Bhagat Ram (hereinafter referred to as 'the accused') came to the spot and claimed half walnut being co-sharer and claimed that the walnut tree was in joint ownership. Complainant (PW-1) refused to give walnut to the accused, consequently, the accused gave 'danda' blow on the face of the complainant. As a result of which, one tooth of the complainant was broken and he sustained injury, thereafter accused went away. Thereafter, complainant (PW-1) reported the matter to the police. Medical examination of the complainant was conducted and FIR was registered. During investigation, police took into possession the 'danda' with which accused had hit the complainant. Investigating Officer visited the spot and prepared site plan.

3. The prosecution, in order to prove its case, examined as many as eight witnesses. Statement of the accused was recorded under Section 313 Cr. P.C, wherein he has denied the prosecution case and claimed innocence. No defence evidence was led by the accused.

4. Learned Additional Advocate General while appearing on behalf of the appellant has argued that the accused has committed heinous crime in a broad day light and the prosecution though proved the guilt of the accused beyond all reasonable doubt, but the learned Court below has committed an error in acquitting the accused. He has further argued that the accused may be convicted after setting aside the impugned judgment of acquittal.

5. On the other hand, learned counsel appearing on behalf of the accused has argued that the accused is innocent and falsely implicated in the present case by the complainant due to family dispute, which dispute was related to the walnut tree. He has further argued that no recovery was effected and the alleged 'danda' to be used was not recovered at all neither the injuries to the person of the injured can be said to be caused by the accused and he is falsely implicated in the present case.

6. To appreciate the arguments of learned Additional Advocate General and learned counsel for the accused, this Court has gone through the record in detail and minutely scrutinized the statements of the witnesses.

7. PW-1 Nup Ram has deposed that on 10.9.2004 at about 7:00 am, when he alongwith Kirat Ram (PW-3) was about to pluck walnut, accused came there and demanded half of the walnut, when he refused to give him half of the walnut, accused gave him a 'dada' blow on his face, as a result of which, his tooth was broken and he also sustained injuries on his arm and wrist. Thereafter, he reported the matter to the police. He has further deposed that his medical examination was got conducted by the police. He has deposed that during investigating, accused has produced 'danda' Ex.P-1 before the police, which was taken into possession, vide recovery memo Ex.PW1/B. PW-2 Kewal Ram, father of the complainant also deposed this fact that accused have demanded half of walnut, when his son refused to do so, accused had given him a 'danda' blow on his face, as a result of which, one tooth of his son was broken. PW-3 Jagat Ram alias Kirat Ram, who was called by the father of the complainant to pluck the walnut, has deposed that in his presence accused had picked up a quarrel with the complainant and gave 'danda' blow to the complainant (PW-1), as a result of which, Nup Ram (PW-1) sustained injury. He has deposed that police has visited the spot and 'danda' Ex.P-1 was taken into possession in his presence and recovery memo Ex.PW1/B, was signed by him and Teja Singh (PW-4) as witnesses. PW-4 Teja Singh has deposed that on 10.9.2004, he was called by Kewal Ram (PW-2) and when he reached the spot, he found Nup Ram (PW-1) has sustained injury, as his one tooth was broken. He has also deposed that accused was also present on the spot with 'danda' in his hand. He has also deposed that in his presence 'danda' Ex.P-1 was taken into possession by the police, vide recovery memo Ex.PW1/B. Roop Singh (PW-5) has deposed that case FIR Ex.PW5/B, was registered upon the statement of complainant Ex.PW1/A. PW-6 LC Geeta Devi lodged rapat Ex.PW1/A, as per the statement of complainant. She has further deposed that after medical examination of the complainant, ASI Surender Pal (PW-7) has lodged another rapat Ex.PW5/A revealing that complainant has sustained grievous injury, as his tooth was broken. PW-8 Dr. Harsh Mehra, has deposed that on 10.9.2004, he medically examined the complainant Nup Ram (PW-1) vide MLC Ex.PW8/A and found that one tooth of injured was broken and opined that the injury to be grievous in nature, which can be caused by blunt weapon.

8. From the above, it is clear that though complainant Nup Ram (PW-1) has deposed that the area of the land over which the walnut tree was standing was about four bighas, but his father has stated that the area of the land was about two bighas. Similar is the deposition of Jagat Ram (PW-3), who was called to pluck the walnut. There is a huge difference of area as stated by the witnesses, so their presence is suspicious on the spot. As per the evidence of Investigating Officer, 'danda' Ex.P-1 was produced by him before the police and the same was taken into possession vide recovery memo Ex.PW1/B. Kewal Ram (PW-2) has deposed that after giving the 'danda' blow, accused had thrown 'danda' on the spot and the said 'danda' was taken by him. He has also deposed that he produced the 'danda' before the police. As per the complainant, the police recovered the alleged 'danda' from the spot. In these circumstances, the recovery of 'danda' became most suspicious. The injuries could not be connected with the

'danda' and the presence of the witnesses at the spot became suspicious. Statement of Teja Singh (PW-4) has stated that when he reached the spot, about two baskets (kiltas) of walnuts were plucked, so these facts were not disclosed by any other witnesses, therefore, his presence on the spot also became suspicious. Complainant (PW-1) has stated that accused has given him 'danda' blow, as a result of which his tooth was broken and he sustained injury on his left arm and wrist. He has also deposed that blood oozed out of his mouth and there was swelling on his lips due to which, he could not eat food for 15 days, but Medical Officer (PW-8) did not notice any injury or swelling on the lip of the complainant Nup Ram. Therefore, MLC Ex.PW8/A does not corroborated the version of complainant regarding the injuries sustained by him. The complainant in his cross-examination has categorically deposed that accused did not give any beating to him or his father or Jagat Ram. This specific statement on the part of complainant is sufficient to demolish the prosecution story that accused had given 'danda' blow to the complainant and caused injuries to him.

9. It has been held in **K. Prakashan vs. P.K. Surenderan (2008) 1 SCC 258,** that when two views are possible, appellate Court should not reverse the judgment of acquittal merely because the other view was possible. When judgment of trial Court was neither perverse, nor suffered from any legal infirmity or non consideration/misappreciation of evidence on record, reversal thereof by High Court was not justified.

10. The Hon'ble Supreme Court in **T. Subramanian vs. State of Tamil Nadu (2006) 1 SCC 401,** has held that where two views are reasonably possible from the very same evidence, prosecution cannot be said to have proved its case beyond reasonable doubt.

11. The net result of the above discussion is that the prosecution has failed to prove the guilt of the accused beyond all reasonable doubt. There is no illegality and infirmity in the findings, so recorded by the learned trial Court.

12. In view of the aforesaid decisions of the Hon'ble Supreme Court and discussion made hereinabove, I find no merit in this appeal and the same is accordingly dismissed. Record of the learned trial Court be sent back forthwith.

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

State of Himachal Pradesh .....Appellant.

Versus

Hardev Singh & ors. .....Respondents.

Cr. Appeal No.172 of 2008.
Reserved on : 01.03.2017.
Decided on : 15.03.2017.

Indian Penal Code, 1860- Section 147, 148, 149, 323, 324, 325, 341 and 427- Complainant and his son were ploughing their field – accused H and N came armed with sickle and stick- accused K was present on the spot and he asked the complainant to stop ploughing the field – the accused attacked the complainant and complainant sustained injuries – he and his son raised alarm on which K and R arrived at the spot, who were also beaten – the accused were tried and acquitted by the Trial Court- held in appeal that there was a cross FIR- accused had also sustained injuries- the place where the incident took place does not belong to the complainant but is in the possession of the accused- it was not proved that accused were aggressors and they were rightly acquitted by the Trial Court- appeal dismissed.(Para- 8 to 13)

Cases referred:

K. Prakashan vs. P.K. Surenderan (2008) 1 SCC 258

T. Subramanian vs. State of Tamil Nadu (2006) 1 SCC 401

For the appellant		Mr. Pushpinder Singh Jaswal, Dy. Advocate General with Mr. Rajat Chauhan, Law Officer.
For the respondents	:	Mr. N.K. Thakur, Sr. Advocate with Ms. Jamuna Kumari, Advocate. Mr. Vineet Vashishta, Advocate, for the complainant.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present appeal is maintained by the appellant-State of Himachal Pradesh against the judgment of acquittal of accused in a case under Sections 147, 148, 149, 325, 324, 323, 341 and 427 of the Indian Penal Code passed by the learned Judicial Magistrate 1st Class, Court No.II, Amb, District Una, (H.P) dated 29.9.2007, in Criminal Case No.117-I-2000/107-II of 2000.

2. Briefly stating facts giving rise to the present appeal are that on 18.6.2000, Station House Officer, Police Station Amb, alongwith Head Constable Suresh Kumar and other Police personnel was on patrolling duty at Amb Chowk, when a wireless information was received that two parties had a fight at village Takarla and the injured of one party have been restrained by other party. On this, Station House Officer arranged for a vehicle and reached at the spot and found that some women were sitting on the road. On seeking the police party, they fled away from the spot. Complainant Jagdish Ram, his wife Kamla Devi and son Vijay Singh, were in their home in injured condition and were taken to Primary Health Centre, Amb, for medical treatment. Their MLCs were obtained. Statement of complainant Jagdish Ram under Section 154 of the Code of Criminal Procedure was recorded. Complainant stated that on 18.6.2000 at around 3:00 pm, he alongwith his son Vijay Singh was ploughing their fields in Khasra Nos.1008, 1010, 1011, 1014, 1015 and 1016 with tractor. Accused persons formed an unlawful assembly and came on the spot. Accused Hardev Singh and Nirmala Devi were armed with sickle and stick. Accused Kuldeep Singh was also present on the spot and asked Vijay Singh to stop ploughing the tractor and on objection of complainant, belaboured the complainant on his right arm. Accused Hardev Singh and Nirmala Devi attacked them with sickle and other accused attacked them with sticks. The complainant and his son raised alarm, upon which Kamla Devi and her daughter-in-law Rano Devi came on the spot for their rescue. Kamla Devi was caused injury with sickle by Nirmla Devi. Thereafter, people of the locality gathered on the spot. It is further stated that a drain adjoins their private land and Chanan Singh etc. blocked their drain and moved an application to Deputy Commissioner, Una and also kept cultivating his land. Due to this, accused have attacked and caused hurt. Accused have restrained them from getting the first aid and reported the matter to the police. Statement of witnesses were recorded and site plan was prepared. Weapon of offence was also taken into possession by the police. The vehicle in question was taken into possession by the police and photographs were prepared.

3. The prosecution, in order to prove its case, examined as many as sixteen witnesses. Statement of accused persons were recorded under Section 313 of the Criminal Procedure Code, wherein they have denied the prosecution case and claimed innocence. Accused persons led their evidence in defence.

4. Learned Deputy Advocate General appearing on behalf of the appellant has argued that the prosecution has failed to prove the guilt of accused beyond the shadow of reasonable doubt, but the learned Court below on the basis of surmises and conjectures has acquitted the accused and the present is a fit case, where the accused is liable to be convicted after setting aside the judgment of acquittal.

5. On the other hand, Mr. N.K. Thakur, Senior Counsel appearing on behalf of the accused has argued that the prosecution has failed to prove the guilt of the accused beyond all

reasonable doubt, as there was no evidence to connect the injuries with the alleged recovered weapon of offence. The recovery is full of suspicious and otherwise also the land on which the alleged occurrence has taken place, is in the occupation and possession of the accused.

6. Learned counsel appearing on behalf of the complainant has also argued that the learned Court below has failed to take into consideration the material aspects of the case and has not considered the vital evidence and the judgment is perverse.

7. To appreciate the arguments of learned Deputy Advocate General and learned counsel for the parties, this Court has gone through the record in detail and minutely scrutinized the statements of the witnesses.

8. Shri Jagdish Ram, complainant, while appearing as PW-1, has deposed that he alongwith his son was ploughing their fields with tractor, when accused came on the spot and asked his son not to cultivate the land. He has deposed that when he refused, accused persons attacked them. He has deposed that when accused persons restrained them to get medical aid and to report the matter to the police, he telephoned Sada Ram his uncle, who came on the spot with jeep bearing No. HP-19-1729. In his cross-examination, he has deposed that accused and complainant party are in dispute for the last 4-5 years on account of the land in dispute. He has further admitted that one cross case qua the alleged occurrence was made out against the complainant party. He has denied that the place of occurrence is in possession of the accused by cultivation of 'Chery' crop. He has deposed that 5-6 villagers came on the spot, but the same were not witness to the fight. He has deposed that accused Kuldeep hurt him with stick in the presence of his wife and daughter-in-law. PW-2 Vijay Singh-injured has deposed on the same line as PW-1 and he has also admitted there was a cross case of same occurrence has been made out against the complainant party. He has denied that the accused are cultivating 'Cherry' crop on the place of occurrence. He has deposed that the occurrence took place towards the South of his house and not towards the West of his house. He has admitted that such injuries were not disclosed to the police. PW-3 Kamla Devi, mother of PW-2 and wife of PW-1, also supported the version of PW-1 and PW-2. In her cross-examination, she has admitted that accused have cultivated the 'Cherry' crop on the place of occurrence and deposed that accused have forcibly cultivated the same. She has admitted that police recorded her statement on the narration and desire of her husband. She has further admitted that she is giving her deposition on the basis of said statement. She has deposed that during fight no villager reached at the spot and then stated that 15/18 women were accompanying the accused who belonged to the family of the accused. She has further deposed that her nephew Baldev was also came on the spot. PW-4, Sada Ram has deposed that complainant telephonically disclosed about the alleged occurrence to him. He has also admitted that Baldev Singh is related to him and further deposed that when he reached at the spot with jeep, Baldev Singh and other persons of the village were not present there. PW-5 Rakesh Kumar has deposed that on 18.6.2000, Sada Ram (PW-4) booked his jeep bearing No. HP-19-1729 for going to Takarla, when he reached at the spot alongwith Sada Ram, 2-3 persons in injured condition were present. In his cross-examination, he has deposed that he brought the injured to Police Station, Amb at around 4:45 pm and took them back from Police Station at about 9:00/9:30 pm. The medical evidence of Dr. S.K. Verma (PW-11) has deposed that on 18.6.2000 at about 9:30 pm, he examined Kamla Devi (PW-3) and opined simple injuries on her person. He has deposed that injury No.1 can be caused with sickle and injury No.2 can be caused with stick. He has further deposed at about 9:40 pm, he examined Jagdish Ram (PW-1) and opined that two injuries on his person, of which one was simple and another was grievous, caused within the same duration. He has also examined Vijay Singh (PW-2) and opined four simple injuries caused within the same duration. He has deposed that these injuries are possible with stick blow. In his cross-examination, he has deposed that the injuries on the person of Kamla Devi (PW-3), is a result of self infliction, whereas the injury on the person of Vijay Singh (PW-2) and Jagdish Ram (PW-1), can result by fall on hard surface.

9. It is on the record that it was a cross FIR and the injuries was also on the person of the accused. Since it is admitted fact that there was also injuries on the person of accused and

as a result of which, another cross case was initiated, the only thing to be deciphered is that whether accused were aggressor in the present case or the injuries on the person of the complainant are result of scuffle to prevent the complainant party from forcibly ploughing the land of accused by tractor. The demarcation report Ex.PW10/A further proved on record that the land where the occurrence took place is not the land of complainant. The said demarcation report further revealed that the place of occurrence is comprised in Khasra No.1012, 1013, 1017 to 1020, 1077, 1079 to 1082, 1095. Jamabandis Ex.PW10/B and Ex.PW10/C also shows that the complainant is not owner-in-possession of the said land. Hence, it stands proved that the complainant and his son were not ploughing their land, but were ploughing the land in possession of accused party. PW-14 ASI Jaswinder Singh, in his cross-examination admitted that during demarcation the place of occurrence was found to be of the accused. PW-2 Vijay Singh has deposed that his wife Rano Devi was also beaten by accused and she sustained injury. He has admitted that such disclosure was not made to the police. PW-2 and PW-3 have also deposed that the place where the occurrence took place is on the Southern side of their house and not on the Western side, which fact is contrary to the site plan Ex.PW16/A. PW-3 deposed that 15/18 women were present on the spot alongwith accused and were from the family of the accused. She has further deposed that her statement recorded by the police was as narrated by her husband. PW-5 Rakesh Kumar has denied that when he reached at the spot, accused party have restrained them. Rather, he has deposed that he reached alongwith the complainant and others at Police Station at about 4:45 pm and brought them back from the Police Station at about 9:30 pm. Further, it has come in the evidence that the injuries on the person of Kamla Devi (PW-3) can be self conflicted. It has also come on record that the land was in occupation and possession of the accused, where the alleged occurrence has taken place. All these facts goes to show that the story of prosecution is full of suspicious and no conviction can be based on such suspicious evidence.

10. It has been held in **K. Prakashan vs. P.K. Surenderan (2008) 1 SCC 258,** that when two views are possible, appellate Court should not reverse the judgment of acquittal merely because the other view was possible. When judgment of trial Court was neither perverse, nor suffered from any legal infirmity or non consideration/misappreciation of evidence on record, reversal thereof by High Court was not justified.

11. The Hon'ble Supreme Court in **T. Subramanian vs. State of Tamil Nadu (2006) 1 SCC 401,** has held that where two views are reasonably possible from the very same evidence, prosecution cannot be said to have proved its case beyond reasonable doubt.

12. The net result of the above discussion is that the prosecution has failed to prove the guilt of the accused conclusively and beyond reasonable doubt. There is no illegality and infirmity in the findings, so recorded by the learned trial Court.

13. In view of the aforesaid decisions of the Hon'ble Supreme Court and discussion made hereinabove, I find no merit in this appeal and the same is accordingly dismissed. Record of the learned trial Court be sent back forthwith.

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

Shri Kamal Kant Bhatia & another. .....Petitioners.

Versus

Shri Roop Singh Verma. .....Respondent.

CMPMO No. 73 of 2017
Reserved on: 15.03.2017
Decided on: 16.03.2017

Code of Civil Procedure, 1908- Order 14 Rule 5- An application for framing issues was filed, which was dismissed by the Rent Controller- held that no objection was raised at the time of framing of issues that any specific issue was not framed – evidence was led- no application was filed for framing any specific issue- application was filed when the case was listed for arguments – when the parties knew their case and they had led evidence on all aspects of the case, non-framing of any issue is not detrimental for adjudication of the case- issue was already framed to the effect whether the petitioner is entitled for arrears of rent and the Rent Controller is bound to adjudicate the rate of rent- hence, the plea that issue regarding the rent being less than Rs.5,000/- should also have been framed is not acceptable- application was rightly dismissed by the Rent Controller- petition dismissed. (Para-8 to 12)

For the petitioners: Mr. Rakesh Manta, Advocate,
For the respondent: Mr. Ajay Kumar, Senior Advocate, with Mr. Dheeraj K. Vashistha, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present petition is maintained by the petitioners/respondents/tenants (hereinafter referred to as 'the petitioners') assailing the order of learned Rent Controller, Court No. 2, Shimla, dated 03.03.2017, passed in application of the petitioners filed under Order 14, Rule 5 CPC, in Rent Case No. 128-2 of 15/14, titled as Shri Roop Singh Verma vs. Shri Kamal Kant Bhatia and another, with a prayer to quash and set aside the impugned order.

2. The brief facts giving rise to the present petition are that the respondent/landlord (hereinafter referred to as 'the respondent') filed an eviction petition under Section 14 of the Himachal Pradesh Urban Rent Control Act, 1987, against the petitioners. As per the petitioners, the aforementioned petition was pending adjudication before the learned Rent Controller below for arrears rent w.e.f. June, 2009, till date at the rate of Rs. 5,000/- per month. Accordingly, issue No. 2 was framed by the learned Court below, though the amount of rent was contested by the petitioners. As per the petitioners, they have specifically averred before the learned Rent Controller below that in the month of October, 2007, they were inducted as tenants on monthly rental of Rs. 1800/- and w.e.f. October, 2010, rent was enhanced to the tune of Rs. 3,000/- per month. It is further contended that in the year 2014 the respondent (landlord) demanded exorbitant rent of Rs. 6,000-Rs. 7,000/- per month, which they did not accept. Resultantly, the respondent blocked their water supply, which compelled the petitioners to resort to legal recourse by approaching the learned Rent Controller for restoration of water supply. As per the petitioners, the learned Rent Controller did not frame imperative issues on the basis of pleadings of the parties, thus they moved an application under Order 14, Rule 5 CPC for framing the following issues:

"Issue No. 1-A: *Whether the respondents have been inducted tenants in the demised premises in October, 2007 at the monthly rent of Rs. 1800/-, which was enhanced to the tune of Rs. 3000/- per month w.e.f. October, 2010?*

Issue No. 2-B: *Whether the petitioner is entitled to enhance the rent exorbitantly in contravention of the provisions of H.P. Urban Rent Control Act, 1987, where under only 10% rent can be enhanced after every three years, if so, its effects?"*

However, the learned Rent Controller dismissed their application, hence the present petition.

4. The learned counsel for the petitioners has argued that the application under Order 14, Rule 5 CPC was required to be allowed, as the learned Rent Controller framed the following issues:

"*2. Whether the petitioner is entitled to the arrears of rent w.e.f. June, 2009, till date @ 5000/- per month? OPP*

3. Whether the petitioner requires the said accommodation bonafide for his own personal use and occupation, as alleged? OPP

4. Whether the present petition is not competent nor maintainable? OPD

5. Whether the petition has been filed with sole intention to harass the respodnents, as alleged? OPD

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

7. Whether the petition lakhs material particulars, as alleged? OPD

8. Relief."

5. The learned counsel for the petitioners has further specifically averred that the learned Rent Controller has framed the issue assuming that the rent is Rs. 5,000/- per month and new issue was required to be framed so that the case of the parties can be adjudicated.

6. The learned Senior counsel for the respondent has argued that the issues framed did not determine rent at the rate of Rs. 5,000/- conclusively, as the petitioners while leading his evidence was fully knowing that the rent was Rs. 5000/- or less than Rs. 5,000/-, as pleaded by them. It has been further averred that the parties have led their evidence on all the issues and now the Court is to determine the rate of rent on the basis of issue No. 2. In rebuttal, the learned counsel for the petitioners has argued that without there being any specific issue, the findings could not be arrived at.

7. In order to appreciate the rival contentions of the parties, I have gone through the records.

8. It is on record that earlier also the petitioner has come before this Court with a prayer to allow them to lead evidence, when their case to lead evidence was closed, and they got opportunity to lead evidence from this Hon'ble Court. Now the present petition has been maintained by the petitioners.

9. Apparently, issues were framed by the learned Rent Controller on 06.07.2015 and at that time no objection was raised by the petitioners qua non-framing of any specific issue. The petitioners firstly went on with leading their evidence and concluded the same on 12.01.2017. No application was filed for framing additional issues between the period 06.07.2015 to 12.01.2017 and the application under Order 14, Rule 5 CPC was only filed when the case came up for final arguments.

10. It is well settled that when the parties know their case and they had led the evidence on all the aspects of the case on the basis of pleadings, then non-framing of any issue is not detrimental for the adjudication of the case.

11. In the instant case, the learned Rent Controller has framed the following issue *inter alia* others:

"*2. Whether the petitioner is entitled to the arrears of rent w.e.f. June, 2009, till date @ 5000/- per month? OPP*"

It means that if the petitioners prove that they are not in arrears of rent at the rate of Rs. 5,000/- per month and the respondent fails to rebut the evidence of the petitioners by leading cogent evidence to the effect that the rent is Rs. 5,000/- per month w.e.f. June, 2009, and it was lesser, then the learned Court below will adjudicate the issue accordingly.

12. The net result of the above discussion is that the issue framed by the learned Rent Controller below is sufficient for adjudication of the *lis inter se* the parties and in the opinion of this Court no further issue is required to be framed. The findings rendered by the learned Rent Controller below while deciding application of the petitioners filed under Order 14, Rule 5 CPC,

calls for no interference as the findings cannot be said to be perverse in any manner. As the findings of the learned Rent Controller below are neither perverse nor against the confines of law and facts and also when the parties know their case fully and they lead their evidence knowing their case, thus issue No. 2 cannot be interpreted in the manner as the learned counsel for the petitioner has interpreted. Therefore, this Court finds that the present is not a fit case to exercise extraordinary jurisdiction vested in this Hon'ble Court under Article 227 of the Constitution of India. The petition being devoid of merits deserves dismissal and is accordingly dismissed. However, in view of peculiar facts and circumstances of the case, the parties are left to bear their own costs.

13. All pending miscellaneous application(s), if any, stand(s) disposed of.

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

Pushap Raj and another .....Petitioners.

Versus

The State of Himachal Pradesh .....Respondent.

Cr. Revision No. 168 of 2010
Date of decision: 16.03.2017

Code of Criminal Procedure, 1973- Section 378- Petitioners were tried and acquitted of the commission of offences punishable under Sections 41 and 42 of Indian Forest Act and 120-B of Indian Penal Code– an appeal was filed, which was allowed and the judgment of acquittal was set aside – petitioners were held guilty of violation of Rule 5 of H.P. Forest Produce Transit (Land Routes) Rules, 1978 punishable under Rule 20 and Section 42 of Indian Forest Act – held, that appeal against bailable and non-cognizable offences is not maintainable before the Court of Sessions but the same has to be filed before the High Court – Sections 41 and 42 of Indian Forest Act are bailable and non-cognizable – the appeal filed before Sessions Judge was not maintainable – adjudication of the same by the Sessions Judge was without jurisdiction- appeal allowed – judgment of the Sessions Judge set aside. (Para-9 to 12)

Case referred:
Sanjaysingh Ramrao Chavan Vs. Dattatray Gulabrao Phalke and others, (2015) 3 Supreme Court Cases 123

For the petitioners: Mr. Surinder Saklani, Advocate.
For the respondent: Mr. Vikram Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge*(Oral)**:***

Taking into consideration the issue involved in the present revision petition, it is not necessary to go into the factual matrix of the case in detail.

2. Suffice it to say that the petitioners before this Court were tried for commission of offences punishable under Sections 41 and 42 of the Indian Forest Act and Section 120-B of the Indian Penal Code by the Court of learned Sub Divisional Judicial Magistrate, Chachiot at Gohar, Mandi in Police Challan No. 23-I/2002 and learned trial Court vide its judgment dated 31st August, 2006, acquitted the present petitioners alongwith other co-accused in the matter.

3. Feeling aggrieved by the judgment of acquittal so passed by the learned trial Court, State filed an appeal in the Court of learned Sessions Judge, Mandi and learned appellate

Court vide its judgment, dated 17.05.2010 passed in Criminal Appeal No. 43 of 2006, while setting aside the judgment of acquittal passed by the learned trial Court in favour of the present petitioners, held them guilty for violation of Rule 5 of Forest Produce Transit (Land Routes), Rules 1978 punishable under Rule 20 and also under Section 42 of the Forest Act. On the question of sentence, the matter was sent back by the learned appellate Court to the learned trial Court and thereafter learned trial Court imposed the following sentence upon the accused.

> *"For the offence punishable u/s 42 of Indian Forest Act, convicts are sentenced to punishment till rising of the Court and also a find of Rs.4000/- each (Rs. Four Thousand). For the violation of Rule 5 of Forest Produce Transit (Land Route) Rules, 1978 punishable under Rule 20, convicts are only fined Rs.500/- each (Rs. Five hundred). In case of non deposition of fine amo*unt convicts will undergo simple imprisonment of one week."

4. Feeling aggrieved, the petitioners have filed this revision petition.

5. Mr. Surinder Saklani, learned counsel appearing for the petitioner has submitted that the impugned judgment passed by the learned appellate Court, i.e. the Court of learned Sessions Judge, Mandi is perverse and *void abinitio*, because learned appellate Court while entertaining and deciding the said appeal has failed to appreciate that as the offences for which the present petitioners were tried by the learned trial Court were bailable offences, no appeal was maintainable before the learned Sessions Judge as per the provisions of Section 378 of the Code of Criminal Procedure, 1973 and the *Fora* for the State to have had challenged the said decision was this Court, i.e. the High Court.

6. I have heard the learned counsel for the parties and have also gone through the records of the case as well as the judgments passed by both the learned Courts below.

7. Before proceeding in the matter, it is relevant to take note of what is the scope of revisional jurisdiction of this Court. It is settled law that the scope of revisional jurisdiction of this Court does not extend to re-appreciation of evidence. It has been held by the Hon'ble Supreme Court that the High Court in exercise of its revisional power can interfere only if the findings of the Court whose decision is sought to be revised is shown to be perverse or untenable in law or is grossly erroneous or glaringly unreasonable or where the decision is based on no material or where the material facts are wholly ignored or where judicial discretion is exercised arbitrarily or capriciously. It has been held by the Hon'ble Supreme Court in **Sanjaysingh Ramrao Chavan** Vs. **Dattatray Gulabrao Phalke and others,** (2015) 3 Supreme Court Cases 123, that unmerited and undeserved prosecution is an infringement of guarantee under Article 21 of the Constitution of India. In this case, Hon'ble Supreme Court has further held that the purpose of revision jurisdiction is to preserve the power in the Court to do justice in cases of criminal jurisprudence.

8. Keeping in view the consideration of law so declared by the Hon'ble Supreme Court, this Court proceeds to adjudicate the revision petition on merit.

9. A perusal of Section 378 of the Code of Criminal Procedure demonstrates that in case of acquittal, where the offences alleged against the accused are bailable and non-cognizabele, then appeal against the judgment of such acquittal is not maintainable before the Court of learned Sessions Judge, but the same has to be filed before the High Court. Section 378 of the Code of Criminal Procedure provides as under:

> *"378.* ***Appeal in case of acquittal.***
>
> *(1) Save as otherwise provided in sub- section (2), and subject to the provisions of sub- sections (3) and (5),-*
>
> *(a) the District Magistrate may, in any case, direct the Public Prosecutor to present an appeal to the Court of Session from an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence;*
>
> *(b) the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal*

passed by any Court other than a High Court (not being an order under clause (a) or an order of acquittal passed by the Court of Session in revision.]

(2) If such an order of acquittal is passed in any case in which the offence has been investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or by any other agency empowered to make investigation into an offence under any Central Act other than this Code, the Central Government may, subject to the provisions of sub-section (3), also direct the Public Prosecutor to present an appeal-

(a) to the Court of Session, from an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence;

(b) to the High Court from an original or appellate order of an acquittal passed by any Court other than a High Court (not being an order under clause (a) or an order of acquittal passed by the Court of Session in revision.

(3) No appeal to the High Court under sub- section (1) or sub- section (2) shall be entertained except with the leave of the High Court.

(4) If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court.

(5) No application under sub- section (4) for the grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of six months, where the complainant is a public servant, and sixty days in every other case, computed from the date of that order of acquittal.

(6) If in any case, the application under sub- section (4) for the grant of special leave to appeal from an order of acquittal is refused, no appeal from that order of acquittal shall lie under sub- section (1) or under sub- section (2).”

10. It is specifically mandated in Clause (a) of Sub-section (1) of Section 378 of the Code of Criminal Procedure that the District Magistrate may, in any case, direct the Public Prosecutor to present an appeal to the Court of Session from an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence, whereas Clause (b) of Sub-section(1) of Section 378 provides that the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court (not being an order under Clause (a) or an order of acquittal passed by the Court of Session in revision.

11. It is not disputed that Sections 41 and 42 of the Indian Forest Act are bailable and non-cognizable offences. Similar is the position with Section 120-B of the Indian Penal Code, keeping in view that the main offences for the commission of which the accused were charged are bailable and non-cognizable. In these circumstances, it is but apparent that the appeal filed by the State against the judgment of acquittal passed by the learned trial Court in the Court of learned Sessions Judge, Mandi was not maintainable and was hit by provisions of Clause (b) of Sub-section(1) of Section 378 of the Code of Criminal Procedure. Despite this, learned appellate Court not only entertained an appeal which was not maintainable before it, but also went on to adjudicate upon the same and convicted the present petitioners by setting aside the judgment of acquittal passed by the learned trial Court.

12. In my considered view, as the appeal was not maintainable before the learned appellate Court, i.e. before the Court of learned Sessions Judge, Mandi, accordingly adjudication on the same by the learned appellate Court was without any jurisdiction. Therefore, the present revision petition is allowed and the judgment of conviction passed by the Court of learned Sessions Judge, Mandi in Criminal Appeal No. 43 of 2006, dated 17.05.2010 is set aside, so also sentence imposed upon the petitioners by the learned trial Court pursuant to judgment of

conviction passed by learned appellate Court. Amount of fine, if any, deposited by the petitioners shall be released to them in accordance with law. Revision petition is disposed of in above terms.

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

Tulsi Ram .....Petitioner.
Versus
State of H.P. & others ....Respondents.

Civil Revision No. 161 of 2016.
Date of Decision: 16th March, 2017.

Code of Civil Procedure, 1908- Order 7 Rule 14(3)- An application for producing jamabandi on record was filed, which was dismissed by the Trial Court on the ground that provisions of Order 7 Rule 14(3) are not applicable, after the plaintiff had closed the evidence in affirmative – held that copy of jamabandi tendered in evidence did not bear the signatures of HalkaPatwari, on which the applicant approached the Patwari to supply fresh jamabandi- application was filed to produce the signed jamabandi on record- document is essential for adjudication of the dispute- application can be filed during the hearing of the suit- since the hearing continues even after theclosing of the evidence by the plaintiff- therefore, Trial Court had wrongly rejected the application- Trial Court directed to permit the applicant to adduce the copy of jamabandi in evidence. (Para-1 to 3)

For the Petitioner: Mr. Ajay Sharma, Advocate.
For Respondents No.1 & 2 : Mr. Vivek Singh, Attri, Dy. A.G.
For Respondent No.3: Mr. Goldy Kumar, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral)

Heard. After the learned counsel for the plaintiff making a statement before the learned trial Court holding echoings qua his closing the plaintiff's evidence in the affirmative, an application under Order 7, Rule 14 (3) of the Code of Civil Procedure stood preferred therebefore by the plaintiff, with a prayer therein qua a copy of jamabandi for the year 2002-2003 pertaining to the suit land being permitted with the leave of the Court to be adduced in evidence. However, the learned trial Court refused to allow the application, on anvil, qua sub rule (3) to Rule 14 of Order 7 not holding any mandate qua after the plaintiff closing his evidence in the affirmative, his standing entitled to thereafter seek leave of the Court to adduce the relevant document into evidence.

2. The strength of the aforesaid reason has to be tested in the backdrop qua the relevant document at the time of its standing tendered into evidence, it thereat on its discernment not holding thereon the signature(s) of the Patwari of the Halqua concerned whereupon the apposite portrayal(s) made therein would obviously hold no tenacity. For curing the aforesaid infirmity gripping the relevant document, the plaintiff had approached the Patwari of the Halqua concerned, to purvey him a copy of the jamabandi apposite to the suit land holding therewithin his signatures, for its thereupon standing fastened with the apposite evidentiary worth. Since, time stood consumed by the plaintiff to obtain a copy of the relevant jamabandi holding therewithin the signatures of the Patwari of the Halqua concerned, thereupon after the closure of the plaintiff's evidence, he hence preferred an application constituted under Order 7, Rule 14(3) of the CPC wherein he sought the leave of the Court to adduce it, into evidence, it being both, just and essential to decide the controversy. However, the learned trial Court for the aforesaid reasons

declined the relief to the plaintiff. The declining of relief to the plaintiff by the learned trial Court under its impugned order has visibly spurred from its grossly misconstruing the import of sub rule (3) to Rule 14 of Order 7 of the CPC, provisions whereof stand extracted hereinafter, also it abridging the parlance borne by the hereafter words occurring therein qua the apposite leave being grantable to the applicant "at the time of hearing of the suit" besides its construing qua the signification borne by the aforesaid words occurring therein holding echoings qua after the the closure of the plaintiff's evidence, the hearing of the suit terminating, thereon the relief claimed therein being impermissible, whereas, the appropriate parlance borne by the aforesaid words "after the hearing of the suit" occurring therein, is qua even after the closure of the plaintiff's evidence or of the defendants' evidence uptil the Court concerned proceeding to hear arguments of the respective counsel, thereupto the hearing of the suit continuing whereat it, for good reasons also for facilitating the cause of justice predominantly for clinching the relevant issues resting upon evidence, just and essential for hence its making a firm conclusion thereon, thereat holding jurisdiction to grant the apposite leave to the applicant despite reiteratedly the defendant or the plaintiff closing his evidence. Also since the apposite jamabandi did not at the stage of its standing tendered into evidence hold the signature(s) of the Patwari concerned whereupon it stood rendered unworthwhile thereupon when it constituted a pivotal piece of evidence for resting the relevant issue put to trial, its adduction into evidence even at the stage of the trial Court commencing to hear arguments on the suit, is hence imperative whereupon, the apposite relief stood enjoined to be accorded to the plaintiff by the learned trial Court. The Relevant provisions of Order 7, Rule 14(3) of the CPC read as under:-

> *"**14. Documents relied on in plaint.**- Production of document on which plaintiff sues or relies-*
>
> *(1).....*
>
> *(2).....*
>
> *(3) A document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexe to the plaint but is not produced or entered accordingly, shall not without the leave of the Court, be received in evidence on his behalf at the hearing of the suit."*

3. Consequently, the instant petition is allowed and the order impugned hereat is quashed and set aside. In sequel, the application under Order 7, Rule 14(3) of the Code of the Civil Procedure is allowed and learned trial Court is directed to permit the plaintiff/petitioner herein to adduce into evidence copy of jamabandi for the year 2002-2003. Records be sent back forthwith. The parties are directed to appear before the learned trial Court on 13th April, 2017. All pending applications also stand disposed of.

****

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

Smt. Vijaya Shakti Gupta ...non-applicant/petitioner.

Versus

Shri Rakesh Khanna ...applicant/respondent.

CMP No. 1227 of 2017 in
CMPMO No.: 344 of 2014.
Decided on: 16.03.2017.

Code of Civil Procedure, 1908- Order 9 Rule 13- Applicant was proceeded ex-parte on 22.9.2015 for which date he was served by way of publication in the daily newspaper – attempts to serve him personally could not succeed as he had left the address mentioned in the petition – an application for setting aside ex-parte order was filed by the applicant contending that the applicant had not read the newspaper – held that the service by way of publication in the

newspaper circulating in the area where the applicant last resided is proper service – it is not required to be proved that the applicant had actually read the newspaper to complete the service – the service was proper and there is no justification for setting aside ex-parte order – application dismissed. (Para-9 to 11)

For the non-applicant/ Petitioner: Mr. Sanjeev Sood, Advocate.
For the applicant/ respondent : Mr. R.K. Sharma, Sr.Advocate with Ms.Vidushi Sharma, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

CMP(M) No. 139 of 2017

Application allowed. Delay condoned.

CMP No. 1227 of 2017

By way of this application, applicant/ respondent has prayed for setting aside *ex parte* judgment passed by this Court on 19.10.2016 on the ground that the judgment has been passed by this Court without issuance of any notice to the applicant/ respondent and without effecting any proper service upon him.

2. I have heard learned counsel for the parties and also gone through the records of this case to satisfy myself as to whether respondent was duly served in the case or not.

3. As per records of the case, the CMPMO was admitted on 22.09.2015, on which date, the respondent was proceeded against *ex parte* as service was complete but there was no representation on behalf of the respondent.

4. Records demonstrate that notices were issued to applicant/respondent on 31st October, 2014 and 12.11.2014 but as he could not be served for want of correct address, accordingly, on 09.12.2014 this Court ordered filing of fresh process fee and correct address. Thereafter, as per the records, notice issued to the respondent for his appearance in the Court on 25.03.2015 was received back with the report that the respondent was not available at the given address and on inquiry, it was informed that respondent had left the said address since long. The address on which said notices were issued is quoted here-in-below.

"Rakesh Khanna S/o Sh. Romesh Kumar Kahanna, R/o NL-130, Mohalla Mohindru, Jalandhar City, Punjab"

5. Records also demonstrate that notices were issued to the respondent on 6th of April, 2015 for his appearance in the Court on 13th May, 2015 on the following address.

"Rakesh Khanna S/o Sh. Romesh Kumar Kahanna, R/o Wispering Winds Resort (Khaniyara Road), Mohal Kasol, Mauja Khanyara, Tehsil Dharamshala, District Kangra,176215"

6. As per records, this notice was also received back with the report that respondent was not found on the address given and he was stated to be out of station. Thereafter, again notices were issued to the respondent on 08.07.2015 for his appearance in the Court on 7th August, 2015 on both his addresses mentioned above. The respondent was again not served as he was not found on the given addresses. Thereafter, an application i.e. CMP No. 6620 of 2015 was filed by the petitioner under Order 5 Rule 20 of the Code of Civil Procedure for substituted service of the respondent, on which following order was passed.

"20.06.2015

Present: Ms. Ranjana Chauhan, vice counsel for the petitioner.

CMP No. 6620 of 2015 has been moved under Order 5 Rule 20 read with section 151 CPC for the service of respondent Sh. Rakesh Khana by way of substituted mode. It is stated in the application that the said respondent is not being served through ordinary mode of service as he is intentionally keeping himself away and avoiding the service. The application is supported by an affidavit. It is clear from the perusal of the record that the aforesaid respondent is not being served for one reason or the other despite attempts having already been made thrice in this regard. Therefore, the application is allowed, as requested for. Respondent Sh. Rakesh Khana, be served through ordinary process as also through registered AD post. The said respondent be also served by way of publication in the daily newspaper "Amar Ujala" having wide circulation in the area where the respondent is residing/last resided/concerned area. Steps, i.e. publication charges, RAD covers, process fee etc., be taken within two weeks. Notices for the aforesaid purpose be made returnable on 07.08.2015.

Additional Registrar"

7. Thereafter notices were published in vernacular Newspaper "Amar Ujala" Jalandhar Edition, (Punjab) dated 30th July, 2015 and vernacular Newspaper "Amar Ujala" Dharamshala Edition, (Himachal Pradesh) Edition dated 30th July, 2015, in which notices respondent was called upon to appear before the Court either in person or through an authorized agent, however, even after this publication, as none appeared on behalf of the respondent before the Court, in these circumstances that the applicant/ respondent was ordered to be proceeded against *ex parte* and judgment was announced in the case on 19.10.2016.

8. Mr. R.K. Sharma, learned senior counsel appearing for the applicant/respondent has vehemently challenged the same on the ground that the service so effected upon the respondent by way of publication /substituted service is no service in the eyes of law as the applicant/respondent had not read the newspaper in issue, therefore, it is to be presumed that the publication of notice for his appearance in the Court was not in his knowledge. No other point is argued.

9. I am afraid that the said contention of learned senior counsel appearing for the applicant/respondent is without any merit. Records demonstrates that efforts were made for the service of respondent at his two known addresses but the notices could not be served upon the respondent as on the address which pertained to Jalandhar City, report was coming again and again that he was not residing on the said address. Whereas the address which pertained to Dharamshala, report was coming that respondent was not found for the purpose of service on the said address. Incidentally, the address given by the applicant/respondent in the present application which has been filed praying for setting aside the *ex parte* order is the same on which the Registry was not able to serve him which is both strange and surprising.

10. Be that as it may, the fact of the matter still remains that there has been effective service of the respondent by way of publication of notice in two vernacular newspapers dated 30th July, 2015 i.e. Amar Ujala, Jalandhar Edition, (Punjab) and Amar Ujala, Dharamshala Edition (Himachal Pradesh), in which notices were issued intimating the respondent to put in appearance before this Court on 07.08.2015 and despite publication of these notices, no representation or appearance was made on his behalf in the Court. As has already been mentioned by me above, the argument raised by learned senior counsel appearing for the respondent that publication of notices in newspaper is no service until and unless and it proved that the person who is to be served has read the newspaper and thereafter had chosen not to appear in the Court is without any merit. It is not the mandate of law that when notices are published in newspaper then notice is deemed to have been served only when it is proved that newspaper in issue was actually read by the person to whom the notice was issued. Once this Court was satisfied that the petitioner despite best efforts was not able to serve the respondent and order of substituted service was made and notices were duly published in a vernacular newspaper, presumption is that the respondent was duly served.

11. Therefore, as the applicant/respondent has not been able to satisfy this Court that there was no proper service of notice upon him by way of publication, this application is dismissed being devoid of merit.

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

Ashok Thakur and another ....Petitioners

Versus

M.C. Shimla and others ....Respondents.

CMPMO No. 79 of 2017.
Date of decision : 17th March, 2017.

H.P. Municipal Corporation Act, 1994- Section 254(1)- Petitioners were directed by respondent No.2 to stop the construction work and to take demarcation by associating their immediate neighbours- an appeal was filed, which was dismissed- aggrieved from the order, the present petition has been filed contending that the order is beyond the scope of Section 254(1) – held, that the notice issued by the Commissioner did not touch any of the conditions contemplated by Section 254 of the M.C. Act – the power was exercised for extraneous consideration – the Appellate Court had also not looked into this aspect while deciding the appeal – notice under Section 254(1) cannot be served in a routine, casualor callous manner on the basis of allegations made in the complaint by the neighbour– it was incumbent upon the respondent to set out in detail various acts of omission and commission to afford an opportunity to meet the case against the petitioners – reply filed by the petitioners was not even taken into consideration while passing the order – no reasons were assigned in support of the order- the notice was to be issued by the Commissioner and could not have been issued by Architect planner – he had exercised a jurisdiction not vested in him – petition allowed- order passed by respondent No.2 quashed and set aside. (Para- 8 to 51)

Cases referred:

Mohinder Singh Gill and another vs. The Chief Election Commissioner, New Delhi and others (1978) 1 SCC 405

S. L. Kapoor vs. Jagmohan, AIR 1981 SC 136

Daya Ram vs. Raghunath (2007) 11 SCC 241

Chairman, Disciplinary Authority, Rani Lakshmi Bai Kshetriya Gramin Bank vs. Jagdish Sharan Varshney and others (2009) 4 SCC 240,

Kranti Associates Private Limited and another Vs. Masood Ahmed Khan and others (2010) 9 SCC 496

Nazir Ahmad vs. King Emperor (AIR 1936, PC 253)

Rao Shiv Bahadur Singh and anr. vs. State of Vindh-P, AIR 1954, SC 322

Deep Chand vs. State of Rajasthan, AIR 1961 SC 1527

State of Uttar Pradesh vs. Singhara Singh and Ors, AIR 1964, SC 358

Chandra Kishore Jha vs. Mahavir Prasad, 1999 (8) SCC 266

Dhananjaya Reddy vs. State of Karnataka, 2001 (4) SCC 9

State of Jharkhand & Ors vs. Ambay Cements and anr. (2005) 1 SCC 368

Gujarat Urja Vikas Nigam Limited vs. Essar Power Limited, 2008 (4) SCC 755

Zuari Cement Ltd vs. Regional Director, ESIC, Hyderabad & Ors., AIR 2015, SC 2764

Uddar Gagan Properties Ltd. vs. Sant Singh and Ors. 2016 (5) JT 389

Harshad Chiman Lal Modi Vs. DLF Universal Ltd. and another (2005) 7 SCC 791

For the Petitioners Mr. Bimal Gupta, Senior Advocate, with Ms. Kusum Chaudhary, Advocate.

For the Respondents : Mr. Hamender Singh Chandel, Advocate, for respondents No.1 & 2.
Mr. Ajay Kumar, Senior Advocate, with Mr. Dheeraj K. Vashisht, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral).

The contesting parties are neighbours, it was on the complaint of the private respondent, the petitioners were directed by respondent No.2 i.e. Senior Architect Planner, Municipal Corporation, Shimla vide notice dated 2.5.2016 (Annexure P-3) to stop the construction work and take demarcation immediately "by associating your immediate neighbours" i.e. private respondent so that these issues are resolved.

2. The petitioners filed reply to the said notice. However, respondent No.2 vide order dated 7.5.2016 (Annexure P-5) stopped the construction work being undertaken by the petitioners.

3. Aggrieved by the order passed by respondent No.2, the petitioners filed an appeal before the learned District Judge, Shimla, exercising powers of Appellate Authority (for short 'Appellate Authority'), who dismissed the same and upheld the order passed by respondent No.2.

4. It is vehemently argued by Mr. Bimal Gupta, Senior Advocate, assisted by Ms. Kusum Chaudhary, Advocate that the learned Appellate Authority has miserably failed to appreciate that the impugned order passed by respondent No.2, though purported to be an order passed under Section 254(1) of the Himachal Pradesh Municipal Corporation Act, 1994 (for short, 'M.C.Act') does not even remotely meet the requirement of said Section as no satisfaction has been recorded either by respondent No.2 or by the Appellate Authority that the building work which has been commenced or is being carried out is without or contrary to the sanction referred to in Section 246 ; secondly, in contravention of any of the conditions subject to which sanction has been accorded; thirdly, in contravention of any provisions of Municipal Corporation Act, 1994 or byelaws made thereunder.

5. On the other hand, Mr. Ajay Kumar, Senior Advocate, assisted by Mr. Dheeraj K. Vashisht, Advocate appearing for private respondent would vehemently argue that the petition is nothing, but an abuse of process of the Court as the orders passed by respondents No. 1 and 2 as affirmed by learned Appellate Authority having been passed after firstly taking into consideration the facts and thereafter applying the law to the same and thus, no exception can be taken to these findings.

6. Mr. Hamender Singh Chandel, learned counsel for Municipal Corporation would obviously support the order passed by it and thereafter affirmed by the learned Appellate Authority.

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

8. The initial notice served upon the petitioners on 2.5.2016 (Annexure P-3) whereby the petitioners were directed to stop the construction work reads thus:

"SHIMLA MUNICIPAL CORPORATION,

No. MCS/AP/549/AP/16-3104-05 Dated 2/5/16.

From

Sr. Architect Planner,
Municipal Corporation, Shimla.

To

S/Sh. Ashok Thakur & Sanjeev Thakur,
R/o Thakur Niwas, Chakkar,
Shimla.

Subject:-Review of sanction given to S/Sh. Ashok Thakur & Sanjeev Thakur R/o Thakur Niwas, Chakkar, Shimla-5.

With reference to the subject cited above, it is stated that Sh. Amit Kashyap R/o Prospect Villa, Chakkar, Shimla has filed complaints dated 04.04.2016 and 16.04.2016 wherein it has been alleged that wrong entries of area of land had been made in the revenue documents (submitted by you for approval of the map), during the process of settlement. The correction orders of the same were passed by the Settlement Collector, Shimla vide case No. 247/05 dated 09.05.2007. The appeal of Smt. Uma Devi against these orders was also dismissed by the Divisional Commissioner, Shimla and further appeal is pending before the Ld. Financial Commissioner (Appeal) H.P. It has been further alleged that the demarcation report submitted by you for getting your drawings approved is not correct as being an immediate neighbour he was not associated with the process of demarcation.

Hence in view of the above facts you are hereby directed under Section 254(1) of H.P.M.C. Act to stop the construction work and take demarcation immediately by associating your immediate neighbours so that these issues are resolved.

Sd/-
Sr. Architect Planner,
Municipal Corporation, Shimla.

Copy to:-

1. Sh. Amit Kashyap R/o Prospect Vila, Chakkar Shimla with reference to letter referred to above for information.

/
Sr. Architect Planner,
Municipal Corporation, Shimla."

9. Notably, the petitioners filed detailed reply to this notice. However, respondents thereafter issued final order on 7.5.2016 which reads thus:

नगर निगम षिमला

क्रमांक MCS/CAMP/Chakkar/16/01 दिनांक 07/05/16

प्रेषित

श्री Ashok Thakur,
Sanjeev Thakur, Thakur Niwas,
Chakkar, Shimla

विषय हि0प्र. नगर निगम अधिनियम 1994 की धारा 254 ;1द्ध।

अधोहस्ताक्षरी की संतुष्टि हेतू यह बात साबित हो चुकी है कि आप नगर निगम की बिना स्वीकृति/बदलाव व बड.ाव कार्य दुकान /मकान न0 Thakur Niwas, Chakkar Shimla, Stop the Construction work at site. As notice given to you vide office order No. MCS/AP/549/AP/16-3104-05 dated 02/05/16 and copy of that notice not been compiled by you.

हिमाचल प्रदेष नगर निगम अधिनियम 1994 की धारा 369 के अन्तर्गत मुझे शक्तियों का प्रत्योजन किया गया है और हिमाचल प्रदेष नगर निगम अधिनियम 1994 की धारा 254 ;1द्ध के अन्तर्गत मुझे सौंपी गई ष्षक्तियों का प्रयाग करते हुए मैं क0 अभियन्ता Pankaj Kaushal हिमाचल प्रदेष नगर निगम अधिनियम 1994 की धारा 254 ;1द्ध की अनुपालना करते हुये आपको भवन निर्माण कार्य बन्द करने के निर्देष देता हूं।

क0 अभियन्ता
वास्तुक योजनाकार शाखा
नगर निगम षिमला।''

10. In this case, this Court is only concerned with the interpretation of provisions as contained in sub section (1) of Section 254 and same read as under:

> *"**254. Order of stoppage of building or works in certain cases.(**1) Where the erection of any building or execution of any work has been commenced or is being carried on (but has not been completed) without or contrary to the sanction referred to in section 246 or in contravention of any condition subject to which such sanction has been accorded or in contravention of any provisions of this Act or bye-laws made thereunder, the Commissioner may in addition to any other action that may be taken under this Act by order require the person at whose instance the building or the work has been commenced or is being carried on, to stop the same forthwith."*

11. It is clearly evident from the above that before passing an order under the aforesaid provision, the Commissioner has to be satisfied that:

> *(i) the erection of any building or execution of any work can only be stopped in case, it has been commenced or is being carried on (but has not been completed) without or contrary to the sanction referred to in section 246 or;*
>
> *(ii) in contravention of any condition subject to which such sanction has been accorded ;*
>
> *(iii) or in contravention of any provisions of this Act or bye-laws made thereunder.*

12. Notably, the notice dated 2.5.2016 (Annexure P-3) does not even remotely touch upon any of these pre-conditions as contemplated under Section 254 of the M.C. Act and, therefore, this Court has no hesitation in concluding that the power was probably exercised by respondent No.2 for extraneous reasons and considerations or else, he would have atleast cared to have had a glance of the bare provisions as contained in section under reference.

13. Mr. Ajay Kumar, learned senior Counsel, for private respondent would vehemently try to justify the impugned order by contending that probably the reasons may be separately recorded in the official file, though not reflected in the impugned orders. To say the least, this argument is fallacious.

14. It is more than settled that if a law requires a particular thing to be done in a particular manner, then in order that particular act must be done in the prescribed manner alone. That apart, there can be no gainsaying that every decision of an administrative or executive nature must be a composite and self sustaining one, in that it should contain all the reasons which prevailed on the official taking the decision to arrive at his conclusion. It is beyond cavil that any Authority cannot be permitted to travel beyond the stand adopted and expressed by it in the impugned action. If precedent is required for this proposition, it can be found in the celebrated decision of the Hon'ble Supreme Court titled ***Mohinder Singh Gill and another*** vs. ***The Chief Election Commissioner, New Delhi and others (1978) 1 SCC 405***, of which the following paragraph deserves extraction:

> *"8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit*

or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose J. in Commr. of Police, Bombay vs. Gordhandas Bhanji, AIR 1952 SC 16 : Public orders publicly made, in exercise of a statutory authority cannot be construed in the light of Explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the acting and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.

Orders are not like old wine becoming better as they grow older".

15. What is more surprising is that even the learned Appellate Authority after reproducing Section 254 (1) of the Act did not bother to satisfy itself regarding the mandatory pre-conditions which were required to be fulfilled by the competent authority before invoking this provision and dismissed the appeal filed by the petitioners by according the following reasons:

"11. The perusal of the record shows that the respondent No.3 on 05.04.2016 has moved the complaint before M.C. Shimla with a request to review the sanction given to the appellants. Alongwith the application, the copy of order dated 09.05.2007 passed by the Settlement Collector has also been annexed. On the basis of the above documents, the impugned order has been passed. By virtue of the impugned order, only the work has been stopped and the appellants were directed to take the demarcation. The learned counsel could not satisfy the judicial conscious of this authority, as to how the impugned order/notice is liable to be declared as illegal, wrong, void ab initio whereas a simple direction has been issued to stop the work till the demarcation of the land, that too, on the application of the respondent No.3. Section 254 authorises the M.C. to stop the work in certain cases. No prejudice has been caused to the appellants from the impugned notice as it has specifically been mentioned in the notice that wrong entries of the area submitted by the appellants for approval of the map. A specific reference has been given in the impugned notice regarding the decision dated 09.05.2007 passed by the Settlement Collector. The demarcation report has also been impugned in the notice by the complainant and the M.C. has simply exercised the powers under Section 254 M.C. Act on the application of the respondent No.3."

16. This Court is at a complete loss to understand how the learned Appellate Authority took the impugned order directing stoppage of construction work so lightly, that too, by observing that it did not cause prejudice to the appellants (petitioners). This reasoning clearly reflects total lack of sensitivity, after all, constructions are not raised in the air and it requires men, material and time apart from other things. Therefore, until and unless the construction was in clear violation of the mandate of provisions contained in Section 254(1), the same could not have been ordered to be stopped and said findings could not have been affirmed by the learned Appellate Authority so lightly.

17. In addition to what has been observed above, it is established that there was gross and blatant misuse and abuse of power and authority by respondent No.2 justifying interference, then why the Appellate Authority turned a Nelson's eye is not forthcoming.

18. The notice under Section 254(1) cannot be served in a routine, casual or callous manner, that too, only on the basis of the allegations made in the complaint by a neighbour or any other person or even an authority for that matter, before the Commissioner having actually satisfied itself regarding the veracity and contents thereof and after coming to the conclusion that the provisions of the Act, more particularly, Section 254(1) thereof has been violated.

19. After all, the very purpose of giving show cause notice is to enable the noticee to meet the grounds on which the action is proposed against him and such grounds have to be fully

detailed in the said notice. But here, as observed earlier, not even a show cause notice was served and straightway an order directing stoppage of construction was issued.

20. It is more than settled that non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. It is here then that the action of the official respondent is required to be tested on the touchstone of justice, equity, fair play and in case its decision is not based on justice, equity and fair play and has been taken after taking into consideration other material, then even though on the face of it, the decision may look to the legitimate, but as a matter of fact the reasons are not based on values but on extraneous consideration that decision cannot be allowed to stand.

21. In this connection, the decision in ***S. L. Kapoor*** vs**. *Jagmohan, AIR 1981 SC 136*** is relevant. In paragraph 16 of the judgment, their Lordships of the Hon'ble Supreme Court have held as follows:-

> *"....In our view, the requirements of natural justice are met only if opportunity to represent is given in view of proposed action. The demands of natural justice are not met even if the very person proceeded against has furnished the information on which the action is based if it is furnished in a casual way or for some other purpose. We do not suggest the opportunity need be a 'double opportunity' that is one opportunity on the factual allegations and another on the proposed penalty. Both may be rolled into one. But the person proceeded against must know that he is being required to meet the allegations which might lead to a certain action being taken against him. If that is made known the requirements are met. ..."*
>
> *(Emphasis added)*
>
> *..... In our view the principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed. The non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. It ill comes from a person who has denied justice that the person who has been denied justice is not prejudiced. As we said earlier where on the admitted or indisputable facts only one conclusion is possible and under the law only one penalty is permissible, the court may not issue its writ to compel the observance of natural justice, not because it is not necessary to observe natural justice but because courts do not issue futile writs. We do not agree with the contrary view taken by the Delhi High Court in the judgment under appeal."*
>
> (Emphasis supplied)

22. In Wade & Forsyth -- 'Administrative law', the learned Authors have said thus:-

> *"A proper hearing must always include a 'fair opportunity to those who are parties in the controversy for correcting or contradicting anything prejudicial to their view'. Lord Denning has added :*
>
> > *'If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. ...."*
> >
> > *(Emphasis supplied).*

23. As observed earlier, once the respondent had decided to issue a notice to the petitioners, then it was incumbent upon him to have set out in detail and with precision the various acts of commission and omission to the notice of the petitioners so as to afford them an effective opportunity to meet their case because unless the petitioners were put to such notice, they virtually had no opportunity to meet the case of the private respondent. It is more than settled that a party to whom a notice has been issued must be made aware of the exact

allegations, he is required to meet, as this requirement in itself is a requirement of natural justice.

24. In addition to the aforesaid, it would be noticed that in the notice dated 2.5.2016, the order of stoppage was passed only on the basis of the complaint made by private respondent to which a detailed reply (4 pages) was filed. But the respondent No.2 in a highly illegal, arbitrary and cursory manner that too by using stereotype cyclostyled form, affirmed the stoppage order already passed by him on 2.5.2016 by according the following reasons:

> *"……Stop the construction work at site. As notice given to you vide office order No.MCS/AP/549/AP/16-3104-05 dated 02/05/16 and reply of that notice not been compiled by you….."*

25. Indisputably, the reasons given subsequently are at total variance to the one given in the notice dated 2.5.2016. It cannot be disputed that the notice is the foundation on which the respondent has to build up its case, therefore, if the allegations in the earlier notice are not specific and are on the contrary vague, lack details and/or unintelligible or do not disclose the real material upon which a proposed action is contemplated to be drawn, then it is sufficient to hold that the noticee was not given proper opportunity to meet the allegations indicated in the show cause notice (and in the instant case the notice dated 2.5.2016). There is no gainsaying that it is fundamental principle of law that adjudication has to be within the four corners of the allegations set out in the show cause notice and any findings given beyond the terms of notice, is hit by the principle of natural justice.

26. Moreover, the requirement for recording of reasons in the order and making these reasons known to the petitioners is to enable an opportunity to the petitioners to approach the High Court under its writ jurisdiction under Article 226 of the Constitution so as to enable them to challenge the order, inter alia, either on the ground that it is mala fide or arbitrary or that it is based on irrelevant and extraneous considerations.

27. Furnishing of specific and intelligible reasons for the purpose of notice is only a concomitant of the concept of reasonable opportunity and fair play. Unless the noticee knows the precise case is required to meet out, he would be handicapped in putting forth his objections effectively.

28. In ***Daya Ram vs. Raghunath (2007) 11 SCC 241***, the Hon'ble Supreme Court held as under:

> *"Reasons are live links between the mind of the decision taker to the controversy in question and the decision or conclusion arrived at." Reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision reveals the "inscrutable face of the sphinx", it can, by its silence, render it virtually impossible for the courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reasons is an indispensable part of a sound judicial system, reasons at least sufficient to indicate an application of mind to the matter before court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made, in other words, a speaking order. The "inscrutable face of a sphinx" is ordinarily incongruous with a judicial or quasi-judicial performance."*

29. In ***Chairman, Disciplinary Authority, Rani Lakshmi Bai Kshetriya Gramin Bank*** vs. ***Jagdish Sharan Varshney and others (2009) 4 SCC 240***, the Hon'ble Supreme Court held that "*whether there was an application of mind or not can only be disclosed by some reasons."*

30. Towards the impressing need to inform reasons for a decision and the manner in which they are to be informed, the Hon'ble Supreme Court has succinctly summarized the legal

position in ***Kranti Associates Private Limited and another*** Vs. ***Masood Ahmed Khan and others (2010) 9 SCC 496,*** in the following terms:-

> *"(a) In India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially.*
>
> *(b) A quasi-judicial authority must record reasons in support of its conclusions.*
>
> *(c) Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well.*
>
> *(d) Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative power.*
>
> *(e) Reasons reassure that discretion has been exercised by the decision maker on relevant grounds and by disregarding extraneous considerations.*
>
> *(f) Reasons have virtually become as indispensable a component of a decision making process as observing principles of natural justice by judicial, quasi-judicial and even by administrative bodies.*
>
> *(g) Reasons facilitate the process of judicial review by superior Courts.*
>
> *(h) The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the life blood of judicial decision making justifying the principle that reason is the soul of justice.*
>
> *(i) Judicial or even quasi-judicial opinions these days can be as different as the judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered. This is important for sustaining the litigants' faith in the justice delivery system.*
>
> *(j) Insistence on reason is a requirement for both judicial accountability and transparency.*
>
> *(k) If a Judge or a quasi-judicial authority is not candid enough about his/her decision making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism.*
>
> *(l) Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or "rubber-stamp reasons" is not to be equated with a valid decision making process.*
>
> *(m) It cannot be doubted that transparency is the sine qua non of restraint on abuse of judicial powers. Transparency in decision making not only makes the judges and decision makers less prone to errors but also makes them subject to broader scrutiny. (See David Shapiro in Defence of Judicial Candor (1987) 100 Harward Law Review 731-37).*
>
> *(n) Since the requirement to record reasons emanates from the broad doctrine of fairness in decision making, the said requirement is now virtually a component of human rights and was considered part of Strasbourg Jurisprudence. See Ruiz Torija v.Spain (1994) 19 EHRR 553, at 562 para 29 and Anya vs. University of Oxford, 2001 EWCA Civ 405, wherein the Court referred to Article 6 of European Convention of Human Rights which requires,*
>
> *"adequate and intelligent reasons must be given for judicial decisions".*
>
> *(o) In all common law jurisdictions judgments play a vital role in setting up precedents for the future. Therefore, for development of law, requirement of giving reasons for the decision is of the essence and is virtually a part of "due process".*

31. Now, the further question that arises for consideration is as to whether the respondent No. 2 while passing the impugned order, has infact applied its mind and given

reasons for his conclusion or has simply arrived at a conclusion without disclosing any reasons. As observed earlier, the reply filed by the petitioners was not even taken into consideration and the impugned order on the face of it is bereft of any reasons. Therefore, it can safely be concluded that while passing the impugned order, the relevant factors have not been objectively considered. The minimum that was expected from the respondent No.2 was that in support of his order, he ought to have given reasons that were cogent, clear and succinct, more especially, when the order passed by him was subject to an appeal. As already observed, the decision being bereft of any reasons is a result of caprice, whim and fancy of respondent No.2 and suffers from vice of arbitrariness as also non-application of mind.

32. In light of the various pronouncements of the Hon'ble Supreme Court noticed above, it is unnecessary to say anything beyond what has been so eloquently said in support of the need to give reasons for orders made by Courts and statutory or other authorities exercising quasi judicial functions. I only need to reiterate that in a system governed by the rule of law, there is nothing like absolute or unbridled power exercisable at the whims and fancies of the repository of such power. There is nothing like a power without any limits or constraints. That is so even when a Court or other authority may be vested with wide discretionary power, for even discretion has to be exercised only along well recognized and sound juristic principles with a view to promoting fairness, inducing transparency and aiding equity.

33. The decision making process of respondent No.2 is itself so flawed that the impugned order cannot be allowed to stand even for a moment. It does not require Solomon's wisdom to state that it is absolutely sans reasons, bereft of analysis and shorn of appreciation.

34. In addition to what has been stated above, it would also be noticed that while serving notice upon the petitioners, neither the complaint nor the material accompanying the complaint had been provided to the petitioners which is in clear denial of the basic principles of natural justice and fair play.

35. The law is well settled that if prejudicial allegations are made against a person, he must be given particulars of that before hearing, so that he can prepare his defence. The fair procedure and principle of natural justice are inbuilt into the rules. As observed earlier, the very purpose of issuing a notice is meant to give a person proceeded against, a reasonable opportunity of making his objection against the proposed action or charges indicated in the notice. Therefore, at that stage, the person proceeded against must be told the charges or proposed action, so that he can give an effective and proper reply to the same. Reply to a notice or show cause notice is not an empty formality because after all justice must not only be done, but it must be manifestly done which principle is equally applicable to quasi-judicial proceedings. The giving of notice containing reasons for the proposed action is after all a basic postulate for compliance of the principles of natural justice. It is axiomatic that unless a party is informed of the reasons for the proposed action, it would be impossible for the noticee to put-forth its point of view with regard to the reasons for the proposed action of notice. It must be adequate so as to enable a party to effectively object or respond to the same. Therefore, in case the respondent No.2 wanted to rely upon any material which was in his notice, then the petitioners ought to have been put to notice and supplied the same before acting upon it especially when it not only formed the foundation, but the very basis of passing the impugned order.

36. It is high time that respondent No.2 and other officers of the Municipal Corporation, realise that the public offices both big and small are sacrosanct. Such offices are meant for use and not for abuse and in case repositories of such offices spoils the rule, then the law is not that powerless and would step in to quash such arbitrary orders.

37. The Municipal Corporation being a creation of the statute is admittedly a State within the meaning of Article 12 of the Constitution of India and cannot, therefore, act like a private individual, which is free to act in a manner whatsoever he likes, unless it is interdicted by law. It needs no reiteration that the State or its instrumentalities have to strictly fall within the

four corners of the law and all its activities are governed by the Rules, Regulations, Instructions etc.

38. Lastly, one of the most important question which unfortunately has not been raised by the petitioners, but still arises for consideration is as to whether respondent No.2 i.e. Senior Architect Planner was empowered to issue a notice and thereafter pass an order under Section 254(1) of the Act.

39. Section 254(1) of the Act already stands extracted above and it would be evident from the perusal thereof that the only authority empowered and vested with the jurisdiction and authority to issue notice is the 'Commissioner' or such authority which may have specifically been vested with the powers of the Commissioner by the State Government.

40. 'Commissioner' is defined in Section 2(5) of the Act and reads thus:

> ***"2(5). "Commissioner" means the Commissioner of the Corporation appointed by the State Government."***

41. Appointment of the Commissioner is made under Section 45 of the Act and reads thus:

> *"**45. Appointment of Commissioner. –** (1) The Government shall, by notification, in the Official Gazette, appoint a Class I Officer of the Government having a service as such of ten years, as the Commissioner of the Corporation.*
>
> *(2) Subject to the provisions of sub-section (3), the Commissioner so appointed shall hold office for a term of three years in the first instance:*
>
> *Provided that his appointment may be renewed for a term not exceeding three years:*
>
> *Provided further that no officer who has attained the age of superannuation shall be appointed or continued as Commissioner.*
>
> *(3) The Government –*
>
> *(a) shall recall the Commissioner if at a special meeting of the Corporation called for the purpose, a resolution for such recall has been passed by a majority of not less than two-thirds of the total number of members;*
>
> *(b) may in the public interest recall the Commissioner at any time during the term of his appointment."*

42. At this stage, it would be necessary to make note of Section 46 of the Act as therein the State Government has been empowered to appoint Joint/Assistant Commissioner and certain other officers and the Joint /Assistant Commissioner have also been vested with powers and performance of duties as may be conferred and imposed upon the Commissioner under the Act and further delegated to them by the Commissioner as would be evident from bare perusal of Section 46, which reads thus:

> "**46. *Appointment of Joint/Assistant Commissioner and certain other officers***.- *(1) The State Government may, if in its opinion it is expedient to do so in the public interest, appoint a person or persons to be called Joint/Assistant Commissioner appointed under section 45 for the efficient performance of the functions of the Corporation and they shall be governed by such conditions of service as may be fixed by the State Government from time to time.*
>
> *(2) Subject to the approval of the Corporation and rules made in this behalf, the Joint/Assistant Commissioners appointed under sub-section (1) shall be subordinate to the Commissioner and shall exercise such powers and perform such duties as may be conferred and imposed upon the Commissioner under this Act and are further delegated to them by the Commissioner.*

[(3) There shall be a Legal Advisor-cum-Law Officer to aid and advice the Corporation in all legal matters, to be appointed by the Corporation, on such terms and conditions as may be prescribed.]

43. As already observed above, an action to be taken in a particular manner as provided by the statute, must be taken, done or performed in the prescribed manner or not at all. Likewise, when a particular act has to be performed by particular authority (ies), then it is those authority (ies) alone, who can perform the said Act and nobody else.

44. It is more than settled that an action to be taken in a particular manner as provided by a statute, must be taken, done or performed in the manner prescribed or not at all. More than eighty years back, the Hon'ble Privy Council in ***Nazir Ahmad vs. King Emperor (AIR 1936, PC 253)*** held that where a power is given to do a certain thing in a certain way, the things must be done in that way or not at all and this has been approved and further expanded by the Hon'ble Supreme court in catena of judgments (Refer: ***Rao Shiv Bahadur Singh and anr***. vs. ***State of Vindh-P***, AIR 1954, SC 322; ***Deep Chand*** vs. ***State of Rajasthan***, AIR 1961 SC 1527; ***State of Uttar Pradesh*** vs. ***Singhara Singh and Ors***, AIR 1964, SC 358; ***Chandra Kishore Jha*** vs. ***Mahavir Prasad***, 1999 (8) SCC 266 ; ***Dhananjaya Reddy*** vs. ***State of Karnataka***, 2001 (4) SCC 9; ***State of Jharkhand & Ors*** vs. ***Ambay Cements and anr.*** (2005) 1 SCC 368 ; ***Gujarat Urja Vikas Nigam Limited*** vs. ***Essar Power Limited***, 2008 (4) SCC 755 ; ***Zuari Cement Ltd*** vs. ***Regional Director, ESIC, Hyderabad & Ors***., AIR 2015, SC 2764 ; and ***Uddar Gagan Properties Ltd***. vs. ***Sant Singh and Ors***. 2016 (5) JT 389.).

45. The aforesaid settled legal proposition is based on a legal maxim "*Expressio unius est exclusion alterius"* meaning thereby that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner and following some other course is not permissible.

46. Mr. Hamender Singh Chandel, learned counsel for the Municipal Corporation would place strong reliance upon Section 50 of the Act to contend that the powers of the Commissioner can be vested in any other officer and have been so vested in the Architect Planner. Section 50 reads thus:

*"**50. Functions of the Commissioner.**- Save as otherwise provided in this Act, and subject to supervision and control of the Corporation and its Mayor the executive power for the purpose of carrying out the provisions of this Act, shall vest in the Commissioner, who shall also-*

(a) exercise all the powers and perform all the duties specifically conferred or imposed upon him by this Act or by any other law for the time being in force ;

(b) prescribe the duties of and exercise supervision and control over the acts and proceedings of all Corporation officers and other Corporation employees, and subject to any rules that may be made in this behalf dispose of all questions relating to the service of the said officers and other employees and their pay, privileges, allowances and other conditions of service ;

(c) on the occurrence or threatened occurrence of any sudden accident or any unforeseen event or natural calamity involving or likely to involve extensive damage to any property of the Corporation, or danger to human life, take such immediate action in consultation with the Mayor and make a report forthwith to the Corporation of the action he has taken and the reasons for the same as also of the amount of cost, if any, incurred or likely to be incurred in consequence of such action, which is not covered by a budget grant;

(d) the Commissioner shall bring to the notice of the Corporation any act or resolution of the Corporation which may be in violation of any Government

instructions or the provisions of this Act, provided that if such act or omission of the directions of the Government or the provisions of the Act, as the case may be, is not rectified within 15 days of the communication, it shall be the duty of the Commissioner to bring such omission or violation to the notice of the Government."

47. It is evidently clear from the aforesaid provisions that the same in fact does not and cannot confer the powers of Commissioner upon any authority for the simple reason that the Commissioner, Municipal Corporation of his own cannot confer his own powers upon someone else as these powers are only vested with the State who may in exercise of powers conferred under Section 46 vest upon any person like Joint/Assistant Commissioner etc., the powers and duties as conferred and imposed upon the Commissioner under this Act.

48. However, Mr. Hamender Singh Chandel, would argue that no objection regarding jurisdiction was ever raised by the petitioners before the authorities below, therefore, this question cannot be gone into by this Court in these proceedings.

49. Even this contention is without merit as the Court cannot be conferred jurisdiction by consent of parties and in case there is inherent lack of jurisdiction, then the order passed by such court is void ab initio, nullity and therefore, is *coram-non-judice* and the decision amounts to nothing. Reference in this regard can conveniently be made to the judgment of the Hon'ble Supreme Court in ***Harshad Chiman Lal Modi Vs. DLF Universal Ltd. and another (2005) 7 SCC 791***, which reads as follows:

"29. Ms. Malhotra, then contended that Section 21 of the Code, requires that the objection to the jurisdiction must be taken by the party at the earliest possible opportunity and in any case where the issues are settled at or before settlement of such issues. In the instant case, the suit was filed by the plaintiff in 1988 and written statement was filed by the defendants in 1989 wherein jurisdiction of the court was 'admitted'. On the basis of the pleadings of the parties, issues were framed by the court in February, 1997. In view of the admission of jurisdiction of court, no issue as to jurisdiction of the court was framed. It was only in 1998 that an application for amendment of written statement was filed raising a plea as to absence of jurisdiction of the court. Both the courts were wholly wrong in allowing the amendment and in ignoring Section 21 of the Code. Our attention in this connection was invited by the learned counsel to Hira Lal v. Kali Nath, (1962) 2 SCR 747 and Bahrein Petroleum Co. v. Pappu, 1966 (1) SCR 461.

30. We are unable to uphold the contention. The jurisdiction of a court may be classified into several categories. The important categories are (i) Territorial or local jurisdiction; ii) Pecuniary jurisdiction; and (iii) Jurisdiction over the subject matter. So far as territorial and pecuniary jurisdic tions are concerned, objection to such jurisdiction has to be taken at the earliest possible opportunity and in any case at or before settlement of issues. The law is well settled on the point that if such objection is not taken at the earliest, it cannot be allowed to be taken at a subsequent stage. Jurisdiction as to subject matter, however, is totally distinct and stands on a different footing. Where a court has no jurisdiction over the subject matter of the suit by reason of any limitation imposed by statute, charter or commission, it cannot take up the cause or matter. An order passed by a court having no jurisdiction is nullity.

31. In Halsbury's Laws of England, (4th edn.), Reissue, Vol. 10; para 317; it is stated;

317. Consent and waiver. -Where, by reason of any limitation imposed by statute, charter or commission, a court is without jurisdiction to entertain any particular claim or matter, neither the acquiescence nor the express consent of the parties can confer jurisdiction upon the court, nor can consent give a court jurisdiction if a condition which goes to the

> jurisdiction has not been performed or fulfilled. Where the court has jurisdiction over the particular subject matter of the claim or the particular parties and the only objection is whether, in the circumstances of the case, the court ought to exercise jurisdiction, the parties may agree to give jurisdiction in their particular case; or a defendant by entering an appearance without protest, or by taking steps in the proceedings, may waive his right to object to the court taking cognizance of the proceedings. No appearance or answer, however, can give jurisdiction to a limited court, nor can a private individual impose on a judge the jurisdiction or duty to adjudicate on a matter. A statute limiting the jurisdiction of a court may contain provisions enabling the parties to extend the jurisdiction by consent."

32.I In Bahrein Petroleum Co., this Court also held that neither consent nor waiver nor acquiescence can confer jurisdiction upon a court, otherwise incompetent to try the suit. It is well-settled and needs no authority that 'where a court takes upon itself to exercise a jurisdiction it does not possess, its decision amounts to nothing.' A decree passed by a court having no jurisdiction is non - est and its validity can be set up whenever it is sought to be enforced as a foundation for a right, even at the stage of execution or in collateral proceedings. A decree passed by a court without jurisdiction is a coram non judice.

33. In Kiran Singh v. Chaman Paswan, (1955) 1 SCR 117 : AIR 1954 SC 340, this Court declared;

> "It is a fundamental principle well established that a decree passed by a court without jurisdiction is a nullity and that its invalidity could be set up whenever and it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction strikes at the very authority of the court to pass any decree, and such a defect cannot be cured even by consent of parties."
>
> (emphasis supplied)

37. In the instant case, Delhi Court has no jurisdiction since the property is not situate within the jurisdiction of that court. The trial court was, therefore, right in passing an order returning the plaint to the plaintiff for presentation to the proper court. Hence, even though the plaintiff is right in submitting that the defendants had agreed to the jurisdiction of Delhi Court and in the original written statement, they had admitted that Delhi Court had jurisdiction and even after the amendment in the written statement, the paragraph relating to jurisdiction had remained as it was, i.e. Delhi Court had jurisdiction, it cannot take away the right of the defendants to challenge the jurisdiction of the court nor it can confer jurisdiction on Delhi Court, which it did not possess. Since the suit was for specific performance of agreement and possession of immovable property situated outside the jurisdiction of Delhi Court, the trial court was right in holding that it had no jurisdiction."

50. Thus, it is evidently clear that respondent No.2 has illegally usurped the power, authority and jurisdiction that was not even vested in him and proceeded to pass an order which is without jurisdiction and is coram non judice. Unfortunately, the Appellate Authority failed to notice this aspect of the matter and illegally affirmed the order passed by respondent No.2.

51. Having said so, I find merit in this petition and the same is allowed and the impugned orders passed by respondent No.2 dated 2.5.2016 (Annexure P-3) and 7.5.2016 (Annexure P-5) are quashed and set-aside. The pending application(s), if any, also stands disposed of.

52. However, before parting, it is made clear that henceforth no officer(s) of the Municipal Corporation shall exercise the powers as are vested only with the Commissioner except where such powers have been specifically conferred by the State Government on the officers like the Joint/Assistant Commissioner etc.

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

Chain Singh .....Petitioner.

Versus

Smt. Kavita .....Respondent.

Cr. Revision No. 400 of 2014
Date of decision: 17.03.2017

Code of Criminal Procedure, 1973- Section 127- Maintenance of Rs.2,500/- was awarded to the wife in the year 2004- an application for enhancement of maintenance was filed, which was allowed and maintenance was enhanced from Rs.2,500/- to Rs.4,500/- - aggrieved from the order, present revision has been filed- held, that husband had retired as Superintendent and his salary was Rs.49,000/- at the time of superannuation – he received a sum of Rs.18,67,344/- as GPF and reasonable amount as Death-cum-Retirement Gratuity- his pension was Rs.15,000/- to 18,000/- per month- wife was engaged as daily mid-day meal worker and her income was Rs.10,000/- per annum- taking into consideration the amount of the pension and escalation in price, amount of Rs.4,500/- per month cannot be said to be excessive- petition dismissed.

(Para-5 to 9)

For the petitioner: Mr. P.S. Goverdhan, Advocate.
For the respondent: Mr. Hamender Chandel, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)**:***

By way of this revision petition, petitioner has challenged the order passed by the Court of learned Judicial Magistrate, 1st Class, Kandaghat, Solan in Case No. 131/4 of 2013, dated 21.10.2014, vide which on an application filed by the present respondent under Section 127 of the Code of Criminal Procedure, learned Court below has enhanced the amount of maintenance ordered to be paid by the present petitioner to respondent-wife from Rs.2500/- to Rs.4500/-.

2. Brief facts necessary for the adjudication of this case are that respondent claiming herself to be legally wedded wife of present petitioner filed a petition under Section 125 of the Code of Criminal Procedure in the year 2002 and maintenance to the tune of Rs.500/- was awarded to her initially and thereafter, said amount of maintenance was enhanced to Rs.2500/- in the year 2004 on the basis of an application which had been so filed by the respondent before the learned Court below. Thereafter, in the year 2013, again an application was preferred by the respondent under Section 127 of the Code of Criminal Procedure praying therein that the maintenance earlier awarded in her favour be enhanced taking into consideration the considerable elapse of time as well as increase in the price index and also in view of the factum of income of husband having increased considerably. Learned trial Court vide order under challenge ordered the enhancement of maintenance amount from Rs.2500/- per month to Rs.4500/-per month in favour of the wife. While passing the said order, learned Court below took into consideration the evidence on record, which demonstrated that the present petitioner had retired as Superintendent from the Court of Civil Judge (Junior Division), Kandaghat in the year

2013 and at the time of his superannuation, salary he was earning was approximately Rs.49,000/-. Learned Court below also took note of the fact that at the time of superannuation, the present petitioner had received GPF to the tune of Rs.18,67,344/- and considerable amount as Death-cum-Retirement Gratuity. Learned trial Court also took note of the fact that the present petitioner was also receiving pension to the tune of Rs.15,000/- to Rs.18,000/- per month. Learned Court below also took into consideration that the present respondent who was working as MDM mid day meal worker since 10.09.2008 was receiving a meager amount of Rs.10,000/- per annum. It was on these bases that learned Court below enhanced the amount of compensation in favour of the present respondent from Rs.2500/- to Rs.4500/-.

3. Feeling aggrieved by the said order, the present petitioner has filed this revision petition.

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

5. A perusal of the records demonstrate that the factum of the present petitioner having superannuated from the post of Superintendent Civil Judge (Junior Division, Kandaghat in the year 2013 and his salary being around Rs.49,000/- at the time of his superannuation has come in the statement of CW-2 Vinod Sharma, who was serving as Naib Nazir in the same Court in which the present petitioner was serving. In fact the testimony of CW-2 demonstrates that at the time of superannuation of the present petitioner, he received an amount of Rs.18,67,344/- as GPF and reasonable amount as Death-cum-Retirement Gratuity. This witness also deposed that the pension of the present petitioner was between Rs.15,000/- to Rs.18,000/- per month. There was no cross-examination on behalf of the present petitioner of this witness on the said material depositions made by him. Records also demonstrated that Vinod Sharma, Superintendent Circle-2, Senior Secondary School, Kandaghat, District Solan, who entered the witness box as RW-1 has deposed that respondent-wife was engaged as MDM mid day meal worker since 10.09.2008 and her monthly income from the same was about Rs.10,000/- per month.

6. It is a matter of record that on 21.12.2005, the amount of maintenance which had initially been ordered by the learned Court below to be paid by the present petitioner to respondent-wife was enhanced from Rs.500/- to Rs.2500/-. Thereafter, from 2005 onwards, it was for the first time vide the order under challenge that the amount of maintenance was enhanced from Rs.2500/- to Rs.4500/- after taking into consideration subsequent developments as well as escalation in the cost of day to day living.

7. Taking into consideration the fact that at the time of his superannuation, the present petitioner was drawing salary amounting to approximately Rs.49,000/- per month as well the amounts he received on superannuation, in my considered view, amount of Rs.4500/-, which has been ordered to be paid by him to the respondent-wife by learned trial Court below, cannot be said to be either high or unreasonable. This Court cannot lose sight of the fact that in the present days, it is not possible for an individual to survive and fulfill his/her domestic necessities of life with a meager amount of Rs.2500/- per month.

8. Section 127 of the Code of Criminal Procedure, 1973 contemplates that on proof of a change in the circumstances of any person, Magistrate may make such alteration as it thinks fit in the allowance of maintenance or interim maintenance, as the case may be, vis-à-vis maintenance which the person was earlier receiving under Section 125 of the Code of Criminal Procedure. In these circumstances, it cannot even otherwise be said that the order of enhancement of maintenance amount which has been passed by the learned Court below is without jurisdiction.

9. Now taking into consideration the fact that the scope of revisional jurisdiction of this Court is not to re-appreciate the evidence but to check jurisdictional error etc. committed by the learned Court below, in my considered view, there is no infirmity or illegality with the order passed by the learned Court below vide which it has enhanced the amount of maintenance in favour of respondent-wife from Rs.2500/- to Rs.4500/- per month. Findings returned by the

learned Court below are duly borne out from the records of the case and further learned Court below was having authority in law under Section 127 of the Code of Criminal Procedure to pass the order in issue. Therefore, it cannot be said that either there is perversity with the findings returned by the learned Court below or the order passed by the learned Court below is without jurisdiction.

10. In view of my findings returned above, I do not find any merit in the present revision petition and the same is accordingly dismissed, so also miscellaneous applications, if any.

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

Srijan Sharma ....Petitioner.
Versus
Union of India and Ors. ...Respondents.

CWP No. 505 of 2012.
Decided on: 17.03.2017.

Constitution of India, 1950- Article 226- Applications were invited for awarding distribution dealership outlet of Rajiv Gandhi Grameen LPG VitrakYojna under open category – petitioner was declared qualified for the draw of selection and was called upon to be present along with his photo identity for draw of lots- a letter was sent that there was a mistake in the description of khasra number- certain short-comings were noticed and the petitioner was called upon to remove the same within a period of seven days- thereafter his candidature was cancelled without affording an opportunity of being heard- aggrieved from the order, petitioner filed the present writ petition- held, that candidature of the petitioner was cancelled without affording an opportunity, which is a violation of principle of natural justice - present writ petition allowed and the Corporation directed to afford an opportunity of being heard. (Para-3 to 5)

For the petitioner : Mr. B.C. Negi, Sr. Advocate with Mr. Narender Thakur, Advocate.
For the respondents : Ms. Sukarma Sharma, Advocate vice counsel for respondent No. 1.
Mr. K.D.Sood, Sr. Advocate with Mr. Sanjeev Sood, Advocate for respondents No. 2 to 4.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

Brief facts necessary for adjudication of the present petition are that applications were invited by the respondent-Corporation for awarding distribution-dealership outlet of Rajiv Gandhi Grameen LPG Vitrak Yojna, at Sihunta Jarei, District Chamba, HP under open category vide advertisement dated 11th October, 2010. According to the petitioner as he was eligible to be awarded such dealership, accordingly, he applied to the respondent-Corporation with all requisite documents. Thereafter, vide communication dated 1st August, 2011, he was intimated by the respondent-Corporation that he had qualified for the draw of selection of Rajiv Gandhi Grameen LPG Vitrak Yojna and he was called upon to be present alongwith his photo identity etc. for the draw of lots on 26.08.2011 at 10:00 a.m. It is pertinent to mention at this stage that a perusal of communication dated 1st August, 2011 demonstrates that it was mentioned therein that the result of draw and further proceedings shall be subject to the outcome of the CWP No. 1192 of 2011 pending before this Court . The said petition stands disposed of as withdrawn by this Court vide its decision dated 23.11.2016. According to the petitioner, he was successful in the draw of

lots and was waiting for letter of intent, however, rather than issuing any letter of intent, respondent-Corporation sent communication dated 11.10.2011 to him vide which he was interalia informed that there was a mistake of description of khasra number for the purpose of dealership and that land comprised in Khasra No. 1239/359 was duly inspected by the Officers of the respondent-corporation alongwith Patwari concerned and certain shortcomings were noticed in the said land and the petitioner was called upon to remove the same within a period of seven days. This as per the petitioner was followed by communication dated 09.01.2012 vide which the candidature of the petitioner was cancelled for the purpose of allotment of dealership outlet of Rajiv Gandhi Grameen LPG Vitrak Yojna at Sihunta Jarei without providing him any opportunity of being heard to him. In this background, the present writ petition was filed praying for the following reliefs.

> *"(A) Entire record pertaining to the case may kindly be summoned.*
>
> *(B) That the letter dated 9.1.2012 (annexure P-4) may kindly be quashed and respondents may kindly be directed to issue letter of intent for setting up RGGLV Distributorship at village Sihunta in favour of the petitioner.*
>
> *(C) Cost of this petition may kindly be awarded in favour of the petitioner.*
>
> *(D) Any other writ, order or direction, which this Hon'ble Court may deem fit, just and proper in the facts and circumstances of the present case, may kindly also be passed, in the interest of justice."*

2. I have heard the learned counsel for the parties.

3. It is a matter of record that before issuance of the impugned communication dated 09.01.2012 vide which candidature of the petitioner was cancelled for the purpose of allotment of distribution outlet of Rajiv Gandhi Grameen LPG Vitrak Yojna at Sihuntra Jarei, no opportunity of being heard was provided to him. In other words, his candidature has been cancelled by the respondent-Corporation in violation of principles of natural justice.

4. In the present case, after the petitioner was informed that he was successful in the draw of lots, he had a legitimate expectation that the dealership shall be allotted to him. In these circumstances, act of respondent-Corporation of cancelling his candidature without any notice and without affording the petitioner an opportunity of being heard is arbitrary and violative of Article 14 of Constitution of India as said order could not be passed without at least affording an opportunity of being heard to the petitioner, as the same had civil consequences as far as petitioner is concerned.

5. Therefore without adjudicating on the rest of the issues raised in the writ petition, as it is evident that the impugned order is passed by the respondent-Corporation in violation of principles of natural justice, impugned communication dated 09.01.2012, Annexure P-4 issued by Dy. General Manager, of the respondent-Corporation informing the petitioner about the cancellation of his candidature for allotment of dealership outlet of Rajiv Gandhi Grameen LPG Vitrak Yojna at Sihuntra Jarei is quashed and set aside. Respondent-Corporation is directed to afford an opportunity of being heard to the petitioner and thereafter take a decision on the candidature of the petitioner for allotment of dealership outlet of Rajiv Gandhi Grameen LPG Vitrak Yojna at Sihuntra Jarei. For this purpose, petitioner shall make himself present before the respondent No. 3/ authority concerned on 18th of April, 2017 at 11:00 a.m. It is clarified that this Court has not expressed any opinion on the merits of the case or on objections on the basis of which the candidature of the petitioner was cancelled by the respondent-corporation. All these issues are left open for the appropriate authority to decide as per the material available before the said authority.

6. Writ petition is disposed of accordingly, so also pending miscellaneous application(s), if any. No orders as to costs.

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

State of H.P. .....Appellant
Versus
Ramesh Chand .....Respondent.

Cr. Appeal No. 221 of 2007
Decided on : 17/03/2017

Indian Penal Code, 1860- Section 451, 325, 504 and 506(1)- Accused came to the house of the complainant to make a telephonic call – wife of the complainant handed over the apparatus to the accused through window –the accused could not connect the number so he asked the wife of the complainant to connect the number – the wife of the complainant stated that she could not dial the number in darkness – the accused got agitated on hearing this and started hurling filthy abuses – the complainant asked the accused not to do so, on which the accused entered inside the room armed with stick and gave blows to the complainant – the accused was tried and acquitted by the Trial Court – held in appeal that no disclosure statement was made prior to the recovery –hence, no probative value can be attached to the recovery- the Trial Court had correctly appreciated the evidence – appeal dismissed.(Para- 9 to 11

For the Appellant: Mr. Vivek Singh Attri, Dy. A.G.
For the Respondent: Mr. Arun Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The instant appeal stands directed against the impugned judgement of acquittal recorded by the learned Additional Chief Judicial Magistrate, Kandaghat, District Solan, H.P. whereby he pronounced an order of acquittal qua the accused qua the offences allegedly committed by him.

2. The brief facts of the case are that on 26.8.2003, Smt. Promila Pardhan Gram Panchayat Kahla informed the Police telephonically at about 9.20 p.m. that the accused has given beatings to Hari Chand. After receiving the information, the police party went to the place of incident where Hari Chand complainant recorded his statement. The complainant told to the police that at about 9.00 p.m. the accused came to his house and requested him for making a telephone call. His wife has handed over the apparatus to the accused through window and the accused started dialing the requisite number. The accused could not connect the number so he asked the wife of the complainant to dial the requisite number then his wife told him that she could not dial the number in darkness. On hearing this, the accused became agitated and he put down the telephone apparatus and started hurling filthy abuses to him. He asked the accused to not hurl filthy abuses to him from the room in which he was sitting with his grand son but the accused entered into the room with a stick in his hand and gave blows on the complainant. He also gave a blow with a stick to the complainant. On hearing the noise, his wife Parwati and daughter-in-law Nisha came to the room and rescued him from the clutches of the accused. The statement of the complainant was sent to the police station through constable Ravinder Lal and on the basis of which F.I.R. was registered and investigation started. During investigation, the police recovered the blood soaked shirt of 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 451, 325, 504 and 506-I of the IPC to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 7 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.

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 Deputy Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned trial Court standing not based on a proper appreciation of 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 standing replaced by findings of conviction.

7. 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.

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 victim/injured, as testified by PW-5 who proved Ext.PW-5/A, received on his person, the injuries delineated therein also PW-5 has proven qua the injuries displayed therein being causable by user of stick/Danda Ext.P-3 besides PW-5 has made a disclosure in his deposition qua the injury suffered on the left ear of the victim sequelling its auditory impairment. The deposition of the aforesaid PW when read in tandem with the disclosure qua the occurrence rendered by PW-1 in his examination in chief besides by PW-2 conspicuously when both testify qua the version, bereft of any inter se contradictions occurring in their respective examinations in chief vis.a.vis their respective cross-examinations contrarily when they depose with intra se harmony thereupon the prosecution case warranted its success also qua the charge the learned trial Magistrate stood enjoined to pronounce an order of conviction against the accused.

10. Dehors both PW-1 and PW-2 deposing with intra se harmony qua the relevant injuries standing suffered by the victim by user of stick/Danda Ext.P-3 upon him by the accused, it was also imperative for the prosecution to prove qua its recovery standing validly effectuated. However, in determining the factum of the Investigating Officer concerned effectuating a valid and efficacious recovery of Ext.P-3, an allusion to the apposite memo is essential. The apposite recovery memo held in Ext.PW-3/A makes a communication qua the accused/respondent handing it over to the Investigating Officer also a thorough scanning of the entire record underscores qua prior thereto no disclosure statement of the accused standing recorded.

11. The Investigating Officer concerned stood enjoined with a dire legal necessity to prior to effectuate recovery of weapon of offence, his during the course of holding the accused to custodial interrogation his recording the disclosure statement of the accused, holding unfoldments therein qua the place of its concealment or hiding by him, necessity whereof stands cornered within the domain of Section 27 of the Indian Evidence Act, 1872 provisions whereof stand extracted hereinafter also therein it stands propounded qua thereupon an admissible besides a relevant custodial confessional statement of accused assuredly making its emergence in sequel whereto the subsequent recovery of the weapon of offence at the instance of the accused would hold immense evidentiary clout, contrarily when without preceding thereto, the apposite statutorily warranted custodial confessional disclosure statement of the accused remained unrecorded, thereupon any bald recovery of any weapon of offence by the investigating Officer at the instance of the accused would be hence wholly naked nor would it be construable to be an admissible besides a relevant piece of incriminatory evidence vis-à-vis the accused, significantly when the mandate of law warrants effectuation of the relevant recovery at the instance of the accused not under a composite recovery memo rather warrants recording prior thereto an

admissible custodial disclosure statement of the accused. In other words, the recording of a disclosure statement of the accused by the Investigating officer prior to his effectuating any recovery at the instance of the accused, is preemptory, its embodying the custodial confessional statement of the accused, omission to record whereof renders inconsequential besides inadmissible any recovery under a naked bald recovery memo.

> "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 proven."

12. Hereat, tritely with the Investigating Officer concerned prior to his effectuating recovery of weapon of offence not recording the apt custodial admissible disclosure statement of the accused renders the indispensable cannon held within the domain of Section 27 of the Indian Evidence Act qua the accused prior to his facilitating the Investigating Officer to effectuate recovery of the purported weapon of offence, his making an admissible relevant custodial confessional statement remains wholly un-satiated hence rendering recovery, if any, at the instance of the accused, of the purported weapon of offence to hold no probative vigor nor also it can be concluded qua the prosecution thereupon proving qua 'stick/Danda' with purported user whereof injuries stood sustained by the victim standing hence used thereon by the accused.

13. For the reasons which stand 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 material on record by the learned trial Court 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 whereupon its judgement warrants no interference.

14. 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.

Jagdish ....Appellant.
Versus
Pinky Devi and others ....Respondents.

FAO No.: 519 of 2015
Date of Decision : 18/03/2017

Employees Compensation Act, 1923- Section 3- Deceased was engaged as driver who died in a motor vehicle accident- it was contended that vehicle was transferred and the liability was wrongly fastened upon the appellant- held, that employment is a necessary condition for getting compensation in Workmen Compensation Act- deceased was employed by the appellant and, therefore, he is liable for the payment of compensation- liability cannot be fastened upon the person recorded as owner in R.C.- appeal dismissed. (Para-2 to 4)

For the Appellant: Mr. Y.P.S.Dhaulta, Advocate.
For the respondents: Mr. Virender Singh Chauhan, Advocate for respondents No.1 to 3.

The following judgment of the Court was delivered:

Sureshwar Thakur, *Judge (oral)*

The instant appeal stands instituted by the aggrieved purported employer of deceased workman Inder Singh.

2. Upon this Court, at, the pre admission stage hearing the learned counsel on either side, it is hence deemed fit to frame the hereinafter extracted substantial questions of law, for meteing an answer thereto.

1. Whether the mere purchaser of vehicle in the absence of any documentary proof, can a person be declared as owner?

2. Whether in the absence of registration certificate (RC), person can be declared owner of vehicle?

Thereafter the learned counsel appearing for the contesting parties consensually convey qua their readiness to address arguments thereupon. On the previous date when the appeal was heard the learned counsel for the appellant had made a vociferous submission qua with the learned MACT, Bilaspur while pronouncing an award upon MAC No. 10/2 of 2009, its proceeding to fasten the apposite liability qua the compensation amount determined thereunder qua an injured occupying the offending vehicle, upon the registered owner of the relevant vehicle, thereupon this Court also likewise fastening the apposite liability qua compensation determined under the impugned award upon the relevant registered owner of the vehicle. Inder Singh, who stood impleaded as respondent No.4 in MAC No. 10/2 of 2009, has proceeded to assail the apposite award pronounced by the learned MACT, by instituting herebefore FAO No. 164 of 2015. The learned MACT under its apposite award, had fastened upon Inder Singh the apposite liability qua the compensation amount determined thereunder, on anchorage of his name standing entered as owner of the offending vehicle in the apposite RC, anchorage whereof galvanized force from the apposite verdict(s) recorded by the Hon'ble Apex Court wherewithin a mandate is held qua the Registered owner of the relevant vehicle alone warranting fastening of liability of compensation determined by the MACT concerned. The aforesaid findings rendered by the learned MACT concerned upon the apposite claim petition preferred therebefore by an injured/occupant of the relevant vehicle, cannot ipso facto constrain this court to dispel the tenacity of an affidavit sworn by Jagdish appellant herein, embodied in Mark-RW-1/C, affidavit whereof exists on file of Workmen's Compensation Petition No. 17/2 of 2011/2007/225/2013 wherein he has made a pointed recital qua his purchasing the relevant vehicle from Nand Lal. The relevant paragraph 2 of the affidavit held in Mark-RW-1/C portrays qua the relevant vehicle standing purchased on 29.10.2006 by the appellant herein whereas the accident with respect to the relevant vehicle whereon the deceased workman stood engaged as a driver by his purported employer occurred on 7.12.2006. In sequel thereof, with the illfated mishap involving the relevant vehicle whereon the deceased workman stood engaged as a driver evidently occurring subsequent to the execution of an affidavit embodied in Mark-RW-1/C wherewithin the appellant herein accepts the factum of his making purchase of the relevant vehicle from one Sh. Nand Lal. Hereat in coagulation thereof the tenacity of the submission addressed herebefore by the learned counsel for the appellant qua the apposite liability of compensation determined by the learned Commissioner under the impugned award warranting its standing fastened only upon the Registered owner stands enjoined to be tested whereupon an allusion to the relevant provision(s) of the Workmen's Compensation Act, existing in Section 3(1) thereof, is imperative, provision(s) whereof stand extracted hereinafter:

3. Employer's liability for compensation :- (1) If personal injury is caused to a workman by accident arising out of and in the course of his employment, his employer shall be liable to pay compensation in accordance with the provisions of this Chapter:

3. An incisive reading of the hereinabove extracted relevant provisions of Section 3(1) of the Workmen's Compensation Act unveil qua the employer of the workman concerned being amenable to pay compensation to the workman concerned, if the relevant injury stands suffered by the workman concerned during the course of his performing employment under his employer. Obviously, the *sine qua non* for fastening the apposite liability qua the compensation amount determined by the learned Commissioner under the Act, is evident existence of an express or an implied contract of employment subsisting at the relevant time inter se the workman concerned vis.a.vis his employer. Evidence qua a contract of employment aforesaid existing interse the workman vis-a-vis his employer, may upsurge dehors the vehicle concerned standing not owned by the person/entity whereunder the workman concerned renders his apposite employment conspicuously when no apposite statutory provisions mandate qua the indispensable statutory norm for fastening liability upon an employer of an injured/disabled or deceased workman standing rested qua apart from satiation standing begotten qua the statutory tenet of an express or implied contract of employment subsisting inter se them, the workman concerned also establishing qua his employer also holding the apposite RC with respect to the relevant vehicle. Since the aforesaid statutory tenet remains un-enunciated in the Act, any insistence upon the workman concerned qua his establishing qua his employer holding the apposite RC qua the relevant vehicle, would visibly travel beyond the domain of statutory provisions. Be that as it may, extantly, explicit besides express evidence qua the prima donna factum probandum aforesaid stands unveiled in Mark-RW-1/C, exhibit whereof holds therewithin an affidavit sworn by the appellant herein qua his at the relevant time of the mishap involving the offending vehicle his purchasing it from one from Nand Lal. Since the execution of Mark-RW-1/C stands undisputed nor also with Jagdish concerting to belie the efficacy of the recitals embodied therein especially the one qua his at the time contemporaneous to the occurrence of the ill fated mishap, hence holding possession of the relevant vehicle thereupon with his also holding the apposite capacity to hold a valid possession of the relevant vehicle dehors his name remaining unsubstituted as its owner in the apposite RC also thereupon he held the befitting apposite capacity to engage a driver thereon. In sequel thereto with the oral deposition(s) pronouncing qua the deceased workman at the relevant time performing his apposite employment in the relevant vehicle under respondent No.4 also thereupon attain befitting sinew/probative worth for in concluding qua theirs making unfoldings in consonance with the relevant statutory tenet embodied in Section 3(1) of the Act besides obviously the claimants also proving the factum of their predecessor-in-interest standing engaged as a driver in the relevant vehicle by respondent No.4. In summa, the factum of the name of the appellant herein standing not in the apposite RC hence substituted in place of its hitherto owner, would not, constitute evidence qua no relationship of employer or employee existing inter-se the appellant herein vis-à-vis the deceased workman. Significantly also with the provisions of sub section (1) of Section-3 of the Workmen's Compensation Act enjoining adduction of evidence before the learned Commissioner in portrayal of a contract of employment at the relevant time existing inter-se the workman concerned vis-à-vis his employer, adduction of affirmative evidence whereon hence satiating, the solitary indispensable statutory cannon for fastening the apposite liability qua compensation amount determined under the Act upon the employer concerned, thereupon the fastening of any liability of compensation upon the registered owner of vehicle is per se unbefitting, conspicuously when a claim petition constituted before the MACT concerned stands enjoined to be decided in consonance with the statutory provisions held in the Motor Vehicles Act wherewithin no mandate alike the mandate held in the Workmen's Compensation Act stands encapsulated qua the preponderant statutory tenet enjoining satiation by clinching evidence standing adduced thereon for hence aptly fastening liability of compensation upon the employer of the workman concerned standing anvilled upon existence of a contract of employment inter se both, whereas hereat evidence making evincings qua existence of a contract of employment, evidence whereof is alone for reiteration amenable for imputation of credence thereon dehors respondent No. 4 not standing recorded in the apposite RC to be the owner of the relevant vehicle, for thereupon the apposite liability standing fastened upon the relevant employer, contrarily the apposite claim petition constituted under the Motor Vehicles Act before the MACT concerned does not for

fastening the apposite liability upon the insurer of the relevant vehicle or upon its owner statutorily warrant adduction of any evidence in display of any contract of employment existing inter se the claimants vis.a.vis the owner of the relevant vehicle.

4. The learned counsel appearing for the appellant herein also contended with much vigor qua with one Nand Lal securing the release of the relevant vehicle from the JMIC concerned, hence constituting evidence for succoring an inference qua no subsisting relationship of employer and employee occurring inter-se the deceased workman concerned vis-à-vis respondent No.4. However, even if the registered owner, had obtained from the Court concerned, the release of the relevant vehicle, factum thereof may not oust any inference qua no subsisting relationship of employer and employee ever coming into being inter-se the deceased workman concerned vis-à-vis respondent No.4, relationship whereof stands abundantly marked by Mark-RW1/A, execution whereof remains unbelied also stands marked by unrebutted oral evidence in corroboration thereof. Moreso, the learned Magistrate concerned who had on an application comprised in Ext.RX ordered for the relevant vehicle standing released qua Inder Singh, has recorded its apposite pronouncement, in the wake of Inder Singh, the registered owner of the vehicle not impleading Jagdish as a party thereto also the apposite application of release preferred before the Magistrate concerned whereon the later proceeded to order its release, holds the signatures of Nand Lal as special power of attorney of its registered owner, owner whereof stands recited in Mark-RW1/C to be the person wherefrom through his SPA the appellant herein made a purchase of the relevant vehicle. It hence appears qua given the absence of an apposite substitution in the RC qua the relevant vehicle, the aforesaid Nand Lal, who stood constituted under Mark-RW1/B by its registered owner to be his special power of attorney also when the registered owner held the entitlement to claim its release especially when his name in the RC remained alive, contrarily with the appellant herein not standing substituted in the apposite RC in place of the hitherto owner of the relevant vehicle nor his standing constituted by its registered owner as his special power of attorney thereupon when he hence did not hold any entitlement to proceed to stake a claim for its release from the Magistrate concerned, hence proceeded to stake a claim for its release yet thereupon it would not constrain any inference from this Court qua its release from the Court concerned ousting the aforesaid inference qua his at the relevant time engaging the deceased workman concerned as a driver upon the relevant vehicle prominently when emphatic/oral evidence makes a vivid display qua the aforesaid factum. Furthermore, galvanized force qua satiation qua the relevant statutory parameters standing satiated, stands acquired, by the factum of Nand Lal wherefrom the appellant herein had made a purchase of the relevant vehicle standing impleaded as a party in the apposite petition constituted under the Act yet Nand Lal who stood impleaded as respondent No.4, in his deposition recorded before the Commissioner proves Mark-RW-1/C also in his deposition he has made underscorings therein qua the deceased workman concerned standing employed by Jagdish, wherefrom it is inevitable to infer qua his accepting the factum qua the relevant vehicle at the relevant time dehors his applying for its release before the Magistrate concerned also hence not benumbing the factum qua a subsisting contract of employer and employee which alone constitutes the paramount factum for fastening liability of compensation under the Act coming into existence inter se the deceased workman vis.a.vis respondent No.4. Accordingly, substantial questions of law are answered against the appellant. Appeal dismissed. Impugned award is affirmed.

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

State of Himachal Pradesh .....Appellant.

Versus

Ranjeet Singh & Others. .....Respondents.

Cr. Appeal No. 470 of 2007
Decided on : 18.3.2017

Indian Penal Code, 1860- Section 148, 341, 323, 324 read with Section 149- Complainant was going to drop his driver – when the car reached near M, the driver stated that he could not undertake the journey on foot to his house as it was pitch dark - he requested the complainant to return – a tractor was found parked in the middle of the road which was causing obstruction to the traffic – the complainant got down from the car and requested the persons standing near the tractor to give him the way but accused R and R attacked the complainant – other accused inflicted stick blows – driver and occupant of the car of the complainant cried for help on which accused ran away – the accused were tried and acquitted by the Trial Court- held in appeal thatthere are contradictions in the testimonies of prosecution witnesses- the disclosure statement was not recorded prior to effecting recovery and the recovery is not admissible – Trial Court had properly appreciated the evidence- appeal dismissed.(Para-9 to 17)

For the Appellant: Mr. R.S Thakur, Additional Advocate General.
For the Respondents: Mr. N.K Thakur, Sr. Advocate with Mr. Divay Raj Thakur, Advocate for respondents No. 1 to 3 and 5.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The instant appeal stands directed against the impugned judgment of 31.5.2007 rendered by the learned Judicial Magistrate, 1st Class, Jogindernagar, District Mandi, H.P., in police challan No. 2-II/2004, whereby the learned trial Court acquitted the respondents (for short "accused") for the offences charged.

2. Brief facts of the case are that on dated 24.2.2003 at about 11.00 P.M. complainant Shri Ravinder Singh was going to drop his driver at place Chapru of Tehsil Jogindernagar. Driver Rabel Singh and Ram Dhan were also sitting in this car No.HP-29-0722. When the car reached near Magru Nalla, driver Rabel Singh said that since it was pitch dark, he could not undertake the journey on foot to his house. Owing to this reason , Rabel Singh changed his mind and advised that all of them to return back. While they were returning, a tractor was found stationed in the middle of the road in such a manner so as to cause obstruction to the vehicular traffic. The complainant got down from the car and requested all of the persons who were standing near the tractor to give him the way, but accused Ramesh and Rakesh who were holding Khukris started assaulting him with Khukris. The complainant received injuries in the assault aforesaid. The remaining accused were also armed with sticks and they also assaulted the complainant by stick blows. Accused persons, thereafter snatched the key of the complainant's car. Driver Rabel Singh and Ram Dhan cried for help and the accused persons fled away. The complainant approached Police Station during the night and reported the matter at about 1.30 A.M. upon which formal FIR against the accused persons came to be lodged. 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. The accused stood charged by the learned trial Court for theirs committing offences punishable under Sections 148, 341, 323, 324 readwith Section 149 of Indian Penal Code, to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 6 witnesses. On closure of prosecution evidence, the statements of the accused under Section 313 of the Code of Criminal Procedure were recorded in which they pleaded innocence besides claimed false implication. However, they did not choose to lead any evidence in defence.

5. On an appraisal of evidence on record, the learned trial Court returned findings of acquittal qua the accused.

6. The learned Additional Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned trial Court standing not based on

a proper appreciation of evidence on record, rather, theirs standing sequelled by gross mis-appreciation of material on record. Hence, he contends qua the findings of acquittal warranted reversal by this Court in the exercise of its appellate jurisdiction and theirs standing replaced by findings of conviction.

7. The learned Sr. counsel appearing for the respondents/accused has with considerable force and vigor contended qua the findings of acquittal recorded by the Court below standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating 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 sequel to victim/complainant Ravinder Pal standing assaulted by co accused Ramesh Chand and Rakesh Chand, by both respectively purportedly wielding "Khukhris" also by co-accused Ranjit Singh by the latter purportedly wielding "sticks", he sustained injuries on his person, injuries whereof stand reflected in Ex.PW5/A.

10. With PW-5 Dr. Susheel Chander in his testification occurring in his examination-in-chief deposing qua the injuries noticed by him to be occurring on the person of the victim, injuries whereof stand embodied in Ex.PW5/A, being causable thereon by user of Khukhri (Ex.P-1) which stood shown to him in Court besides with the purported ocular witnesses to the occurrence PW-1 (Ravinder) and PW-2 (Ram Dhan) also deposing with utmost intra se harmony therewith, constrains the learned Additional Advocate General to espouse qua the learned trial Court while returning findings of acquittal qua the accused, its going astray from the evident fact marked by the aforesaid evidence on record.

11. The genesis of the prosecution case embodied in the FIR held in Ex.PW6/B stood enjoined to be lent succor by convincing evidence, bereft of any discrepancies improvements besides embellishments vis-à-vis the version(s) held in Ex. PW-6/B, making upsurgings in the testimonies of the ocular witnesses thereto comprised in theirs with intra-se harmony testifying not only with respect to the wielding of "Khukhris" respectively by co-accused Ramesh and by Rakesh but also qua the factum pronounced in the FIR aforesaid qua other co-accused standing armed with "sticks". In case the version embodied qua the occurrence in the apposite FIR qua accused Ramesh and Rakesh each respectively wielding "Khukhri" with user whereof they inflicted injuries on the person of the victim, remain untestified by the purported ocular witnesses to the occurrence also if the ocular witnesses to the occurrence do not with utmost intra se harmony depose qua other co-accused delivering blows on the person of victim with user of "Sticks", thereupon the veracity of the version qua the occurrence encapsulated in the FIR would stand rendered enfeebled.

12. On traversing through the deposition of Ram Dhan, a purported ocular witness to the occurrence, it stands unveiled qua his deposing qua co-accused Ramesh and Rakesh inflicting blows of "Khukhri" upon the person of the complainant whereupon he succors the version qua the aforesaid factum pronounced in the FIR yet when in the later part of his examination-in-chief he was shown Ex.P-1 recovered under memo Ex.PW1/A whereat though he identified it to be same which stood used by the accused aforesaid for inflicting injuries on the person of the victim nonetheless thereat both the learned Public Prosecutor also this witness maintained reticence qua user thereof by either accused Ramesh or by accused Rakesh. Also both the learned APP concerned and this witness maintained reticence nor obviously made any narration in consonance with the recitals recorded in the FIR qua both accused Ramesh and Rakesh wielding "Khukhris", non-emanation whereof from PW Ram Dhan renders it befitting to conclude qua the deposition of PW-2 Ram Dhan, a purported ocular witness to the occurrence wandering astray besides not pin pointedly as disclosed in the apposite FIR, making unveilings qua both accused Ramesh and Rakesh wielding "Khukhris" also his hence not corroborating the factum held in the apposite FIR qua both aforesaid accused at the relevant time of occurrence

theirs respectively wielding "Khukhris" whereupon the factum aforesaid enunciated in the FIR looses its tenacity whereupon the prosecution case staggers.

13. Also, PW-3 (Rabel Singh), the other purported eye witness to the occurrence in departure to the factum pronounced in the FIR qua each accused Ramesh and Rakesh wielding "Khukhri" at the site of the occurrence, discloses in his testification only qua Ramesh wielding "Khukri" with user whereof he inflicted injuries on the person of the complainant. Also he deposes qua other accused by user of "sticks" hence inflicting injuries on the person of the complainant. The deposition of PW-3 Rabel Singh contradicts the version recorded by PW-2 Ram Dhan with respect to :-

(a) user by both co-accused Ramesh and Rakesh of "Khukhri";

(b) also with respect to the ascription by PW-3 of an inculpatory role qua other co-accused comprised in theirs delivering injuries on the person of the complainant with user thereon of "Sticks", factum whereof remains un-testified by PW-2.

14. The aforesaid contradictions inter-se the testifications of PW-2 and PW-3 both purported eye witnesses to the occurrence, contradictions whereof arise from theirs not hence deposing in conformity with the crucial factum embodied in the apposite FIR qua user of weapon of offence respectively by the accused also theirs hence deposing with an inherent intra-se contradiction qua the user of weapon(s) of offence respectively by co-accused Ramesh and Rakesh, gives impetus to an inference qua their testimonies not holding any creditworthiness, for thereupon this Court holding with aplomb qua the entire genesis of the prosecution version embodied in the apposite FIR standing clinchingly proven.

15. Moreover, the Investigating Officer concerned stood enjoined with a dire legal necessity, to prior to effectuate recovery of weapon of offence, his during the course of holding the accused to custodial interrogation, his recording the disclosure statement of the accused, holding unfoldments therein qua the place of its concealment or hiding by him, necessity whereof stands cornered within the domain of Section 27 of the Indian Evidence Act, 1872, provisions whereof stand extracted hereinafter also therein it stands propounded qua thereupon an admissible besides a relevant custodial confessional statement of accused assuredly making its emergence, in sequel whereto, the subsequent recovery of the weapon of offence, at the instance of the accused would hold immense evidentiary clout, contrarily when without preceding thereto, the apposite statutorily warranted custodial confessional disclosure statement of the accused remained unrecorded, thereupon any bald recovery of any weapon of offence by the investigating Officer at the instance of the accused would be hence wholly naked nor would it be construable to be an admissible besides a relevant piece of incriminatory evidence vis-à-vis the accused, significantly when the mandate of law warrants effectuation of the relevant recovery at the instance of the accused not under an apposite recovery memo rather warrants recording prior thereto an admissible custodial disclosure statement of the accused. In other words, the recording of a disclosure statement of the accused by the Investigating officer prior to his effectuating any recovery at the instance of the accused, is preemptory, its embodying the custodial confessional statement of the accused, omission to record whereof renders inconsequential besides inadmissible any recovery under a naked bald recovery memo.

> "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 proven."

16. Hereat, tritely with the Investigating Officer concerned prior to his effectuating recovery of weapon of offence not recording an apt custodial admissible disclosure statement of the accused renders the indispensable canon held within the domain of Section 27 of the Indian Evidence Act qua the accused prior to his facilitating, the Investigating Officer to effectuate

recovery of the purported weapon of offence, his making an admissible relevant custodial confessional statement, remains wholly un-satiated hence rendering recovery, if any, at the instance of the accused, of the purported weapon of offence to hold no probative vigor nor also it can be concluded qua the prosecution thereupon proving qua "Khukhri" with purported user whereof injuries stood sustained by the victim standing used thereon by the accused.

17. A wholesome analysis of evidence on record portrays qua the appreciation of evidence as done by the learned trial Court does not suffer from any perversity and absurdity nor it can be said qua the learned trial Court in recording findings of acquittal hence committing any legal misdemeanor, in as much, as, its mis-appreciating the evidence on record or its omitting to appreciate relevant and admissible evidence. In aftermath this Court does not deem it fit and appropriate qua the findings of acquittal recorded by the learned trial Court meriting any interference.

18. In view of the above discussion, I find no merit in this appeal, which is accordingly dismissed and the judgment of the learned trial Court is maintained and affirmed. Record of the learned trial Court be sent back forthwith.

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

Smt. Bala Devi .....Petitioner
Versus
Ved Prakash ....Respondent.

Cr.MMO No 4082 of 2013
Date of Decision: 20.3.2017

Code of Criminal Procedure, 1973- Section 125-Applicant claimed maintenance for herself and her minor children- Trial Court allowed the application partly and granted maintenance at the rate of Rs.1500/- per monthin favour of minor children but declined the maintenance to the applicant – separate revisions were filed which were dismissed- held that the applicant is residing in adulterous relationship with R and her husband had filed an FIR against her – the applicant was lodged in judicial custody at the time of filing of the application – hence, maintenance was rightly declined to her- petition dismissed.(Para-4 and 5)

For the petitioner: Mr. Bimal Gupta, Sr. Advocate with Ms. Kusum Chaudhary, Advocate.
For the Respondent: Mr. Gaurav Gautam, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

The petitioner herein instituted a petition constituted under Section 125 Cr.P.C before the learned Chief Judicial Magistrate, Sirmaur at Nahan, H.P wherein she claimed maintenance for herself as also for her minor children. The learned Chief Judicial Magistrate concerned while deciding the aforesaid petition declined awarding of maintenance qua the petitioner herein whereas it held her minor daughters to stand entitled to receive maintenance quantified at Rs.1500/- each from the respondent.

2. The respondent standing aggrieved by the pronouncement made by the learned Chief Judicial Magistrate whereupon he was directed to pay maintenance at Rs.1500/- each to his minor daughters hence preferred a Criminal Revision petition before the learned Sessions Judge, Sirmaur District at Nahan, H.P. Also the petitioner herein standing aggrieved by the order rendered by the learned Chief Judicial Magistrate whereby he declined to her maintenance hence

preferred a Revision petition before the learned Sessions Judge, Sirmaur at Nahan. Both the petitions aforesaid stood dismissed by the learned Sessions Judge.

3. Now, the petitioner has instituted the instant petition before this Court whereby she assails the concurrently recorded findings by both the learned Courts below in their impugned order(s) whereby her claim for maintenance from her husband stood declined to her.

4. The learned Senior Advocate appearing for the petitioner has contended qua the sole ground which prevailed upon the learned Courts below for declining maintenance to the petitioner is anvilled in RW-7/A and RW-7/B. However, he submits qua the mere factum of the respondent herein lodging an FIR against the petitioner herein perse would not render her disentitled to claim maintenance from the respondent herein, preeminently when he is bound to maintain her, she uncontrovertedly being his legally wedded wife, whereas his refusing to maintain her tantamounts to his infringing the mandate of Section 125 Cr.P.C whereupon he stands interdicted against neglecting or refusing to maintain his legally wedded wife.

> "125. Order for maintenance of wives, children and parents.(1) If any person having sufficient means neglects or refuses to maintain-
>
> (a) his wife, unable to maintain herself, or
>
> (b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or
>
> 1. Subs. by Act 45 of 1978, s. 12, for" Chief Judicial Magistrate" (w. e. f, 18- 12-1978).
>
> (c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or
>
> (d) his father or mother, unable to maintain himself or herself, a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct: Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means. Explanation.- For the purposes of this Chapter,-
>
> (a) " minor" means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875); is deemed not to have attained his majority;
>
> (b) " wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.
>
> (2) Such allowance shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance.
>
> (3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month' s allowances remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made: Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due: Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such

Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing. Explanation.- If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife' s refusal to live with him.

(4) No Wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order."

5. However, the aforesaid submission is rudderless given even if assumingly, there is existing evident proof of the respondent herein neglecting or refusing to maintain his legally wedded wife, nonetheless when such neglect or refusal is hereat prima-facie harbored upon the petitioner herein holding an adulterous relationship hence unveiling conduct unbefitting of a chaste spouse, a prima donna tenet for leveraging her claims besides when there exists at this stage evident proof qua the petitioner herein conspiring with one Ranjeet Singh, to eliminate the respondent herein whereupon the respondent stood constrained to lodge an FIR, moreover, with disclosures existing in the exhibits aforesaid qua the petitioner herein standing lodged in judicial custody at a time prior to the institution of the apposite petition under Section 125 of Cr.P.C before the learned Chief Judicial Magistrate concerned, thereupon at this stage does constrain an inference qua the refusal or neglect of the respondent herein to maintain the petitioner herein standing anvilled upon unbefitting conduct of the petitioner. In aftermath she stood not entitled to claim maintenance from the respondent herein.

In view of the above, there is no merit in this petition, the same is accordingly dismissed. All pending applications stand disposed of accordingly.

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

State of H.P. ....Appellant.
Versus
Ramesh Chand ....Respondent.

Cr. Appeal No. 344 of 2007.
Date of Decision: 20th March, 2017.

Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989- Section 3(x)- Complainant and others had attended the marriage of K- they were asked by the accused to get up from the row in which other guests were sitting to take meals by saying that girls belonging to scheduled caste will not allowed to sit with him in the same row – the accused was tried and acquitted by the Trial Court- held in appeal that there was a delay of more than one month in reporting the matter to the police, which was not explained – a compromise was effected between the parties in which it was stated that there was some misunderstanding – the defence version that therewas no mens rea was probable – the Trial Court had properly appreciated the evidence – appeal dismissed. (Para-9 to 13)

For the Appellant: Mr. Vivek Singh Attri, Deputy Advocate General.
For the Respondent: Mr. S.D. Gill**,** 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 rendered on 26.05.2007 by the learned Special Judge, Una in Sessions Trial No. 19 of 2006, whereby, he acquitted the accused for his allegedly committing an offence punishable under Section 3(x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities)Act.

2. The facts relevant to decide the instant case are that on 28.12.2005, an application was moved by complainant Shri Mahajan Chand along with others, namley, Meena Kumari, Rekha Kumari, Sushma Kumari, Bandna Devi, Primla Devi, Prem Lata, Phulan Devi, Subh Karam, Ranjit Singh, Rajesh Kumar, Jagat Ram, Sukh Ram, Suresh Chand, Dulo Ram and Nirmala Devi to the Superintendent of Police Hamirpur alleging therein that they belong to Scheduled Castes category. It was alleged therein that theirs girls are learning the occupation of tailoring and embroidery in the Centre Started through the Panchayat. The marriage of Kanchan daughter of Amra, who was also undergoing training in the aforesaid centre was fixed for 18.11.2005. All the girls undergoing training in the Centre were invited to the said marriage along with the teacher. The girls belonging to Scheduled castes were made to get up by the accused from the row in which the guests attending the marriage were sitting to take their meals by saying that he would not allow the girls belonging to doom and chamar scheduled castes to sit along with him in the same row. It was also alleged that earlier an application/complaint was also submitted to the Addl. S.P., Hamirpur on 21.11.2005 but no action had been taken in the matter till date. On Receipt of application Ex.PW1/A of 28.12.2005, the same was marked by the Superintendent of Police to Deputy Superintendent of Police (Headquarters) on the same day for immediate necessary action under law, who further marked the same to SHO, P.S., Sadar for registration of a case under Section 3 of the Act. Consequently, an FIR was registered in the concerned police station. Thereafter, the Investigating Officer concerned completed the codel formalities.

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 his committing offences punishable under Sections 3 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities)Act. 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, returned findings of acquittal in favour of the accused/respondent herein.

6. The State of H.P. stands aggrieved by the judgment of acquittal recorded in favour of the accused/respondent by the learned trial Court. The learned Deputy Advocate General for the State has concertedly and vigorously contended qua the findings of acquittal recorded by the learned trial Court standing not based on a proper appreciation of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation 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 standing replaced by findings of conviction.

7. On the other hand, the learned counsel appearing for the accused/respondent herein has with considerable force and vigour, contended qua the findings of acquittal recorded by the learned trial Court 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 alleged incident occurred on 18.11.2005. However, an FIR qua it comprised in Ex.PW1/A stood lodged with the Police Station concerned, on 2.1.2006. Consequently, with the alleged incident standing reported with an immense delay of more than a month elapsing since its occurrence hence Ex.PW1/ is rendered to stand afflicted with inherent taints of premeditation and concoction, whereupon, its veracity gets shaken. Even though, the mere factum of the complainant belatedly qua the relevant occurrence making a report before the police station concerned would not per se thereupon render the version held in belatedly instituted complaint comprised in Ex.PW1/A to stand stained with any vice of premeditations nor also with any stain of concoction nor would the version encapsulated therein be construable to be incredible, unless the prosecution had rendered a truthful tangible explication qua the spurring of the relevant delay. In case, the reason for the occurrence of a delay in the prompt lodging of the apposite FIR holds entrenched elements of prevarication, thereupon the inevitable sequel would be qua this Court concluding with formidability qua the belated lodging by the aggrieved of the complaint/FIR with the police station concerned, rendering the version held therewithin to be in its entirety acquiring a taint of concoction whereupon no reliance would be imputable.

10. The explication which stands purveyed by the complainant qua his omission to promptly report the matter to the police station concerned stands anchored upon qua his earlier on 21.11.2005 proceeding to make an application before the authority concerned, yet the aforesaid explication for the delay which has occurred in the lodging of a report with the police station concerned since the incident occurring vis-a-vis its standing reported with the police station concerned, stands stained or infected with a pervasive vice of falsity, arising from the factum of PW-1 in his statement acquiescing qua his inability to produce the copy of the earlier complaint lodged on 21.11.2005 by him in the police station. Consequently, with the aforesaid explication qua the immensity of delay which had occurred since the occurrence of the incident vis-a-vis it standing reported to the police station concerned, constrains this Court to conclude qua the entire version held in the apposite FIR being a pure concoction also it standing stained with vice of premeditation and afterthought also thereupon its standing rendered incredible.

11. Be that as it may, the relevant records makes a disclosure qua under Ex. D-2, the complainant recording a compromise with the respondent/accused. Even though, the charge qua which the accused/respondent stood subjected to, is non compoundable whereupon the effect, if any, of Ex. D-2 would stand effaced. Nonetheless, an incisive perusal of Ex. D-2 unveils qua it holding communications qua the entire version encapsulated in the FIR embodied in Ex.PW1/A arising from a sheer misunderstanding qua the respondent/accused compelling the aggrieved children to on account of theirs belonging to the Scheduled Castes community to hence arise from their squatting position in the Dham, rather contrarily, it conveys qua the respondent/accused for easing the congestion at the relevant place, his thereupon requesting the aggrieved children to arise from their squatting position. Since no evincings spur in Ex. D-2 qua in its making, it standing prodded by any ulterior motive or its making spurring from any inducement whereupon, its effectuation may efficaciously erase the effect of the belated lodging of the FIR, contrarily absence of evidence aforesaid renders it to hold predominant play, for hence tending vigour to a conclusion qua the FIR lodged qua the incident arising from a sheer misunderstanding.

12. Aggravated momentum to the aforesaid factum stands also acquired from the prime factum qua the prosecution witnesses PW-2, PW-3 and PW-8 deposing with unanimity qua Kiran Kumari, Meena Kumar, Sarswati, Champa and Savita, Ishwari Devi, Hari Dass, Labhu, Kirpu, Uttam Chand and Bachittar all belonging to the schedule caste community, besides theirs deposing qua all the aforesaid taking meals in the same row along with members of the non scheduled caste community besides with PW-2 testifying qua the relevant place becoming congested and uncomfortable, for easing whereof, the respondent making a request upon the

squatters, to arise therefrom, whereupon, it is befitting to conclude qua the revelations occurring in Ex. D-2 also attaining corroborative force therefrom. Thereupon, the defence succeeds in its espousal qua the purported penal misdemeanor ascribed to the accused not holding the relevant mens rea, contrarily, it arising from his holistic perception for easing congestion from the relevant place. The aforesaid evidence succors the espousal of the defence qua the purported misdemeanor ascribed by the prosecution qua the accused/respondent arising from his contemplation for easing the congestion occurring at the relevant site also when thereupon it does not hold any element of his within the domain of the charge standing proven to commit the offence charged, necessarily, hence, the acquittal of the accused was apt.

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

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

State of Himachal Pradesh. ....Appellant.

Versus

Desh Raj and another ... Respondents.

Cr. Appeal No.: 216 of 2015.
Reserved on : 07.03.2017.
Decided on: 20.03.2017.

Indian Penal Code, 1860- Section 302, 201 read with Section 34- Deceased went to work but did not return – his dead body was found – it was found on inquiry that deceased and accused V had consumed liquor in the room of D – the accusedwere tried and acquitted by the Trial Court- held thatthe wife of the deceased had improved upon her previous version – it was not proved that deceased was last seen in the company of the accused –no independent witness, who was present at the time of recovery of dead body, was examined- further, the mere recovery of the dead body will not connect the accused with the commission of offences- disclosure statements and consequent recoveries were not established – the motive to commit the crime was also not proved- the Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed.(Para-8 to 27)

For the appellant : Mr. V.S. Chauhan, Addl. AG with Mr. Vikram Thakur, Dy. AG.
For the respondents : Mr. Vinay Thakur, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge

By way of this appeal, appellant/State has challenged the judgment passed by the Court of learned Additional Sessions Judge-(I), Kangra at Dharamshala, District Kangra, in Sessions Trial No. 16/2014, dated 09.01.2015, vide which, learned Trial Court acquitted the

present respondents (hereinafter referred to as 'accused') for commission of offences punishable under Section 302 and 201 read with Section 34 of Indian Penal Code (in short 'IPC').

2. The case of the prosecution in brief was that on 12.07.2012, PW2 Suresh Kumar, Pradhan of Gram Panchayat Drongu Kandi telephonically informed Police Station, Palampur that dead body of Bantu son of Jovan was found lying in suspicious circumstances in Kandi village behind the veterinary hospital. On the receipt of said information, SI/SHO Dandu Ram alongwith other police officials reached the spot where many persons had also gathered. Lata Devi, wife of deceased-Rajinder Kumar was also present on the spot. She reported the matter to police and her statement under Section 154 of Code of Criminal Procedure (hereinafter referred as 'Cr.P.C.') was recorded wherein she stated that she was married to the deceased in the month of December, 2006, and for the last one year, she was residing separately alongwith her children and husband and for the last about one month, her husband was working as Cleaner with the Tipper of Pradhan Suresh Kumar and the driver of Tipper was accused Vinod Kumar. Lata Devi (complainant) further mentioned in her statement that her husband had gone to work on 11.07.2012 at around 7/7:30 a.m. and that he (deceased) usually used to come back at 7/7:30 p.m. but on the said date, he did not return back at his scheduled time. She waited for her husband the entire night however her husband did not return back. In the morning of 12.07.2012, at around 6:00 a.m., she tried to talk with PW2 Pradhan Suresh Kumar from the Mobile phone of her mother-in-law but could no do so. At around 6:30 a.m., accused Vinod Kumar came to her house and inquired about her husband and she informed him that her husband had not returned back in the night. She further stated that thereafter she went to the shop of Desh Raj and Desh Raj disclosed to her that deceased-Rajender Kumar had gone to his shop on 11.07.2012 and thereafter had come to his house at 7/7:30 p.m. Complainant further stated that thereafter she went ahead of the shop of Desh Raj in search of her husband and on the path which goes to Nagri, she found her husband lying in the verandah of an under construction shop of Santosh Kumar with blood oozing out from his nose and mouth. She further stated that her husband did not respond to her and there were marks of dragging of the body. She returned back to her house and disclosed the entire episode to her in-laws and returned back to the spot alongwith her father-in-law, who informed PW2 Pradhan Suresh Kumar on telephone and Suresh Kumar also came to the spot. She further stated that later on she came to know from Pradhan Suresh Kumar that her husband alongwith Desh Raj and Vinod Kumar had consumed liquor in the room of Desh Raj on the previous evening. She further stated that she doubted that Desh Raj and Vinod Kumar had murdered her husband and had thereafter lifted the dead body and thrown it outside the verandah of the shop of Santosh Kumar.

3. On the basis of this statement of complainant Lata Kumari that FIR No. 129/2012 was registered at Police Station, Palampur on 12.07.2012.

4. Further as per the prosecution, thereafter investigation was got conducted by SI/SHO Dandu Ram and during the course of investigation, photographs were taken, memo of dead body of the deceased was prepared and body was sent for postmortem. Other articles found at the spot were also taken into possession. Eight blood samples were taken from the spot and sealed with seal having impression 'M'. A button of the shirt of the deceased which was found in the room of accused Desh Raj was also taken into possession vide memo Ext. PW2/B. Postmortem of the dead body was got conducted. Both accused were arrested who made disclosure statements under Section 27 of the Indian Evidence Act which interalia led to the recovery of clothes which were worn by the accused at the time of commission of the offence as well as the weapon of offence i.e. the bottle with which Desh Raj hit the deceased. Statements of witnesses under Section 161 of Cr.P.C were recorded.

5. After the completion of investigation, challan was filed in the Court and as a prima-facie case was found against the accused, they were charged for commission of offences punishable under Sections 302 and 201 read with Section 34 of IPC, to which they pleaded not guilty and claimed trial.

6. Learned trial Court on the basis of material produced on record both ocular as well as documentary held that the evidence brought on record by the prosecution was neither cogent not satisfactory nor did the same points towards the guilt of the accused. Learned trial Court held that the testimonies of prosecution witnesses were full of contradictions and improbabilities and only inference which could be drawn was that prosecution had failed to bring home the guilt of the accused beyond reasonable doubt. On these bases, learned trial Court acquitted the accused. Judgment of acquittal so returned by the learned trial Court is under challenge by way of this appeal.

7. We have heard the learned Additional Advocate General as well as learned counsel appearing for the respondents/accused. We have also gone through the records of the case as well as the judgment passed by the learned trial Court.

8. Admittedly in the present case, there is no eyewitness and the entire case of the prosecution rests upon the circumstantial evidence. No one has actually seen the commission of offences with which accused have been charged. During the course of arguments learned Additional Advocate General has culled out the following circumstances which as per prosecution link the accused with the commission of the offences for which they were charged.

1. Last seen together

2. **Recovery of dead body**

3. **Disclosure Statements**

4. **Postmortem report**

5. **Motive**

9. Before proceeding further, it is relevant to take note of the fact that the salient points, which have been carved out by the Hon'ble Supreme Court in a case of circumstantial evidence, on the basis of which the guilt of the accused can be brought home are as under.

> *"(i) The circumstances from which the conclusion of guilt is to be drawn must or should be and not merely 'may be' fully established;*
>
> *(ii) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;*
>
> *(iii) The circumstances should be of a conclusive nature and tendency;*
>
> *(iv) They should exclude every possible hypothesis except the one to be proved; and*
>
> (v) *There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."*

10. Because present case is a case of circumstantial evidence, therefore, this Court has to satisfy its judicial conscience as to whether by way of circumstantial evidence produced on record by the prosecution, it has been able to link the accused with commission of the offences or not.

11. We will deal with each of the circumstance independently in order to satisfy ourselves as to whether the chain of circumstances as culled out by learned Deputy Advocate General links the accused with the commission of offence or not, in view of the law laid down by the Hon'ble Supreme Court.

1. <u>Last seen together:</u>

12. As per the prosecution, this circumstance has been proved by PW1 Puroshatam and P11, complainant Lata Devi, wife of the deceased. A perusal of statement of PW1 Puroshatam who admittedly was the real uncle of the deceased demonstrates that he has deposed in his

examination-in-chief that after he came to know about the death of his nephew, he reached the spot where accused Desh Raj was already present and that Desh Raj confessed that on the previous evening, he alongwith co-accused Vinod Kumar had consumed liquor with the deceased and thereafter had given a bottle hit on the head of the deceased and had also struck the head of deceased on the wall. It has nowhere come in his deposition that he had last seen the deceased in the company of accused.

13. Now a perusal of the statement of complainant PW11 Lata Devi recorded before the learned trial Court demonstrates that she has nowhere stated that she had last seen the deceased in the company of accused. What in fact she has deposed is that when her husband did not return back home on the evening of 11.07.2012 she went to the shop of accused Desh Raj in the morning of 12.07.2012 to enquire about her husband and there Desh Raj informed her that deceased had visited his shop and both the accused had consumed alcohol together with the deceased at around 7/7:30 p.m. on the evening of previous day and thereafter deceased had gone to his house. Incidentally, a perusal of statement of complainant Lata Devi recorded under Section 154 of Cr.P.C. demonstrates that all that is recorded in the said statement, which is on record as Ext. PW7/A is that on the morning of 12.07.2012 when she went to the shop of accused Desh Raj, all that Desh Raj told her was that deceased had visited his shop on the previous evening but had left at around 7/7:30 p.m. It is not recorded in the said statement that Desh Raj told her that he alongwith co-accused and deceased had consumed liquor. This obviously demonstrates that the complainant has made improvement in her statement recorded in the Court which creates doubts over the veracity of deposition of this witness. Be that as it may, the fact of the matter still remains that PW11 has nowhere stated that she had last seen the deceased in the company of accused. Therefore, it cannot be said that prosecution was able to prove this circumstance against the accused that they were last seen with the deceased. Accordingly, the only conclusion which can be drawn from the above discussion is that the prosecution has failed to prove chain of circumstance against the accused.

2. <u>Recovery of dead body:</u>

14. The factum of recovery of dead body as per learned Additional Advocate General stood proved on record by the testimony of PW1 Puroshatam, PW2 Suresh Kumar, PW11 complainant Lata Devi and PW12 Jovan Lal, father of the deceased. Undoubtedly, recovery of dead body from the spot though stands established from the testimony of the above witnesses as well as from the statement of Investigating Officer who has entered the witness box as PW14 but there is nothing in the deposition of all these witnesses from which it can be inferred or concluded that deceased was in fact killed by the accused. It is a matter of record that PW11 complainant Lata Devi stated that dead body was found by her in the verandah of shop of Santosh Kumar. Incidentally, a perusal of statements of abovementioned witnesses demonstrates that there are discrepancies and variations which have remained unexplained with regard to the mode and manner in which the matter was reported to the police after the discovery of the dead body. As per the version of PW11, the complainant, after she discovered the dead body, she went back to her house, informed her in-laws about the incident and her in-laws thereafter proceeded to the spot and she followed them after some time and it was her father-in-law who telephonically intimated PW2 Pradhan Suresh Kumar about the incident who subsequently reached the spot and informed the police. Similarly, a perusal of statement of PW12 Jovan Lal, father of deceased demonstrates that he had deposed in the Court after his daughter-in-law informed him about the dead body of his son lying in the verandah of the shop of Santosh Kumar, he alongwith his wife went to shop of Santosh Kumar and telephonically contacted Suresh Kumar who also reached the spot and informed the police. PW12 in his statement in the Court stated that accused Desh Raj who was present at the spot told him that in the previous evening, deceased and both the accused were together and they consumed liquor and thereafter deceased had fallen from the stairs of his shop. Now, in this background when we peruse the statement of Suresh Kumar who entered the witness box as PW2, he has deposed before the Court that on 12.07.2012 after he came to know about the incident on telephone from Jovan Lal, he visited the shop of Santosh Kumar and found the dead body of deceased lying in front of said shop and thereafter he

informed the police about the occurrence. However in his statement recorded under Section 164 of Cr.P.C. has given a totally different version. In his statement so recorded under Section 164 of Cr.P.C which is on record as PW2/D, he stated on oath that on 12.07.2012, he received telephonic call from the father of deceased-Rajinder Kumar that his son had been killed and he should reach his house immediately and thereafter he (Suresh Kumar) went to the house of Jovan Lal and found Jovan crying in his house and thereafter he went to spot alongwith Jovan. This variation in the statement of PW-2 Suresh Kumar has not been satisfactorily explained by the prosecution. Testimony of PW1 Puroshatam, who is also a witness to the recovery of dead body, is also not reliable at all. This witness has deposed in the Court that after he came to know about the death of his nephew he went to the spot and found accused Desh Raj present at the spot and he also found blood stains in the shop of Desh Raj. He also deposed that "pent" of accused Desh Raj was also having blood stains and gunny bag which was recovered from the shop of accused Desh Raj was also having blood stains. This witness also deposed that Desh Raj had confessed that he alongwith co-accused Vinod Kumar had killed the deceased with a bottle on the previous evening while all of them were consuming liquor. Incidentally, PW1 is also a witness to the confession statements made by both the accused under Section 27 of the Indian Evidence Act as well as with regard to the recoveries effected pursuant to the statements so made by the accused under Section 27 of the Indian Evidence Act. Now as per the prosecution the articles recovered pursuant to the statements of the accused recorded under Section 27 of the Indian Evidence Act were the clothes which were worn by the accused at the time of commission of the offence. If the clothes which were worn by the accused were actually recovered on the basis of statements of accused so recorded under Section 27 of the Indian Evidence Act, then it is not understood as to what is the veracity of this witness who deposed in the Court that when he went to the spot where dead body of deceased was found lying he saw blood stains on the "pent" being worn by accused Desh Raj. Not only this, a perusal of cross-examination of this witness demonstrates that he had admitted therein that before the arrival of police, many persons had gathered at the spot and that after some time police officials disclosed to him (PW1) that during night time, Desh Raj, Vinod Kumar and deceased seemed to have gathered and consumed alcohol together and thereafter the incident might have taken place. Therefore, testimony of this witness is not at all reliable and his credibility also stands impeached by the defence in the course of his cross-examination.

15. Another important and relevant factor is that though it has come on record that there were many persons gathered on the spot where the dead body was lying. But strangely the prosecution has not examined even a single independent witness who was allegedly present on the spot from where dead body was discovered. All the witnesses examined by the prosecution except the official witnesses were either related to the deceased or known to the deceased. Thus had any confession been made by Desh Raj at the spot and if he was actually wearing blood stained clothes etc. at the spot and there were blood stains on the path and in his shop, it is not understood as to why these important facts have not been proved by the prosecution by bringing on record cogent evidence by way of testimony of independent witnesses.

16. From the discussion held above the only conclusion which can be arrived at is that through the discovery of dead body at the spot is a matter of record, however, merely on account of recovery of the same it cannot be inferred or concluded that the murder of the deceased was actually committed by the accused. Therefore, in our considered view, the prosecution has not been able to prove even this circumstance against the accused.

3. **Disclosure statements:**

17. As per prosecution, accused made disclosure statements while they were in police custody. Disclosure statement made by accused Desh Raj is on record as Ext. PW1/A and Puroshatam and Suresh Kumar are witnesses to the same. As per this disclosure statement, accused mentioned therein that he could get shirt, pajama and baniyan recovered which were blood stained and were worn by him while removing the deceased from his room to the house/shop of Santosh Kumar and which he had concealed inside a room in his house. It was further mentioned in this disclosure statement that he could also get the glass bottle recovered

with which he had hit the deceased on his head and which he had kept in the ground floor room of his shop/house in a sack containing empty bottles of liquor.

18. The disclosure statement made by accused Vinod Kumar under Section 27 of Indian Evidence Act is on record as Ext. PW1/B and the same has also been witnessed by Suresh Kumar and Puroshatam. As per the said statement, the accused stated that he had concealed the blood stained clothes which he was wearing at the time when body of deceased was removed from the house of Desh Raj to the under construction shop of Santosh Kumar in an Almirah in the house of his in-laws.

19. Recovery memos of articles recovered on the basis of said disclosure statements made by the accused are on record as Ext. PW1/C and PE1/D. Now as per the prosecution, the said disclosure statements were made by the accused in the presence of Puroshatam and Suresh Kumar. Puroshatam has entered the witness box as PW1 and Suresh Kumar has entered the witness box as PW2. A perusal of testimony of PW1 Puroshatam demonstrates that in his examination-in-chief, this witness has stated that after he was informed about death of his nephew and he came to the spot where dead body of his nephew was lying, he saw Desh Raj on the spot and Desh Raj was wearing a "pent" which was blood stained. This witness has further stated that gunny bag which was recovered from the shop of accused Desh Raj was also having blood stains. This witness has also stated that clothes of Desh Raj were recovered from his shop and that of Vinod Kumar were recovered from the house of his in-laws. Further a perusal of the cross examination of this witness demonstrates that he has stated therein that on 15.07.2012 i.e. the day when disclosure statements were recorded, when he reached police station, police told him that Desh Raj had disclosed that his clothes were in the shop and clothes of Vinod Kumar were in the house of his in-laws. It is not as if he stated in his cross examination that he gathered this information from the statement of accused recorded under Section 27 of the Indian Evidence Act but he has deposed that said fact was disclosed to him by the police. Similarly, when we peruse the statement of PW2 Suresh, in his cross examination has stated that at the time of recording of his statement under Section 164 of Cr.P.C, police officials were calling him and Kuldeep to the police station time and again and were pressing had on them to record statement as per their version. He further stated that the version told to him by the police was given by him in the Court to save himself from the pressure of police. He further stated in his cross examination that on 15.07.2012 he was called by the police to the Police Station at around 4:00 p.m. and police personnel told him about the recovery of clothes at the instance of accused.

20. In our considered view, the testimony of PW1 and PW2 is neither cogent, nor it is reliable or trustworthy. Besides this, the credibility of both these witnesses has been impeached by the defence in their cross examination. Further both these witnesses have stated in their cross examination that the factum of recovery of the clothes allegedly worn by the accused at the time of commission of the alleged offence was disclosed to them by the police. This, in our considered view renders the so called disclosure statements made by the accused to the police as well as the recovery of clothes made by the police on the basis of said disclosure statements highly suspicious. Even otherwise, it is settled law that with regard to Section 27 of the Indian Evidence Act what is important is discovery of the material object at the disclosure of the accused but such disclosure alone would not automatically lead to the conclusion that the offence was also committed by the accused. In fact, thereafter, burden lies on the prosecution to establish a close link between discovery of the material object and its use in the commission of the offence. What is admissible under Section 27 of the Act is the information leading to discovery and not any opinion formed on it by the prosecution. We may also add that this court is not oblivious of the fact that statement recorded under Section 164 Cr.P.C. is not a substantive piece of evidence and that statement recorded under Section 164 Cr.P.C can never be used as substantive evidence and said statement is always used for the purpose of contradiction or corroboration of a witness who made the same. As such, the statement under Section 164 of Cr.P.C is a formal statement recorded before an authority competent to record these statements. From the discussion held above, it cannot be said that the prosecution was able to prove this circumstance against the accused.

4. **Postmortem report:**

21. Postmortem report of the deceased is on record as Ext. PW8/A. Dr. Krishan Lal Kapoor who conducted the postmortem of the body of deceased entered the witness box as PW8 and this witness has deposed that in his opinion the deceased had died due to antemortem head injury. This witness further deposed in the Court that the "injury occurred to the deceased was not possible by empty bottle but the fatal injury to the deceased was possible by striking of head with the wall and same injury may caused death".

22. Another important fact which we may take note of is that weapon of offence i.e. the glass bottle with which Desh Raj hit the deceased on head was also not shown to PW8 in the course of examination. Not only this, this witness has categorically deposed that the fatal injury suffered by the deceased was not possible by an empty bottle and the same in fact was caused by striking the head of the deceased against a wall. Therefore, neither the postmortem report nor the testimony of PW8 is suggestive of the fact that deceased in fact was killed by the accused. Neither from the statement of PW8 nor from the MLC the prosecution has been able to point out the complicity of the accused with the commission of offence. Thus, in our considered view, even this circumstance was not proved by the prosecution against the deceased.

5. **Motive:**

23. As per prosecution, the motive as to why deceased was done to death by the accused was that deceased owed some money to accused Desh Raj. However, a perusal of the statement of wife and father of deceased who entered the witness box as PW11 and PW12 respectively demonstrates that there is no whisper of any motive which as per them accused had to do away with the deceased in their respective statements. Further it is apparent and evident from the statement of wife of deceased PW11 that after she discovered the body of her husband, she called amongst others her father-in-law to the spot and no suspicion at that stage was raised against Desh Raj by her. PW1 has stated on oath that in fact police had told him that accused had done away with the deceased. Even PW11 has stated in her cross examination that she was deposing against the accused persons only on the basis of suspicion. The attempt of the prosecution to prove the motive of the accused to do away with the deceased on the basis of register Ext. P-5 by relying upon the entries made therein and trying to impress upon the Court that deceased owed money to the accused Desh Raj is a very weak type of evidence which has not been corroborated by any other witness especially in view of the fact that I.O. of the case PW-14 SI Dandu Ram stated that the said register (Ext. P-5) did not contain either any cover nor that the said register belonged to Desh Raj. Not only this, a perusal of this register shows that the monetary figures are not so hefty so as to probably constitute motive to do away with the life of the deceased. Even otherwise, onus was upon the prosecution to have had placed on record cogent and reliable evidence to prove and substantiate that the accused had motive to do away with the deceased which it has had failed to discharge. Hence the prosecution has not been able to prove even this circumstance against the accused.

24. Therefore, according to us, the chain of circumstances enumerated above by learned Deputy Advocate General does not in any manner forms a complete chain linking the accused with the commission of the alleged offence.

25. Further, a perusal of the judgment passed by learned trial Court also demonstrates that after taking into consideration the entire material produced on record by the prosecution and after discussing the same in detail, learned trial Court held that the prosecution was not able to complete chain of circumstantial evidence against the accused nor the testimony of the complainant was free from reasonable doubts and the prosecution had not been able to prove its case against the accused beyond reasonable doubts.

26. In our considered view, the findings so returned by learned trial Court are neither perverse nor it can be said that the finding of acquittal returned by learned trial Court in favour of the accused is not borne out from the records of the case. According to us also, the prosecution has not been able to establish beyond reasonable doubt that the accused were guilty of

commission of offence punishable under Section 302 and 201 read with Section 34 of the Indian Penal Code.

27. In view of above discussion, we do not find any infirmity with the judgment which has been passed by the learned trial Court acquitting the accused of the charges levelled against him. It cannot be said that the judgment passed by the learned trial Court is either perverse or that the prosecution had proved its case beyond reasonable doubt against the accused, but learned trial Court erred in acquitting him. According to us, the prosecution has not been able to prove its case beyond reasonable doubt. Therefore, the judgment passed by the learned trial Court is upheld and the present appeal is accordingly dismissed being devoid of any merit. Pending miscellaneous application(s), if any also stand disposed of.

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

Bhagat Ram .....Appellant/Defendant.
Versus
Bal Krishan .....Respondent/Plaintiff.

RSA No. 179 of 2008.
Decided on : 21st March, 2017.

Code of Civil Procedure, 1908- Section 100- Plaintiff is working as an agent of M/s B- the defendant acknowledged the receipt of Rs.1,09,430/- from the plaintiff and agreed to pay the same with interest at the rate of 5% - the amount was not paid- hence, the suit was filed for the recovery – the defendant denied the claim of the plaintiff – suit was decreed by the Trial Court- an appeal was filed, which was partly allowed- held in second appeal that photocopy and not the original ledger was exhibited- the signatures of the defendant were also not proved – the Courts had not properly appreciated the evidence- appeal allowed- the judgment and decrees of the Courts set asideand the suit of the plaintiff dismissed. (Para-8 to 11)

For the Appellant: Mr. I. S. Chandel, Advocate.
For the Respondent: Mr. Neeraj Gupta, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral)

The plaintiff had instituted a suit before the learned trial Court for a recovery of Rs.1,64,145 from the defendant/appellant herein. The suit of the plaintiff stood decreed by the learned trial Court and in an appeal carried therefrom before the learned First Appellate Court, the latter Court modified the verdict recorded by the learned trial Court. Standing aggrieved therefrom, the defendant/appellant herein has instituted the instant appeal herebefore.

2. Briefly stated the facts of the case are that the plaintiff is working as an Agent of M/s BHS Fruit Commission Agency, Delhi. It is averred that On 22nd October, 2001, after settling the amounts with the defendant, the defendant acknowledged his having received an amount of Rs.1,09.430/- from the plaintiff and duly acknowledged the same by signing the ledger. It is averred that the defendant also agreed to pay 5% interest on the amount till the final payment of the amount. It is averred that the defendant again acknowledged the liability on August 22, 2002 and an amount of 1, 64,145/- had become due against the defendant. However, the defendant did not care to pay the amount to the plaintiff and accordingly, a legal notice was issued on August 28, 2002. The cause of action stated to have arisen on October, 22, 2001 when the amount was acknowledged by the defendant and thereafter on August 28, 2002. Hence this suit.

3. The defendant contested the suit and filed written statement wherein he had taken preliminary objection qua the plaintiff being not entitled to the interest at the rate of 5%, cause of action and that the alleged ledger, basis of the suit, is not maintained in accordance with law and it is false document. On merits, it is alleged that the defendant had not settled any account with the plaintiff. It is denied that the defendant never acknowledged qua his having received an amount of Rs.1,09,430/- from the plaintiff. It is also denied that the defendant acknowledged the liability of Rs.1,64,145/- respectively on 22nd October, 2001 and on August 22, 2002. It is averred that the defendant some time 14-15 years back took empty apple boxes of value of about Rs.3,000/- and the plaintiff had recovered about Rs.15,000/- from him by fraud and forcible acts. Hence, he prayed for the dismissal of the suit.

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

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

1. Whether the plaintiff is entitled to the recovery of suit amount as alleged? OPP
2. Whether the plaintiff is entitled to recovery interest at the rate of 5% per month? OPP
3. Whether the plaintiff has no cause of action? OPD
4. Whether the suit is not maintainable? OPD
5. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the plaintiff/respondent herein. In an appeal, preferred therefrom by the defendant/appellant herein before the learned First Appellate Court, the first Appellate Court partly allowed the appeal and modified the judgment and decree recorded by the learned trial Court.

7. Now the defendant/appellant herein has instituted the instant Regular Second Appeal before this Court assailing the findings recorded by the learned first Appellate Court in its impugned judgment and decree. When the appeal came up for admission on 27.11.2008, this Court, admitted the appeal instituted by the defendant/appellant against the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

a) Whether the Ex.PW1/A being the copy was admissible in evidence, in the absence of the original and in the absence of any averment or proof that the entry in the ledger was maintained in regular course of business?
b) Whether the Court was justified in ignoring the case pleaded and the one stated in the cross-examination regarding the consideration of the acknowledgement as stated in grounds of appeal?

Substantial questions of Law No.1 and 2.

8. The entire anvil of the verdicts concurrently recorded against the defendants by both the learned Courts below, stand hinged upon Ex.PW1/A, a photo copy of the ledger maintained by the plaintiff wherewithin the purported signature(s) of the defendant exist, wherefrom, the learned courts below drew a concomitant inference qua it constituting an admission besides acknowledgement qua the defendant borrowing a sum of Rs.1,64,145/- from the plaintiff, hence, constraining both the learned Courts below to decree the suit of the plaintiff.

9. The paramount factum qua Ex.PW1/A enjoying the relevant probative tenacity spurring from the purported relevant signatures existing thereon standing clinchingly proven by adduction of best evidence, constitutes the sole bedrock whereupon the entire lis stands rested.

At the time whereat Ex.PW1/A stood exhibited before the learned trial Court, the plaintiff had thereat produced its original whereafter the learned trial Court permitted its standing exhibited. However, even at the time whereat, photo copy of the apposite entries held in the original ledger stood embossed with Ex.PW1/A, the learned counsel appearing for the defendant objected qua the mode qua its proof. A reading of the examination-in-chief of PW-1 unfolds qua thereat the counsel for the defendant making his protest qua the authenticity of the signatures of the defendant existing in circle 'A' of Ex.PW1/A, protest whereof qua the authenticity of the signatures of the defendant occurring in circle 'A' of Ex.PW1/A, continued throughout the cross-examination of PW-1. The learned counsel for the defendant had put apposite suggestions to PW-1 holding echoings qua the purported signatures occurring in circle 'A" of Ex.PW1/A standing not owned by the defendant. Also, the learned trial Court during the course of PW-1 standing held to cross-examination by the counsel for the defendant had made observations qua their occurring a difference in the signatures of the defendant held in the original ledger. The aforesaid observations recorded by the learned trial Court during the course of PW-1 standing held to cross-examination by the learned counsel for the defendant is a marked portrayal, qua the signature(s) of the defendant occurring in the original ledger holding intra se difference. The aforesaid observation(s) are not unworthwhile, they pronounces upon the factum of photo copy thereto, photo copy whereof on production of original at the time of the recording of the deposition of PW-1 stood exhibited as Ex. PW1/A, not standing efficaciously proven rather it constrains an inference qua the photo copy of the original ledger whereon Ex.PW1/A hence stood embossed, not holding any compatibility with the original. The aforesaid observations made by this Court are in tandem with the protests made by the counsel for the defendant during the course when PW-1 proceeded to constrain the learned trial Court to on the photo copy of the original ledger, emboss thereon Ex.PW1/A. Consequently, hence, any reliance upon Ex.PW1/A was most inappropriate.

10. Be that as it may, even if Ex.PW1/A was for the reasons aforestated discardable, it was incumbent upon the learned trial Court to given the pointed protest(s) of the defendant in his pleadings also with the counsel for the defendant while holding PW-1 to cross-examination putting apposite suggestions wherein echoings occurred qua the defendant disputing the authenticity of the relevant signatures occurring in the original ledger, to proceed, to, significantly when it had recorded observations during the course of the recording of the deposition of PW-1 qua the purported signatures of the defendant occurring in the original ledger holding inter se difference, secure the best evidence, for settling the controversy qua the signatures of the defendant purportedly occurring in the original ledger belonging to him. It was the paramount duty of the learned trial Court, when, it made observations qua a noticeable difference in the purported signature(s) of the defendant occurring in the original ledger wherefrom EX.PW1/A stood for the aforesaid reasons faultily untenably permitted to be adduced in evidence, to elicit best evidence comprised in its requisitioning, the report of the handwriting expert dehors the defendant not moving any apposite application therebefore for the purpose aforesaid. Even the failure of the defendant to in his testification raise any dispute qua the authenticity of his signatures occurring in the original ledger, cannot, at all forestall the plenary jurisdiction of the trial Court to, for resting the controversy qua the authenticity of the signatures of the defendant occurring in the original ledger, to hence order for the comparison by the handwriting expert concerned qua the disputed signature(s) of the defendant occurring in the original ledger with his admitted signatures . However, the learned trial Court proceeded to abandon the aforesaid paramount duty, rather has drawn fallacious findings anvilled upon unproven besides discardable Ex.PW1/A.

11. The above discussion unfolds qua the conclusions arrived by the learned first Appellate Court as also by the learned trial Court standing not based upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court as well as the learned trial Court have excluded germane and apposite material from consideration. Accordingly, the substantial questions of law are answered in favour of the defendant/appellant and against the plaintiff/respondent.

12. In view of above discussion, the present Regular Second Appeal is allowed and the suit of the plaintiff stands dismissed. In sequel, the judgements and decrees rendered by both the learned Courts below are set aside. All pending applications also stand disposed of. No order as to costs.

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

Dalip Kumar ...Petitioner.
Versus
H.P. Public Service Commission ...Respondent.

CWP No. 3157 of 2016
Decided on: 21.03.2017

Constitution of India, 1950- Article 226- Petitioner has questioned the result of entrance examination for SAS conducted by H.P. Public Service Commission on the ground that no marks were awarded to the petitioner for some of the correct answers – the respondent stated that the answer sheets were rightly evaluated by the Experts and re-checking of the answer-sheets is not permissible –held, that the Court cannot sit in appeal over the expert's opinion- further, it was specifically mentioned in the advertisement that re-evaluation or re-checking is not permissible – the petitioner had gone through the advertisement and had participated after knowing about the conditions- he cannot seek the re-evaluation of the answer sheets- writ petition dismissed.

(Para- 2 to 11)

Cases referred:

Mukesh Thakur and another versus Himachal Pradesh Public Service Commission, 2006 (1) Shim.LC 134

Himachal Pradesh Public Service Commission versus Mukesh Thakur and another, (2010) 6 Supreme Court Cases 759

Arvind Kumar & others versus Himachal Pradesh Public Service Commission, I L R 2014 (IX) HP 905

Lalit Mohan versus H.P. Public Service Commission, ILR 2015 (VI) HP 61 (D.B.)

For the petitioner: Mr. Sat Prakash, Advocate.
For the respondents: Mr. D.K. Khanna, Advocate.

The following judgment of the Court was delivered:

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

By the medium of this writ petition, the writ petitioner has sought the following relief amongst others, on the grounds taken in the memo of the writ petition:

> *"i) That keeping in view the facts and circumstances mentioned hereabove in this writ petition, the respondent Commission may kindly be directed to reevaluate the answer sheets of the petitioner and declare him as pass or in the alternative, the papers of the petitioner may kindly be got checked up from some independent expert in the interest of justice and fair play."*

2. The writ petitioner has questioned the result of the entrance examination for SAS (OB category) conducted by the respondent-H.P. Public Service Commission (for short "the Commission"), in which he has been declared to be unsuccessful, on the ground that no marks

have been awarded to some of the correct answers, thus, has sought re-evaluation of his answer sheets.

3. The respondent-Board has taken a specific stand in its reply that the answer sheets of the said examination have rightly been evaluated by the experts. It has also been averred that re-evaluation of the answer sheets of the writ petitioner cannot be allowed as it was clearly mentioned in the advertisement notice that the re-evaluation or rechecking of answer books is not permissible.

4. This Court in a case titled as **Mukesh Thakur and another versus Himachal Pradesh Public Service Commission, report in 2006 (1) Shim.LC 134,** interfered and quashed the result made by the Commission, was subject matter of Civil Appeals No. 907 and 897 of 2006 before the Apex Court, titled as **Himachal Pradesh Public Service Commission versus Mukesh Thakur and another,** reported in **(2010) 6 Supreme Court Cases 759.** It is apt to reproduce paras 23 to 26 of the judgment herein:

> "23. The situation will be entirely different where the court deals with the issue of admission in mid-academic session. This Court has time and again said that it is not permissible for the courts to issue direction for admission in mid-academic session. The reason for it has been that admission to a student at a belated stage disturbs other students, who have already been pursuing the course and such a student would not be able to complete the required attendance in theory as well as in practical classes. Quality of education cannot be compromised. The students taking admission at a belated stage may not be able to complete the courses in the limited period. In this connection reference may be made to the decisions of this Court in *Pramod Kumar Joshi (Dr.) v. Medical Council of India, (1991) 2 SCC 179; State of U.P. v. Dr. Anupam Gupta, 1993 Supp (1) SCC 594 : AIR 1992 SC 932; State of Punjab v. Renuka Singla, (1994) 1 SCC 175 : AIR 1994 SC 932, Medical Council of India v. Madhu Singh, (2002) 7 SCC 258; and Mridul Dhar v. Union of India, (2005) 2 SCC 65.*
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> 24. The issue of revaluation of answer book is no more *res integra.* This issue was considered at length by this Court in *Maharashtra State Board of Secondary and Higher Secondary Education v. Paritosh Bhupeshkurmar Sheth, (1984) 4 SCC 27 : AIR 1984 SC 1543*, wherein this Court rejected the contention that in the absence of the provision for revaluation, a direction to this effect can be issued by the Court. The Court further held that even the policy decision incorporated in the Rules/ Regulations not providing for rechecking/verification/revaluation cannot be challenged unless there are grounds to show that the policy itself is in violation of some statutory provision. The Court held as under: (SCC pp. 39-40 & 42, paras 14 & 16)
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> > "14. .....It is exclusively within the province of the legislature and its delegate to determine, as a matter of policy, how the provisions of the Statute can best be implemented and what measures, substantive as well as procedural would have to be incorporated in the rules or regulations for the efficacious achievement of the objects and purposes of the Act...
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> > * * *
> >
> > 16. .....The Court cannot sit in judgment over the wisdom of the policy evolved by the legislature and the subordinate regulation-making body. It may be a wise policy which will fully effectuate the purpose of the enactment or it may be lacking in effectiveness and hence calling for revision and improvement. But any drawbacks in the policy incorporated in a rule or regulation will not render it ultra vires and the Court cannot strike it down on the ground that, in its opinion, it is not a wise or

> prudent policy, but is even a foolish one, and that it will not really serve to effectuate the purposes of the Act."
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> 25. This view has been approved and relied upon and re-iterated by this Court in *Pramod Kumar Srivastava v. Bihar Public Service Commission, (2004) 6 SCC 714,* observing as under: (SCC pp. 717-18, para 7)
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> > "7. ... Under the relevant rules of the Commission, there is no provision wherein a candidate may be entitled to ask for revaluation of his answer book. There is a provision for scrutiny only wherein the answer books are seen for the purpose of checking whether all the answers given by a candidate have been examined and whether there has been any mistake in the totalling of marks of each question and noting them correctly on the first cover page of the answer book. There is no dispute that after scrutiny no mistake was found in the marks awarded to the appellant in the General Science paper. *In the absence of any provision for revaluation of answer books in the relevant rules, no candidate in an examination has got any right whatsoever to claim or ask for revaluation of his marks."*
> >
> > (emphasis added)
>
> A similar view has been reiterated in *Muneeb-Ul-Rehman Haroon (Dr.) v. Govt. of J&K State , (1984) 4 SCC 24 : AIR 1984 SC 1585; Board of Secondary Education v. Pravas Ranjan Panda, (2004) 13 SCC 383; Board of Secondary Education v. D. Suvankar, (2007) 1 SCC 603; W.B. Council of Higher Secondary Education v. Ayan Das, (2007) 8 SCC 242 : AIR 2007 SC 3098; and Sahiti v. Dr. N.T.R. University of Health Sciences, (2009) 1 SCC 599.*
>
> 26. Thus, the law on the subject emerges to the effect that in the absence of any provision under the statute or statutory rules/regulations, the Court should not generally direct revaluation."

5. The Apex Court, after discussing the law and judgments, which were governing the field till the date of the decision, has laid down the tests.

6. Applying the tests to the instant case, the experts have evaluated the answer sheets of the writ petitioner and this Court cannot sit over the expert's opinion.

7. It is also apt to record herein that the advertisement notice was issued on 16th February, 2016, which contained the conditions, including re-evaluation or rechecking, which reads as under:

> *"**Re-evaluation or rechecking** of Answer books is not permissible nor the Commission enters into correspondence in this regard."*

8. The writ petitioner, after noticing the said advertisement notice and after going through all the conditions, applied and participated in the examination, thus, cannot now make a u-turn and seek re-evaluation or rechecking of his answer sheets.

9. The same principle has been laid down by this Court in a batch of writ petitions, **CWP No. 9169 of 2013,** titled as **Vivek Kaushal & others versus Himachal Pradesh Public Service Commission,** being the lead case, decided on 17th July, 2014; **CWP No. 6812 of 2014,** titled as **Arvind Kumar & others versus Himachal Pradesh Public Service Commission,** and other connected matters, decided on 16th October, 2014; **CWP No. 3866 of 2015,** titled as **Lalit Mohan versus H.P. Public Service Commission,** decided on 2nd November, 2015; and **CWP No. 699 of 2016,** titled as **Rustam Garg and others versus Himachal Pradesh Public Service Commission,** decided on 29th March, 2016.

10. It is worthwhile to record herein that the judgment rendered by this Court in **Vivek Kaushal's case (supra)** stands upheld by the Apex Court vide order, dated 7th August, 2014, rendered in Special Leave to Appeal (C) Nos. 20992 to 20995 of 2014.

11. Having glance of the above discussions, the writ petition deserves to be dismissed and is, accordingly, dismissed alongwith all pending applications.

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

Smt. Gita Devi .....Appellant
Versus
Shri Subhash Chand .....Respondent

RSA No. 506 of 2015
Decided on: March 21, 2017

Specific Relief Act, 1963- Section 63- Plaintiff filed a Civil Suit for seeking permanent prohibitory injunction pleading that the suit land is jointly owned – the defendant had purchased the share of a co-sharer and wanted to occupy the best portion of the suit land – the defendant pleaded that he is in exclusive possession of the suit land – the possession was handed over at the time of sale – the suit was dismissed by the Trial Court- an appeal was filed, which was dismissed- held in second appeal that plaintiff had earlier filed a civil suit in the year 1990, which was withdrawn without obtaining any liberty – the present suit is barred under Order 23 of C.P.C. – the defendant was found in possession of the suit land during demarcation – the injunction was rightly declined by the Courts- appeal dismissed.(Para-12 to 25)

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

For the appellant Mr. Ajay Sharma, Advocate.
For the respondent: Mr. S.C. Sharma, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:

Instant Regular Second Appeal is filed under Section 100 CPC against judgment and decree dated 12.5.2015 passed by the learned Additional District Judge-II, Kangra at Dharamshala in Civil Appeal No. 9-D/XIII/2014, affirming judgment and decree dated 17.5.2014 passed by the learned Civil Judge (Junior Division), Court No. II, Dharamshala in Civil Suit No. 300/13/11, whereby suit for permanent injunction having been filed by the appellant-plaintiff (herein after, 'plaintiff') came to be dismissed.

2. Briefly stated the facts as emerge from the record are that the plaintiff filed a suit for permanent injunction restraining the defendant from claiming exclusive ownership and possession qua the suit land, averring therein that land comprised in Khata No. 188 Khatauni No. 341 Khasra No. 497, measuring 00-05-08 Hectares situated in Mahal Uperli Dar, Mauza Ghaniara, Tehsil Dharamshala District Kangra, HP (herein after, 'suit land') was jointly owned and possessed by the parties alongwith others. Plaintiff further averred that some persons in Khatauni No. 342 to 345 are shown in possession without status, about which a separate suit is pending in the Court of Civil Judge (Junior Division)-I, Dharamshala. Plaintiff further alleged that entire suit land comprising Khatauni No. 339, 340 and 341 is jointly owned and possessed by owners and defendant but in the revenue record, separate possession has been shown which is not as per the spot position. Plaintiff also alleged that the defendant has purchased a share in the

Khata from Smt. Reena and other co-owners and that possession has been recorded in Khatauni No. 341, Khasra No. 497. She further alleged that since suit land was much more valuable, defendant taking advantage of the entry in the revenue record was attempting to occupy the same. It is further alleged that in order to occupy the suit land, which is partly in possession of the plaintiff, defendant applied for demarcation. Plaintiff also claimed that defendant is proclaiming himself to be exclusive owner-in-possession of the suit land and harassing the plaintiff and others through police. By way of suit, plaintiff claimed that till the suit land/entire Khata is partitioned, defendant has no right to appropriate this valuable piece of land to the disadvantage of plaintiff and other co-owners. Plaintiff prayed for decree restraining the defendant from changing the nature of suit land, raising any fence/barbed wire and artificial partition, raising construction on the land as described above, till the partition of Khewat No. 188 by metes and bounds. In the alternative, plaintiff also prayed for permanent injunction.

3. Defendant refuted the aforesaid contentions put forth on behalf of the plaintiff by filing written statement. Defendant specifically stated that the suit of the plaintiff is barred under Order IX Rule 9 CPC and Order XXIII Rule 1 CPC. While claiming himself to be in exclusive possession of the suit land, he stated that there had been a private partition of suit land between the predecessor-in-interest of the plaintiff and one Hari Kishan and Khasra No. 497 fell to the share of Hari Kishan and possession of Hari Kishan was also recorded qua Khasra No. 497, which was clear from previous records, as such his possession was recorded qua suit land. Defendant further claimed that Hari Kishan sold suit land to the defendant vide registered sale deed dated 1.10.1987 and possession was also handed over to the defendant on the spot. It is also averred that the defendant got the suit land fenced with angle iron and barbed wire after getting it demarcated through revenue agency on 25.3.1990, in the presence of plaintiff and Hari Kishan. Defendant also averred that the suit land was exclusively owned and possessed by him, therefore, question of getting suit land partitioned, did not arise. In this background, he prayed for dismissal of suit.

4. Learned trial Court, on the basis of pleadings framed following issues:

"1. Whether the plaintiff is entitled for the relief of permanent perpetual and prohibitory injunction with respect to suit property as prayed for? OPP

2. Whether the suit of plaintiff is legally and factually not maintainable in the present form, as alleged? OPD

3. Whether the plaintiff has not come to the court with clean hands and suppressed the material facts from the court, as alleged? OPD

4. Whether the plaintiffs are estopped by their act, conduct and acquiescence to file the present suit? OPD

5. Relief."

5. Subsequently, learned trial Court, on the basis of pleadings as well as material and evidence adduced on record by the respective parties, dismissed the suit. Plaintiff filed appeal before the learned Additional District Judge-II, however, the fact remains that the appeal was also dismissed. Hence, the present Regular Second Appeal.

6. Present regular second appeal was admitted on 27.10.2015, on the following substantial questions of law:

"1 Whether impugned judgments and decrees stand vitiated owing to applying provisions of res judicata and provisions of Order 23 Rule 1 of the Civil Procedure Code with respect to injunction suits?

2. Whether every co sharer being owner of every inch of land uptil its partition and as such injunction suit by co owners against another co owner not to raise construction before partition is maintainable? If yes, impugned judgments and decrees passed by Courts below stand vitiated and liable to be set aside?"

7. Mr. Ajay Sharma, learned counsel representing the appellant vehemently argued that the impugned judgments and decrees passed by the learned Courts below are not sustainable as the same are not based on correct appreciation of evidence available on record as well as law and as such deserve to be set aside. Mr. Sharma, while referring to the impugned judgments and decrees, vehemently argued that a bare perusal of same suggests that the learned Courts below have failed to appreciate the evidence in its right perspective, as a result of which, erroneous findings have come on record to the detriment of the plaintiff and as such same can not be allowed to sustain. Mr. Sharma, contended that it is settled position of law that if an entry comes in revenue record without any basis, that too abruptly, presumption of truth can not be attached to the same. With a view to substantiate his arguments, Mr. Sharma invited the attention of this Court to the judgments and decrees passed by the learned Courts below to demonstrate that even the Courts below came to a conclusion on the basis of material on record that there is no basis for such entry and as such Courts below ought to have ignored aforesaid entry in favour of the defendant while considering prayer of plaintiff for grant of decree of permanent injunction. Mr. Sharma, forcefully contended that the learned Courts below overstepped their jurisdiction while concluding that co-owners are in separate possession on the basis of some arrangement and other co-owners can not disturb said possession, except by filing suit for partition. Mr. Sharma further contended that as far as suit for partition is concerned, same is distinct and separate remedy available to the plaintiff but for immediate relief suit for injunction having been filed by plaintiff, ought to have been decreed in the facts and circumstances of the case, where plaintiff successfully proved on record that suit land is joint and same has not been partitioned in metes and bounds, as required under law. Mr. Sharma, while inviting attention of this Court to Ext. DW-1/A, contended that admittedly, earlier suit for injunction was withdrawn by the plaintiff when respondent-defendant assured not to take law in his own hands. But, once in the year 1991, defendant started taking steps for raising construction, plaintiff rightly filed suit for injunction on fresh cause of action and as such, Courts below wrongly applied principle of res judicata and provisions of Order IX Rule 9 CPC in the case of plaintiff, while dismissing her suit. In the aforesaid background, Mr. Sharma prayed that suit having been filed by the plaintiff for injunction may be decreed after setting aside judgments and decrees passed by learned Courts below.

8. Mr. S.C. Sharma, learned counsel representing the respondent-defendant (herein after, 'defendant') supported the impugned judgments and decrees. While referring to the same, Mr. S.C. Sharma stated that bare perusal of the judgments and decrees suggests that the same are based upon correct appreciation of evidence adduced on record by the respective parties and as such there is no scope of interference by this Court, especially in view of concurrent findings of facts and law recorded by the Courts below. To refute the contentions having been raised by Mr. Ajay Sharma, Mr. S.C. Sharma made this Court to travel through the evidence on record having been adduced by the respective parties, to demonstrate that the defendant purchased suit land from one Shri Hari Kishan, who happened to be in exclusive possession of the suit land. While referring to the document Ext. DW-2/A i.e. sale deed, Mr. S.C. Sharma contended that the defendant after having purchased the land from Hari Kishan, was put to possession qua a specific portion i.e. Khasra No. 497 and as such name of defendant was rightly reflected in the Jamabandi, Ext. PW-1/B. He further contended that revenue entry as reflected in Ext. PW-1/B is strictly in consonance with sale deed, Ext. DW-2/A and as such there is no force in the contention put forth by the learned counsel representing the plaintiff. While referring to Exts. PW-1/B and D1, Mr. Sharma stated that all the cosharers were put to possession qua specific parcels of land. He also stated that as per column of remarks in the Jamabandi (Ext. D1), mutation No. 100 was sanctioned and as such there is no force in the contention of the plaintiff that there was no basis, whatsoever, for effecting change in the revenue entry, whereby defendant was shown to be in exclusive possession of suit land. While concluding his arguments, Mr. Sharma strenuously argued that this Court has a limited jurisdiction to re-appreciate the evidence led on record by respective parties while exercising powers under Section 100 CPC, that too, when both the learned Courts below have returned concurrent findings of facts and law. In this regard, he placed reliance upon judgment passed by Hon'ble Apex Court in ***Laxmidevamma***

***and Others vs. Ranganath and Others*, (2015)4 SCC 264,** wherein the Hon'ble Supreme Court has held:

> "16. Based on oral and documentary evidence, both the courts below have recorded concurrent findings of fact that the plaintiffs have established their right in A schedule property. In the light of the concurrent findings of fact, no substantial questions of law arose in the High Court and there was no substantial ground for reappreciation of evidence. While so, the High Court proceeded to observe that the first plaintiff has earmarked the A schedule property for road and that she could not have full-fledged right and on that premise proceeded to hold that declaration to the plaintiffs' right cannot be granted. In exercise of jurisdiction under Section 100 CPC, concurrent findings of fact cannot be upset by the High Court unless the findings so recorded are shown to be perverse. In our considered view, the High Court did not keep in view that the concurrent findings recorded by the courts below, are based on oral and documentary evidence and the judgment of the High Court cannot be sustained." ***(p.269)***

9. Perusal of the judgment, referred hereinabove, suggests that in exercise of jurisdiction under Section 100 CPC, concurrent findings of fact cannot be upset by the High Court unless the findings so recorded are shown to be perverse. There can be no quarrel (dispute) with regard to aforesaid observation made by the Court and true it is that in normal circumstances High Courts, while exercising powers under Section 100 CPC, are restrained from re-appreciating the evidence available on record, but as emerges from the case referred above, there is no complete bar for this Court to upset the concurrent findings of the Courts below, if the same appears to be perverse.

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

> "35. The learned counsel for the defendants relied on the judgment of this Court in Hero Vinoth v. Seshammal, (2006)5 SCC 545, wherein the principles relating to Section 100 of the CPC were summarized in para 24, which is extracted below : (SCC pp.555-56)
>
> > "24. The principles relating to Section 100 CPC relevant for this case may be summarised thus:
> >
> > (i) An inference of fact from the recitals or contents of a document is a question of fact. But the legal effect of the terms of a document is a question of law. Construction of a document involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a document or wrong application of a principle of law in construing a document, it gives rise to a question of law.
> >
> > (ii) The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue. A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law.
> >
> > (iii) The general rule is that High Court will not interfere with the concurrent findings of the courts below. But it is not an absolute rule. Some of the

> well-recognised exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to "decision based on no evidence", it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding."
>
> We have to place reliance on the afore-mentioned case to hold that the High Court has framed substantial questions of law as per Section 100 of the CPC, and there is no error in the judgment of the High Court in this regard and therefore, there is no need for this Court to interfere with the same." ***(pp.174-175)***

11. I have heard the learned counsel for the parties and gone through the record carefully. Since both the substantial questions of law are interconnected, as such, same are being taken up together, to avoid repetition of discussion of evidence.

12. While hearing arguments having been advanced by the learned counsel representing the parties, this Court had an occasion to peruse pleadings as well as evidence adduced on record by the respective parties, perusal whereof nowhere suggests that there is any mis-appreciation and misreading of evidence by the Courts below while rejecting the claim of the plaintiff, who, while filing suit for permanent injunction specifically admitted that suit land is/was jointly owned and possessed by the parties to the lis alongwith others. It is also admitted case of the plaintiff that the defendant purchased share in Khata from Smt. Reena and others, as such, his possession qua suit land was recorded. In nutshell, case of the plaintiff is that the suit land was joint and same was valuable being abutting to the road and defendant could not be allowed to take undue advantage of entry in revenue record qua his possession. As per the plaintiff, since suit land has not been partitioned in metes and bounds, defendant has no right to claim exclusive possession and to raise fence thereupon. Perusal of Ext. D2 clearly suggests that plaintiff had filed suit for permanent injunction restraining defendant and one Shri Prem Chand, from taking possession of any part of suit land, digging the land, raising any construction and changing the nature of land comprising of Khata No. 95, Khatauni Nos. 253, 254, 255, 256, 257, Khasra Nos. 460, 480, 481, 482, 492, 497, 499, 484, 494, 495, 483, 485, 493 and 496/1 Kita 14 measuring 0-76-13 Hectares situate in Mohal Gabli Dar, Mauza Khaniara, Tehsil Dharamshala, District Kangra, HP, till the joint land is partitioned. Perusal of Ext. DW-1/A, copy of plaint filed in earlier suit, clearly suggests that plaintiff had filed suit on same and similar grounds as have been taken in the present suit in the year 1990. In the aforesaid suit, plaintiff prayed for decree of permanent injunction restraining defendants No.1 and 2 from taking possession of any part of joint land and raising any construction over the suit land. Perusal of Ext. D2 clearly suggests that aforesaid suit having been filed by plaintiff for permanent injunction on same and similar grounds as have been taken in the present suit, was withdrawn unconditionally and no permission/liberty was obtained from the Court for filing suit afresh, on same and similar cause of action.

13. Mr. Ajay Sharma, vehemently argued that there is/was no bar for the plaintiff to file suit for permanent injunction against the defendant on the same and similar grounds because, fresh cause of action accrued, when, in the year 2011, defendant started interfering in the suit land by erecting iron pillars. Mr. Sharma further contended that since in the year 1991, defendant agreed not to interfere in the suit land, plaintiff withdrew suit, unconditionally, but by no stretch of imagination, same can be treated as bar for the plaintiff to file fresh suit, which is admittedly on fresh cause of action. But this Court, after carefully perusing Ext. DW-1/A i.e. plaint having been filed by the plaintiff in the earlier suit, as well as Order dated 19.1.1991 (Ext. D2) sees no force, much less substantial, in the arguments having been made by the learned counsel representing the plaintiff. Perusal of the plaint filed in earlier suit clearly suggests that the plaintiff on the same and similar grounds, as have been taken in the present suit, approached

this Court seeking decree of permanent injunction restraining defendant from raising any construction over the suit land in Khasra No. 497.

14. At this stage, provisions of Order XXIII Rule 1 CPC are reproduced below:

"Order XXIII

WITHDRAWAL AND ADJUSTMENT OF SUITS

1. Withdrawal of suit or abandonment of part of claim. –(1) At any time after, the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim:

Provided that where the plaintiff is a minor or other person to whom the provisions contained in rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.

(2) An application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that abandonment proposed is, in his opinion, for the benefit of the minor or such other person.

(3) Where the Court is satisfied, --

(a) that a 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,

It may, on such terms, as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.

(4) Where the plaintiff --

(a) abandons any suit or part of claim under sub-rule (1), or

(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3),

He shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

(5) Nothing in this rule shall be deemed to authorize the Court to permit one of several plaintiffs to abandon a suit or part of a claim under sub-rule (1), or to withdraw, under sub-rule 93), any suit or part of a claim, without the consent of the other plaintiffs."

15. Aforesaid provisions of law clearly suggest that once the plaintiff withdrew from suit, without permission, as could be sought under Order XXIII Rule 1 (3), he/she shall be precluded from instituting any fresh suit in respect of said subject-matter or such part of claim. In earlier suit having been filed by the plaintiff, plaintiff himself admitted that defendant had purchased land measuring 0-05-08 Hectares, as is apparent from copy of Jamabandi for the year 1984-85 but since suit land has never been partitioned between the original owners, defendant can not be allowed to occupy best portion of land on the basis of sale deed made in his favour by one of the cosharers. Plaintiff further claimed in the suit as referred to above that the defendant has no right to get aforesaid possession of suit land till the same is partitioned.

16. It clearly emerges from the record that aforesaid suit having been filed by the plaintiff was withdrawn by the plaintiff himself on 19.1.1991 without seeking permission of the Court as provided under Order XXIII Rule 1(3) CPC for filing fresh suit on the same cause of action. If plaint of the instant suit having been filed by the plaintiff is analyzed, juxtaposing the plaint of earlier suit, this Court sees no illegality or infirmity in the findings returned by the Courts below that plaintiff was precluded from filing suit on same cause of action as was pointed out in the earlier suit filed in the year 1991. This Court sees no force in the contentions of Mr. Sharma that since defendant stopped interfering in the suit land, plaintiff withdrew earlier suit, because, admittedly, there is nothing on record suggestive of the fact that defendant had given

any undertaking not to interfere in the suit land, on the basis of which, plaintiff withdrew the suit. Moreover, this Court is unable to find any averment in the plaint of the instant suit having been filed by the plaintiff with regard to filing of earlier suit by him against the defendant. Similarly, plaintiff has stated that the cause of action accrued to him about a fortnight ago, when defendant tried to fence/raise construction on suit land.

17. Hence, this Court, after perusing the averments contained in both the plaints, admittedly having been filed by the plaintiff by way of two suits, sees no illegality or infirmity in the impugned judgments and decrees, whereby suit of the plaintiff has been held to be barred in view of provisions contained in Order XXIII Rule 4 CPC. Moreover, if the aforesaid pleadings as made in the subsequent plaint as well as submissions having been made by the learned counsel representing the plaintiff are accepted, it certainly suggests that defendant remained in peaceful possession of suit land from 1991 till the filing of the subsequent suit in the year 2011, meaning thereby there was no occasion for the Courts below to grant decree of permanent injunction in favour of plaintiff as was prayed.

18. There can not be any quarrel with the settled proposition of law that every cosharer is owner of every inch of land till its partition, but in the present case, perusal of Ext. D1, Jamabandi for the year 1984-85, clearly suggest that suit land was owned and possessed by Har Bhaj and Hari Kishan in equal shares. As per column of possession, Hari Kishan has been recorded in exclusive possession of the suit land. Perusal of remarks column suggests that Hari Kishan sold land to the defendant and accordingly, mutation No. 100 was attested, whereafter, defendant succeeded to the share of Hari Kishan. Moreover, it emerges from the column of remarks that plaintiff succeeded to the share of Har Bhaj being his widow and Smt. Reena, Smt. Hina Kumari, Pinki, Surender Kumar and Suresh Kumar etc. succeeded to the share of Hari Kishan. Ext. PW-1/B, Jamabandi for the year 2009-10 also proves on record that suit land was jointly owned and possessed by the parties to the lis alongwith other cosharers but the same is in exclusive possession of defendant. Perusal of Ext. DW-2/A i.e. sale deed clearly suggests that defendant purchased suit land from Hari Kishan. Close reading of aforesaid sale deed suggests that Hari Kishan sold suit land, which was in his exclusive possession to the defendant and his possession thereto was also delivered to the defendant. On the strength of Ext. DW-2/A, name of defendant came to be recorded in the Jamabandi, Ext. PW-1/B, as owner in exclusive possession of suit land. Perusal of Ext. PW-1/B leaves no doubt in the mind of the Court that all the cosharers have been recorded in exclusive possession of different Khasra numbers.

19. True, it is that there is no document on record suggestive of the fact that some arrangement qua separate parcels of land, as recoded in Jamabandi was consented by all the cosharers but, there is no dispute, if any, with regard to respective possession of cosharers qua separate parcels of land. Plaintiff himself, in his plaint has admitted defendant to be one of cosharers in suit land. He has also admitted that Hari Kishan sold suit land to the defendant. Plaintiff averred in the plaint that entire land is in joint possession of the cosharers and land in Khasra No. 497 is much more valuable being abutting to the road side. As per the plaintiff, defendant taking undue advantage of entry in revenue record attempted to occupy the land in Khasra No. 497 and to raise construction there upon. But, interestingly, in para-5 of the plaint, plaintiff himself claimed to be partly in possession of land comprising Khasra No. 497. If, averments contained in para-5 of the plaint are carefully read and analyzed, it clearly suggests that parties have been put to possession qua specific parcels of land and are enjoying their possession qua the same. Plaintiff herself claims that specific plot bearing Khasra No. 497 is partly in her possession and in this regard, defendant applied for demarcation. Ext. PW-1/B, i.e. Jamabandi for the year 2009-10, clearly suggests that all the cosharers have been recorded in exclusive possession qua specific Khasra numbers. Defendant has been shown to be in exclusive possession of Khasra No. 497. Perusal of Ext. D1 i.e. Jamabandi for the year 1984-85 clearly proves that Hari Kishan sold suit land bearing Khasra No. 497 measuring 0-05-08 Hectares to the defendant and in this regard mutation No. 100 was attested and, as such, there is no force in the contentions of the learned counsel representing the plaintiff that change as reflected in Ext. PW-1/B i.e. Jamabandi for the year 2009-10 is without any basis. Admittedly, aforesaid entry in

favour of defendant qua Khasra No. 497 was firstly made in the year 1984-85 vide Ext. D1 and, if at all plaintiff was aggrieved of the aforesaid entry, he ought to have filed appropriate proceedings as envisaged under law for the correction of revenue entry but in the instant case, there is no document available on record suggestive of the fact that plaintiff ever took any steps to get aforesaid revenue entry corrected, rather, he continued to enjoy exclusive possession of his share i.e. Khasra No. 450, 460. At this stage, it may be noticed that even in the earlier suit i.e. DW-1/A, plaintiff failed to lay challenge to the entries made in the Jamabandi for the year 1984-85 (Ext. D1), wherein admittedly, defendant was shown to have purchased land bearing Khasra No. 497, measuring 0-05-08 Hectares. Even in these proceedings, plaintiff claimed that defendant be restrained from changing the nature of the joint land or any portion of land, till the same is partitioned between the parties. If plaintiff was aggrieved with the aforesaid entry made in the name of the defendant, that too specifically qua Khasra no. 497, he ought to have filed partition proceedings before appropriate authority, which have not been filed till date.

20. It also emerges from the revenue record that suit land was demarcated twice, wherein defendant was found to be in possession of suit land. Perusal of demarcation reports (Ext. D3 and Ext. D4/A) clearly proves on record that defendant was in exclusive possession of the suit land bearing Khasra No. 497. Similarly, this Court sees no challenge, if any, to the demarcation report having been placed on record by the defendant in the shape of Exts. D3 and D4/A, which strengthens the case of the defendant that, after purchase of land from Hari Kishan, he was put to possession qua specific share i.e. Khasra No. 497. It is well settled that if co-owners are in possession of separate parcels of land after an arrangement consented to by all the owners, it is not open for any one to disturb said arrangement except by way of filing suit for partition. At the cost of repetition, it may be stated that, admittedly, there is no document available on record suggestive of the fact that arrangement/ agreement, if any, at any point of time, was entered between the parties regarding their possession qua separate parcels of land but pleadings adduced on record by the parties specifically plaintiff as well as defendant, certainly suggest that all the cosharers were put to their exclusive possession qua their specific shares in the joint land and same could not be disturbed by either of the parties except by filing suit for partition. Plaintiff has nowhere disputed that Hari Kishan was not in exclusive possession of suit land, rather, plaintiff herself admitted that Hari Kishan sold his share to the defendant, meaning thereby that defendant was put in possession of share, which was originally owned by Hari Kishan.

21. Once, no challenge, if any, to the ownership of defendant is/was laid qua the suit land, this Court sees no illegality in the judgments and decrees passed by the Courts below, which are admittedly based upon correct appreciation of evidence adduced on record by the respective parties. Similarly, there are no pleadings that the defendant is claiming more than his share which he actually purchased from Hari Kishan and as such, learned Courts below rightly refused to grant equitable relief of injunction in favour of the plaintiff, more particularly, when defendant specifically proved on record by leading cogent and convincing evidence that he is/was in exclusive possession of suit land.

22. In support of his argument, Mr. Ajay Sharma relied upon following judgments:

(i) AIR 1984 (HP) 167

(ii) 1991(2) SLC 222

(iii) 1995(3) SLJ 1806

(iv) 1995(1) SLJ 428

23. This court also carefully perused the case law pressed into service by Mr. Ajay Sharma.

24. There cannot be any quarrel with the proposition of law that whenever there is any conflict between the revenue entries, it is the later entry which must prevail. It is also settled law that presumption of truth is attached to the later entries, but the same is rebuttable one and it would stand rebutted by the fact that the alteration in the later entries was made un-authorisedly or mistakably, there being no material to justify the change of entries.

25. But, in the instant case, as clearly emerges from documentary evidence i.e. Ext. D-1, Jamabandi for the year 1984-85 that Hari Kishan sold suit land bearing Khasra No. 497 measuring 0-05-08 Hectares to the defendant and in this regard, mutation No. 100 was attested in favour of the defendant, as a result of which, he was shown to be in exclusive ownership and possession of suit land, qua the share of Hari Kishan, and, as such, there is no force in the contentions of the learned counsel representing the plaintiff that the change as reflected in Ext. PW-1/B, Jamabandi for the year 2009-10 is without any basis. At the cost of repetition, it may be stated that entry, which was made in the year 1984-85 vide Ext. D-1, was made on the basis of mutation No. 100 attested by revenue authorities in favour of defendant and no proceedings, if any, and as envisaged under law, for correction of revenue entry, were initiated by the plaintiff, and, as such, defendant continued to be reflected in the revenue record thereafter i.e. Ext. PW-1/B. Similarly, it is well settled law that till land is partitioned amongst the cosharers, all the cosharers enjoy possession on every inch of land and they are owners of the entire land but, in the instant case, as clearly emerges from the record, that all the cosharers have been recorded in exclusive possession qua specific Khasra numbers and they are enjoying their possession qua the same. Plaintiff herself has admitted defendant to be cosharer alongwith others qua their respective parcels of land. Defendant has successfully proved that he is in possession of the suit land and learned Courts below have rightly not granted relief of injunction to the plaintiff.

26. Hence, this Court sees no illegality or infirmity in the judgments and decrees passed by the learned Courts below, which are upheld.

27. Substantial questions of law are answered accordingly.

28. Consequently, in view of the discussion above, there is no merit in the present appeal and the same is dismissed. Pending applications, if any, are disposed of. Interim directions, if any, are also vacated.

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

Veerdeen @ Biru .....Petitioner

Versus

State of Himachal Pradesh .....Respondent

Cr.MP(M) No. 245 of 2017
Decided on: 21st March, 2017

Code of Criminal Procedure, 1973- Section 438- Applicant was found in possession of 18.140 kgs of poppy husk – he filed an application seeking pre-arrest bail, which was dismissed by the Trial Court as not maintainable- held that rigors of Section 37 of N.D.P.S. Act are applicable when a person is booked for the commission of offences punishable under Section 19 or 24 or Section 27(a) of N.D.P.S. Act and where the quantity seized is commercial quantity – in the present case, the quantity stated to have been recovered is less than commercial quantity and rigors of Section 37 are not applicable- seven criminal cases have been registered against the applicant and present case is the eighth one- therefore, the concession of pre-arrest bail cannot be granted to the applicant – application dismissed. (Para- 2 to 5)

Cases referred:

Rakesh Kumar @ Kukka V. State of H.P. 2003 Cri.L.J. 3503

Baljit Singh V. State of Assam, 2004(3) Crimes 433

For the petitioner: Mr. Sanjeev Kumar Suri, Advocate.

For the respondent: Mr. Pramod Thakur, Addl. A.G.

ASI Suresh Kumar, S.I.U. Una is present in person along with record.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)

Heard further.

2. The petitioner, who is an accused in a case registered against him under Section 15 of the NDPS Act vide FIR No. 39/17 in Police Station, Haroli, District Una, H.P., had approached the Court of learned Special Judge, Una by filing an application under Section 438 of the Code of Criminal Procedure for the grant of pre-arrest bail. Learned Special Judge after having taken note of the facts of the case and the manner in which poppy husk weighing 18.140 Kgs. was allegedly recovered from his possession has dismissed the application on the ground of maintainability and also on merits. Learned Special Judge after having taken note of the law laid down by a Co-ordinate Bench of this Court in ***Rakesh Kumar @ Kukka*** V. ***State of H.P. 2003 Cri.L.J. 3503*** has held that in view of the provisions contained under Section 37 of the NDPS Act, an application under Section 438 of the Code of Criminal Procedure is not maintainable.

3. The allegations against the accused-petitioner, in a nut-shell, are that on 12.02.2017, when search of the cow-shed of the accused-petitioner situated near Bolewal chowk was conducted, poppy husk weighing 18.140 Kgs was recovered therefrom. Therefore, a case under Section 15 and 25 of the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as the 'NDPS Act') has been registered against the accused-petitioner.

4. The rigor of Section 37 of the Act in the matter of grant of bail, against an offender are attracted only in a case where an offender is booked for the commission of offence punishable under Section 19 or Section 24 or 27(a) and also the offences involving commercial quantity under the Act. The present is not a case of commission of offence by the accused-petitioner either under Section 19 or 24 or Section 27(a) of the Act and for that matter even in a case involving recovery of commercial quantity for the reason that the poppy husk weighing 18.140 kgs allegedly recovered from the accused is not commercial quantity but intermediatory i.e. above smaller quantity and less than commercial quantity. Therefore, perhaps the ratio of the judgment of a Co-ordinate Bench of this Court in ***Rakesh Kumar @ Kukka*** (supra) is not attracted in the given facts and circumstances of this case nor the rigor of Section 37 of the NDPS Act applicable. Otherwise also, a Division Bench of the Gauhati High Court in ***Baljit Singh*** V. ***State of Assam, 2004(3) Crimes 433***, has held that the Act nowhere exclude the maintainability of an application under Section 438 of the Code of Criminal Procedure in a case registered under the provision thereof and has taken a view of the matter that an application filed under Section 438 of the Code of Criminal Procedure by the accused booked for the commission of the offence under the NDPS Act is maintainable. Even as per the provisions contained under Section 37 of the Act in the matter of bail and bonds the provisions in the Code of Criminal Procedure are applicable. The question of maintainability of this application as raised by learned Additional Advocate General hardly carries any force. Any how, since no such issue is involved in the case in hand, therefore, this aspect of the matter is left open to be considered in an appropriate case if came for consideration before this Court.

5. So far as the case in hand is concerned, the poppy husk has been recovered from a 'Barra' (kachha structure) allegedly cow-shed of the accused-petitioner. It may not be appropriate to make any observation qua the manner and place from where the contraband allegedly poppy husk has been recovered as in that event prejudice is likely to be caused to the case of either party. However, suffice would it to say that when seven criminal cases are/were registered against him in the recent past and present is the 8th one for the commission of various offences under the Indian Penal Code and also Indian Forest Act, Excise Act as well as the NDPS Act, the present is not a case where the pre-arrest bail should be granted to him. Rather in order to take the investigation to its logical end, his custodial interrogation is required. The application, as such, is dismissed.

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

Jeet Singh ...appellant/plaintiff.
Versus
Tilak Raj ...respondent/defendant.

RSA No. 242 of 2008 alongwith
RSA Nos. 243, 306 & 307 of 2008.
Reserved on 08.03.2017.
Decided on:22.3.2017.

Indian Succession Act, 1925- Section 63- Plaintiff pleaded that he is cultivating the land for more than 40 years on the payment of batai – the entry in the revenue record was not corrected due to cordial relation between the plaintiff and the deceased- the deceased had executed a Will in his favour and in favour of the defendant- the defendant also produced the Will – the revenue authorities sanctioned the mutation on the basis of the Will of the defendant – the defendant pleaded that the deceased had executed a valid Will in his favour and mutation was rightly sanctioned on the basis of the same- the suit was partly decreed by the Trial Court – separate appealswere preferred, which were partly allowed- held that the Will propounded by the plaintiff was duly proved and Appellate Court had wrongly ignored the same – the Will set up by the defendant was not proved satisfactorily and Appellate Court had wrongly held the same to be proved – the judgment of Appellate Court set aside and judgment passed by Trial Court restored.

(Para-22 to 53)

Cases referred:

Pentakota Satyanarayana and others Vs. Pentakota Seetharatnam and others, (2005) 8 Supreme Court Cases 67

Mahesh Kumar (dead) by LRs Vs. Vinod Kumar and others (2012) 4 Supreme Court Cases 387

For the appellant(s)	Mr. N.K. Thakur, Sr. Advocate with Ms. Jamuna Pathik, Advocate for appellant
For the respondent(s)	Mr. R.K. Gautam, Sr. Advocate with Mr. Gaurav Gautam, Advocate for respondent.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.

All these appeals are being decided by a common judgment, as the present appeals arise out of a common judgment and decree passed by the Court of learned District Judge, Una dated 31.3.2008 in the following cases; Civil Appeal No. 34 of 2006 titled Tilak Raj Vs. Jeet Singh, Civil Appeal No. 35 of 2006 titled Tilak Raj Vs. Jeet Singh, Civil Appeal No. 52 of 2006 titled Jagan Nath Vs. Tilak Raj and another, which appeals arose from the common judgment passed by the Court of learned Civil Judge (Sr. Division) Court No.1, Una in Civil Suit No. 156 of 1996 titled Jeet Singh Vs. Tilak Raj and Civil Suit No. 213 of 1996 titled Tilak Raj Vs. Jeet Singh and another decided on 30.3.2006.

2. Factual controversy involved in these appeals is as under.

3. Jeet Singh son of Rikhi Ram filed Civil Suit No. 156 of 1996 on the grounds that Chiranji Lal son of Kanshi Ram was owner of suit land measuring 0-21-39 comprised in Khewat No. 222min, Khatauni No. 365min, Khasra No. 3938(new) 84/15/1 (old) situated in village Panjawar, Tehsil and District Una and plaintiff was cultivating the suit land at the spot since last more than 40 years on payment of Batai. According to the plaintiff due to cordial relations between him and deceased Charanji Lal, entry in the revenue record could not be corrected but

he continued to be in actual physical possession over the suit land. Deceased Charanji Lal was unmarried and it was the plaintiff who rendered all kind of services to Charanji Lal during his lifetime till his death. Charanji Lal executed a 'Will' out of his free will and volition and in a sound state of mind on account of love and affection, in favour of the plaintiff and defendant on 26.3.1996. As per plaintiff defendant Tilak Raj alleged that Charanji Lal had also executed a 'Will' in his favour on 6.2.1996, and when both these 'Wills' were presented before Revenue Authorities for mutation, Tehsildar (Settlement) illegally ignored the 'Will' which was in favour of the plaintiff and attested mutation No. 255 dated 8.5.1996 in favour of the defendant without following the provisions required to be followed while sanctioning mutation. On these grounds, it was urged by plaintiff that the mutation attested in favour of Tilak Raj was illegal, null and void. It was also the case of the plaintiff that he had also acquired proprietary rights over the suit land after enforcement of H.P. Land Reforms & Tenancy Act as well as Rules framed thereunder. Further as per the plaintiff on the basis of illegal entry, defendant was threatening to dispossess the plaintiff from the suit land and trying to change nature of the suit land. On these bases, plaintiff filed said suit praying for decree for declaration that he was owner in possession of suit land on the basis of last genuine 'Will' of deceased testator Charanji Lal dated 26.3.1996 and mutation entered in favour of defendant Tilak Raj on the basis of 'Will' dated 6.2.1996 was illegal, null and void and also for decree of permanent injunction restraining defendant from interfering in any manner in the peaceful and lawful possession of plaintiff as owner and further for restraining defendant from alienating or changing the nature of suit land in any manner whatsoever and in the alternative for decree for possession in case defendant succeeded in ousting the plaintiff from the suit land during the pendency of the suit.

4. The said claim of the plaintiff was resisted by defendant who denied that plaintiff had ever served Charanji Lal or that he was inducted as tenant over the suit land or was ever in possession over the suit land. As per defendant, Charanji Lal executed Will dated 6.2.1996 in his favour in presence of respected villagers and mutation sanctioned in his favour on the basis of said Will was a valid mutation and on the basis of mutation so attested in his favour on the basis of said Will, he was coming in possession over the suit land as its owner. It was further the case of the defendant that mutation was rightly sanctioned in his favour on the basis of valid Will executed by Charanji Lal on account of love and affection and services rendered to the testator by the defendant.

5. On the basis of pleadings of the parties, learned trial court framed the following issues in Civil Suit No. 156 of 1996 vide order dated 22.5.1997 and 12.12.2000 as under:-

> "1. Whether the plaintiff was non-occupancy tenant over the suit land, if so, its effect? OPP.
>
> 2. Whether the plaintiff has cause of action to file the suit ? OPP.
>
> 2A. Whether late Charanji Lal had executed a Will in favour of the defendant on 6.2.1996? OPD.
>
> 2-B. Whether late Charanji Lal has executed a valid and last Will 26.3.1996 in favour of the plaintiff? OPP.
>
> 3. Relief.

6. Civil Suit No. 213 of 1996 was filed by Tilak Raj (defendant in Civil Suit No. 156 of 1996) against Jeet Singh (Plaintiff in Civil Suit No. 156 of 1996) and Jagan Nath. The case put forth in the said suit was that land measuring 0-44-44 square meters comprising in Khasra No. 3481, 3482, 3716, 3721, 3938, Khatauni No. 365, Khewat No. 222 situated at Village Panjawar, Tehsil and District Una was exclusively owned and possessed by plaintiff and defendants were utter strangers to the suit land who had no right, title or interest over the suit land. According to the plaintiff, defendants were threatening to interfere and change the nature of suit land as well as to raise construction over the suit land without any right and had also started collecting building material at the spot. On these bases the suit was filed praying decree for permanent injunction restraining defendants from interfering in any manner, changing nature, raising any

sort of construction as well as cutting and removing the trees standing over the suit land. In the alternative decree for possession by way of mandatory injunction was also prayed for.

7. Defendant No.1 Jeet Singh contested the claim of plaintiff on the ground that suit was not maintainable as plaintiff was neither owner nor in possession of the suit land. A preliminary objection was also taken on the ground that as the controversy involved in this suit was also subject matter of Civil Suit No. 156 of 1996, therefore, proceedings in present suit be stayed under the provisions of Section 10 of the CPC. On merits case put forth by defendant No.1 was that Charanji Lal had executed a valid Will dated 26.3.1996 in favour of plaintiff and defendant No.1 and land comprised in Khasra No. 3938 measuring 05 kanal 11 marlas, which was coming in possession of defendant No.1 since long, stood bequeathed by Chiranji Lal in favour of defendant by way of Will dated 26.3.1996. According to defendant No.1 he was in possession of Khasra No. 3938 as its owner.

8. Defendant No.2 contested the suit on the ground that the plaintiff was neither owner nor in possession of suit property and issue involved in the suit was subject matter of Civil Suit No. 78 of 1996 titled Jagannath Vs. Tilak Raj etc., therefore, proceedings in the present suit be stayed. On merits the defence taken by defendant No.2 was that said defendant had succeeded along with others to the property of Charanji Lal and that he was in possession of the suit land.

9. On the basis of pleading of the parties, following issues were framed in the present case by the learned Trial Court in Civil Suit No. 213 of 1996 on 21.10.1997 as under:-

> "1. Whether the plaintiff is entitled to the relief of injunction as prayed? OPP.
>
> 2. Whether the suit is not maintainable in the present form? OPD.
>
> 3. Whether the suit is liable to be stayed U/S 10 CPC as alleged ? OPD.
>
> 4. Whether the suit has been properly valued for the purpose of Court fee and jurisdiction? OPP.
>
> 5. Relief."

10. Learned Trial Court vide common judgment and decree dated 30.3.2006 partly decreed both the above suits in the following terms:

> "Cumulative effect of aforesaid discussion and findings is that plaintiff Jeet Singh succeeded in Civil Suit No. 156/96. Accordingly, suit of the plaintiff Jeet Singh is decreed with cost. He is declared owner in possession of Khasra No. 3938 (new) Khasra No. 84/15/01 (old) land measuring 0-21-39 as comprised in khewat No. 222min, khatauni No. 365min situated in village Panjawar Tehsil and District Una on the basis of Will Ext. PW2/A. Mutation No. 255 stand set aside. Defendant Tilak Raj is restrained not to interfere in suit land in any manner. Similarly, suit filed by Tilak Raj bearing No. 213/96 is also partly decreed with cost. Defendant Jeet Singh and Jagan Nath are restrained not to interfere in Khasra No. 3481, 3482, 3716, 3721, khatauni No. 365 khewat No. 222. However, suit of the Tilak Raj regarding khasra No. 3938 stands dismissed. Decree-sheets in both the cases be separately. A signed copy of judgment be placed on record. Both the case file be consigned to record room."

11. Learned Trial Court thus declared Jeet Singh to be owner in possession of khasra No. 3938 (new) khasra No. 84/15/01 (old) land measuring 0-21-39 comprised in khewat No. 222min, khatauni No. 365min situated in village Panjawar Tehsil and District Una on the basis of Will Ext. PW2/A and it set aside mutation No. 255 and restrained defendant Tilak Raj from interfering in the suit land in any manner. Learned Trial Court also partly decreed the suit filed by Tilak Raj i.e. 213 of 1996 and restrained Jeet Singh and Jagan Nath from interfering in khasra No. 3481, 3482, 3716, 3721 khatauni No. 365 khewat No. 222. It dismissed the suit of Tilak Raj qua Khasra No. 3938.

12. While arriving at the said conclusion, it was held by Learned Trial that Will executed in favour of Jeet Singh Ext. PW2/A demonstrated that the same was executed by its testator on account of services which were rendered by plaintiff Jeet Singh and also defendant Tilak Raj. Learned trial court held that the Will revealed that plaintiff was cultivating the suit land and intention of testator could be gathered from the fact that he had only bequeathed suit land comprised in Khasra No. 3938 in favour of the plaintiff and remaining property stood bequeathed in favour of defendant Tilak Raj through Will Ext. PW2/A. Learned trial Court also held that Will Ext. PW2/A stood satisfactorily proved by plaintiff Jeet Singh. Learned Trial Court also held that though Charanji Lal had executed a gift in favour of defendant Tilak Raj but gift was with regard to different land and was not related to the suit land. Learned trial court also did not concur with the contention of defendant Tilak Raj in civil suit No. 156 of 1996 that the Will propounded by plaintiff Jeet Singh was shrouded with suspicious circumstances. It was further held by learned trial court that as far as Will executed in favour of defendant which was Ext. D1 was concerned, the original Will had not been produced in the Court and thus it could not be said that the execution and attestation of said Will was satisfactorily proved. Learned trial court also held that merely because the document was marked as exhibited document, the same did not dispense the factum of its being proved as per law. Learned trial court also held that defendant had not satisfactorily explained as to why the original Will was not produced at the time of examination of DW2 and therefore the only conclusion which could be arrived at was that propounder of Will dated 6.2.1996 had failed to prove legal and valid execution and attestation of Will in accordance with law. These findings were returned in the suit filed by Jeet Singh.

13. In the suit filed by Tilak Raj it was held by learned Trial Court that it had come on record that Jeet Singh (defendant No. 1 in the said suit) was in possession of land comprised in khasra No. 3938 and defendant No.2 had not proved his possession over the same, nor defendant No.2 had proved that the said land stood vested in him on the basis of succession and this demonstrated that possession of plaintiff Tilak Raj was proved over the suit land subject matter of said Civil Suit except khasra No. 3938. On these bases learned trial court held that plaintiff Tilak Raj was entitled for relief on the basis of possession qua suit land comprised in khasra No. 3481, 3482, 3716, 3721 except Khasra No. 3938.

14. The judgment and decree so passed by learned trial court were challenged by way of three appeals before the learned Appellate Court. Civil Appeal No. 34 of 2006 was filed by Tilak Raj in civil suit No. 156 of 1996, Civil Appeal No. 35 of 2006 was filed by Tilak Raj in civil suit No. 213 of 1996 and Civil Appeal No. 52 of 2006 was filed by Jagan Nath in Civil Suit No. 156 of 1996 as well as Civil Suit No. 213 of 1996.

15. Learned appellate court vide common judgment and decree passed in the said three appeals dated 313.2008 partly allowed civil appeals No. 34 of 2006 and 35 of 2006 by setting aside the judgment and decree passed by learned trial court vide which learned trial court had upheld Will dated 26.3.1996 Ext. PW2/A.

16. Civil Suit No. 156 of 1996 was partly decreed by learned appellate court in the following terms:-

> "The suit land comprised in khasra No. 3938 is owned by defendant Tilak Raj and possessed by plaintiff Jeet Singh. Defendant Tilak Raj is restrained from interfering with plaintiff Jeet Singh's possession over the suit land or changing the nature thereof till he (Jeet Singh) is dispossessed therefrom in due course of law.
>
> The remaining part of the suit was dismissed"

17. Civil Suit No. 213 of 1996 was also decreed by learned appellate court in the following terms:-

> "Plaintiff Tilak Raj is owner of the disputed land comprised in khasra Nos. 3481, 3482, 3716, 3721 and 3938, and in possession of part thereof (Khasra Nos. 3481, 3482, 3716 and 3721). The defendants Jeet Singh and Jagan Nath are

permanently restrained from interfering with the said part of the disputed land and changing the nature thereof by raising construction. The latter two are also permanently restrained from cutting and removing the trees standing on the disputed land.

The remaining part of the suit was dismissed."

18. As far as appeal filed by Jagan Nath is concerned, the same was dismissed by learned appellate court.

19. Against the judgments and decrees so passed by learned trial court, present four appeals have been filed.

20. RSA No. 242 of 2008 has been filed by Jeet Singh feeling aggrieved by the judgment and decree passed by learned appellate court in Appeal No. 34 of 2006 arising out of civil suit No. 156 of 1996.

21. RSA No. 243 of 2008 has been filed by appellant Jeet Singh feeling aggrieved by the judgment and decree passed by learned appellate court in Appeal No. 35 of 2006 arising out of civil suit No. 213 of 1996.

22. RSA No. 307 of 2008 has been filed by Tilak Raj feeling aggrieved by the judgment and decree passed by learned appellate court in Appeal No. 34 of 2006 arising out of civil suit No. 156 of 1996.

23. RSA No. 306 of 2008 has been filed by appellant Tilak Raj feeling aggrieved by the judgment and decree passed by learned appellate court in Appeal No. 35 of 2006 arising out of civil suit No. 213 of 1996.

24. I have heard learned counsel for the parties and have also gone through the records of the case as well as the judgments and decrees passed by the learned Courts below.

25. I will first deal with both the RSAs which have been filed by Jeet Singh i.e. RSA No. 242 of 2008 and RSA No. 243 of 2008.

26. The substantial questions of law on which these RSAs were respectively admitted are as under:-

RSA No. 242 of 2008

"1. Whether the findings of the learned lower appellate court are legally sustainable that the deceased executed a Will in favour of Tilak Raj without there being any evidence and proof of the execution of the alleged Will and mere exhibit put on the photocopy of the Will held to have validly executed the Will?

2. Whether the findings of the learned lower appellate court in ignoring the document Ex.PW-2/A, the Will, which has been duly proved to have been validly executed, are not sustainable in the eyes of law?

3. Whether the copy of the Will Ex. D-1 the alleged Will meets the requirement of law and its due and valid execution, by not producing the original Will nor examining any marginal witness of the Will."

RSA No. 243 of 2008

"1. Whether the findings of the learned lower appellate court are legally sustainable that the deceased executed a Will in favour of Tilak Raj without there being any evidence and proof of the execution of the alleged Will and mere exhibit put on the photocopy of the Will held to have validly executed the Will?

2. Whether the findings of the learned lower appellate court in ignoring the document Ex.PW-2/A, the Will, which has been duly proved to have been validly executed, are not sustainable in the eyes of law?

3. Whether the copy of the Will Ex. D-1 the alleged Will meets the requirement of law and its due and valid execution, by not producing the original Will nor examining any marginal witness of the Will."

27. In these cases there are two Wills one Ext. PW2/A propounded by Chiranji Lal in favour of the plaintiff as well as Tilak Raj dated 26.3.1996 and other is Ext D1 propounded by testator Chiranji Lal dated 6.2.1996 exclusively in favour of Tilak Raj. While learned trial court upheld the Will executed by Chiranji Lal in favour of Jeet Singh and Tilak Raj Ext. PW2/A it held that Will executed by Chiranji Lal in favour of Tilak Raj was no Will in the eyes of law as the original of the said Will had not seen light of the day. Learned appellate court while upsetting the findings so returned by learned trial court upheld Will executed by Chiranji Lal in favour of Tilak Raj i.e. Ext. D1 by holding that DW3 had stated in the Court that he had seen the original when photocopy of the same was exhibited as DW1 and it further held that the Will propounded by Jeet Singh i.e. Ext. PW2/A was shrouded with suspicious circumstances and was not a valid Will executed in favour of Jeet Singh and Tilak Raj.

28. Therefore, primarily the question which has to be answered by this Court is as to whether the findings returned to this effect by learned appellate court are borne out from the records of the case or the same are perverse finding.

29. Taking into consideration the fact that both Wills executed by Chiranji Lal, therefore, I shall first deal with the Will later in time i.e. Ext. PW2/A propounded by Jeet Singh and purportedly executed by Chiranji Lal both in favour of Jeet Singh and Tilak Raj.

30. Mr. N.K. Thakur learned Senior Counsel appearing for appellant Jeet Singh has vehemently argued that the judgment and decree passed by learned appellate court whereby learned appellate court concluded that learned trial court had wrongly upheld Will dated 26.3.1996 Ext. PW2/A propounded by Jeet Singh and it upheld the Will propounded by Tilak Raj are not sustainable in the eyes of law. It was argued by Mr. Thakur that besides the factum of original Will Ext. D2 having not seen the light of the day as was held by learned trial court, propounder Jeet Singh had proved Will dated 26.3.1996 as per law and learned appellate court had set aside the findings returned in this regard by learned trial court by totally misreading and mis-appreciating the evidence on record. According to Mr. Thakur execution of Will Ext. PW2/A stood proved by the testimony of Anil Jaswal the scribe of the Will who deposed in the Court as PW2 as well as from the testimony of Kartar Chand as PW3 who was an attesting witness along with Harvilas PW-4. Mr. Thakur further argued that vide Will Ext. PW2/A, executant had bequeathed khasra number 3938 measuring 0-21-39 hectares situated in Panjawar village Tehsil and Distt. Una in favour of Jeet Singh out of love and affection and in fact the remaining property had been bequeathed by him in favour of defendant Tilak Raj. Mr. Thakur further argued that the factum of Jeet Singh being in possession of land comprised in khasra No. 3938 in fact stood proved not only from the evidence placed on record by Jeet Singh but also from the statements of the defendant witnesses. According to Mr. Thakur learned appellate court erred in not appreciating that Will Ext. PW2/A was the last Will executed by Chiranji Lal and the said Will had been executed by him out of his free will and volition without any coercion or pressure and the same was not shrouded with any suspicious circumstance. Mr. Thakur further argued that learned appellate court had also erred in upholding Will Ext. D-1 and the findings returned by learned appellate court to the effect that original Will was produced at the time of the examination of the scribe of the Will are perverse because original Will was never produced before the learned trial court.

31. On the other hand Mr. R.K. Gautam learned Senior Counsel appearing for respondent Tilak Raj argued that the findings returned by learned appellate court to the effect that Will Ext. PW2/A was not executed by Charanji Lal were correct findings based on the appreciation of evidence on record and the same did not call for any interference. It was argued by Mr. Gautam that there were lot of variations in the statements of plaintiff witnesses i.e. scribe and attesting witnesses and further Charanji Lal was not neither mentally nor physically fit to have had executed Will on 26.3.1996. Mr. Gautam further argued that the findings returned by

learned appellate court to the effect that Ext. D1 was a duly executed last Will of Charanji Lal also did not warrant any interference and on these bases it was urged by Mr. Gautam that there was no merit in the appeals filed by Jeet Singh and the same be dismissed.

32. A perusal of Will dated 26.3.1996 Ext. PW2/A demonstrates that this Will was scribed by Anil Jaswal and attesting witnesses to the same were Kartar Chand and Harvilas. A perusal of the said exhibit also demonstrates that executant Chiranji Lal had mentioned therein that he was satisfied with the services which were being rendered to him by Jeet Singh and Tilak Raj and in lieu of the same he was bequeathing his property as detailed in the said Will. Incidentally it is not as if he had bequeathed his entire property in favour of Jeet Singh. Part of the property has been bequeathed in favour of Jeet Singh whereas remaining property has been bequeathed in favour of Tilak Raj.

33. Scribe of Will Ext. PW2/A Anil Jaswal entered the witness box as PW2 and deposed that the said Will was scribed by him and he had scribed the same as per the desire of its executant Charanji Lal at his residence which was in favour of Tilak Raj and Jeet Singh. This witness further deposed that he was taken to the house of Chiranji Lal by Kartar Singh S/o Rikhi Ram. He further deposed that at the time when the said Will was scribed, Charanji Lal was in his senses and he had bequeathed 05 kanal 11 marlas of land in favour of Jeet Singh, whereas the remaining land and bank balance etc. were bequeathed in favour of Tilak Raj. He further deposed that Will was scribed as stated by Chiranji Lal. He further stated that after the Will was scribed he read over the same to Charanji Lal who after acknowledging the contents of the same appended his signature on it which were in Urdu. He further deposed that thereafter Kartar Chand appended his thumb impression and Harvilas appended his signature as witnesses.

34. In his cross examination PW2 Anil Jaswal stated that Charanji Lal was ill and besides the marginal witnesses there were two other persons present whose names he was not aware of. In his cross examination he also denied the suggestion that he had not scribed the Will as was dictated by Chiranji Lal. It is necessary to mention this fact in view of the stand taken by defendant Tilak Raj in his written statement as per which Charanji Lal had not executed any Will dated 26.3.1996 and the Will was forged and a fraudulent Will. In other words the stand of defendant was not that though there may be a Will executed by Charanji Lal in favour of Jeet Singh but the same was a result of coercion and undue influence, the unambiguous stand taken in the written statement that Charanji Lal had not executed any Will in favour of Jeet Singh and the Will propounded by Jeet Singh was a forged Will.

35. Besides Anil Jaswal both the marginal witnesses of Ext. PW2/A namely Kartar Chand and Harvilas also deposed in the Court as PW3 and PW4 respectively. PW3 Kartar Chand stated in the Court that he knew plaintiff as well as defendant and he knew Charanji Lal also, the executant of the Will. This witness further deposed that Charanji Lal was a bachelor and as such he was not having any offspring. He also deposed that Jeet Singh used to look after Charanji Lal and he used to attend Charanji Lal when he was ill and also used to bear medical expenses of Charanji Lal. He further deposed that suit land was being cultivated by Jeet Singh for the last 40 years. This witness further deposed that on 26th of March Charanji Lal told him that he wanted to execute a Will and thereafter Charanji Lal asked him to bring a scribe for the said purpose. This witness also stated that at the time when the Will was executed Charanji Lal was in his senses. He further stated that he came to Una from where he took Anil Jaswal. He further stated that he also called Harvilas as was instructed by Chiranji Lal and around 3:00 p.m., Will was scribed by Jeet Singh as dictated by Charanji Lal who desired that 05 kanal 11 marla land be bequeathed in favour of Jeet Singh and remaining movable and immovable property be bequeathed in favour of Tilak Raj. He also deposed that after the Will was scribed, the same was read over to Charanji Lal and he appended his signatures upon the same after acknowledging the contents thereof and thereafter he (PW-3) appended his thumb impression over the same, whereas Harvilas appended his signatures. In his cross-examination PW3 deposed that at the time when the Will was executed by Chiranji Lal both Tilak Raj and Jagan Nath were present there. He also stated that Jagan Nath and Tilak Raj did not sign the Will. This witness in his

cross-examination also stated that Chiranji Lal died in the morning of 27.3.1996. He further deposed that on 26.3.1996 no doctor was called for though he (PW-3) had brought some medicine from local doctor who was a retired Army personnel. He also stated that Charanji Lal had given up food 5-6 days before his death and he only used to consume bread and juice. He denied the suggestion that Will in fact was a forged one and had been prepared after the death of Chiranji Lal.

36. The other marginal witnesses Harvilas entered the witness box as PW4 and deposed about the mode and manner in which the Will was executed and that he had appended his signatures upon the same as a marginal witnesses. In his cross-examination this witness stated that he was called by Kartar Chand. He also stated that Tilak Raj and Jagan Nath were present at the time when the Will was executed. In his cross-examination he also stated that Chiranji Lal was ill 4-5 days before his death. He also stated in his cross-examination that the suit land was cultivated by Jeet Singh from the last 40 years. This witness also deposed that Charanji Lal had himself told him that his condition was deteriorating. He denied the suggestion that the Will was forged after the death of Charanji Lal.

37. One Sh. Jai Gopal also entered the witness Box as PW5 and this witness deposed that he was aware of the suit land and the same was being cultivated by Jeet Singh since 1965 and the owner of the same was Charanji Lal and that Charanji Lal who was issueless had told him that he had given his land to Jeet Singh who was looking after him. In his cross examination this witness stated that Jeet Singh was not related to Charanji Lal whereas Tilak Raj was grandson of Charanji Lal. He denied the suggestion that there was any dispute between him and defendant as he had cut grass from the land of defendant.

38. Now a perusal of the statements of the scribe of the Will as well as the marginal witnesses clearly demonstrates that there is consistency in their statements as far as execution of the will by Charanji Lal is concerned. Scribe has categorically stated that he was called for by Kartar Chand who took him to the house of Charanji Lal and that the Will was scribed as per the wish of Charanji Lal and after the Will was scribed the same was read over to Charanji Lal who after understanding the same appended his signature over the same. This witness has categorically stated that thereafter marginal witnesses appended their signatures upon the same. Both the marginal witnesses have also deposed in the court about the mode and manner in which the Will was executed. Scribe as well as both the marginal witnesses were subjected to lengthy cross examination, however the credibility of these witnesses could not be impeached by the defendant. Incidentally both the marginal witnesses have stated in unison that defendant Tilak Raj and Jagan Nath were present at the time when the Will was scribed and presence of two persons whose names were not known to him has also been mentioned in his statement by the scribe of the Will. Now in this background when one peruses the findings returned by learned appellate court with regard to the execution of the said Will, the only conclusion which can be arrived at is that learned appellate court has disbelieved the execution of the said Will on conjectures and surmises by totally misreading and mis-appreciating the evidence which was on record. Learned appellate court failed to appreciate that the case put forth by defendant was that the Will in issue was a forged one and the onus to prove the same was on the defendant who miserably failed to prove the same. Incidentally witnesses to Will Ext. PW2/A though have stated that the executor of the Will was in his disposing stand of mind executed the Will but they have not concealed this fact from the Court that Charanji Lal was keeping ill health at the time when the Will was executed. Simply because Charanji Lal died a day or thereafter after execution of the Will dated 26.3.1996 will not shroud the same with suspicious circumstances especially when the propounder of the Will Jeet Singh has been able to discharge the initial onus about the Will having been executed in accordance with law.

39. Hon'ble Supreme Court in **Pentakota Satyanarayana and others** Vs. **Pentakota Seetharatnam and others**, (2005) 8 Supreme Court Cases 67 has held that though the initial onus to prove the 'Will' is on the propounder of the 'Will' but thereafter it shifts to the party alleging undue influence or coercion in execution of the 'Will'.

40. Hon'ble Supreme Court in **Mahesh Kumar (dead) by LRs** Vs. **Vinod Kumar and others** (2012) 4 Supreme Court Cases 387, has recapitulated the said legal position and relevant paras of the said judgment are quoted herein below:-

> *28. In one of the earliest judgments in H. Venkatachala Iyengar v. B. N. Thimmajamma , the three Judge Bench noticed the provisions of Sections 45, 47, 67 and 68 of the Indian Evidence Act, 1872 and Sections 59 and 63 of the 1925 Act and observed: (AIR pp. 451-52, paras 18-21)*
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> > *"18. ..... Section 63 requires that the testator shall sign or affix his mark to the will or it shall be signed by some other person in his presence and by his direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing as a will. This section also requires that the will shall be attested by two or more witnesses as prescribed. Thus the question as to whether the will set up by the propounder is proved to be the last will of the testator has to be decided in the light of these provisions. Has the testator signed the will? Did he understand the nature and effect of the dispositions in the will? Did he put his signature to the will knowing what it contained? Stated broadly it is the decision of these questions which determines the nature of the finding on the question of the proof of wills. It would prima facie be true to say that the will has to be proved like any other document except as to the special requirements of attestation prescribed by Section 63 of the Indian Succession Act. As in the case of proof of other documents so in the case of proof of wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters.*
> >
> > *19. However, there is one important feature which distinguishes wills from other documents. Unlike other documents the will speaks from the death of the testator, and so, when it is propounded or produced before a court, the testator who has already departed the world cannot say whether it is his will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last will and testament of the departed testator. Even so, in dealing with the proof of wills the court will start on the same enquiry as in the case of the proof of documents. The propounder would be called upon to show by satisfactory evidence that the will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free will. Ordinarily when the evidence adduced in support of the will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, courts would be justified in making a finding in favour of the propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated.*
> >
> > *20. There may, however, be cases in which the execution of the will may be surrounded by suspicious circumstances. The alleged signature of the testator may be very shaky and doubtful and evidence in support of the propounder's case that the signature, in question is the signature of the testator may not remove the doubt created by the appearance of the signature; the condition of the testator's mind may appear to be very feeble and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the will may appear to be unnatural, improbable or unfair in the*

light of relevant circumstances; or, the will may otherwise indicate that the said dispositions may not be the result of the testator's free will and mind. In such cases the court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy; and, unless it is satisfactorily discharged, courts would be reluctant to treat the document as the last will of the testator. It is true that, if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the will propounded, such pleas may have to be proved by the caveators; but, even without such pleas circumstances may raise a doubt as to whether the testator was acting of his own free will in executing the will, and in such circumstances, it would be a part of the initial onus to remove any such legitimate doubts in the matter.

21. Apart from the suspicious circumstances to which we have just referred, in some cases the wills propounded disclose another infirmity. Propounders themselves take a prominent part in the execution of the wills which confer on them substantial benefits. If it is shown that the propounder has taken a prominent part in the execution of the will and has received substantial benefit under it, that itself is generally treated as a suspicious circumstance attending the execution of the will and the propounder is required to remove the said suspicion by clear and satisfactory evidence. It is in connection with wills that present such suspicious circumstances that decisions of English courts often mention the test of the satisfaction of judicial conscience. It may be that the reference to judicial conscience in this connection is a heritage from similar observations made by ecclesiastical courts in England when they exercised jurisdiction with reference to wills; but any objection to the use of the word "conscience" in this context would, in our opinion, be purely technical and academic, if not pedantic. The test merely emphasizes that, in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is deciding a solemn question and it must be fully satisfied that it had been validly executed by the testator who is no longer alive." (emphasis supplied)

29. The ratio of H. Venkatachala Iyengar's case was relied upon or referred to in Rani Purnima Devi v. Kumar Khagendra Narayan Deb , Shashi Kumar Banerjee v. Subodh Kumar Banerjee, Surendra Pal v. Saraswati Arora, Seth Beni Chand v. Kamla Kunwar, Uma Devi Nambiar v. T.C. Sidhan, Sridevi v. Jayaraja Shetty, Niranjan Umeshchandra Joshi v. Mrudula Jyoti Rao and S. R. Srinivasa v. S. Padmavathamma .

30. In Jaswant Kaur v. Amrit Kaur the Court analysed the ratio in H. Venkatachala Iyengar case and culled out the following propositions: (Jaswant Kaur case, SCC pp. 373-74, para 10)

"1. Stated generally, a will has to be proved like any other document, the test to be applied being the usual test of the satisfaction of the prudent mind in such matters. As in the case of proof of other documents, so in the case of proof of wills, one cannot insist on proof with mathematical certainty.

2. Since Section 63 of the Succession Act requires a will to be attested, it cannot be used as evidence until, as required by Section 68 of the Evidence Act, one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence.

3. Unlike other documents, the will speaks from the death of the testator and therefore the maker of the will is never available for deposing as to the circumstances in which the will came to be executed. This aspect introduces an element of solemnity in the decision of the question whether the document propounded is proved to be the last will and testament of the testator. Normally, the onus which lies on the propounder can be taken to be discharged on proof of the essential facts which go into the making of the will.

4. Cases in which the execution of the will is surrounded by suspicious circumstances stand on a different footing. A shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the will under which he receives a substantial benefit and such other circumstances raise suspicion about the execution of the will. That suspicion cannot be removed by the mere assertion of the propounder that the will bears the signature of the testator or that the testator was in a sound and disposing state of mind and memory at the time when the will was made, or that those like the wife and children of the testator who would normally receive their due share in his estate were disinherited because the testator might have had his own reasons for excluding them. The presence of suspicious circumstances makes the initial onus heavier and therefore, in cases where the circumstances attendant upon the execution of the will excite the suspicion of the court, the propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator.

5. It is in connection with wills, the execution of which is surrounded by suspicious circumstances that the test of satisfaction of the judicial conscience has been evolved. That test emphasises that in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is called upon to decide a solemn question and by reason of suspicious circumstances the court has to be satisfied fully that the will has been validly executed by the testator.

6. If a caveator alleges fraud, undue influence, coercion etc. in regard to the execution of the will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution of the will may raise a doubt as to whether the testator was acting of his own free will. And then it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter."

41. In my considered view in the present case the appellant has not brought any material on record from where it could establish that 'Will' Ext. DW2/A was not a valid 'Will' but was a result of either fraud or misrepresentation of undue influence exercised by the propounder of the 'Will' on its testator.

42. Because it was the case of defendant that the said Will was shrouded with suspicious circumstances as per whom, the Will in fact was a fraud Will and was a forged Will, the onus was upon the defendant Tilak Raj to have had proved that Charanji Lal had not executed any Will on 26.3.1996 and Will i.e. Ext. PW2/A was in fact forged and fabricated after the death of Charanji Lal. However, there is no evidence to this effect placed on record by said defendant. Learned appellate court has not only erred in not appreciating the statements of PW2, PW3 and PW4 in their correct perspective but it has also erred in not appreciating the findings returned by learned trial court qua Will Ext. PW2/A correctly. In fact a perusal of judgment passed by learned appellate court demonstrates that learned appellate court has tried to create suspicious circumstance to demolish Will Ext. PW2/A where none existed. To illustrate this, learned appellate court has held that PW3 Kartar Chand and PW4 Harvilas were brother and

cousin of the propounder of the Will Jeet Singh and it has drawn adverse inference of the fact that as to why only PW3 and PW4 were chosen by testator as witnesses without appreciating that the scribe of the Will has categorically demonstrated in his deposition that the Will was executed as per the desire of the testator and there is no record that Jeet Singh played any role in execution of Will. Further this aspect of the matter has also been totally ignored by learned appellate court that it stands proved on record from the statements of PW2 to PW4 that defendant Tilak Raj as well as Jagan Nath were present at the time when the said Will was executed and there is no cross-examination of witnesses on this count that defendant Tilak Raj was not present at the time when Will Ext. PW2/A was executed. Similarly, learned appellate court has tried to create suspicious circumstance on the ground that there was discrepancy with regard to the date on which Chiranji Lal was died, as to whether he died on 27.3.1996 or 28.3.1996. Learned appellate court also held that the factum of Jeet Singh first stating that Chiranji Lal was died on 26.3.1996 and then stating that he died on 28.3.1996 was also shrouded with suspicious circumstance. In my considered view, while returning the said findings learned appellate court erred in not appreciating that it was not even the case of Tilak Raj that Chiranji Lal had died on 26.3.1996. There is infirmity in the findings so returned by learned appellate court as the said findings are contrary to the pleadings, as learned appellate court has erred in not appreciating that there is difference between a forged Will and a Will though executed by a testator but one which is shrouded with suspicious circumstances. Further learned appellate court has also erred in treating the physical condition of Chiranji Lal to be a suspicious circumstance without appreciating that PW2, PW3 and PW4 had in unison deposed that the Will was in fact executed on the asking/instruction of its testator as per his free will and volition and all these three witnesses have also deposed that when the said Will was executed, the testator was physically unwell. On the contrary no evidence was produced by defendant to demonstrate that on 26.3.1996 Chiranji Lal was mentally disabled and was not in a position to execute any Will. Moreover, learned appellate court has also erred in not appreciating that the contents of said Will otherwise are equitable, as testator had bequeathed part of his property in favour of Jeet Singh whereas remaining property was bequeathed in favour of Tilak Raj.

43. The finding returned by learned appellate court to the effect that the Will was shrouded by suspicious circumstance stood proved on record from the fact that at the time of attestation or mutation dated 26.3.1996 said Will was not produced before Tehsildar by Jeet Singh and rather he took the plea of non occupancy tenancy at the time of attestation of the said mutation is also a result of misreading and mis-appreciation of the findings on record. While returning the said findings, learned appellate court erred in not appreciating that the land qua which said mutation was attested on the basis of gift deed executed by Chiranji Lal in favour of Tilak Raj was not subject matter of Will Ext. PW2/A. The above findings clearly and categorically demonstrate that learned appellate court has in fact erred in not appreciating the statements of PW2 to PW4 in their correct perspective and has erred in adopting a pick and choose method to find infirmities in their statements where none existed.

44. Now I will refer to the validity of Will Ext. D-1.

45. Learned trial court has disbelieved Will Ext. D-1 by holding that propounder of the said Will had failed to prove the same, as the original of said Will was not produced before the Court. Learned trial court held that DW2 who was the witness to the said Will was not shown the original to him at the time of his examination in the Court nor this witness had stated after actually perusing the original Will that any such Will was executed and attested in his presence and that he had seen testator putting his signature over the Will in his presence. Learned trial court further held that scribe of the Will, i.e. DW3 had tendered photocopy of Will which was Ext. D-1 and this was in fact objected to. On these bases it was held by learned trial court that mere mentioning of a document did not dispense with the proof of the same. It also held that Tilak Raj had failed to prove that any Will i.e. Ext. D1 was in fact executed by Chiranji Lal. Learned trial court also held that if a party does not produce a document on record then adverse inference has to be drawn against it and it further held that there was no cogent explanation by the defendant

as to why original Will was not produced by him. On these basis learned trial court held that Tilak Raj propounder of the Will has failed to prove legal and valid execution of the Will.

46. Learned appellate court however set aside the finings so returned by learned trial court by, inter alia, holding that original Will dated 6.2.1996 photocopy of which was Ext. D-1 was in fact produced at the time by the scribe thereof i.e. DW3 on 13.1.2003.

47. Records demonstrate that Ashok Kumar tendered his affidavit by way of evidence in which it was mentioned that he was working in the Court as a Document Writer and he had brought the relevant records and that at Sr. No. 37 against date 6.2.1996, a Will executed by Chiranji Lal s/o Kansi Ram was entered. It was further mentioned in his affidavit that the said Will was scribed at the house of Chiranji Lal and the same was read over to the testator who after understanding the same appended his signatures on it in front of witnesses.

48. In Court this witness while tendering his affidavit by way of evidence has deposed **"Asal Vasiat Dekh Le Hai Jo Meri Kalmi Hai Jis Bara Indraj Mere Register Sr. No. 37 dated 6.2.1996 Page No. 23 Par Daraj Hai. Iski Photocopy Ex. D-1 Mutabak Asal Darust Hai (Objected to)."**

49. Now the inference which has been drawn from the said statement of Ashok Kumar by learned appellate court is that the original Will was produced at the time when Ashok Kumar was examined as DW3 on 13.1.2003. However, the finding so returned by learned appellate court is not borne out from the records. It has not come in the statement of DW-3 that he was shown the original Will in the Court itself and that Ext. D-1 was in fact a photocopy of the original Will. Obviously that is why when photocopy of Will was exhibited as D-1, the same was objected to by the plaintiff.

50. Further it is a matter of record that DW2 Parmod Singh marginal witness to the said alleged Will was never shown the original. This witness deposed in the Court on 14.6.2002.

51. Besides this a perusal of Ext. D-1 which is a photocopy also demonstrates that there is no endorsement on the same to the effect that the same was a photocopy of original Will dated 6.2.1996 and the same was taken on record after comparing it with the original Will. During the course of arguments no cogent explanation was given by learned Senior Counsel appearing for Tilak Raj as to why the original Will was not produced in the Court and in whose possession the said Will was. Therefore, in these circumstances in my considered view learned appellate court has gravely erred in holding that Ext. D-1 was a validly executed Will by Chiranji Lal in favour of propounder Tilak Raj. The substantial questions of law are answered accordingly.

RSA No. 306 of 2008 & RSA No. 307 of 2008.

52. These two appeals were admitted on the following substantial questions of law and I will deal with these substantial questions of law together.

RSA No. 306 of 2008

"Whether the findings of the lower Appellate Court holding that the suit land bearing Khasra No. 3938 khewat No. 222min Khatauni No. 365min measuring 0-21-39 Hect. in the suit land is in possession of the respondent inspite of the fact that the judgment and decree passed by the trial Court has been set aside by the lower Appellate and the Will set up by the respondent in the suit which was held valid by the trial Court has been held invalid by the lower appellate Court and as such, the findings of the lower appellate Court to this extent are perverse to the evidence on record?"

RSA No. 307 of 2008

"Whether the findings of the lower Appellate Court holding that the suit land bearing Khasra No. 3938 khewat No. 222min Khatauni No. 365min measuring 0-21-39 Hect. in the suit land is in possession of the respondent inspite of the fact that the judgment and decree passed by the trial Court has been set aside by the

lower Appellate and the Will set up by the respondent in the suit which was held valid by the trial Court has been held invalid by the lower appellate Court and as such, the findings of the lower appellate Court to this extent are perverse to the evidence on record?"

53. It was held by learned appellate court that the findings returned by learned trial court qua the possession of Jeet Singh over khasra No. 3938 were correct as in his cross examination as PW1 in Civil Suit No. 156 of 1996 Jeet Singh was suggested by Tilak Raj that only Jeet Singh cultivated the suit land and the said suggestion was admitted to be correct by Jeet Singh. Learned appellate court further held that in Civil Suit No. 213 of 1996 Tilak Raj suggested to defendant Jagan Nath that some part of Chiranji Lal's land was cultivated by Jeet Singh and Jeet Singh had sown potatoes in 5 kanal 11 marlas of land comprised in khasra No. 3938. On these bases it was held by learned appellate court that in fact Tilak Raj in his own showing lent credence to the effect that Jeet Singh was in possession of land comprised in khasra No. 3938. On these bases learned appellate court returned the findings that Jeet Singh in fact was in possession of khasra No. 3938. In my considered view as this Court has already held that Will Ext. PW2/A was validly executed by Chiranji Lal in favour of Jeet Singh as well as Tilak Raj vide which land comprised in khasra No. 3938 stood bequeathed to Jeet Singh, nothing more is required to be said on this issue save and except that it not only stands proved on record that Jeet Singh is in possession of khasra No. 3938 but it also stands proved on record that he is in possession of the same in his capacity as has been rightly held by learned trial court that Jeet Singh was in possession of khasra No. 3938 in his capacity as its owner. These substantial questions of law are answered accordingly.

In view of my findings returned above, Regular Second Appeal No. 242 of 2008 and Regular Second Appeal No. 243 of 2008 are allowed whereas Regular Second Appeal No. 306 of 2008 and Regular Second Appeal No. 307 of 2008 are dismissed. Judgment and decree passed by learned District Judge, Una in Civil Appeal Nos. 34 of 2006 and 35 of 2006 are also set aside and the judgment and decree passed by learned Civil Judge (Sr. Division), Court No.1, Una in Civil Suit No. 156 of 1996 are upheld. No order as to costs. Miscellaneous applications if any also stand disposed of.

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

Cr. Revision No. 223 of 2010 alongwith
Cr. Revision No. 254 of 2010
Reserved on: 16.03.2017
Date of decision: 22.03.2017

1. Cr. Revision No. 223 of 2010

Kamal Kishore ... Petitioner
Versus
State of Himachal Pradesh ... Respondent

2. Cr. Revision No. 254 of 2010

Suresh Kumar ... Petitioner
Versus
State of Himachal Pradesh ... Respondent

1. Cr. Revision No. 223 of 2010

For the petitioner: Mr. M.L. Sharma, Advocate.
For the respondent: Mr. Vikram Thakur, Deputy Advocate General.

2. Cr. Revision No. 254 of 2010
For the petitioner: Mr. Lovneesh Kanwar, Advocate.
For the respondent: Mr. Vikram Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.:

These revision petitions are being disposed of by a common judgment as they arise out of the judgment passed in Criminal Appeal No. 23 of 2010 dated 20.10.2010, vide which, learned Appellate Court while dismissing the appeal filed by the present petitioners affirmed the judgment of conviction passed against them by the Court of learned Judicial Magistrate First Class, Barsar, District Una, in Criminal Case No. 32-II-2008/07, dated 29.03.2010, whereby learned trial Court while convicting the accused for commission of offences punishable under Sections 341 and 354 read with Section 34 of Indian Penal Code, sentenced them to undergo rigorous imprisonment for a period of one year each and to pay a fine of Rs.1000/- each for commission of offence under Section 354 read with Section 34 of Indian Penal Code and also sentenced the accused to undergo simple imprisonment for a period of one month for commission of offence under Section 341 read with Section 34 of Indian Penal Code.

2. The case of the prosecution was that on 30.09.2007 at around 11.30 A.M. Smt. Kashmiri Devi, Pradhan Gram Panchayat Ghori Dhabiri telephonically informed police of Police Post Deotsidh that one Asha Devi had been molested and the police was accordingly asked to take appropriate action. On receipt of the said information Rapat Ext. PW7/A was entered by the police, who proceeded to the spot and thereafter recorded the statement of prosecutrix i.e. Kumari Asha Devi Ext. PW2/A wherein the prosecutrix reported that she was a student of 9th class in Dhabiri school and on 29.09.2007 when after she came back from school to her house and after having her meals, she was going to jungle to bring grass where her mother already had gone for bringing grass, at around 04.30 P.M. when she reached Daku Lahra one motorcycle came from Dhabiri side on which two persons were sitting. Motorcycle was halted when it reached near the prosecutrix and the persons riding the same asked the prosecutrix to come ahead and thereafter, they parked the motorcycle at some distance ahead of the prosecutrix. Further as per the prosecutrix, both the persons alighted from the motorcycle and moved towards her. The prosecutrix identified the pillion rider, whose name was Suresh Kumar alias Chuha, resident of Ghori, whereas she was not aware of the name of the other accused who was driving the motorcycle but she identified him by face as he was also resident of at village Ghori. Thereafter, accused Chuha asked her where she was going alone and when she told him that she was going to fetch grass, on this, accused Suresh Kumar wrongfully restrained her and the other accused Kamal Kishore embraced her. Suresh Kumar caught hold of her from her arm and started kissing her. On this, prosecutrix cried loudly and one Kashmir Singh Baba, who was grazing the cattle in the jungle, reached the spot on hearing her cries. As soon as the accused heard the voice of Kashmir Singh Baba, they fled away from the spot on their motorcycle towards Kalwal side. Further, as per the prosecutrix, she narrated the entire incident to Kashmir Singh. While Kashmir Singh was taking the prosecutrix to her mother, prosecutrix met her sister-in-law namely Neelama Devi, who was also in the jungle. The prosecutrix also narrated the entire incident to her sister-in-law and thereafter her sister-in-law took her to her mother, whereas Kashmir Singh returned back. Further, as per the prosecution, prosecutrix narrated the incident to her mother and after they reached their house, her mother telephonically informed the Pradhan about the occurrence of the said incident who advised them to come next morning as it was already dark. Accordingly, complaint was lodged the next day.

3. On the basis of the said statement of the prosecutrix, FIR Ext. PW9/A was registered against the accused. Pursuant to this, investigation was carried out by the police and in the course of investigation, police took into possession the motorcycle being driven by the

accused. Police also recorded the statements of the witnesses as per their versions including the statements of Kashmir Singh and Neelam Devi.

4. After the completion of investigation, challan was presented in the Court and as a prima facie case was found against the accused, they were charged for commission of offences punishable under Sections 341 and 354 read with Section 34 of Indian Penal Code, to which, they pleaded not guilty and claimed trial.

5. On the basis of evidence led by the prosecution both ocular as well as documentary, learned trial Court held that the prosecution had successfully proved its case against the accused for commission of offence with which they were charged beyond shadow of reasonable doubt by leading cogent, convincing and trustworthy evidence. On these basis, learned trial Court convicted the accused for commission of offences under Sections 341 and 354 read with Section 34 of Indian Penal Code and imposed them the sentence already referred to above.

6. In appeal, judgment of conviction passed by learned trial Court was upheld by learned Appellate Court and hence feeling aggrieved, both the accused have filed separate petitions against the judgments of conviction passed against them.

7. Learned counsel for the petitioners have argued that there is perversity with the findings recorded by both the Courts below resulting in wrong conviction of the accused. As per learned counsel, both the learned Courts below have erred in not appreciating that the prosecution was not able to prove its case against the accused beyond reasonable doubt. It was argued by learned counsel for the petitioners that both learned Courts below erred in not appreciating that neither the prosecutrix had proved the case of the prosecution nor the other prosecution witnesses had corroborated the case of the prosecution. As per learned counsel for the petitioners, in the absence of the case of the prosecution having been proved and corroborated on the strength of the testimony of the prosecution witnesses, learned trial Court erred in convicting the accused for commission of offences under Sections 341 and 354 read with Section 34 of Indian Penal Code and learned Appellate Court erred in upholding the said conviction. On these basis, it was urged by learned counsel for the petitioners that the present revision petitions be accepted and the judgment of conviction passed against the petitioners by learned trial Court and upheld by learned Appellate Court be set aside.

8. Mr. Vikram Thakur, learned Deputy Advocate General, on the other hand has argued that there was neither any perversity nor any infirmity with the findings of conviction returned against both the accused by learned Courts below. Mr. Thakur argued that a perusal of the judgment passed by learned trial Court demonstrates that while convicting the accused, learned trial Court was not oblivious to the fact that neither the prosecutrix nor few other witnesses had corroborated the case of the prosecution and in fact, they had turned hostile. Mr. Thakur argued that learned trial Court after taking into consideration the testimonies of all the witnesses in its entirety had concluded and rightly so that though few witnesses had turned hostile, however, the statements made in the Court by them during the course of their cross-examination by learned Public Prosecutor, fully proved and corroborated the case of the prosecution. Mr. Thakur further argued that the contention of learned counsel for the petitioners that simply because the prosecutrix and few witnesses had turned hostile, therefore, the petitioners could not have been convicted is meritless because it is settled law that even if the prosecution witnesses turn hostile then that part of the evidence of such witness which proved the case of the prosecution can be looked into by the Courts. Mr. Thakur further argued that findings returned in the judgment of conviction passed by learned trial Court and upheld by learned Appellate Court were duly borne out from the records of the case, hence, there was neither any perversity nor any infirmity with the findings recorded by both learned Courts below and accordingly, there was no merit in these revision petitions and the same be dismissed.

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

10. Though this Court is not oblivious to the fact that in the exercise of its revisional jurisdiction this Court is not to reappreciate the evidence, however taking into consideration the contention raised by learned counsel for the petitioners that the judgment of conviction was perverse as the prosecutrix as well as other prosecution witnesses had turned hostile, this Court with the assistance of learned counsel for the parties perused the statements of these witnesses in order to conclude as to whether there was any perversity in the findings returned by both learned Courts below against the petitioners.

11. Prosecutrix Asha Devi entered the witness box as PW-2. In her examination-in-chief this witness deposed in the Court that on the fateful day after returning back from the school to her house at around 04.00 P.M. and after having her meals, she started for jungle to bring grass where her mother was already there. She further deposed that when she reached near Talai Laida one motorcycle on which two persons were sitting came from the front and when the said motorcycle reached near her the same was stopped and the persons who were riding the motorcycle misbehaved with her. They caught hold of her from her arm and also kissed her. She deposed that she was not aware of the names of the persons who were riding the motorcycle. She further deposed that when she was being molested by the persons who were riding on the motorcycle, she raised hue and cry and her Dada Ji reached the spot whose name she was not recollecting. She further deposed that thereafter, she narrated the entire incident to her Dada Ji and her Bhabi Neelam Devi met her in the meanwhile and she also narrated the incident to her. Thereafter, she met her mother in the jungle and she again narrated the entire incident to her mother. As this witness was declared hostile witness, she was subjected to cross-examination by learned Public Prosecutor. In her cross-examination, this witness denied that she had given any statement to the police which was on record as Ext. PW2/A. She admitted the suggestion that name of her Dada was Kashmir Singh. She also admitted the suggestion that her Dada Kashmir Singh had seen the persons who molested her running away from the spot. She also admitted the suggestion that qua the said incident a compromise had been arrived at between the accused and her father. She also admitted the suggestion that she was not deposing against the accused in lieu of the compromise so entered into with the accused by her father.

12. Kashmir Singh entered the witness box as PW-3 and he deposed that on the fateful day between 04.30 P.M. and 04.45 P.M. when he was grazing his cattle, prosecutrix, whose name he did not know, came and when he saw the prosecutrix, he asked her whether she had been molested by two boys who had just run away, on which the prosecutrix came to him crying but told nothing. This witness was also declared as hostile and was subjected to cross-examination by learned Public Prosecutor. In his cross-examination, this witness admitted that two boys whom he had seen running away on the motorcycle on the fateful day were the accused. He also admitted the suggestion that accused Suresh Kumar was the pillion rider, whereas accused Kamal was driving the same. He also admitted the suggestion that the girl had approached him on the fateful day and when she came to him, she was crying. He further admitted in his cross-examination that Suresh was son of Brahma and was known to him.

13. Neelam Devi i.e. sister-in-law of Asha Devi, who entered the witness box as PW-4, deposed in the Court that on the fateful day when she was returning from the jungle after cutting the grass, she met the prosecutrix on the road who was alone and the prosecutrix told her that two boys had molested her but the prosecutrix did not reveal her the conduct of the boys and thereafter, she took the prosecutrix to her mother. This witness was also declared as hostile witness.

14. Mother of the prosecutrix Smt. Savitri Devi entered the witness box as PW-1 and in her cross-examination, she deposed that on 29.09.2007, prosecutrix came to her in the jungle where she was cutting the grass at around 04.45 P.M. alongiwth her daughter-in-law Neelam and she was crying and the prosecutrix told her that two boys had molested her. This witness also stated that the prosecutrix had informed her that one of the molester was Suresh and she was not aware of the name of other person. She further deposed that the prosecutrix had told her that Kashmir Singh had met her in the jungle and when Kashmir Singh came those

two boys ran away. It has further come in her examination-in-chief that the prosecutrix had told her that Suresh Kumar had caught hold of her and the other boy had embraced her and Suresh Kumar had also kissed her. This witness further deposed that after her daughter narrated the entire incident to her she contacted the Pradhan, who asked her to go to the police in the morning and thereafter in the morning they went to the police and reported the matter. She further deposed that the name of the accused was Suresh alias Chuha and whereas the name of the other accused was Kamal Kishore. This witness was subjected to cross-examination by the defence but nothing could be elucidated by the defence from her testimony to impeach the credibility of this witness. It is also relevant to take note of the fact that statement of PW-1 Savitri Devi was recorded on 13.08.2008 and on the request of learned Additional Public Prosecutor, proceedings were conducted in camera, whereas the statements of the prosecutrix Asha Devi, PW-3 Kashmir Singh, PW-4 Neelam Devi, was recorded on 02.01.2009 and that of PW-5 Kashmiri Devi was recorded on 16.02.2009.

15. Pradhan Kashmiri Devi who entered the witness box as PW-5, stated that on the fateful day between 08.00-09.00 P.M., she had received a telephone call from Savitri Devi that her daughter had been molested by two boys of the village i.e. Suresh and his friend and she advised them that application in this regard should be moved in the morning and on the next day i.e. on 30th prosecutrix came alongwith her mother and two other persons, who gave her an application and she handed over the same to the police.

16. Now a perusal of the statements of the above witnesses demonstrates that PW-1 i.e. mother of the prosecutrix and PW-5 Kashmiri Devi, i.e. Pradhan have fully corroborated the case of the prosecution. In this background, when one peruses the statements of the prosecutrix i.e. PW-2 and that of Kashmir Singh PW-3, it is apparent and evident that these witnesses have falsely deposed in the Court to protect the accused. Whereas, prosecutrix in her examination-in-chief had stated that she was not aware of the name of the persons who molested her or name of her Dada Ji, who reached the spot. However, in her cross-examination, she admitted the suggestion that name of her Dada Ji was Kashmir Singh and that PW-3 had seen the boys, who had molested her running away on the motorcycle. She also admitted in her cross-examination that she was not deposing against the accused in the Court in view of the compromise which had been arrived in between the accused and her father. Similarly, PW-3 in his cross-examination admitted that the persons whom he saw running away on the motorcycle were the accused and he had also admitted in his cross-examination that the prosecutrix had approached him on the fateful day and informed him that she had been molested by two boys who were riding a motorcycle.

17. All these factors when taken up together lead to only conclusion that on the basis of material on record it stood established beyond reasonable doubt that on the fateful day, the prosecutrix was in deed molested by the accused. Therefore, the findings returned to this effect by the Courts below while convicting the accused for commission of offences punishable under Sections 341 and 354 read with Section 34 of Indian Penal Code are duly borne out from the record of the case and it cannot be said that these findings are either perverse or not substantiated from the material on record placed by the prosecution.

18. As far as the contention of learned counsel for the petitioners to the effect that the conviction of the accused was not sustainable as prosecution witnesses had turned hostile, it is settled law that simply because a witness has turned hostile, this does not mean that entire testimony of this witness has to be over looked and that part of the statement of such witness which supports the case of the prosecution can always be looked into by the Court. Another contention raised by learned counsel for the petitioner that the entire incriminating material was not put to the accused persons under Section 313 Cr.P.C. i.e. so called compromise entered into between the father of the prosecutrix and them, is also without any merit. This is for the reason that the compromise entered into between the father of the prosecutrix and the accused was not an incriminating material used against the petitioners by the prosecution to convict them but this is a suggestion which was put by the prosecution to the prosecutrix in the

course of her cross-examination when the prosecutrix resiled from her previous statement. Furthermore, this suggestion was specifically put to the prosecutrix who in answer to the same deposed in the Court of law that she was not willing to depose against the accused in lieu of a compromise entered into between her father and the accused.

19. Therefore, in view of the above discussion, in my considered view, neither learned trial Court has erred in convicting the accused for commission of offences with which they were charged nor learned Appellate Court has erred in upholding the said judgment of conviction. Therefore, as there is no merit in the present revision petitions, the same are accordingly dismissed. Miscellaneous applications pending, if any, stand disposed of.

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

Shri Moti Ram .....Appellant.

Vs.

Shri Ses Ram and others .....Respondents.

RSA No.: 575 of 2006
Reserved on: 01.03.2017
Date of Decision: 22.03.2017

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit pleading that he had purchased the suit land from N- defendants started fencing the suit land without any right to do so – matter was reported to police and demarcation was conducted – a boundary wall was put on the suit land but the defendants are interfering with the possession of the plaintiff by removing the retaining wall – the suit was opposed by filing a written statement pleading that plaintiff was not in possession – the suit was dismissed by the Trial Court after holding that the plaintiff had failed to prove his possession- an appeal was filed, which was dismissed- held in second appeal that no demarcation report was placed on record- no application for appointment of Local Commissioner was filed and there was no necessity to conduct a fresh demarcation- additional evidence cannot be led as the documents were in the knowledge of the plaintiff - the application was filed to fill up the lacuna – appeal dismissed. (Para- 11 to 29)

Cases referred:

Lekhraj Bansal Vs. State of Rajasthan and another (2014) 15 Supreme Court Cases 686
State of Karnataka and another Vs. K.C. Subramanya and others (2014) 13 SCC 468
A. Andisamy Chettiar Vs. A. Subburaj Chettiar, AIR 2016 Supreme Court 79
N. Kamalam (dead) and another Vs. Ayyasamy and another (2001) 7 SCC 503

For the appellant/applicant: Mr. Sanjeev Kuthiala, Advocate.
For the respondents/ non-applicants: Mr. Ajay Kumar, Senior Advocate, with Mr. Dheeraj K. Vashisht, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge :

By way of this appeal, appellant/plaintiff has challenged the judgment and decree passed by the Court of learned Additional District Judge, Fast Track Court, Kullu in Civil Appeal No. 13 of 2005 as well as the judgment and decree passed by the Court of learned Civil Judge (Junior Division), Manali, District Kullu in Civil Suit No. 35/2003-93 of 2004, vide which

learned trial Court dismissed the suit for permanent injunction filed by the present appellant and the learned appellate Court upheld the judgment and decree so passed by the learned trial Court.

2. The present appeal was admitted by this Court on 06.07.2007 on the following substantial questions of law:

> *"1. Whether the learned first appellate Court while entertaining a doubt about the correctness of demarcation and the report, had erred in not exercising its discretion in allowing the application under Order 26 Rule 9 CPC for appointment of a Local Commissioner to determine the lis inter se the parties and whether the said application could be rejected in the judgment while holding the previous demarcation bad without ordering for a fresh one?*
>
> *2. Whether once the learned District Judge had entertained a doubt about the correctness of the report, it was incumbent to have appointed Local Commissioner to demarcate the disputed area instead of proceeding to dismiss the suit, when the plaintiff had proved his case, and whether such impugned judgment and decree is sustainable in law?"*

3. Brief facts necessary for the adjudication of the present case are that the appellant/plaintiff (hereinafter referred to as 'the plaintiff") filed a suit against the respondents/defendants (hereinafter referred to as 'the defendants') for permanent prohibitory injunction on the grounds that plaintiff had purchased land measuring 0-0-5 bighas from one Norbu Ram, comprised in Khasra No. 1044/2, Khatauni No. 114 min/360 to the extent of 5/1198 shares in Phati and Kothi Bajaura, situated at village Sharabai Phati and Kothi Bajaura, Tehsil and District Kullu vide registered sale deed No. 535, dated 17.04.2003 and in fact the suit land stood handed over by Norbu Ram to the plaintiff even before the execution of the sale deed and the plaintiff was in continuous possession of the suit land with the consent of said Norbu. It was further the case of the plaintiff that on 09.04.2003, defendants with an ulterior motive and dishonest intention came with a group of 20 to 25 persons and started fencing the suit land without any right or title. The matter was reported to the police and police visited the spot and instructed the parties not to interfere over the suit land till the demarcation of the same was duly carried out. Further, as per the plaintiff, Tehsildar Kullu was requested by the police on 16.04.2003 and Patwari and Kanoongo accordingly came on the spot on 22.4.2003 and demarcated the land in the presence of plaintiff and defendants as well as in the presence of members of Panchayat and police. As per the plaintiff, the suit land was found to be of Norbu Ram, qua which subsequently sale deed stood executed in his favour. It was further the case of the plaintiff that defendants were never in possession over the suit land and that the plaintiff after demarcation had put the boundary wall on the suit land, but despite this, defendants had started interfering in the possession of the plaintiff by removing the retaining wall partly and by taking up quarrel with the plaintiff as well as with his wife. As per the plaintiff, the cause of action arose in his favour on 27.04.2003 when defendants forcibly tried to remove the retaining wall which stood constructed by the plaintiff and on these bases, the plaintiff filed the abovementioned suit praying for the following relief:

> *"It is, therefore, respectfully prayed that a decree for permanent prohibitory injunction may kindly be passed in favour of the plaintiff and against the defendants, restraining the defendants from interfering in the suit land by themselves or through their agents servants or relatives in any manner. Any other relief which this Hon'ble Court deems fit may also be granted in favouf of the plaintiff and against the defendants in the interest of justice."*

4. The suit of the plaintiff was contested by the defendants, who by way of their written statement even denied the factum of the plaintiff being owner or being in possession of the suit land. As per the defendants, the suit land which initially comprised of Khasra No. 1044 was owned by several owners and the same was in possession of Shri Jayoti Parshad etc. Land measuring 4-2-0 bighas of the suit land was sold in favour of Nurbu, Panchi Ram, Tashi Dawa, Bhagwan Dass and Tashi Angrop. On account of there being National Highway 21 on the Western

side of the suit land, part of Khasra No.1044 bearing Shikmi, Khasra No. 1044/1 measuring 1-2-2 bighas alongwith houses and trees was acquired for the purpose of widening the said National Highway vide Notification dated 04.08.1986 and award qua the acquisition of the same was also passed on 27.01.1988 and compensation amount of Rs. 1,99,837/- was paid to S/Sh. Nurbu, Panchi Ram, Tashi Dawa, Bhagwan Dass and Tashi Angroop. Further, as per defendants, after acquisition of the said land, the aforesaid owners were left with only 2-19-18 bighas of land in Shikmi Khasra No. 1044/2 and they sold the same in favour of 12 persons, who constructed 11 houses over Shikmi Khasra numbers and there was no land left vacant over the same. Further as per the defendants, towards the Southern eastern side of the suit land, there was Khasra No. 1047, which was a site for Gharat and Khasra No. 1045, on which Kuhal for the said Gharat existed, which were possessed by Shri Chamaru as tenant at will , who became owner of the same by way of operation of Himachal Pradesh Tenancy and Land Reforms Act. It was further mentioned in the written statement that the estate of Chamaru was inherited by his daughter's sons as per Will dated 28.09.1990 and after the death of Narinder Kumar, one of the sons of his daughter, the estate of Narinder Kumar was inherited by his widow Savitri Devi. It was further mentioned in the written statement that there was another Gharat over Khasra No. 1046 and its Kuhal was on Khasra No. 1041 towards the Eastern side of Khasra No. 1047 and Chamaru was also sub tenant and after his death, his grand sons became sub tenants and approach to Khasra No. 1047 and 1046 was through Khasra No. 1044 and after acquisition of aforesaid Khasra No. 1044/1, now there was a direct approach to Khasra Nos. 1047 and 1046 through National Highway 21 and thus, there was no vacant land in between Khasra No. 1047 and acquired Khasra No. 1044/1. It was also mentioned in the written statement that on the basis of a false report lodged by the plaintiff, the police party as well as Patwari, Kanungo and Panchayat members had visited the spot and after demarcation, they advised the plaintiff not to cause any unlawful interference over the peaceful possession of defendants over the aforesaid Gharat and its approach through National Highway 21. On these bases, the suit of the plaintiff was resisted by the defendants.

5. On the basis of pleadings of the parties, learned trial Court framed the following issues:

"1. Whether the plaintiff is entitled for the relief of injunction, as prayed for? OPP.

2. Whether suit of plaintiff is not maintainable in the present form? OPD.

3. Whether the plaintiff is stopped from filing the present suit by his act and conduct? OPD.

4. Relief.

6. On the basis of evidence adduced by the respective parties in support of their respective claims, the following findings were returned by learned trial Court on the issues so framed:

"Issue No. 1:	*No.*
Issue No. 2:	*Yes.*
Issue No. 3:	*No.*
Relief:	*The suit is dismissed per operative part of the judgment.*

7. Learned trial Court on the basis of evidence on record concluded that plaintiff had failed to prove his possession over the suit land as on 09.04.2003, when as per the plaintiff, defendants interfered over the suit land. Learned trial Court also held that plaintiff had failed to prove that any cause of action had accrued in his favour as was set up by him in the plaint. On these bases, learned trial Court dismissed the suit of the plaintiff. While arriving at the said conclusion, it was held by the learned trial Court that as per the case put forth by the plaintiff, defendants caused interference on the suit land for the first time on 9th April, 2003 on which

date, he was in possession of the suit land. As per plaintiff, suit land was purchased by him on 17.04.2003, however before that he was in possession of the same with the consent of owner of the land. Learned trial Court held that plaintiff had failed to prove on record his possessory title over the suit land as on 09.04.2003 either by way of examining its owner Nurbu or any other co-sharer, who could have stated that in fact it was the plaintiff who was in possession of the suit land as on 09.04.2003 and further plaintiff had also failed to prove that cause of action accrued in his favour after demarcation was carried out by revenue authorities on 22.04.2003, in view of the fact that plaintiff himself had categorically stated in his statement that defendants damaged his *danga* on 17.04.2003, but said damage was not caused by the defendants in his presence. On these bases, it was held by the learned trial Court that no *danga* was existing on 17.04.2003, as averred in para 3 of the plaint by the plaintiff, in view of the fact that plaintiff himself had deposed that he had put the boundry wall by way of constructing a retaining wall and boundry wall on the suit land after demarcation of the suit land which was carried out on 22.04.2003. Learned trial Court also held that plaintiff had admitted in his statement that there stood 11 houses on Khasra No. 1044/02, which covered this entire Khasra number and this included his house also which was constructed 14-15 years back. Learned trial Court also held that the plaintiff had admitted that Khasra No. 1047, which was in possession of defendants was abutting National Highway which was existing on Khasra No. 1044/1 and thus, there was no question of interference by defendant over the land comprised in Khasra No. 1044/2, as defendants had direct approach to their Gharat and land from the National Highway. On these bases, learned trial Court dismissed the suit so filed by the plaintiff.

8. In appeal, learned trial Court while upholding the judgment and decree passed by the learned trial Court held that taking into consideration the fact that relief of injunction was a discretionary relief, parties have to approach the Court with clean hands and a party which suppresses material facts, is not entitled for discretionary relief of injunction. Learned appellate Court further held that plaintiff had withheld material facts from the Court and neither the officer who carried out the demarcation was examined nor any demarcation report was placed on record and in the absence of same, it was difficult to infer that defendants had raised any construction over the suit land by removing *danga.* Learned appellate Court further held that PW-1 Moti Ram had admitted in the course of his cross-examination that on Khasra No. 1044/2, 11 houses stood constructed and there was nothing on record to suggest that either suit land was lying vacant on the spot or the said piece of land was exclusively in the ownership and possession of the plaintiff. Learned appellate Court also held that the identity of the land was also not established in view of the fact that the suit land was joint and it was concluded by the learned appellate Court that it could safely be said that the plaintiff had not been able to establish on record that there was any interference on the suit land at the behest of defendants. On these bases, learned appellate Court dismissed the appeal.

9. Feeling aggrieved by the judgments and decrees so passed by both the learned Courts below, the plaintiff has filed this appeal.

10. I have heard the learned counsel for the parties and have also gone through the records of the case as well as the judgments and decrees passed by both the learned Courts below.

11. I will deal with both the substantial questions of law on which the appeal was admitted, independently.

Substantial Question of Law No. 1:

> "*Whether the learned first appellate Court while entertaining a doubt about the correctness of demarcation and the report, had erred in not exercising its discretion in allowing the application under Order 26 Rule 9 CPC for appointment of a Local Commissioner to determine the lis inter se the parties and whether the said application could be rejected in the judgment while holding the previous demarcation bad without ordering for a fresh one?*"

12. In the present case, there was no demarcation report placed on record by the plaintiff. This is evident from the findings returned in this regard by the learned first appellate Court in para 14 of its judgment, wherein it has been held by the learned trial Court that no demarcation report was placed before the Court by the appellant. The finding so returned by the learned appellate Court is not a perverse finding, because a perusal of exhibits on records demonstrate that no demarcation report was placed on record by the plaintiff. During the course of arguments, learned counsel appearing for the appellant could not satisfy the Court as to how this substantial question of law arose from either the facts of the case or from the adjudications made by both the Courts below. Therefore, in view of the fact that there was no demarcation report on record, there was no question of learned first appellate Court entertaining any doubt about the correctness of any demarcation report. Therefore, in this view of the matter, the substantial question of law is misleading.

13. Now coming to the issue as to whether the learned appellate Court erred in not exercising its discretion in allowing the application under Order 26 Rule 9 of the Code of Civil Procedure for appointment of Local Commissioner "while holding the previous demarcation bad is concerned", the mode and manner in which the said part of the substantial question of law has been framed, the same is also misleading. This is for the reason that as per record, no application under Order 26 Rule 9 of the Code of Civil Procedure for appointment of Local Commissioner was ever filed by the plaintiff before the learned appellate Court. Thus, when no such application was filed, there was no question of learned appellate Court allowing or disallowing the same. Further, as I have already held above, there is no observation or finding returned by the learned appellate Court that "previous demarcation" was bad as is being tried to be demonstrated by the plaintiff. What learned appellate Court held was that plaintiff never placed any demarcation report on record. The factum of no such application under Order 26 Rule 9 of the Code of Civil Procedure having been filed before the learned appellate Court is also evident from the grounds of appeal as have been mentioned in this Regular Second Appeal, in which it is mentioned that learned Courts below erred in not *"suo moto"* appointing the Local Commissioner to have the suit land demarcated. Therefore, in view of the discussion held above, I hold that the said substantial question of law as framed is misleading and in fact not borne out from either the records of the case or from the adjudications made by both the learned Courts below, as neither plaintiff had placed any demarcation report on record which was disbelieved by the learned Courts below nor any application was filed under Order 26 Rule 9 of the Code of Civil Procedure for appointment of Local Commissioner, which was disallowed by the learned appellate Court. This substantial question of law is answered accordingly.

Substantial Question of Law No. 2:

> *"Whether once the learned District Judge had entertained a doubt about the correctness of the report, it was incumbent to have appointed Local Commissioner to demarcate the disputed area instead of proceeding to dismiss the suit, when the plaintiff had proved his case, and whether such impugned judgment and decree is sustainable in law?"*

14. This substantial question of law in fact is nothing but an extension of the first substantial question of law, which has already been answered by me above. The present substantial question of law is also misleading and not borne out from the records of the case and from the adjudications made by both the learned Courts below, because as I have already held above, as there was no demarcation report on record placed by the plaintiff, there was no occasion for the learned appellate Court to have had entertained any doubt over the same nor learned appellate Court has entertained any doubt about the correctness of the report. In this view of the matter, the present substantial question of law is misleading because it is not as if learned appellate Court went on to adjudicate upon the matter after disbelieving one demarcation report and thereafter not calling upon for another demarcation report to be filed after having the land demarcated. Accordingly, this substantial question of law is answered in above terms.

15. Therefore, in view of the discussion held above, as there is no merit in the present appeal, the same is dismissed with costs and the judgment and decree passed by the learned appellate Court in Civil Appeal No. 13 of 2005, dated 19.10.2006 and the judgment and decree passed by the learned Civil Judge (Junior Division), Manali in Civil Suit No. 35 of 2003-93 of 2004, dated 10.01.2005 are upheld.

CMP No. 1043 of 2006

16. By way of this application, the appellant/applicant has prayed that additional evidence appended with the present application, i.e. copy of sale deed dated 17.04.2003, copy of demarcation report conducted by the revenue agency at the behest of police, be taken on record.

17. Vide order dated 06.07.2007, the said application was ordered to be heard with the main appeal and the same was accordingly heard with the main appeal.

18. Reason given in the application as to why the documents which are now intended to be placed on record were not initially produced either before the learned trial Court or before the learned first appellate Court, is that inadvertently the same could not be exhibited due to the reason that the demarcation report had not been supplied by police authorities to the applicant. There is no murmur in the application as to why certified copy of sale deed was not previously exhibited either before the learned trial Court or before the learned appellate Court.

19. In ***Lekhraj Bansal*** Vs. ***State of Rajasthan and another*** (2014) 15 Supreme Court Cases 686 has categorically held that parties to an appeal shall not be entitled to produce additional evidence in appellate Court unless conditions stipulated under Order 41 Rule 27 of the Code of Civil Procedure are satisfied.

20. Now, as per the provisions of Order 41 Rule 27 of the Code of Civil Procedure, parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the appellate Court, until and unless the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted or the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not even after exercise of due diligence could be produced by him at the time when the decree was passed or if the appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment or for any other substantial cause.

21. In the present case, the additional evidence which the plaintiff intends to produce on record is not required by this Court for the purpose of adjudication of the case. Incidentally, it is not the case of the plaintiff that either of the learned Courts below refused to admit the evidence which is now intended to be produced by way of the present application. Not only this, it is not the case of the plaintiff that the said documents were not in his knowledge or despite due diligence, he could not produce them earlier. In fact, in my considered view, there is no cogent explanation as to why these two documents, which were well within the knowledge of the appellant/applicant, and which facts demonstrate, were also in his possession, were not produced before the learned Courts below. The feeble attempt made in the application to explain as to why the demarcation report was not earlier produced before the learned Courts below, does not inspire any confidence. Not even a whisper is there as to why the sale deed was not produced before the learned Courts below. Therefore, filing of the present application is nothing but an attempt to place on record those documents which the plaintiff has omitted to do so and to fill up lacunae and the appellant has failed to satisfy any of the conditions stipulated under Order 41 Rule 27 of the Code of Civil Procedure and, therefore, in my considered view, he is not entitled to produce additional evidence.

22. In ***State of Karnataka and another*** Vs. ***K.C. Subramanya and others*** (2014) 13 Supreme Court Cases 468, the Hon'ble Supreme Court has held that additional evidence can be permitted only if the evidence sought to be produced could not be produced at the stage of trial in spite of exercise of due diligence and the evidence could not be produced as it was not within the knowledge of the parties. Hon'ble Supreme Court went on to hold that there are conditions

precedent before allowing a party to adduce additional evidence at the stage of appeal, which specifically incorporates conditions to the effect that the party in spite of due diligence could not produce the evidence and the same cannot be allowed to be done at his leisure or sweet will.

23. The Hon'ble Supreme Court in ***A. Andisamy Chettiar*** Vs. ***A. Subburaj Chettiar***, AIR 2016 Supreme Court 79 has held as under:

> *"Under the scheme of Code of Civil Procedure, 1908 (for short "the Code") whether oral or documentary, it is the trial court before whom parties are required to adduce their evidence. But in three exceptional circumstances additional evidence can be adduced before the appellate court, as provided under S. 107(1)(d) read with Rule 27 of Order XLI of the Code. Rule 27 of Order XLI reads as under: -*
>
> *"27. Production of additional evidence in Appellate Court. – (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if –*
>
> *(a) The Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or*
>
> *(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or*
>
> *(b) The Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, The Appellate Court may allow such evidence or document to be produced, or witness to be examined.*
>
> *(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission."*
>
> *(emphasis supplied)*
>
> *From the opening words of sub-rule (1) of Rule 27, quoted above, it is clear that the parties are not entitled to produce additional evidence whether oral or documentary in the appellate court, but for the three situations mentioned above. The parties are not allowed to fill the lacunae at the appellate stage. It is against the spirit of the Code to allow a party to adduce additional evidence without fulfillment of either of the three conditions mentioned in Rule 27. In the case at hand, no application was moved before the trial court seeking scientific examination of the document (Ex.A-4), nor can it be said that the plaintiff with due diligence could not have moved such an application to get proved the documents relied upon by him. Now it is to be seen whether the third condition, i.e. one contained in clause (b) of sub-rule (1) of Rule 27 is fulfilled or not.*
>
> *In K.R. Mohan Reddy Vs. Net Work Inc., this Court has held as under:-*
>
> *"19. Appellate Court should not pass an order so as to patch up the weakness of the evidence of the unsuccessful party before the trial Court, but it will be different if the Court itself require the evidence to do justice between the parties. The ability to pronounce judgment is to be understood as the ability to pronounce judgment satisfactorily to the mind of the Court. But mere difficulty is not sufficient to issue such direction……."*
>
> *In North Eastern Railway Admn. Vs. Bhagwan Das, this Court observed thus:-*
>
> *"13. Though the general rule is that ordinarily the appellate court should not travel outside the record of the lower court and additional evidence, whether oral or documentary is not admitted but Section 107 C.P.C., which carves out an exception to the general rule, enables an appellate court to take additional evidence or to*

require such evidence to be taken subject to such conditions and limitations as may be prescribed. These conditions are prescribed under Order 41 Rule 27 C.P.C. Nevertheless, the additional evidence can be admitted only when the circumstances as stipulated in the said rule are found to exist……"

In Union of India Vs. Ibrahim Uddin and another, this Court has held as under:

"49. An application under Order 41 Rule 27 CPC is to be considered at the time of hearing of appeal on merits so as to find out whether the documents and/or the evidence sought to be adduced have any relevance/bearing on the issues involved. The admissibility of additional evidence does not depend upon the relevancy to the issue on hand, or on the fact, whether the applicant had an opportunity for adducing such evidence at an earlier stage or not, but it depends upon whether or not the appellate Court requires the evidence sought to be adduced to enable it to pronounce judgment or for any other substantial cause. The true test, therefore is, whether the appellate Court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced……."

24. In ***N. Kamalam (dead) and another*** Vs. ***Ayyasamy and another*** (2001) 7 SCC 503, the Hon'ble Supreme Court while interpreting Rule 27 of Order XLI of the Code of Civil Procedure, has observed in para 19 as under:-

".…….the provisions of Order 41 Rule 27 has not been engrafted in the Code so as to patch up the weak points in the case and to fill up the omission in the Court of Appeal - It does not authorise any lacunae or gaps in evidence to be filled up. The authority and jurisdiction as conferred on to the Appellate Court to let in fresh evidence is restricted to the purpose of pronouncement of judgment in a particular way."

25. Coming to the facts of the present case, as I have already held above, the documents intended to be produced by way of additional evidence are not required by this Court to pronounce judgment, as this Court is in a position to pronounce judgment even without taking into consideration the additional evidence sought to be adduced.

26. Therefore, in the light of discussion held above and the ratio of judgments cited above, there is no merit in the present application and the same is accordingly dismissed.

CMP No. 1042 of 2006

27. By way of this application, appellant/applicant has prayed for appointment of a Local Commissioner for the purpose of local investigation and demarcation of the land subject matter of the present appeal.

28. Rule 9 of Order 26 of the Code of Civil Procedure envisages that in any suit in which the Court deems a local investigation to be requisite or proper for the purpose elucidating any matter in dispute etc., the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court.

29. Having heard learned counsel for the parties and after having gone through the records of the case as well the judgments passed by both the learned Courts below, in the facts and circumstances of the case, this Court does not deem it fit to have a Local Commissioner appointed for demarcation of the suit land, as has been prayed for by the appellant/applicant. Why the demarcation carried out before the institution of the suit was not exhibited by the appellant/applicant before the learned trial Court, has not been satisfactorily explained by him. Why no such application was filed either before the learned trial Court or before the learned appellate Court, has also not been satisfactorily explained by the appellant/applicant. Not only this, misleading substantial questions of law were framed so as to give an impression as if there was a demarcation report on record and learned appellate Court despite expressing its doubts

over the correctness of the same, failed to appoint a fresh Local Commissioner for the purpose of demarcating the suit land. Even otherwise, application under Order 26 Rule 9 of the Code of Civil Procedure is not to be allowed at the whims of the parties. Satisfaction has to be that of the Court and though the said satisfaction of the Court can also not be arbitrary, but then there has to be cogent material on record placed by the applicant to satisfy the Court that appointment of Local Commissioner is necessary for the adjudication of lis before it. In the present case, in my considered view, material on record is sufficient for the purpose of adjudication of the appeal and no report of Local Commissioner is required for the purpose of adjudication of the present appeal. Further, in my considered view, none of the issue arising in the present case, involve any scientific investigation.

30. Therefore, in view of the discussion held above, as there is no merit in the present application, the same is dismissed.

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

Pawan Kumar ... Petitioner

Versus

Himachal Pradesh State Electricity Board through its Secretary & Anr. ... Respondents

CWP No. 847 of 2011 alongwith
CWP No. 848 of 2011
Date of decision: 22.03.2017

Industrial Disputes Act, 1947- Section 25- Claimants pleaded that they were continuously working with the respondent from April, 1990- their services were terminated on 1.7.2001 – a reference was sought, which was answered in negative – held, that the respondent had taken a plea that workmen had abandoned their job voluntarily- however, this plea was never accepted by the Court – hence, writ petition allowed and the case remanded to the Labour Court for a fresh decision. (Para-11 to 14)

For the petitioner: Mr. Rakesh Manta, Advocate, in both the petitions.
For the respondents: Mr. Vivek Sharma, Advocate, in both the petitions.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J. (Oral):

By way of these two writ petitions, which have been filed against the award passed by learned Presiding Judge, Industrial Tribunal-cum-Labour Court, Shimla, in Reference No. 84 of 2005, decided on 13.07.2009, the petitioners herein have challenged the same as Reference petition has been answered by learned Labour Court against the petitioners/workmen.

2. Brief facts necessary for the adjudication of both the petitions are that the following Reference was received for the purpose of adjudication by learned Labour Court:-

> "Whether the termination of the services of
>
> 1. Shri Pawan Kumar S/O Shri Baldev Singh 2. Beer Singh S/O Shri Baldev Singh 3. Shri Heera Pal S/O Shri Ram Saran and Shri Raj Kumar S/O Shri Mullu Ram workmen by the Executive Engineer, HPSEB Electrical Division Parwanoo, District Solan w.e.f. 20.8.1999, 20.8.1999, 20.12.1999 and 20.2.2000 without complying the provisions of Industrial Disputes Act, 1947 is proper and justified? If not, what relief

of service benefits and amount of compensation, the above aggrieved workmen are entitled to?"

3. As per the claim putforth by the claimants before learned Labour Court, they were continuously working as workmen with the respondent Board from April, 1990 at Barotiwala and Baddi Electrical Station in Operation Section, however, their services were illegally terminated on 01.07.2001 by making them believe that as new muster roll had not been received by the concerned Sub Division for the month of July, 2001, therefore, the workmen need not to come on duty on 01.07.2001 and the workmen shall be called for duty as and when new muster rolls are received. It was further the contention of the workmen that as they had been working since year 1990 and had completed more than 240 days in each calendar year and further that as they had completed more than 240 days in the preceding 12 months from the date on which date their services were illegally terminated, therefore, their termination was in violation of the statutory provisions of the Industrial Disputes Act.

4. The claim so putforth by the claimants was contested by the respondent Board inter alia on the ground that the services of the workmen were not terminated as alleged. According to the respondent Board, the workmen in fact had voluntarily abandoned their jobs. It was further the case of the respondent Board that the date of initial engagement of the workmen was also not correctly stated by them and the correct dates of their engagements were as under:-

Pawan Kumar	:	26.01.1991
Beer Singh	:	01.04.1990
Raj Kumar	:	26.05.1990

and the date on which they voluntarily abandoned their jobs was 21.08.1999, as far as Pawan Kumar and Beer Singh were concerned and 21.02.2000 as far as Raj Kumar was concerned.

5. It was further the case of the respondent Board that even otherwise the workmen were not entitled to any relief as they had not completed more than 240 days either in any calendar year or in the preceding 12 months from the date when they had voluntarily abandoned their jobs.

6. On the basis of the pleadings of the parties, learned Labour Court framed the following issues:-

1. Whether the services of the petitioners were illegally terminated by the respondent without complying with the provisions of Industrial Disputes Act, 1947? If so, its effect? .... OPP
2. If issue no. 1 is proved in affirmative, to what relief, he petitioners are entitled to? ... OPP
3. Whether the petition in the present form is not maintainable as the petitioners have no cause of action? ... OPR
4. Whether the petition is barred by limitation? ... OPR
5. Relief.

7. On the basis of evidence produced on record by the respective parties, the issues so framed by the learned Labour Court were answered as under:-

Issue No. 1	:	No.
Issue No. 2	:	Not entitled to any relief.
Issue No. 3	:	No.
Issue No. 4	:	No.
Relief:		Reference answered in negative per operative part of award.

8. Reference petition was accordingly dismissed by learned Labour Court.

9. Feeling aggrieved, Pawan Kujmar and Raj Kumar, have filed these petitions.

10. I have heard learned counsel for the parties and have also gone through the records of the case as well as the award passed by learned Labour Court.

11. A perusal of the award passed by learned Court below demonstrates that while deciding Issue No. 1 against the workmen and in favour of the respondent Board, what weighed with learned Labour Court was that the workmen were not able to prove that they had put in more than 240 days in the preceding 12 months from the date of the alleged termination of their services. On these basis, it was held by learned Labour Court that the workmen were not entitled to any service benefits as they had failed to prove that they had worked for 240 days in 12 months preceding their termination.

12. In my considered view, while arriving at the said conclusion, learned Labour Court has erred in not appreciating the stand taken by the respondent Board before learned Labour Court, which was that the workmen had voluntarily abandoned their jobs. In fact, Shri J.S. Rana, the then Assistant Executive Engineer, HPSEB, Sub Division Barotiwala, who deposed on behalf of the respondent Board as RW-1, stated in his examination-in-chief that the workmen had abandoned their jobs on their own and their services were not terminated. Though, he also deposed before learned Court below that none of the workmen had completed 240 working days in any calendar year preceding their termination but the fact of the matter still remains that the specific stand taken by the respondent Board that the workmen in fact voluntarily abandoned their jobs has not been adjudicated upon by learned Labour Court.

13. In my considered view, learned Labour Court ought to have returned findings on this point as to whether the contention of the respondent Board that the workmen had voluntarily abandoned their jobs stood proved by the respondent Board or not and in case, conclusion was to the contrary then the factum of workmen not having completed 240 days as on the date when their services were terminated was of no consequence in the facts of the present case. This is for the reason that if stood proved that workmen had not abandoned the job, then learned Labour Court was bound to return findings on the legality of the act of respondent Board of arbitrarily doing away with the services of petitioners.

14. Accordingly, in view of my findings returned above, these two writ petitions are allowed and the award passed by learned Labour Court in Reference No. 84 of 2005 decided on 13.07.2009 is set aside and the matter is remanded back to learned Labour Court to adjudicate upon the Reference afresh. It is jointly submitted by learned counsel representing the parties that as the matter is being remanded back, in the interest of justice, the claimants as well as respondent Board be given an opportunity to produce additional evidence in case so required. Accordingly, it is directed that in either the claimants/petitioners or the respondent Board make request before learned Labour Court to give them an opportunity to lead additional evidence then one opportunity be accordingly provided. Parties through their learned counsel are directed to appear before learned Labour Court on **17.04.2017**. Taking into consideration the fact that the Reference is of the year 2005, this Court hopes and expects that learned Labour Court shall adjudicate upon the Reference on or before 31.12.2017.

15. Petitions stand disposed of accordingly, so also the pending miscellaneous application(s), if any.

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

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

Cr. Appeal No. 90 of 2008
Decided on : 22.3.2017

Indian Penal Code, 1860- Section 279, 337 and 304-A- Accused was driving a tempo- he could not control the same and hit the bus coming from the opposite side – 4-5 passengers sustained injuries – one passenger succumbed to the injures- the accused was tried and acquitted by the Trial Court- held in appeal that the death was proved by post mortem report – prosecution version was proved by the prosecution witnesses – mere non-association of the passengers will not make the prosecution case doubtful – the Trial Court had relied upon the report of the mechanical expert but there is no evidence of any defect in the vehicle prior to the accident – the Trial Court had wrongly acquitted the accused – appeal allowed- judgment passed by the Trial Court set aside- accused convicted of the commission of offences punishable under Sections 279, 337 and 304-A of I.P.C. (Para-9 to 19)

For the Appellant: Mr. Vivek Singh Attri, Deputy Advocate General.
For the Respondent: Mr. Vivek Singh Thakur, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The instant appeal stands directed against the impugned judgment of 13.12.2007 rendered by the learned Chief Judicial Magistrate, Lahaul-Spiti at Kullu, in Criminal Case No. 10-I/2003, whereby the learned trial Court acquitted the respondent (for short "accused") for the offences charged.

2. Brief facts of the case are that on 23.8.2002 complainant Sh. Dhanwant Singh, was deployed as conductor in bus bearing registration No. HP34/7284 to cater Bhunter-Garagushaini. Shri Churamani was its driver. At about 11.45 a.m. the bus of the complainant was near village Kalheli when a tempo bearing No. HP 24-0427 arrived from the opposite side. The driver of the said tempo could not control his vehicle and hit the bus. In the collision which occurred inter-se the bus and tempo aforesaid, 4-5 passengers including one Gayatri Devi received injuries on their person. The Tempo went ahead and again hit against another Mini bus bearing registration No. HP 58-0429 and thereafter went off the road. The injured were shifted to District Hospital, Kullu for medical treatment where Gayatri Devi aforesaid died owing to the injuries sustained by her in the accident. Thereafter FIR was registered. 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. Notice of accusation stood put to the accused by the learned trial Court qua his committing offences punishable under Sections 279, 337 and 304-A of the Indian Penal Code to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 8 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 claimed innocence besides false implication. However, he did not choose to lead any evidence in defence.

5. On an appraisal of evidence on record, the learned trial Court returned findings of acquittal qua the accused.

6. The learned Deputy Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned trial Court standing not based on a proper appreciation of 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 standing replaced by findings of conviction.

7. The learned counsel appearing for the respondent/accused has with considerable force and vigor contended qua the findings of acquittal recorded by the Court below standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating 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 a collision which occurred inter-se tempo bearing registration No. HP 34-0427 driven by the accused vis-à-vis the bus bearing registration No. HP 34-7284 driven by PW-8 (Chura Mani), the passengers occupying the bus aforesaid suffered injuries. Gayatri Devi a passenger in the bus aforesaid driven by PW-8, suffered her demise, in sequel, to hers standing afflicted with injuries in the collision aforesaid. Post Mortem Report comprised in Ex. PW-4/D unveils qua the demise of aforesaid Gayatri Devi standing sequelled by a head injury leading to Cardio respiratory arrest.

10. In proof of the prosecution case, the prosecution had led into the witness box three eye witnesses to the occurrence, who respectively testified as PW-1 (Dhanwant Singh, PW-5 (Balbir Singh) and PW-8 (Shri Chura Mani).

11. PW-1 in his testification occurring in his examination-in-chief, has made underlinings qua the accused negligently besides rashly driving his vehicle whereafter he continued to testify qua the collision which occurred inter-se the vehicles aforesaid standing caused by a penally culpable negligence of the accused in driving his vehicle aforesaid. In his testification, he also proves Ex. PW-1/A to Ex.PW-1/D. However in his cross-examination, he has disclosed qua at the relevant time, his distributing tickets to the passengers occupying the bus whereupon he has proceeded to testify qua his thereupon standing incapacitated to depose with formidability qua the inculpable role in the relevant mishap of the driver of the bus or of the driver of the tempo. However, his testification occurring in his cross-examination though erodes the entire effect of the echoings made by him in his examination-in-chief wherein he has with utmost categoricality imputed penally inculpable negligence qua the accused, nonetheless his testification existing in his cross-examination appears to loose its apposite effect, in negating his testimony embodied in his examination-in-chief, significantly when he proves Ex. PW-1/D besides proves the occurrence of his signatures as a witness thereto. With PW-1 proving the aforesaid factum embodied in Ex.PW-1/D importantly the recital held therein qua the accused fleeing from the site of occurrence, also when the aforesaid factum stood not concerted to be belied by the learned defence counsel while holding him to cross-examination thereupon an inevitable sequel generates qua the defence acquiscising qua the accused fleeing from the site of occurrence whereupon it is befitting to conclude qua the aforesaid acquiescence making vivid portrayals qua the conduct of the accused, conduct whereof , is wholly inconsistent with his innocence.

12. The other ocular witness to the occurrence testified as PW-5. In his testification embodied in his examination-in-chief he has with utmost specificity purveyed succor to the prosecution case. His deposition comprised in his cross-examination does not hold any echoings qua his negating the effect of his deposition occurring in his examination-in-chief wherein he has emphatically pronounced qua the penally inculpable negligence of the accused.

13. Be that as it may PW-8 the driver of the bus bearing registration No. HP 34-7284 has in his examination-in-chief with intra-se corroboration vis-à-vis the testimonies embodied in the examinations-in-chief of PWs aforesaid ascribed therein a penally inculpable negligence vis-à-

vis the accused, nonetheless, he, in his cross-examination had denied the factum of the accused driving the offending vehicle, however thereupon no conclusion can stand formed qua the identity of the accused in manning the steering wheel of the offending vehicle standing ousted besides benumbed, significantly when

(a) PW-1 has voiced therein qua the accused fleeing from the site of occurrence whereupon it has to stand concluded qua his identifying the accused to be the person who was manning the driver seat of the offending vehicle.

(b) the aforesaid factum pronounced by PW-1 in his examination-in-chief standing not concerted to be shred of its efficacy by the learned defence counsel during the course of his holding him to cross-examination whereupon it is befitting to conclude qua the defence acquiscising to the factum aforesaid pronounced by PW-1 in his examination-in-chief

(c) PW-5 in his examination-in-chief has identified the accused present in Court to be the person who was manning the driver's seat of the offending vehicle. The aforesaid factum remained also un-concerted tobe belied by the learned defence counsel while subjecting him to cross examination thereupon the defence also acquiesces qua the accused manning the driver's seat of the offending vehicle.

14. In aftermath no conclusion can stand formed merely on the anvil of the testimony of PW-8 qua the prosecution failing to establish the prime factum of the accused driving the relevant vehicle.

15. The learned counsel for the accused has contended with force qua all the aforesaid ocular witnesses to the occurrence being interested witnesses arising from the factum of theirs respectively being the conductor, owner besides driver of the relevant bus thereupon their versions qua the occurrence warrants dis-imputation of credence thereon. However, the aforesaid factum whereupon the defence espouses qua theirs rendering a colored version qua the occurrence would hold vigor only when apposite suggestions stood put to the Investigating Officer by the learned defence counsel while holding him to cross examination holding echoings therewithin qua his holding a slanted and skewed investigation qua the occurrence. However the aforesaid suggestion stood not purveyed to him by the learned defence counsel while holding him to cross examination whereupon it is apt to conclude qua defence failing to establish qua the investigating officer holding a slanted besides a skewed investigation qua the occurrence, comprised in his associating only the driver, conductor and the owner of the relevant bus.

16. Moreover, though apparently the bus driven by PW-8 stood at the relevant time occupied by passengers, however none of the passengers of the bus driven by PW-8 stood associated by the investigating Officer in the apposite investigations conducted by him qua the occurrence thereupon the learned counsel for the respondent contends qua it being perse inferable therefrom qua the investigating Officer excluding eruption of un-interested evidence qua the occurrence, comprised in his recording the statements of the passengers who were aboard the bus aforesaid. However, the mere non-association in the relevant investigations, by the Investigating Officer, of passengers occupying the bus would not beget an inference qua the investigating Officer holding a skewed investigation qua the occurrence unless forthright evidence stood concerted to be adduced by the defence in portrayal of his exclusion to associate the passengers occupying the bus aforesaid spurring from his holding leanings qua the driver, conductor besides the owner of the bus aforesaid. The aforesaid evidence stood comprised in the apposite suggestions standing purveyed to the Investigating Officer concerned by the learned defence counsel, nonetheless no suggestion stood purveyed by the learned defence counsel to the investigating Officer concerned while holding him to cross-examination, holding unveilings qua the exclusion by him in the apposite investigations of passengers occupying the relevant bus, standing aroused by his holding leanings vis-à-vis the aforesaid nor any suggestion stood put to the investigating Officer by the learned defence counsel while subjecting him to cross-examination qua despite the passengers occupying the relevant bus entailing him to record their statements his yet refusing to record their statements.

17. Consequently when for reasons aforesaid, the proven conduct of the accused fleeing from the site of accident is inconsistent with his innocence also when for reasons aforesaid this Court places reliance upon the testimony of PWs 1,5 and 8, thereupon non-association in the relevant investigations, by the Investigating Officer, of passengers occupying the bus driven by PW-8, does hence withstand the test of his holding a fair investigation into the offences allegedly committed by the accused.

18. The learned trial Court had recorded findings of acquittal upon the accused on anvil of Ex. PW-2/B, wherewithin it stands articulated qua the front tyres of the offending vehicle standing afflicted with a burst, whereupon it concluded qua the penally inculpable negligence ascribed by the prosecution qua the accused standing enfeebled, contrarily the relevant mishap spurring from sudden eruption of mechanical defect(s) in the offending vehicle. However, any imputation of reliance upon Ex.PW-2/B by the learned trial Court, is wholly inapt, significantly when prior thereto, PW-2 in his report comprised in Ex.PW-2/A omitted to record the aforesaid factum, contrarily therein he had echoed qua no mechanical defect(s) standing detected thereat by him in the offending vehicle whereupon when, obviously PW-2/A stood prepared by PW-2 at a time contemporaneous to the occurrence of the mishap, it warranted imputation of credence thereto whereas PW-2/B prepared subsequently thereto holding a narration in contradiction thereto appears to stand blemished with taints of doctoring whereupon no reliance is imputable.

19. The crux of the above discussion is that the appeal is allowed and the impugned judgment rendered by the learned trial Court whereby it recorded findings of acquittal qua the accused stands reversed and set aside. Accordingly, the respondent/accused stands convicted for the offence(s) punishable under Sections 279,337 and 304-A of the Indian Penal Code. Let the accused/convict be produced on 17.4.2017 before this Court for his being heard on the quantum of sentence. Records of the learned trial Court be sent back forthwith.

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

Dr. V.P. Madhyak. .....Appellant.

Versus

Shri Inder Pal & others. .....Respondents.

RSA No. 595 of 2007
Reserved on: 14.03.2017
Decided on: 23.03.2017

Specific Relief Act, 1963- Section 34- Plaintiffs pleaded that they had purchased the suit land vide sale deed- defendant No.1 had also purchased adjacent plot and had constructed a four storeyed house on the land purchased by him – the stairs were constructed by defendant No.1 in the land purchased by the plaintiffs- plaintiffs requested the defendant No.1 to demolish the stairs but the defendant No.1 stated that the stairs could be used by both parties and did not remove the stairs – hence, the suit was filed for permanent prohibitory and mandatory injunction- the suit was decreed by the Trial Court- an appeal was filed by defendant No.1, which was dismissed- held in second appeal that demarcation report shows that stairs were raised in the land of the plaintiffs- the demarcation was conducted in accordance with law- the Courts had rightly decreed the suit – appeal dismissed.(Para-12 to 18)

For the appellant. Mr. R.K. Bawa, Sr. Advocate, with Mr. Jeevesh Sharma, Advocate.

For the respondents. Mr. Vaibhav Tanwar, Advocate, for respondents No. 1 & 2.
Mr. Hamender Chandel, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present regular second appeal has been maintained by the appellant/defendant No. 1 (hereinafter referred to as 'defendant No. 1') assailing the judgment and decree, dated 20.10.2006, of the learned District Judge, Shimla, H.P. passed in Civil Appeal No. 115-S/13 of 2005, upholding the judgment and decree, dated 01.10.2005, passed by learned Civil Judge (Senior Division) Court No. (II), Shimla, H.P., passed in Civil Suit No. 120-1 of 1999, whereby the suit of the plaintiffs/respondents No. 1 & 2 (hereinafter referred to as 'the plaintiffs') was decreed.

2. Brief facts giving rise to the present appeal are that the plaintiffs maintained a suit for permanent prohibitory and mandatory injunction against the respondents. The plaintiffs alleged that they are owners of land comprising in Khewat Khatauni No. 99/187, Khasra No. 340/297 (831 new), measuring 143.89 square meters, situate in Mauza Kanlog, Tehsil and District Shimla (hereinafter referred to as 'the suit land'). It was further averred by the plaintiffs that they had purchased the suit land vide sale deed No. 454, Book No. 1, dated 31.12.1994 from Smt. Lalita, Smt. Savita Kumari, Smt. Shobha Kumari, Shri Vipan, Shri Punit and Shiri Vaneet and Mutation No. 114, dated 23.12.1997, was entered in their favour. Defendant No. 1 also purchased adjacent plot, measuring 0.5 biswas, and he constructed a four storeyed building thereon. As per the plaintiffs, defendant No. 1 raised construction of his stairs on their land, thus the plaintiffs requested him to demolish the stairs, however, he asserted that the stairs would be used by both the parties. It was further alleged by the plaintiffs, that due to the construction of the stairs by defendant No. 1, their land became useless, unequal from all sides and house with proper alignment cannot be constructed thereon. It was alleged that the said stairs did not find mention in the map of defendant No. 1, which has been approved by defendant No. 2 (respondent No. 3 herein). As per the plaintiffs, defendant No. 1 did not remove the stairs, hence the present suit.

3. Defendant No. 1, by filing written statement, resisted and contested the claim of the plaintiffs. He took preliminary objections qua maintainability, estoppel and suppression of facts. On merits, defendant No. 1 denied the ownership of the plaintiffs. He contended that stairs have been built on his own land and in natural profile. No portion of the stairs falls in the suit land, thus the plaintiffs have no concern with the same. He further denied that no assurance qua use of the stairs had been given by him. As per defendant No. 1, the suit has been filed just to harass him.

4. Defendant No. 2 (respondent No. 3 herein), by way of filing the written statement, raised preliminary objection, viz., maintainability, cause of action and that the suit is bad for notice under Section 393 of the H.P.M.C. Act, 1994. On merits, it is contended that the spot was inspected by officials of defendant No. 2 and it transpired that stairs have been constructed in natural profile. Lastly, it has been contended that encroachment can only be ascertained in case the land is demarcated by the Revenue Agency and demarcation aspect is only between the plaintiffs and defendant No. 1 and defendant No. 2 has nothing to do with the same.

5. The plaintiffs, by way of filing replication, denied the contents of written statements and reiterated the averments made in the plaint.

6. The learned Trial Court on 16.04.2002 framed the following issues for determination and adjudication:

> *"1. Whether the plaintiffs are entitled to the relief of permanent prohibitory injunction and mandatory injunction against the defendants, as prayed for? OPP.*
>
> *2. Whether the suit is not maintainable? OPD*
>
> *3. Whether the plaintiffs are estopped to file the present suit? OPD-1*

4. *Whether the suit is bad for non service of notice under Section 392 of H.P.M.C. Act, 1994? OPD-2*

5. *Whether the plaintiffs have no cause of action? OPD-2*

6. *Relief."*

7. After deciding issue No. 1 in favour of the plaintiffs, issues No. 2 to 5 against the defendants, the suit of the plaintiffs was decreed. Subsequently, defendant No. 1 preferred an appeal before the learned Lower Appellate Court which was also dismissed. Hence the present regular second appeal, which was admitted for hearing on the following substantial questions of law:

"1. Whether the learned Courts below have committed serious illegality by not considering that the alleged demarcation report, Ex. PW-3/A, and the orders, Ex. PW-3/C passed by the Revenue Officer are in violation and dehors the provisions of Section 107 of the HP Land Revenue Act and Clause 10.2 of the HP Land Records Manual and also in violation to the rules and the instructions issued by the Financial Commissioner (Revenue) to the Government of HP with regard to the carrying out the demarcation in case of boundary disputes?"

8. I have heard the learned counsel/Senior Counsel for the parties.

9. The learned Senior counsel for the appellant has argued that the demarcation was conducted without determining the *pucca* points and earlier also the land was demarcated, thus the judgments passed by the learned Courts below are required to be set aside. Conversely, the learned counsel for respondents No. 1 & 2 has argued that the judgments and decrees passed by both the learned Courts below are after properly appreciating the facts, which have come on record, to their right perspective. He has further argued that the demarcations have been conducted as per law and the learned Courts below have not committed any violation of the provisions of Section 107 of H.P. Land Revenue Act and Clause 10.2 of the H.P. Land Records Manual and the same have been properly applied while carrying out demarcation. Therefore, there is no question of law involved in the present appeal and the same may be dismissed.

10. The learned Senior Counsel for the appellant, in rebuttal, has argued that when earlier demarcation was not proved on record, then subsequent demarcation could not have been taken into consideration.

11. In order to appreciate the rival contentions of the parties, I have gone through the records in detail.

12. Precisely, the stairs constructed by defendant No. 1 is the bone of contention in the present case. As per the plaintiffs, the stairs have been constructed on their land by defendant No. 1.

13. PW-1, Shri Inder Pal (plaintiff No. 1), has deposed that the defendant No. 1 purchased 163 square meters land adjacent to his land and built a four storeyed house thereon. As per this witness, initially defendant No. 1 constructed stairs on his own land, however, the same were dismantled and new stairs were constructed on his land by defendant No. 1 by encroaching approximately 50 square meters land. PW-1 has further stated that demarcation was applied by him and four notices were issued to the defendant and he was served thrice, however, he did not turn up. Consequently, Kanungo gave his report qua the encroachment of 50 meters by defendant No. 1. He has further deposed that notice was also issued to defendant No. 1 when the land was demarcated.

14. Plaintiffs have examined Shri Raj Kumar, Field Kanungo, as PW-3. He has deposed that after demarcation it was unearthed that there was encroachment to the extent of 50.75 square meters on the land of the plaintiffs. He has also proved the demarcation report, Ex. PW-3/A, and *tatima,* which was prepared by him. As per this witness, defendant was served with notice to join demarcation and final order, Ex. PW-3/C, dated 18.10.2002, had been passed by

the Tehsildar. This witness in his cross-examination has stated that after ascertaining *pucca* points, demarcation was carried out through triangular method. This witness did not specify the nature of encroachment and he stated that demarcation was carried out as per the settled procedure and instructions issued under the H.P. Land Revenue Manual.

15. The plaintiffs tried to get the benefit of photographs, Ex. PW-1/C to Ex. PW-1/F, of the spot, however, nothing has come in the statement of the plaintiff (PW-1) about when these photographs were taken, who has taken these photographs and these pertain to which land. Certainly, photographs could not establish the exact place where they were taken and moreover construction is always proved by the demarcation report and not by the photographs.

16. Shri Bhavesh Chaturvedi, Junior Engineer, Municipal Corporation, was examined as DW-1 by defendant No. 2. This witness has proved the certified copy of the proposed plan, Ex. DW-1/A, of defendant No. 1. As per this witness, on the spot stairs have been constructed in natural profile, however, this witness did not tell anything about the demarcation. Defendant No. 1 stepped into the witness-box as DW-2 and has deposed that he had constructed stairs about 14/15 years ago. He has further stated that he received a notice qua demarcation and also prayed for change of date. Thus, it is apparently proved that defendant No. 1 had the knowledge that demarcation proceedings are going against him. Defendant No. 1 did not state that he constructed the stairs on his own land after getting his land properly demarcated. Before constructing the stairs, defendant No. 1, did not ascertain whether the land belongs to him or not. He has further denied that it was in his knowledge that the final notice qua demarcation was received by his wife. He has also denied having knowledge that after demarcation encroachment was found to the extent of 50.75 square meters. Thereafter, he came up with the new plea that the land belongs to the State Government, however, this plea was not taken by him in the written statement. Moreover, no evidence qua this fact has come on record. Defendant No. 1 has further stated that he had taken demarcations of the land before starting the construction, but he has not produced on record any such demarcation report.

17. Now when the demarcation report is there and the Kanungo (PW-3) has specifically stated that he has followed the settled procedure while conducting demarcation and it has also come on record that PW-3 he conducted the demarcation on the basis of *aks sajra* and he was competent to give demarcation. Demarcation report, Ex. PW-3/A, clearly and unequivocally demonstrates the manner in which Field Kanungo (PW-3) carried out the demarcation. PW-3, Raj Kumar, Field Kanungo, was cross-examined at length, however, nothing much to fortify the case of defendant No. 1 could be extracted from him. Field Kanungo prepared the site plan, Ex. PW-3/B, solely on the basis of *aks sajra.* Apparently, order dated 18.10.2002, passed by Assistant Collector 2nd Grade reveals that defendant No. 1 did not appear before him and the said report was confirmed. On close scrutiny of the evidence on record it has come that defendant No. 1 was having knowledge that demarcation proceedings are pending against him, as notices were issued to him and his wife, however, he did not turn up and chosen not to file any objections in the demarcation proceedings. Defendant No. 1 pleaded that earlier also several times demarcations have been taken, however, no record qua previous demarcations has seen the light of the day. Thus, it can be said that defendant No. 1, without having proper demarcation of his land, started raising construction of stairs. Defendant No. 1 took another plea that the stairs have been constructed in natural profile, however, this plea is also hollow, as defendant No. 1 had no right to raise construction of his stairs on a land which does not belong to him. The plea of defendant No. 1 that stairs have been constructed in the government land is also not proved by him. Defendant No. 1 failed to prove his pleas that he raised construction of his stairs on his own land and if not so, the same was raised on the government land. Therefore, the only conclusion is that defendant No. 1 had made the construction of his stairs on the land of the plaintiffs and this fact is further fortified by demarcation report, Ex. PW-3/A. Now, it can be safely held that defendant No. 1 had no right to raise construction on the land of the plaintiffs. The only question of law, as framed in the present appeal, is answered by holding that both the learned Courts below have committed no illegality in appreciating demarcation report, Ex. PW-3/A, and order,

Ex. PW-3/C, passed by the Revenue Officers. The demarcation was also carried out as per the law, after taking *pucca* points, thus the same is legal and valid.

18. Resultantly, the findings arrived at by both the learned Courts below needs no interference, as the plaintiffs have proved their case that defendant No. 1 has raised construction of his stairs over the land owned and possessed by the plaintiffs. In these circumstances, this Court finds that both the learned Courts below have not committed any illegality while appreciating the demarcation report, Ex. PW-3/A, and order of Tehsildar dated 18.10.2002, Ex. PW-3/C, which are in accordance with law. Thus, the substantial question of law is answered accordingly and the instant appeal, which sans merits, deserves dismissal and is dismissed. However, in view of peculiar facts and circumstances of the case, the parties are left to bear their own costs.

19. Pending miscellaneous application(s), if any, also stand(s) disposed of.

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

State of H.P. .....Appellant

Versus

Kamal and others .....Respondents.

Cr. Appeal No. 487 of 2007
Decided on : 23/03/2017

Indian Penal Code, 1860- Section 341, 353 and 332 read with Section 34- Complainant was working as room attendant in a restaurant owned and managed by the Punjab Tourism - some customers came and complainant was directed by the Manager to show the room to the customers- customers opted to occupy the room shown to them- complainant went out to bring the luggage- accused were the employees of Hotel Ishan and told that they were charging Rs.100/- only for the night stay- complainant made a report to the Manager- accused threatened to beat the complainant and thereafter gave beating to him- he suffered injuries- accused were tried and convicted by the Trial Court- an appeal was preferred, which was allowed- held that complainant stated that he had lost gold chain and money – however, these articles were not recovered- medical evidence did not support the version of the complainant- complainant had improved upon his version- it was not found that clothes were torn – presence of eye-witness was suspicious - Appellate Court had taken a reasonable view while acquitting the accused- appeal dismissed. (Para-9 to 11)

For the Appellant: Mr. R.K.Sharma, Dy. A.G.
For the Respondents: Mr. Anoop Chitkara, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The State of Himachal Pradesh standing aggrieved by the verdict recorded by the learned Additional Sessions Judge, Fast Track Court, Kangra at Dharamshala, whereby he reversed the findings of conviction recorded upon the accused by the learned Judicial Magistrate 1st Class (II), besides pronounced a verdict of acquittal upon them, stands hence constrained to institute the instant appeal herebefore.

2. The brief facts of the case are that on 29.03.1998 one Hakam Chand was working as room attendant in a restaurant at Dharamsala owned and managed by Punjab

Tourism Report. At about 9.45 some customers came and complainant was directed by the Manager of the concerned resort to show the rooms to the customers. After the rooms were shown and the customers opted to occupy that room Hakam Chand went out to bring his luggage. In the meantime some other customers came who inquired about availability of rooms and charges. In the meantime the accused, who were employees of Hotel Ishan Resort came and told that they were charging 100/- only for the night stay in their hotel. The room attendant Hakam Chand called the Manager namely Pritam Chand and told him that their customers are not being permitted by the accused party to come to their restaurant. The Manager of Ishaan Resort Madhu Sudan told Pritam Chand that he would beat him. At this Pritam Chand went inside the resort whereas the accused started giving beatings to the complainant. All the accused, namely, Kamal, Amit, Kapil, Madhu Sudan and one another boy came there and administered him beatings. His uniform was also torn. In this scuffle he also lost his golden chain and money which were in his pocket. He had also suffered injuries. The manager informed the police on the basis of which F.I.R was registered and after completing all codal formalities and on conclusion of the investigation into the offences, 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 theirs committing offences punishable under Sections 341, 353 and 332 read with Section 34 IPC to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 7 witnesses. On closure of prosecution evidence, the 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 did not choose to lead evidence in defence.

5. On an appraisal of the evidence on record, the learned Appellate Court returned findings of acquittal in favour of the accused.

6. The learned Deputy Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned Appellate 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 standing 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. The principal accused one Mr. Madhu Sood did not come to be subjected to trial as he stood declared a proclaimed offender. The co-accused alongwith him are alleged to share a common mens rea with him in theirs subjecting him to severe belabourings also the victim in his apposite complaint, has enunciated therein qua in the alleged assault, his clothes comprised in pant Ext.P-1, shirt Ext.P-2 and Banyan Ext.P-3 also begetting tearings. The prosecution is enjoined to by clinching evidence prove all the apposite recitals embodied in the F.I.R. In the F.I.R, the victim had made a disclosure qua in sequel to his standing belaboured by the accused, his suffering loss of some money also his losing a golden chain. However, the aforesaid recital to acquire an aura of veracity enjoined valid effectuation of recovery of money also recovery of a gold chain, both items whereof the victim stood deprived of. However, neither the sum of money nor the gold chain qua whereof the victim stood deprived of, in the alleged incident stood recovered at the instance of the accused by the Investigating Officer. Non effectuation of recovery of the aforesaid money and gold chain qua whereof the victim stood deprived of during the course of the alleged beatings perpetrated upon him by the accused, begets an inference qua his contriving

the aforesaid factum. Even if the aforesaid factum stands inferred to stand contrived, the factum of the recitals/allegations embodied in the apposite F.I.R. qua his standing severely belaboured by the accused comprised in their conjointly inflicting blows on his head, chest and arms also stood enjoined to be proven by the apposite MLCs holding recitals therein in tandem with the recitals in respect thereto held in the apposite F.I.R. Apparently, the thrashing of the victim by the accused continued for about 5 minutes also the victim in corroboration qua the factum of the accused conjointly inflicting blows on his chest, head and arms also his thereon sustaining injuries hence stood enjoined to be in absolute commensuration thereof, proven by apposite reflections manifested in the MLC, prepared by the doctor concerned who subjected the victim to medical examination. However, Ext.PW-1/A proven by PW-1 enunciates therein the hereinafter extracted injuries:

> 1. Abrasion over superanuary region was present. No bleeding was present, no swelling was present tenderness was present. The patient was advice for x-ray chest to rule out any fracture.
>
> 2. bleeding from right nostril was present, no perfusal bleeding clots were present no swelling was present.
>
> 3. Complain of pain in the back but there was no injuries, x-ray no fracture. Hence injuries were simple in nature.

Obviously therein though he pronounces qua the victim suffering abrasion(s) on his chest nonetheless he omits to pronounce in conformity with PW-2 qua in sequel to his standing assaulted by the accused his suffering injuries on his head and arms, thereupon even if the testification of PW-2 qua his suffering injuries on his chest stand succored by Ext.PW-1/A yet the further testification of PW-2 corroborated by PW-3 and PW-7 qua all the accused while sharing a common intention conjointly for five minutes inflicting blows on his head and arms whereon he too sustained injuries also stood enjoined to stand reflected in Ext.PW-1/A. However, in Ext.PW-1/A it remains uncommunicated qua the victim suffering any injury on his head and on his arms, corollary thereof is qua in the victim complainant disclosing the aforesaid factum during his examination in chief, his thereupon hence grossly embellishing upon the factum of the accused severely belabouring him. Nonetheless, even if he has exaggerated an iotic portion of the relevant occurrence yet when he obtains succor from PW-1 qua injury No.1, his testification besides the testifications of PW-3 and PW-7 whose lend corroboration in respect thereof qua his version, cannot stand ousted whereupon a conclusion stands enhanced qua the prosecution proving the assault taking place at the relevant site of occurrence. However, the gravity of the embellishment(s) resorted by the victim complainant besides by the purported ocular witnesses thereto, visibly does not halt here. It continues upto the victim complainant making a disclosure in the complaint besides his in tandem thereto in his testification also the purported ocular witnesses thereto in corroboration thereof, testifying qua in the relevant occurrence Ext.P-1 pants, shirt Ext.P-2 and Banyan Ext.P-3, suffering tearings. The aforesaid factum stands belied comprised in PW-2 during the course of his examination in chief by the learned APP concerned, whereat he stood shown Ext.P-1 pants, shirt Ext.P-2 and Banyan Ext.P-3, his not making any echoings therein nor any observation stands recorded by the learned trial Magistrate qua thereat theirs displaying any tearings, corollary whereof, is, thereupon the version qua the factum aforesaid testified by the prosecution witnesses standing enfeebled also the apt connectivity inter se theirs recovery(s) under the apposite memo vis-à-vis their production in Court stands deestablished. PW-1 pronouncing qua blood oozing from the nostril of the victim thereupon with naturally the aforesaid exhibits warranting theirs acquiring stains of blood yet no observation stands recorded at the time when the aforesaid exhibits stood produced before the learned trial Court qua theirs holding any stain of blood. Apparently also the exhibits aforesaid stood undispatched to the FSL concerned for enabling the latter to record an opinion pronouncing thereon qua blood stains, if any, occurring thereon belonging to the victim.

10. Be that as it may, the complainant, in his complaint, had also omitted to disclose therein qua the relevant incident standing witnessed by PW-7. However, the prosecution for

succoring the charge introduced PW-7 as its witness. Even if PW-7 stood introduced as a witness by the prosecution, his testification would not lose its efficacy, significantly if the prosecution had proven qua the aforesaid PW not recording his presence before the victim whereupon latter stood precluded to recite his name in the apposite F.I.R. rather had proven qua his witnessing the incident from some distance from the alleged place of occurrence, his being unsightable therefrom by the victim/complainant. However, in the testification of PW-3 there occurs an articulation qua, at the command, besides at the intervention, of PW-7, the relevant scuffle terminating, obviously when PW-7 was hence sightable by the victim complainant whereupon the effect of his omitting to record his name in the F.I.R, is qua the prosecution by sheer contrivance introducing him as a witness merely for erecting a false edifice qua the relevant occurrence. Significantly the factum of PW-7 not recording his presence at the relevant time of occurrence also gains strength from the factum of his contradicting the versions of PW-2 and PW-3 qua the relevant customers proceeding to occupy their rooms.

11. In aftermath, the machination of the prosecution, to, by introducing a witness who did not record his presence at the relevant sight of occurrence hence stood precluded to witness it hence invent the genesis of the occurrence, does also concomitantly firm up a conclusion qua the prosecution contriving the alleged incident.

12. For the reasons which stand recorded hereinabove, this Court holds that the learned Appellate Court has appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of material on record by the learned Appellate Court does not suffer from any perversity or absurdity of mis-appreciation and non appreciation of evidence on record, rather it has aptly appreciated the material available on record whereupon its judgement warrants no interference.

13. 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 DHARAM CHAND CHAUDHARY, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Varinder Singh .....Appellant.

Versus

State of Himachal Pradesh & ors. .....Respondents.

Cr. Appeal No. 58 of 2011.
Reserved on: 9.3.2017.
Decided on: 23.3.2017.

Indian Penal Code, 1860- Section 498-A and 306 read with Section 34- Deceased was married to accused M- the accused M was adopted son of co-accused R and D – accused started treating the deceased with mental and physical cruelty – father of the deceased requested the accused to behave with his daughter properly – the deceased informed her mother that accused were fighting with the deceased and she had consumed some medicine-father of the deceased visited the house of the accused accompanied by his wife and both sons– they found the deceased was lying unconscious – she was taken to Hospital from where she was referred to a better institution having better facilities- she was taken to Jalandhar but she breathed her last – the accused were tried and acquitted by the Trial Court- held, that the deceased had committed suicide in her matrimonial home – however, the evidence regarding the mal-treatment and torturing the deceased was not satisfactory as different witnesses had given different versions regarding the same – mother of the deceased was not examined and she was a material witness – the comments

stated to have been uttered by the accused were not of such a nature as would drive any person to commit suicide –the call record was not produced and an adverse inference has to be drawn against the prosecution – the Trial Court had rightly acquitted the accused- appeal dismissed.(Para-11 to 37)

Cases referred:
State of H.P. vs. Ramesh Chand, : I L R 2016 (IV) HP 829 (D.B.)
Ajay @ Sunder Pal vs. State, 2016(2) JCC 1099
Kundula Bala Subrahmanyam and Another V. State of Andhra Pradesh, (1993) 2 SCC 684
Ramesh Kumar V. State of Chhatisgarh, (2001) 9 SCC 618
Krishan V. State of Haryana, (2013) 3 SCC 280
Mohd. Hoshan, A.P. and another V. State of A.P., (2002) 7 SCC 414
Anand Mohan Sen and Another V. State of West Bengal, (2007) 10 SCC 774
Sahebrao and another V. State of Maharashtra (2006) 9 SCC 794
Mudupula Raji Reddy V. State of A.P. (2004) 13 SCC 128

For the appellant	Mr. Balram Singh & Mr. Pawan Gautam, Advocates.
For the respondents	Mr. D.S.Nainta and Mr. Virender Verma, Addl. AGs for respondent No. 1. Mr. N.K.Thakur, Sr. Advocate with Ms. Snehlata, Advocate, for respondents No. 2 to 4.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J.

Complainant Sh. Virender Singh, victim of the occurrence, aggrieved by the judgment dated 18.11.2010 whereby respondents No. 2 to 4 (hereinafter referred to as the accused) have been acquitted from the charge under Sections 498-A and 306 read with Section 34 IPC framed against each of them has preferred this appeal on the grounds inter alia that material piece of evidence viz. the conversation of deceased Seema Devi with her mother and her sister-in-law (Bhabhi) Renu PW-5 over cell phone has not been taken into consideration without assigning any plausible reason and rather erroneously ignored. The remaining evidence as has come on record by way of the testimony of complainant Virender Singh (PW-1) and Amit Kumar (PW-4) which also proves the torturing and mal-treatment of the deceased at the hands of accused persons and the abetment of commission of suicide by her is also stated to be erroneously ignored. The deceased had committed suicide in the matrimonial home within 7 years of her marriage with accused Manoj Kumar and as the accused persons have failed to offer plausible explanation qua commission of suicide by her, in case it was not due to her maltreatment at their hands, the Court below has gravely erred in not drawing the presumption under Section 113-A of the Indian Evidence Act against them. The link evidence was also sufficient to bring guilt home to the accused persons, however, the same has also not been relied upon. The impugned judgment, as such, has been sought to be quashed and set aside.

2. Deceased Seema Devi was daughter of Virender Singh (PW-1) and sister of Amit Kumar (PW-4) whereas sister-in-law (Nanad) of PW-5 Renu. She was married to accused Manoj Kumar on 2.12.2005 according to Hindu rites and ceremonies. The said accused was adopted son of his co-accused Raj Rani and Des Raj. PW-2 Sukhdev Singh is the natural father of accused Manoj Kumar. The said accused was employed in CRPF. Out of this wed-lock, one son was born to deceased Seema Devi from the loins of her husband accused Manoj Kumar.

3. PW-1 Virender Singh, the father of the deceased vide his statement recorded under Section 154 Cr.P.C. Ext. PW-1/A had reported that his daughter was treated nicely by the accused persons in the matrimonial home for about 3 years. Thereafter, they started quarreling

with her on trivial issues. The deceased was being treated with physical and mental cruelty by them. He was apprised qua all this by his wife Kashmiro Devi. He allegedly visited the house of accused on 2-3 occasions and asked them to behave with his daughter properly but of no avail as while treating her nicely for few days, the accused persons started quarreling with her again. The comments and taunts such as deceased was not knowing to perform the agricultural work were being passed on by them upon her.

4. On 10.5.2010 around 8:45 PM, he was informed by his wife over telephone that Seema had disclosed to her over phone that the accused were fighting with her and as they maltreated her, therefore, she had consumed some medicine. She had also requested his wife to come to the place of her father-in-law at Panjawar and take away her minor son therefrom. On hearing all this, Virender Singh (PW-1) allegedly hired a vehicle and accompanied by his wife and both sons reached the hospital at Una. The police had already reached in the hospital. He found his daughter deceased Seema lying unconscious. The Medical Officer on duty referred her to some other health institution having better facilities qua her treatment and further management. He, therefore, took his daughter for further treatment to Jallandhar. She, however, breathed her last at 4:00 AM immediately on their arrival at Jallandhar.

5. The information qua death of his daughter was given to the police and he had brought her dead body to the hospital at Una at 8:15 am. It was thus reported by PW-1 that his daughter Seema had taken a decision to end her life on account of her mal-treatment at the hands of the accused.

6. On the basis of the statement Ext. PW-1/A, FIR Ext. PW-9/A was registered in Police Station Haroli by PW-9 ASI Vijay Kumar. During the course of investigation, inquest papers Ext. PW-1/B were prepared and the post mortem of the dead body got conducted in the hospital at Una. The post mortem report is Ext. PD. On completion of the investigation and on receipt of Chemical Examiner's report, final report was prepared and filed in the Court.

7. Learned trial Judge, having formed an opinion prima-facie that the deceased was being treated with cruelty, both mental and physical, by the accused persons and as a result thereof she committed suicide has framed charge against them for the commission of offence punishable under Sections 498-A and 306 read with Section 34 IPC. They, however, not pleaded guilty to the charge. The prosecution, therefore, has produced evidence in support of the charge so framed against each of the accused persons.

8. The material prosecution witnesses are her father Virender Singh (PW-1), brother Amit Kumar (PW-4) and sister-in-law PW-5 Renu. PW-2 Sukhdev Singh, natural father of accused Manoj Kumar did not support the prosecution case and as such was declared hostile. PW-7 Ankush Sharma is a witness to the issuance of sim of cell No. 98057 20482 in the name of deceased Seema as it is he who had identified her before the cell phone company. The remaining witnesses PW-6 HC Vipan Kumar, PW-8 HHC Ashwani Kumar, PW-9 ASI Vijay Kumar, PW-10 Arundeep and PW-11 ASI Gian Chand, being police officials, are formal.

9. Mr. Balram Singh, Advocate assisted by Mr. Pawan Gautam, Advocate, while taking us to the evidence available on record has contended that the telephonic conversation of the deceased with her Bhabhi PW-5 Renu could have been taken as dying declaration and the findings of conviction recorded on sole basis thereof. According to the learned counsel, she had committed suicide within 7 years of her marriage with accused Manoj Kumar. It is not at all proved that the poisonous substance *"phosphide"* was consumed by the deceased by way of mistake nor any such plea has been raised by the accused persons in their defence. The evidence available on record, according to the learned counsel is suggestive of that all the accused were not only torturing the deceased physically but mentally also. It was, therefore, urged that while raising the presumption as envisaged under Section 113-A of the Indian Evidence Act, they all should have been convicted for the commission of offence punishable under Sections 498-A and 306 read with Section 34 IPC.

10. On the other hand, Mr. N.K.Thakur, Sr. Advocate assisted by Ms. Sneh Lata, Advocate has urged that the allegations against accused in the prosecution evidence are not at all sufficient to form an opinion that they have treated the deceased with cruelty and it is only on account of such acts and conduct attributed to them, she had committed suicide. Rather, as per the evidence available on record, they facilitated her to prosecute further studies in the College at Dhaliara from where she did 2 years B.Ed. course. During this period, she had been residing in a rented accommodation at Dhaliara. On the date of occurrence, she was removed to hospital and all the accused were present in the hospital so that better medical facilities could be provided to her. Had the deceased informed her mother Kashmiro Devi over cell phone that on account of her torturing at the hands of the accused persons she had consumed some medicine, the mother or her father PW-1 could have reported the matter to local police there and then. According to Mr. Thakur, it is not the deceased but the call on cell phone was made by accused Manoj Kumar to inform his mother-in-law qua the deceased having consumed poisonous substance and also that she was removed to Una hospital for treatment. The non-examination of Kashmiro Devi, the mother of the deceased speaks in plenty that she has been withheld intentionally and deliberately in order to save her from being subjected to cross-examination. On the way to Una hospital from Jallandhar, accused Des Raj and his wife as well as co-accused Raj Rani were left behind by Virender Singh (PW-1) in his house situated there. Therefore, such conduct of Virender Singh (PW-1) amply demonstrate that he had no complaint against anyone, including the accused persons qua the commission of suicide by his daughter. Had there been any suicide notes left behind by the deceased in the almirahs, as she allegedly disclosed over cell phone to her mother Kashmiro Devi, according to Mr. Thakur, where the same had gone as those were not traceable to the I.O. when search of the room was conducted. It has, therefore, been urged that learned trial Court has rightly acquitted all the three accused of the charge framed against each of them as no case was found to be made out against them.

11. As per the admitted case, the deceased had committed suicide on 10.5.2010 in the matrimonial home at village Panjawar, District Una. However, it is the accused persons who have abetted the commission of suicide by her was due to mal-treatment and torturing at their hands is a question to be adjudicated upon in the light of law of the land and also the evidence as has come on record during the course of trial. However, before that we deem it appropriate to discuss as to what constitutes the harassment of a married woman in the matrimonial home within the meaning of Section 498-A and abetment of commission of suicide by such woman on account of her mal-treatment and torturing at the hands of her in-laws.

12. A bare reading of Section 498-A reveals that subjecting the wife to cruelty by her husband or his relative with a view to coerce her or any person related to her to meet with their unlawful demand for any property or valuable security or any willful conduct of the husband of such woman or his relative, of such a nature as is likely to drive her to commit suicide or to cause grave injury or danger to life, limb or health is *sine qua non* to constitute the commission of offence punishable under Section 498A IPC. We are drawing support in this regard from the judgment dated 12.8.2016 of a Division Bench of this Court rendered in Cr. Appeal No. 800 of 2008 titled ***State of H.P. vs. Rajinder Singh and others***.

13. If coming to the offence punishable under Section 306 of the Indian Penal Code, the prosecution is required to plead and prove beyond all reasonable doubt that some person has committed suicide and he/she did so after being instigated by the accused. Abetment has been defined under Section 107 of the Indian Penal Code. Its simple meaning is that a person abets the doing of a thing who firstly instigates any person to do a thing, or secondly, engages with one or more other person or persons in any conspiracy for doing of that thing. If an act or illegal omission takes place in pursuance of that conspiracy, and in order of doing of that thing, or intentionally aids, by any act or illegal omission, the doing of that thing can be said to have abetted the doing of that thing.

14. It is thus crystal clear that in order to infer the commission of an offence punishable under Section 306 IPC, the prosecution is required to plead and prove that one

person has instigated another person to commit suicide and as a result of such instigation, such another person had committed suicide. It is only in that event the person causing the instigation is liable to be punished for the commission of an offence punishable under Section 306 IPC.

15. In the case of suicidal death, the onus to prove that it is the acts and conduct attributed to the accused alone had instigated the person who had committed suicide to do so is on the prosecution and to raise the presumption under Section 113-A of the Indian Evidence Act, the factum of the deceased was subjected to cruelty by the accused persons immediately before commission of suicide by her is first required to be proved by the prosecution.

16. Now, if adverting to the case in hand, only following instances of cruelty are disclosed from the statement Ext. PW-1/A under Section 154 Cr.P.C. of Virender Singh (PW-1) recorded by the police:

> "(i) After marriage, for about three years, the in-laws of his deceased daughter Seema behaved nicely but after that on trivial issues they started quarreling with her.
>
> (ii) When he came to know from his wife Kashmiro Devi about the same, he went to the place of in-laws of his daughter 2-3 times and made them to understand. After treating her nicely for some time, they had been quarreling with her at the pretext that she had no knowledge of performing agricultural work.

17. Now, if coming to the statement of PW-1 Virender Singh, he has quoted the following instances of cruelty towards the deceased against the accused persons:

> (i) The accused started taunting the deceased on small family matters like not knowing to milch cattle, clean the house properly and perform agricultural work.
>
> (ii) Accused persons Des Raj and Raj Rani used to instigate accused Manoj Kumar not to give money to the deceased to meet out her day to day expenses.
>
> (iii) Accused Manoj Kumar used to switch off his mobile phone to avoid to attend her calls and as and when on leave, he used to quarrel with her."

18. If coming to statement of PW-4 Amit Kumar, brother of the deceased, he had different woe to tell because it has come in his statement that:-

> (i) The accused used to ill-treat the deceased on small matters and had not been allowing her to cook food nor to talk with her for a pretty long time.
>
> (ii) He accompanied by his brother Vikas and his father Virender Singh (PW-1) visited the place of the accused persons and asked them to treat the deceased nicely in the presence of PW-2 Sukhdev Singh, natural father of accused Manoj Kumar.
>
> (iii) Both accused i.e. Des Raj and Raj Rani proclaimed that they would not allow the deceased to cook food during their life time.
>
> (iv) The deceased was taken by them to the house of PW-2 Sukhdev Singh at Bhabnaur where she remained for 15-20 days. Accused Manoj Kumar came to home on leave and a meeting was organized at Bhabnaur which was attended to by the accused and his father. In the meeting, accused begged pardon for their acts and thereafter deceased came to her matrimonial home at village Panjawar."

19. The rest of the allegations in the statement of Amit Kumar (PW-4) are similar to that of Virender Singh (PW-1), his father.

20. Now, if coming to the allegations of so called mal-treatment and torturing of the deceased as per the statement of complainant under Section 154 Cr.P.C. Ext. PW-1/A, while in the witness-box as PW-1 and in that of his son Amit Kumar (PW-4), there is no consistency and both while in the witness-box have rather improved their version and given coloured version of

the entire episode. In the statement under Section 154 Cr.P.C. Ext. PW-1/A, alleged torture of deceased was at the pretext of she was not having any knowledge of performing agricultural affairs, however, while in the witness-box, Virender Singh (PW-1) has come forward with the version that her torturing was at the pretext of she had no knowledge of milching the cattle, cleaning the house properly and performing work, including agricultural work. He has given a different colour to the prosecution story while stating that accused Des Raj and Raj Rani used to instigate accused Manoj Kumar not to give money to the deceased to meet out her day-to-day expenses and that accused Manoj Kumar in order to avoid to speak to her used to switch off his cell phone. A further story that as and when the said accused used to be on leave had been quarreling with the deceased has also been introduced.

21. The brother of the deceased Amit Kumar (PW-4) has also deposed beyond the allegations in the statement Ext. PW-1/A. In addition to the allegations leveled by his father Virender Singh (PW-1) while in the witness-box against the accused persons, Amit Kumar (PW-4) has different story to tell as according to him, the accused were not allowing the deceased to cook food since pretty long time. He accompanied by his father Virender Singh (PW-1) and brother Vikas had visited the place of the accused persons and asked them to treat the deceased nicely in the matrimonial home in the presence of Sukh Dev (PW-2), the natural father of accused Manoj Kumar. He further tells us that since the accused did not mend their behavior, therefore, they had to shift the deceased to village Bhabnaur, the native place of PW-2 Sukhdev Singh and it is when accused Manoj Kumar came to the house, a meeting attended by both sides had taken place. The deceased came to her matrimonial home at village Panjawar. Interestingly enough, PW-2 Sukhdev Singh while in the witness-box has not supported the prosecution case qua any such meeting having taken place at Bhabnaur in his presence. He was, therefore, declared hostile and allowed to be cross-examined on behalf of the prosecution.

22. It is seen that the prosecution has failed to elicit anything material lending support to its case during his cross-examination. Rather, in his further cross-examination conducted on behalf of the accused, it is stated that he had been visiting the house of the accused off and on and even accused and deceased also used to visit his house. The parents of deceased were also in visiting terms with him, however, they never complained him and his wife against the accused. Since as per the version of Virender Singh (PW-1) in the statement Ext. PW-1/A and also while in the witness-box, it is his wife Kashmiro Devi who apprised him about the so called mal-treatment and torturing of the deceased at the hands of the accused, however, she has not been examined and rather given up being repetitive as per the statement of learned Public Prosecutor recorded separately on 28.9.2010.

23. In our considered opinion, Kashmiro Devi being mother of the deceased was a material witness because in our society, a daughter would normally apprise the mother about her miseries, if any, in the matrimonial home as has come on record of this case also. However, she has been given up intentionally and deliberately and may be on account of apprehension of the prosecution that she may not support its case or to save her from her cross-examination by learned defence counsel.

24. Interestingly enough, even for the arguments sake if it is believed that the deceased was being treated with cruelty by the accused persons, it is not the case of the prosecution that her torturing and mal-treatment was for the demand of dowry or any valuable security by her husband accused Manoj Kumar or his parents accused Des Raj and Raj Rani. There is not even a whisper also in this regard in the evidence relied upon by the prosecution. It cannot also be believed by any stretch of imagination that she was being tortured at the pretext of having no knowledge of milching cattle, cleaning the house properly or performing the domestic affairs, including agricultural work for the reason that as per the own case of the prosecution the deceased was treated by the accused nicely in the matrimonial home for a period of three years. Not only this, but she rather was allowed by them to complete her 2 years B.Ed. course from Govt. College Dhaliara, District Kangra. While pursuing the said course, she had been residing in rented accommodation at Dhaliara. Therefore, the accused persons who allowed the deceased to

prosecute her further studies even after marriage cannot be said to be so cruel towards her and as a result thereof she had opted for putting an end to her life and that too when a minor son born to her out of her wed-lock with accused Manoj Kumar was dependent upon her.

25. In view of the contradictions, inconsistencies and improvements, as noticed hereinabove, the allegations of cruelty as has come on record in the statements of Virender Singh (PW-1) and Amit Kumar (PW-4) are nothing else but merely an after thought leveled with an idea to implicate the accused persons in this case falsely. Otherwise also, the so called comments/taunting being made by the accused against the deceased that she had no knowledge of milching cattle, cleaning the house properly and doing household chores, including agricultural work were not of such a nature to have derived the deceased to have committed suicide. It is also not proved with the help of cogent and reliable evidence that accused Manoj Kumar had not been paying money to the deceased to meet out her day-to-day expenses on the instigation of accused Des Raj and Raj Rani. Had it been so, it is not known as to upon whom she was dependant qua her day-to-day needs and also during the period when she pursued her studies in Government College Dhaliara because it is nowhere the case of the prosecution that she was being maintained by her father Virender Singh (PW-1) or any one else.

26. The prosecution could have also proved with the help of details of calls that accused Manoj Kumar in order to avoid to speak with deceased used to switch off his cell phone. No such effort, however, has been made and such allegations seem to be leveled against the accused persons just for their implication in a false case. We, therefore, are not in agreement with learned counsel representing the victim of the occurrence i.e. the appellant herein that it is on account of maltreatment of the deceased at the hands of the accused persons, they abetted the commission of suicide by her within the meaning of Section 306 of the Indian Penal Code. It is in this view of the matter the respondent-State also seem to have not chosen to file appeal against the impugned judgment.

27. Mr. Balram Singh, Advocate, learned counsel representing the appellant has vehemently urged that the conversation of the deceased with her mother over cell phone as has come on record by way of testimony of Virender Singh (PW-1) and Amit Kumar (PW-4) as well as PW-5 Renu should have been treated as dying declaration and the findings of conviction recorded on the basis thereof.

28. True it is that a Coordinate Bench of this Court in Cr. Appeal No. 319 of 2012, titled ***State of H.P. vs. Ramesh Chand*** decided on 16.7.2016 has held that a dying declaration can be made at any time and in the presence of anyone and need not to be made in the presence of a Doctor, a Gazetted Officer or an Executive Magistrate, however, with the rider that it would be a different matter as to whether corroboration thereto is required or not. Not only this, but a Division Bench of the High Court of Delhi in ***2016(2) JCC 1099,*** titled ***Ajay @ Sunder Pal vs. State,*** has went one step further while holding that even a call on phone can also be treated as dying declaration if the record thereof is produced and put to the accused in his statement under Section 313 Cr.P.C. and he failed to demonstrate any prejudice caused to him thereby. Also that failure to state exact time of making of phone call and on putting the same to the accused under Section 313 Cr.P.C., if he failed to show any prejudice caused to him thereby, the failure to state exact time of phone call by the witness(s) is not fatal to the prosecution case.

29. The legal principles discussed and settled in the judgment(s) supra, however, are not attracted in the given facts and circumstances of this case at all for the reason that as per Ext. PW-1/A, the call was made by the deceased to her mother Kashmiro Devi regarding she having consumed some medicine on account of her torturing and maltreatment at the hands of the accused. It is his wife who informed him about this over his cell phone at 8:45 PM. As noticed supra, Smt. Kashmiro Devi has not been examined. In our considered opinion, she would have been the best person to have deposed something authentic and genuine qua the call if made by the deceased to her. No doubt, it is proved from the statement of PW-7 Ankush Sharma that cell No. 98057- 20482 was that of the deceased. One call was made from this cell phone over cell phone No. 98154-97652 on 10.5.2010 at 21:11:19 hours. As per the testimony of PW-4 Amit

Kumar cell No. 98154 97652 was that of his mother. As per the call details Ext. PW-3/B, another call was made from cell No. 98154-97652 over cell No. 98057 20482 of the deceased at 21:30:57 hours. Not only this but two calls were made from cell No. 95929-16331 over cell No. 98057-20482 of deceased on that very day at 22:23:34 hours and 22.24:17 hours. Therefore, while it is only one call which has been made from the cell No. of deceased over cell number of her mother Kashmiro Devi on that day at 21:11:19 hours, 3 calls as referred to hereinabove were made over her cell number i.e. one from that of her mother and two calls from cell No. 95929-16331. These calls have been made in continuity and in case deceased had consumed poisonous substance, at the most she could have made a call only to her mother and could have not attended three other calls that too in continuity. Otherwise also, it is not the prosecution case that after having conversation with the deceased her mother Kashmiro Devi had made again a call to her from her own cell No. 98154 97652 and that the same was also attended by the deceased. Therefore, the plea raised by the accused in their defence that it is accused Manoj Kumar who had informed the mother of the deceased about she having consumed some poisonous substance and that she has been taken to hospital at Una seems to be nearer to the factual position. Since said Kashmiro Devi allegedly informed her husband Virender Singh (PW-1) at 8:45 PM over his cell phone that the deceased as per the call received from her had consumed some poisonous substance, it is not known as to how any such information could have been given because alleged call was made by the deceased to her mother at 21:11:19 hours i.e. 9:11 pm. True it is that even if the time of call is not correctly given by the witness in his statement, the same is hardly of any consequence in view of ratio of the judgment in Ajay @ Sunder Pal's case (supra). However, in the case in hand for want of cogent and reliable evidence which could have come on record by way of testimony of Kashmiro Devi, it cannot be believed that any such call was made by the deceased which could have been treated as dying declaration. Being so, the ratio of the judgments in ***Kundula Bala Subrahmanyam and Another*** V. ***State of Andhra Pradesh, (1993) 2 SCC 684***, ***Ramesh Kumar*** V. ***State of Chhatisgarh, (2001) 9 SCC 618***, ***Krishan*** V. ***State of Haryana, (2013) 3 SCC 280*** and ***Mohd. Hoshan, A.P. and another*** V. ***State of A.P., (2002) 7 SCC 414*** are distinguishable on facts, hence not attracted in the case in hand.

30. True it is that the prosecution has examined PW-5 Renu, sister-in-law of the deceased. Nothing, however, has come in the statement of Virender Singh (PW-1) that besides Kashmiro Devi aforesaid, the deceased had conversation over cell phone with PW-5 Renu also. Nothing to this effect has even come in Ext. PW-1/A which contains immediate version qua the manner in which the occurrence did take place. No doubt, as per the version of PW-4 Amit Kumar, the deceased had also spoken with him over cell phone and she even expressed her desire to speak to his wife PW-5 Renu. This part of the prosecution story, however, seems to be introduced later on with an idea to implicate the accused persons in this case falsely. As a matter of fact, no call seems to be made by the deceased over the cell phone of her mother and rather it is accused Manoj Kumar who had called his mother-in-law just to apprise her about the deceased having consumed some poisonous substance. Being so, the evidence as has come on record by way of the testimony of PW-5 Renu that deceased apprised her over telephone qua she is mentally upset because of behavior of the 3 accused and that she had consumed poison, therefore, this witness should take care of her son cannot be believed to be true by any stretch of imagination. Her further version that the deceased expressed her desire that it is her brothers who alone may lit her pyre is also an after thought and the story to this effect was engineered to implicate the accused falsely in this case. Had any call been received by the mother of deceased or PW-5 Renu to the effect that the deceased had left two letters in the almirah which could not be traced out during the search of the room conducted by the police, her testimony that after the deceased talked to her mother she telephoned accused Manoj Kumar also seems to be an afterthought and does not connect the call made on that day from the cell phone of Kashmiro Devi over that of the deceased for the reason that Kashmiro would have made call on the cell phone of accused Manoj Kumar and not on that of the deceased. Therefore, the story that the deceased after consuming poisonous substance had called her mother and also spoken with her brother and sister-in-law is nothing but merely an after thought. Otherwise also, had any such call been received, the first and foremost step the complainant party would have taken was to

have apprised the police about the incident. It has not been done and to the contrary they went to the hospital at Una and noticed that all the accused were present and getting the deceased treated medically there. Not only this but deceased was taken to Jallandhar in the vehicle arranged by the accused. On way back to Una after her death at Jallandhar PW1 dropped his wife, accused Desh Raj and accused Raj Rani in his house at Jallandhar, may be either they were tired on account of fatigue or their ailment. Such conduct of the complainant leads to the only conclusion that initially the complainant party had not suspected the hands of any one in the commission of suicide by the deceased and the statement Ext.PW1/A on the basis whereof FIR has been registered, seems to be lodged on the next day i.e. 11.5.2010 at 9:40 A.M. after due deliberation.

31. PW-2 Sukhdev Singh, natural father of accused Manoj Kumar has not supported the prosecution case qua he accompanied the parents of deceased to the village of accused who were asked not to maltreat the deceased. He has also not supported the prosecution case that the deceased was taken by him to his house at village Bhabnour where she stayed with him. The remaining prosecution case that accused Raj Rani had been instigating accused Manoj Kumar against the deceased and she had consumed poison on account of her maltreatment at the hands of accused was also denied being wrong. True it is that PW-2 was natural father of accused Manoj Kumar, however, since he has caused major dent in the prosecution story while in the witness box, therefore, it cannot be said that the prosecution has proved its case against the accused beyond all reasonable doubt.

32. The remaining prosecution witnesses PW-3 HHC Dharam Pal, PW-6 HC Vipan Kumar, PW-8 HHC Ashwani Kumar, PW-9 ASI Vijay Kumar, PW-10 Constable Arun Deep and PW-10 ASI Gian Chand are formal, as they remained associated during the investigation of the case in one way or the other. Their evidence at the most could have been used as link evidence had the prosecution otherwise been able to bring guilt home to the accused by way of producing cogent and reliable evidence.

33. PW-7 Ankush is also formal because it is on his identification; sim No. 98057-20482 was issued by the concerned cellphone company. The prosecution has even failed to prove that accused Manoj Kumar was not depositing the money in the accounts of deceased so that she could have utilized the same to meet her day-to-day expenses. Therefore, the plea of accused in their defence that the money was being deposited in her account regularly except for the months of December, 2009 to February, 2010 and April, 2010, when the said accused was on leave appears to be nearer to the factual position.

34. Learned counsel representing the victim-appellant has also relied upon the legal principles settled in ***Mohd. Hoshan's*** judgment cited supra and also in ***Anand Mohan Sen and Another*** V. ***State of West Bengal, (2007) 10 SCC 774***, ***Sahebrao and another*** V. ***State of Maharashtra (2006) 9 SCC 794*** and ***Mudupula Raji Reddy*** V. ***State of A.P. (2004) 13 SCC 128*** to persuade this Court that the acts of cruelty attributed to the accused persons towards the deceased are within the domain of Section 498-A of the Indian Penal Code and also that the evidence as has come on record by way of testimony of PW-1, PW-4 and PW-5 leave no manner of doubt that the deceased committed suicide on account of such acts of cruelty on the part of accused, however, unsuccessfully for the reason that legal principles settled in the judgments supra are entirely on different sets of facts and circumstances in each case, hence not attracted in the case in hand.

35. True it is that this incident has taken away the life of a young woman aged 30 years within seven years of her marriage with accused Manoj Kumar. The presumption under Section 113-A of the Indian Evidence Act, however, cannot be drawn in this case because the prosecution has failed to discharge the initial onus upon it that deceased has committed suicide only on account of her harassment by the accused persons. Presumption under Section 113-B of the Evidence Act cannot also be drawn in this case because it is not proved that the accused used to demand dowry from the deceased and had been torturing her mentally as well as physically in connection with their demand for dowry.

36. As a matter of fact, the present is a case where nothing suggesting that the deceased was being tortured or harassed by the accused persons in connection with demand of dowry or otherwise or that the degree of cruelty was so high that she could not make comparison between life and death and rather in such a state of mind, chosen the pangs of death has come on record. True it is that in normal circumstances, no person is expected to take such a drastic step to do away with his/her life, that too, without there being any cause, however, present is not a case where it can be said that the accused persons had abetted the commission of suicide by the deceased.

37. In view of what has been said hereinabove, the appeal fails and the same is accordingly dismissed. The personal bonds furnished by the accused persons shall stand cancelled and the sureties discharged.

****

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

Shri Chain Singh ....Appellant.
-Versus-
Piar Singh and others ....Respondents.

RSA No. 300 of 2008
Date of decision: 24.03.2017

Code of Civil Procedure, 1908- Section 96- A civil suit for declaration was filed, which was dismissed by the Trial Court- a finding was recorded that the Will set up by the defendant is null and void- an appeal was preferred by the defendant, which was dismissed- held in second appeal that appeal against finding is not maintainable – the findings recorded by the Trial Court regarding the invalidity of the Will set up by the defendant No.1 will not constitute res-judicata – appeal dismissed. (Para-16 to 25)

Cases referred:
Sher Chand and another Vs. Pritam Chand 1997 (1) Sim. L.C.300
Krishanananda Vs. Kattu Siva Ashram and others (2007) 10 Supreme Court Cases 185
Ramesh Chandra Vs. Shiv Charan Dass and others 1990 (Supp) Supreme Court Cases 633
Arjun Singh and others Vs. Tara Das Ghosh and others AIR 1974 Patna 1

For the appellant: Mr. D.P. Chauhan, Advocate.
For the respondents: Mr. V.S. Rathore, Advocate, for respondents No. 1 and 2.
Nemo for respondents No. 3 to 5.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge*(Oral)**:*

By way of this appeal, the appellant/defendant No. 1 has challenged the judgment and decree passed by the Court of learned Additional District Judge, Fast Track Court, Kangra at Dharamshala in Civil Appeal No. 53-J/05/04, dated 22.08.2006, vide which learned appellate Court dismissed the appeal filed by the present appellant against the findings returned by the learned Civil Judge (Junior Division), Jawali in Civil Suit No. 202/03/95, dated 09.12.2003, vide which learned trial Court while dismissing the suit so filed by the plaintiffs decided Issue No. 4, i.e. *"whether 'Will' dated 30.08.1995 was legally and validly executed by Rattni Devi* against the defendants.

2. This appeal was admitted on 29.12.2008 on the following substantial questions of law:

> *"1. Whether both the Courts below have committed grave error of law in holding the Will dated 18.08.1995 void which otherwise is fully proved to have been executed by the testatrix in accordance with the provisions of Indian Succession Act and also has been proved as required by Section 63 of the Indian Evidence Act?*
>
> *2. Whether the learned Court below failed to appreciate true and correct principle of law enunciated in Section 63 of Indian Succession Act and Section 68 of Indian Evidence Act in order to give its judicious findings upon the validity of the Will dated 30.08.1995?*

3. When this case was taken up for arguments, Mr. V.S. Rathore, learned counsel for respondents No. 1 and 2 submitted that before this Court enters upon adjudication on the substantial questions of law on which this appeal was admitted, this Court may first decide as to whether the appeal which was filed by the present appellant before the first appellate Court was in fact maintainable, as no decree was passed by the learned trial Court against the defendants and whether this appeal is also therefore maintainable?

4. In this background, at the time of hearing, the following substantial question of law was framed:

> *"Whether in the advent of a Civil Suit having been dismissed and no decree having been passed either in favour of plaintiff or against the defendant, can the defendant file an appeal on findings returned by the learned trial Court on an issue against him?*

5. I have heard learned counsel for the parties on the said newly framed substantial question of law and have also gone through the records as well as the judgments passed by both the learned Courts below.

6. Records demonstrate that suit before the learned trial Court was filed by Piar Singh and Fauja Singh, sons of Tota Ram, who were plaintiffs therein for declaration to the effect that plaintiffs and proforma defendants were entitled to inherit the property of their mother deceased Ratni Devi vide registered Will dated 18.06.1993 qua the suit land and that subsequent Will executed by deceased Ratni Devi in favour of her grand son and defendant No. 1, dated 30.08.1995, was wrong, null and void and a result of fraud, undue influence and misrepresentation etc. Decree for permanent injunction restraining the defendants from getting the mutation attested and accepted on the basis of said Will in their favour and for restraining them from alienating and dispossessing the plaintiffs and proforma defendants from the suit land was also prayed for.

7. The suit so filed by the plaintiffs was *inter alia* contested by defendant No. 1 on the ground that Ratni Devi had executed a Will dated 30.08.1995 in his favour and the same was a valid Will.

8. On the basis of pleadings of the parties, learned trial Court framed the following issues:

> *"1. Whether deceased Rattni Devi executed a legal & valid 'Will' dated 18.06.1993, as alleged? OPP.*
>
> *2. If issue No. 1 is proved, whether the plaintiffs alongwith proforma defendant No. 4 are entitled to inherit the suit land? OPP.*
>
> *3. Whether the plaintiffs are entitled for a decree of injunction? OPP.*
>
> *4. Whether 'Will' dated 30.08.1995 was legally and validly executed by Rattni Devi, if so, its effect? OPD.*
>
> *5. Relief.*

9. On the basis of evidence adduced by the respective parties in support of their respective claims, the following findings were returned by learned trial Court on the issues so framed:

"Issue No. 1:	*No.*
Issue No. 2:	*No.*
Issue No. 3:	*No.*
Issue No. 4:	*No.*
Relief:	*The suit is dismissed as per operative part of the judgment.*

10. Suit filed by the plaintiffs was dismissed by the learned trial Court and following decree was prepared by the learned trial Court:

> *"the suit of the plaintiff is dismissed. The plaintiff, defendants No. 2 to 4 are entitled for the property of Rattni Devi in equal share being her Class-I heirs and the Wills dated 18.6.03 and 30.8.95 have no effect on the rights of the plaintiff, defendants No. 2,3 & 4. However, the defendant No. 1 during the life time of his father has no right on the property of Rattni Devi in any manner, or on the basis of Will dated 30.8.95. Keeping in view the facts and circumstances of the case, the parties are left to bear their own costs."*

11. Thus, learned trial Court dismissed the suit so filed by the plaintiffs and did not pass any decree in favour of the plaintiffs or against defendant No. 1.

12. Feeling aggrieved by the findings returned by the learned trial Court on Issue No. 4, which was 'whether *'Will' dated 30.08.1995 was legally and validly executed by Rattni Devi'* and which was decided by learned trial Court against the defendants, defendant No. 1 filed an appeal before the 1st appellate Court. The appeal so filed by defendant No. 1 was adjudicated by learned 1st appellate Court on merit and it reiterated the findings so returned on the said issue by the learned trial Court.

13. Feeling aggrieved by the judgment so passed by the learned 1st appellate Court, defendant No. 1 has filed the present appeal.

14. Mr. V.S. Rathore, learned counsel appearing for the respondents has argued that in view of the fact that the Civil Suit filed by the plaintiffs was dismissed and no decree was passed against defendant No. 1, i.e. the present appellant, the appeal which was filed by him before the learned first appellate Court against findings returned by the learned trial Court on Issue No. 4, was not maintainable. In support of his contention, Mr. Rathore has relied upon the judgment of this Court passed in **Sher Chand and another** Vs. **Pritam Chand** 1997 (1) Sim. L.C.300 as well as judgment of the Hon'ble Supreme Court in **Krishanananda** Vs. **Kattu Siva Ashram and others** (2007) 10 Supreme Court Cases 185.

15. According to Mr. Rathore, until and unless there was a decree either passed in favour of the plaintiffs and/or against the defendants, no appeal was maintainable on behalf of the defendant, as in the absence of there being any decree either in favour of the plaintiffs or against the defendant, any findings which were returned while adjudicating issues by the learned trial Court were not binding upon the party against whom a decree has not been passed. Mr. Rathore further submitted that an appeal is not filed against the findings returned by the learned Court but it is filed against the decree passed by the learned Court.

16. A perusal of the judgment passed by this Court in ***Sher Chand's*** case (supra) demonstrates that a similar issue was raised in the said appeal also and therein this Court has held that an appeal is not maintainable by a party on a finding which is returned against it in a suit in which otherwise no decree has been passed against it, unless the same operates as *res judicata*. This Court in para 6 of the said judgment has held:

> *"6. In Madras Corporation Vs. P.R. Ramachandriah, AIR 1977 Mad. 25, a Division Bench of the said Court held that when a party is not aggrieved by a decree, it was not competent to appeal against the decree on the ground that an issue is found against him. Similarly, in K.L. Bapuji V. State, AIR 1977 AP 427, a Division Bench of Andhra Pradesh High Court has also taken the similar view that if all the defendants have common interest in obtaining the dismissal of the suit filed by the plaintiff and if for dismissing the suit it is not necessary to decide the controversy between the defendants inter se, the findings recorded on the controversy between the defendants themselves would not be res judicata. No appeal in the aforesaid circumstances, when the entire decree is in favour of the defendants, would lie against the findings at the instance of the defendants aggrieved by it. To the similar effect is a Full Bench judgment of Patna High Court reported in Arjun Singh Vs. T.D. Ghosh, AIR 1974 Pat. 1, where amongst other things, it was observed that appeal would only be maintainable if the findings on the issues decided against the party appealing would operate as res judicata. Since the findings recorded against the appellants on issues in the suit out of which this appeal has arisen do operate as res judicata, therefore, this judgment squarely covers the case of the plaintiff regarding the maintainability of the appeal. No decision to the contrary has been brought to the notice of this Court by the learned Counsel for the appellants.*

17. Hon'ble Supreme Court in ***Krishnananda's*** case (supra) has held that appeal filed at the instance of appellant was not maintainable against certain findings which might be relevant for the purpose of determination of an issue by and between the appellant and the original plaintiff when no decree against the appellant was passed.

18. The Hon'ble Supreme Court in **Ramesh Chandra** Vs. **Shiv Charan Dass and others** 1990 (Supp) Supreme Court Cases 633 has held that one of the tests to ascertain if a finding operates as *res judicata* as if the party aggrieved could challenge it. Since the dismissal of appeal or the appellate decree was not against defendants 2 and 3 they could not challenge it by way of appeal.

19. A Full Bench of Patna High Court in **Arjun Singh and others** Vs. **Tara Das Ghosh and others** AIR 1974 Patna 1 has held that it is well settled that a party against whom a finding has been recorded has got a right of appeal, even though the ultimate decision may be in his favour if the finding can operate as *res judicata* in a subsequent suit or proceeding; if, however, it cannot operate as *res judicata* then such a party has no right of appeal.

20. Therefore, it is evident from the case law cited above that in the absence of there being a decree against a party, it cannot file an appeal, even if an issue has been decided by the Court while adjudicating the case against it. This is for the reason that in the absence of that finding resulting in decree against the party concerned, the same does not operate as *res judicata* vis-à-vis party against whom the said finding has been returned.

21. Confronted with this situation, Mr. Chauhan, learned counsel for the appellant submits that though it is a matter of record that no decree has been passed by the learned trial Court either in favour of the plaintiffs or against the present appellant, but still on record there are findings returned against the present appellant as far as Issue No. 4 is concerned and same stand incorporated in the decree also.

22. In my considered view, the findings so returned by the learned trial Court while deciding Issue No. 4 are nothing but finding which have been returned as the same were relevant for determination of issues *intra* the plaintiffs and the defendants and in view of the fact that neither any decree has been passed in favour of the plaintiffs nor any judgment has been passed against defendant No. 1, the findings so returned do not operate as *res judicata* as far as said issue is concerned qua the present appellant, even though the same find mention in the decree,

which in my considered view was avoidable, as in the absence of a decree against defendant, he has no right to file an appeal.

23. Therefore, it is clarified that findings returned against the present appellant by the learned trial Court while deciding Issue No. 4 which find mention in decree also shall not act as *res judic*ata against the appellant.

24. Accordingly, I hold that the appeal which was filed by the present appellant against the judgment and decree passed by the learned trial Court was in fact not maintainable and neither is this appeal and substantial questions of law earlier framed on 29.12.2008 therefore do not call for any adjudication. Newly framed substantial question of law is answered accordingly.

25. This appeal is thus dismissed as judgment and decree passed by the learned first appellate Court in Civil Appeal No. 53-J/05/04, dated 22.08.2006 against which the present appeal has been preferred are *non est* as in fact appeal filed before the first appellate Court was not maintainable. However, it is clarified that the findings returned against the present appellant by the learned trial Court while deciding Issue No. 4, which also find mention in the decree so passed by the learned trial Court shall not operate as *res judicata.* Miscellaneous applications, if any, stand disposed of. No order as to costs.

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

Hari Ram & another .....Appellants/Defendants.
Versus
Smt. Santi Devi & others .....Respondents/Plaintiffs.

RSA No. 76 of 2005.
Reserved on : 28.02.2017.
Decided on : 24th March, 2017.

Specific Relief Act, 1963- Section 38- The original plaintiff filed a suit seeking injunction pleading that the defendants were interfering with his possession without any right, title or interest- the defendants pleaded that plaintiff had agreed to sell the suit land and had handed over the possession to the defendants- they had raised an orchard over the same – the Trial Court dismissed the suit- an appeal was filed, which was allowed – held in second appeal that plaintiff is recorded to be the owner in possession of the suit land – entry in jamabandi carries with it a presumption of correctness – the defendants had not led sufficient evidence to rebut the presumption – the Appellate Court had rightly reversed the decree of the Trial Court- appeal dismissed. (Para-8 to 12)

For the Appellant: Mr. G.R. Palsra, Advocate.
For the Respondents: Mr. Sanjeev Kuthiala, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiff instituted a suit against the defendants 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 allowed the appeal of the plaintiffs whereupon it rendered a decree of injunction, permanently restraining the defendants from interfering in the possession of the plaintiffs over

the suit land. The defendants standing aggrieved by the impugned rendition recorded by the learned First Appellate Court concert to assail it by preferring an appeal therefrom before this Court.

2. Briefly stated the facts of the case are that the original plaintiff, Mohan, the predecessor in interest of the respondents was owner in possession of the land comprised in khewat and khatauni No. 95/92/135, khasra No. 920/492, old khasra No.10 new, measuring 2-9-0 bighas situated at Mouja Rathol, Illaqua Balh, tehsil Sadar, District Mandi, H.P.. He filed the suit against the respondents alleging therein that the defendants without any right, title or interest in the suit land are interfering with his possession in the suit land by letting lose their cattle in the suit land and destroying the crop sown in the suit land. It is further averred that despite the repeated requests of the plaintiff the defendants did not stop interfering with the possession of the plaintiff in the suit land, hence, this suit. In the alternative the plaintiff claimed the relief of possession, if the defendants occupied any part of the suit land during the pendency of the suit.

3. The defendants contested the suit and filed written statement. It is pleaded that they have purchased 0-11-2 bigha of land from plaintiff Mohan and thereafter on 17.8.1984 the plaintiff agreed to sell and exchange the suit land in favour of the defendants for a consideration of Rs.6,000/- and for the exchange of land,measuring 0-11-12 bigha. It is alleged that after the execution of the sale cum exchange deed the parties exchanged their land and at that time a sum of Rs.4,000/- was paid to the plaintiff and the remaining amount was to be paid at the time of execution of the sale deed. It is further alleged that since the suit land has been allotted as nautor land to the plaintiff, it could not be transferred for a period of 15 years and it was agreed that after completion of 15 years the plaintiff would execute the registered sale deed of the same in favour of the defendants. The case of the defendants is that after the purchase of the suit land they raised an orchard over it by planting trees of Safeda etc. The defendants denied that they ever destroyed the crop sown by the plaintiff or interfered with the possession of the plaintiff over the suit land.

4. The plaintiffs/respondents herein filed replication to the written statement of the defendants/appellants, 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 following issues inter-se the parties in contest:-

1. Whether the plaintiff is entitled to the relief of injunction, as prayed for? OPP
2. Whether the suit is not maintainable? OPD
3. Whether the plaintiff has no locus standi to file the present suit? OPD
4. Whether the plaintiff is estopped by his own act and conduct to file the suit? OPD
5. Whether the valid agreement has been executed by the plaintiff with the defendant No.1 on 17.8.1984, for exchange and sell the suit land?, If so, its effect? OPD.
6. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court dismissed the suit of the plaintiffs/respondents herein. In an appeal, preferred therefrom by the plaintiffs/respondents before the learned First Appellate Court, the first Appellate Court allowed the appeal and reversed the findings recorded by the learned trial Court.

7. Now the defendants/appellants herein have instituted the instant Regular Second Appeal before this Court assailing the findings recorded in its impugned judgment and decree by the learned first Appellate Court. When the appeal came up for admission on

27.03.2006, this Court, admitted the appeal instituted by the defendants/appellants against the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

a) Whether the First Appellate Court has misread, misinterpreted and misconstrued the oral as well as documentary evidence of the parties especially agreement Ex. DA, statements of PW1, PW2, PW3 and PW4, which has materially prejudiced the case of the appellants?

b) Whether the suit for permanent prohibitory injunction is not maintainable when the respondents/plaintiffs are out of possession as per agreement Ex. DA?

c) Whether the judgment and decree of the learned first Appellate Court is perverse, who has reversed the judgment and decree of the learned trial Court without assigning good reasons?

d) Whether the respondents/plaintiffs have not come with clean hands and have suppressed the material facts while filing the present suit and as such not entitled for discretionary injunction?

Substantial questions of Law No.1 to 4:

8. In a suit for permanent prohibitory injunction, the solitary factum which stands enjoined to be clinchingly proven is qua the plaintiffs or the defendants respectively holding possession of the suit land, whereupon, this Court would stand constrained to accord or refuse the apposite relief qua the plaintiffs. The best evidence for underscoring the factum qua the plaintiffs holding possession of the suit land stands comprised in Ex. PA, exhibit whereof is the jamabandi qua the suit land pertaining to the year 1993-94, also stands comprised in the jamabandi for the year 1987-88 wherewithin in the apposite column(s) of ownership and possession, deceased plaintiff Mohan stands recorded to be holding its ownership and possession. A presumption of truth is enjoyed by entries held in the revenue record. Though, the presumption of truth enjoyed by revenue entries occurring in the relevant revenue record is dis-placeable, nonetheless, the efficacy of the reflections occurring in the relevant revenue record would stand displaced, only by clinching evidence, unraveling qua the defendants holding possession of the suit land.

9. For displacing the presumption of truth enjoyed by the revenue entries held in jamabandies comprised in Ex. PA and PD, the defendants had placed reliance upon a report comprised in Ex.DW2/A proven by DW-2. However, the tenacity of the aforesaid report stands eroded by the factum of the application, in sequel whereto DW-2 visited the spot and thereafter prepared Ex.DW2/A standing not entered by him in the apposite records, though, he unveils in his deposition qua an obligation standing cast upon him to enter therein both the application as also his apposite report. However, even report Ex. DW2/A remained unentered by DW-2 in the apposite Panchayat register. DW-2 also acquiesced to the suggestion put to him by the learned defence counsel while holding him to cross-examination qua after any visit standing made to the spot concerned by an official of the Panchayat, a copy of the report prepared in sequel thereto standing enjoined to be handed over to the Secretary of the Panchayat concerned, for facilitating the latter to safely maintain it in the Panchayat record. However, DW-2 after preparing Ex.DW2/A omitted to hand it over to the Secretary of the Panchayat concerned, for its being safely kept in the relevant record(s) of the Panchayat concerned. Consequently, with Ex.DW2/A not emanating from any appropriate custody nor also when preceding thereto application, if any, as stood preferred before the Panchayat concerned by the defendants for thereupon constraining DW-2 to make a visit to the relevant spot, stood unentered in the relevant record, inevitably constrains an inference qua DW-2 holding leanings vis-a-vis the defendants thereupon his preparing a biased report qua the defendants rendering it to stand stained with an aura of unauthenticity, thereupon, any tenacity which it holds in displacing the presumption of truth enjoyed by the reflections held in Ex. PA and Ex.PD hence stand eroded.

10. Be that as it may, oral evidence, if any, for benumbing the presumption of truth held by the revenue entries wherein the predecessor-in-interest of the plaintiffs stands disclosed to be holding ownership besides possession of the suit land, stood communicated by DW-4. However, the deposition of DW-4 stands blunted of its efficacy arising from the factum of each aforesaid contradistinctively deposing qua the genre besides the number of fruit trees growing upon the suit land. Given the contradistinct communication(s) made by DW-2 in his report Ex.DW2/A and by DW-4 in his testifification qua the genre besides the number of fruit trees growing upon the suit land, efficacy of their respective oral testifications, for eroding the presumption of truth enjoyed by the revenue entries occurring in Ex.PA and PD, hence, gets shattered. Even otherwise the tenacity of the recitals held in Ex.DW2/A besides of the oral deposition of DW-4 also stands benumbed by the factum of the counsel for the defendants while holding PW-1 Durga Dass to cross-examination his purveying a suggestion to him qua 15 pear tress growing upon the suit land, suggestion whereof is an apparent acquiescence of the defendant qua the suit land only holding 15 trees whereas, both DW-4 and EX.DW2/A in stark contradistinction thereof in the respective testifications unveil qua trees more than 15 of pear also of other varieties growing upon the suit land wherefrom an inevitable inference is qua the defendants contriving the depositions of both DW-4 and DW-2

11. In aftermath, the presumption of truth enjoyed by the apposite reflections occurring in Ex.PA and Ex.PD galvanize immense force also it stands concluded qua the apposite reflections occurring therewithin unraveling qua the plaintiffs holding possession of the suit land, hence, acquiring conclusivity.

12. Even though, dehors the factum of Ex.DA standing proven or not, the trite factum of their evidently standing barred to effect a valid alienation of the suit land, execution whereof stood barred by existence at the time of its execution, a clog against its transfer unless the specifically statutorily prescribed period elapsing since the grant of the suit land as nautor uptill its complete alienation occurring on execution of a registered deed of conveyance, whereas, when visibly in sequel to the execution of Ex. DA no complete alienation of the suit land by execution of a registered deed of conveyance evidently occurring thereupon, Ex. DA assumes no emphatic probative force. Also when the defendants omitted to adduce any evidence qua theirs ever on elapse of the statutorily prescribed period of time since the grant of the suit land as nautor to the predecessor-in-interest of the plaintiff Mohan, calling upon the plaintiff to execute a registered deed of conveyance also renders Ex. DA to hold no probative vigour. Consequently no capitalization on the anvil of Ex. DA, can stand accorded to the defendants qua theirs hence proving qua theirs holding possession of the suit land. Preeminently when the granting or refusing the relief of permanent prohibitory injunction to the plaintiff rests upon theirs evidently holding or not holding the possession of the suit land, whereas, with the aforesaid trite factum of the plaintiffs holding possession of the suit land standing proven by unflinching evidence constituted in Ex. PA and Ex.PD, hence entitles them to avail a decree for injunction permanently restraining the defendants from interfering in the suit land.

13. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court is 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, the substantial questions of law are answered in favour of the plaintiffs/respondents and against the defendants/appellants.

14. In view of above discussion, the present Regular Second Appeal is dismissed. In sequel, the judgement and decree rendered by the learned first Appellate Court is maintained and affirmed. All pending applications also stand disposed of. No order as to costs.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J. AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

State of Himachal Pradesh ....Appellant.

Versus

Hem Raj ....Respondent.

Cr. Appeal No. 270 of 2015.
Reserved on 14.3.2017.
Decided on: 25.03.2017.

Indian Penal Code, 1860- Sections 498-A and 306 read with Section 34- Deceased was married to the accused – the accused used to doubt the character of deceased and beat her – he also used to demand dowry – the deceased committed suicide- the accused was tried and acquitted by the Trial Court- held in appeal thatno complaint of ill-treatment was ever made to Panchayat or police during the life time of deceased- no specific incident of demand of dowry was proved – it was admitted that the deceased had given birth to a child after six months of the marriage – the possibility of deceased being under stress due to this fact cannot be ruled out- it was not proved that accused had instigated/abetted the deceased to commit suicide- the Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed. (Para-9 to 30)

For the appellant. Mr. V.S. Chauhan, Addl. Advocate General with Mr. Vikram Thakur, Dy. Advocate General.

For the respondent. Mr. Trilok Jamwal, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.

By way of this appeal, the State has challenged the judgment passed by the Court of learned Additional Sessions Judge (I), Mandi, District Mandi in Sessions Trial No. 15 of 2013 dated 15.1.2015 vide which, the present respondent/accused has been acquitted by the learned trial court for commission of offences punishable under Sections 498A and 306 of IPC.

2. The case of the prosecution was that deceased Asha Devi was married with accused in the year 2010 and after about 4-5 months of marriage accused started physically assaulting her. On this, father of the deceased i.e. complainant Jindu Ram brought her back to his house in the year 2012 and kept her (deceased) with him for about 4 months. Thereafter accused along with Bhasker Ram, Rattan and Bali Ram came to the house of complainant and deceased was sent along with them to the house of accused.

3. As per the prosecution accused used to doubt the character of deceased and he also used to beat her on account of not bringing sufficient dowry. As a result of the cruelty so meted out to the deceased, she committed suicide on 2.4.2013.

4. On the basis of statement recorded under Section 154 Cr. P.C. of the complainant i.e. the father of deceased, FIR was registered, body of deceased was sent for post-mortem which revealed that deceased had committed suicide after consuming poison.

5. Investigation was carried out in the matter and after completion of investigation, challan was filed in the Court and as a prima facie case was made out against the accused, accordingly he was charged for commission of offences punishable under Sections 498A and 306 IPC, to which he pleaded not guilty and claimed trial.

6. On the basis of evidence produced on record by the prosecution both ocular as well as documentary it was held by learned trial court that prosecution had not been able to

prove the guilt of the accused beyond all reasonable doubt for commission of offences punishable under Sections 498A and 306 IPC. While arriving at the said conclusion, it was held by learned trial court that the evidence led by prosecution demonstrated that even the complainant, PW1 father of the deceased, had not corroborated the case of the prosecution, as it had not come in the statement of complainant that accused in fact had abetted his wife to commit suicide. Learned trial court further held that whereas case of the prosecution was that deceased had committed suicide, however, the testimony of PW2 Chuhari Devi mother of deceased was to the effect that deceased was murdered by accused. Learned trial court also held that no witness of near vicinity had been examined and even PW5, Bhaskar Ram and PW6 Bali Ram had not supported the case of prosecution. On these bases it was held by learned trial court that prosecution had not been able to prove the guilt of the accused beyond all reasonable doubt. Accordingly it acquitted the accused for commission of offences punishable under Sections 498A and 306 IPC.

7. Feeling aggrieved by the said acquittal, the State has filed present appeal.

8. We have heard Mr. V.S. Chauhan, learned Additional Advocate General as well as Mr. Trilok Jamwal, learned counsel appearing for the accused and have also gone through the records of the case.

9. In the present case in order to prove its case prosecution examined 11 witnesses. Father of deceased Jindu Ram entered the witness box as PW1, mother of the deceased Chuhari Devi as PW2, brother of the deceased Mohan Lal as PW3, father-in-law of deceased Bhaskar Ram as PW5, maternal uncle of the accused Bali Ram as PW6 amongst others. Dr. Anup Shivhare who conducted the post-mortem of the deceased entered the witness box as PW4.

10. A perusal of FIR Ext. PW10/A, which was lodged on the basis of statement recorded by PW1 Jindu Ram under Section 154 Cr. PC, demonstrates that it was mentioned therein that deceased was married with the accused about one and half years back as per Hindu rites and though initially for a period of 4-5 months husband of the deceased had treated her properly but thereafter he started physically abusing her, as a result of which, deceased remained in the house of the complainant for a period of 4 months and thereafter accused took her back. It is further recorded in the FIR that accused used to verbally abuse the deceased by calling her characterless and ugly and he also used to physically assault her and demand dowry. It was further mentioned in the FIR that on these counts accused had abetted the deceased to commit suicide. Said complainant who entered the witness box as PW1 deposed in his examination-in-chief that on 2.4.2013 accused and his relatives had killed his daughter. He further deposed that the hands of the deceased were tied with a rope and there were injury marks on the body of deceased. In his cross-examination this witness deposed that he had read the statement of his, recorded under Section 154 Cr.P.C before he signed it. He admitted that it was not recorded in the statement recorded by the police that deceased was murdered. He further stated in his cross-examination that accused had started demanding dowry after a few months of marriage. He further stated in his cross-examination that he did not remember as to when accused physically abused his daughter after she returned back from her parent's house. This witness admitted that his daughter had given birth to a male child after six months of marriage. He denied that when accused confronted the deceased as to whose child it was, she came back to her parental house. He denied the suggestion that there were no injury marks on the body of deceased and that he had deposed falsely. He admitted that he had not lodged any complaint to the effect that accused was demanding dowry from him before any authority.

11. Mother of deceased Chuhari Devi who entered the witness box as PW2 deposed that after the marriage of deceased with accused he used to maltreat her and used to demand dowry. She further deposed that on account of ill behaviour being meted out to the deceased they had brought back the deceased to their house. She also deposed that her daughter was in fact killed by accused and his other family members. In her cross examination this witness deposed that she had not stated before the police that accused had abused her deceased daughter by calling her characterless and ugly and for this reason she committed suicide. She feigned

ignorance to the effect that her daughter gave birth to a child after 5 months of the marriage. However, she admitted that deceased had come back to her parent's house after delivering the child. She also admitted in her cross-examination that no complaint had been lodged against the accused on the ground that he was demanding dowry. She denied the suggestion that her deceased daughter had conceived pregnancy from some other person than the accused.

12. Brother of deceased Mohan Lal who entered the witness box as PW3 deposed in the Court that the accused and his family members used to physically abuse the deceased on demand of dowry and his sister committed suicide to save herself from their atrocities. He further deposed that there were injuries marks on the body of his sister. In his cross examination he admitted it to be correct that his sister was not physically assaulted by accused in his presence. In his cross examination he also deposed that he was informed by the doctor that the deceased consumed poison. He admitted the suggestion that his sister had given birth to a child only after 5 months of marriage and thereafter relationship between his family and the family of accused had become strained.

13. Doctor Anup Shivhare who entered the witness box as PW4 proved on record the post-mortem report of deceased Ext. PW4/B. In his cross-examination this witness admitted it to be correct that there were no external marks of injury on the person of deceased and there were no marks of any kind of beatings on the body of the deceased.

14. Father-in-law of deceased was also examined by prosecution as PW5 and this witness deposed that his daughter-in-law gave birth to a child after 5 months of marriage and when she was asked as to whose child it was, she went to her parent's house where she stayed 2 to 3 months. He further deposed that thereafter brother and sister-in-law of deceased left her back in his (PW5) house and she remained in her in-laws house under stress and on this count she consumed poison. As he was declared as hostile witness he was cross-examined by the learned Public Prosecutor. In his cross-examination he denied the suggestion that after the birth of child, deceased was verbally abused and physically assaulted. He also denied that in the year 2012 accused along with Bali Ram and Rattan Singh had gone to bring the deceased back from her parental house to her in-laws house. In his cross-examination by defence, this witness has deposed that the child to whom birth was given by deceased was residing in the house of the accused.

15. Before proceeding any further, it is relevant to take note of the fact that here is a case which admittedly is of unnatural death and the death has taken place within 7 years of the marriage of the deceased.

Section 113-B of the Evidence Act, 1872 reads as under:-

> **"113-B. Presumption as to dowry death**. - When the question is whether a person has committed the dowry death of a woman, and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the court shall presume that such person had caused the dowry death.

Section 304-B of the IPC reads as under:-

> **"304-B. Dowry death**. – (1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called 'dowry death', and such husband or relative shall be deemed to have caused her death."

16. Thus, it is evident that for the purposes contemplated in Section 113-B of the Evidence Act 1872 and Section 304-B I.P.C., to spring into action, it is necessary to demonstrate that cruelty or harassment was caused soon before the death. Therefore, the interpretation of the words "soon before" assumes great significance and importance and these words have to be

interpreted keeping in view the facts and circumstances of each case. The question obviously will be how "soon before" her death such woman was subjected by the accused to cruelty or harassment for or in connection with demand for dowry. The cruelty or harassment will differ from case to case and it will obviously be relating to the mindset of people which will also vary from person to person. Besides cruelty being both mental and/or physical it can also be verbal or emotional.

17. The Hon'ble Supreme Court in **Surinder Singh Vs. State of Haryana**, (2014) 4 Supreme Court Cases 129, has held as under:-

> "17. Thus, the words 'soon before' appear in Section 113B of the Indian Evidence Act, 1872 and also in Section 304B of the IPC. For the presumptions contemplated under these Sections to spring into action, it is necessary to show that the cruelty or harassment was caused soon before the death. The interpretation of the words 'soon before' is, therefore, important. The question is how 'soon before'? This would obviously depend on facts and circumstances of each case. The cruelty or harassment differs from case to case. It relates to the mindset of people which varies from person to person. Cruelty can be mental or it can be physical. Mental cruelty is also of different shades. It can be verbal or emotional like insulting or ridiculing or humiliating a woman. It can be giving threats of injury to her or her near and dear ones. It can be depriving her of economic resources or essential amenities of life. It can be putting restraints on her movements. It can be not allowing her to talk to the outside world. The list is illustrative and not exhaustive. Physical cruelty could be actual beating or causing pain and harm to the person of a woman. Every such instance of cruelty and related harassment has a different impact on the mind of a woman. Some instances may be so grave as to have a lasting impact on a woman. Some instances which degrade her dignity may remain etched in her memory for a long time. Therefore, 'soon before' is a relative term. In matters of emotions we cannot have fixed formulae. The time-lag may differ from case to case. This must be kept in mind while examining each case of dowry death.

18. In the present case, the marriage of the deceased was solemnized on 2010 and the death of the deceased has taken place on 2.4.2013. It is clearly proved by the Medical Officer that the death was caused due to poisoning. Thus, it was unnatural death and death has taken place within seven years of marriage and presumption of dowry death will be applicable. However, merely because the death has taken place within seven years from the date of marriage of the deceased, this does not mean that the presumption as contemplated in Section 113-A of the Evidence Act will not have to be substantiated by the prosecution by placing on record cogent and reliable material.

19. Evidence on record demonstrates that father and mother of deceased who entered the witness box as PW1 and PW2 have maintained that deceased was ill-treated by accused on account of demand of dowry and she was in fact killed by accused and his family members. However, it is a matter of record that accused has not been charged for the offence of murder but he has been charged for commission of offences punishable under Sections 498A and 306 IPC. Though PW1, PW2 and PW3 have deposed in the Court that accused and his family members used to maltreat the deceased but no complaint in this regard was ever lodged by either of them or the deceased either to the Panchayat or Police personnel about the alleged ill-treatment meted out to the deceased by the accused for want of dowry. There is no material adduced on record by the prosecution to demonstrate that demand of dowry was made by the accused from the deceased as alleged. No independent witness has corroborated the version of the prosecution.

20. Besides this perusal of the statement of these witnesses who also happen to be closely related to the deceased also demonstrates that no specific incident of beating or demand of dowry has been narrated by them. Their cross examination further demonstrates that their

credibility stands impeached by the defence in view of inconsistencies in the same and therefore their deposition cannot be said to be trustworthy so as to sufficiently prove the guilt of the accused.

21. Because a married woman commits suicide within seven years of her marriage, presumption under Section 113-A of the Evidence Act would not automatically apply. The mandate of the law is also that where a woman commits suicide and it is shown that soon before her death such woman was subjected to cruelty or harassed for any demand of dowry, the presumption as envisaged under Section 113B of the Evidence Act may attract, however having regard to all other facts and circumstances of the case, such as the suicide had been abetted by her husband or by some relative of her husband. This presumption according to us is discretionary. As far as the present case is concerned, we have already indicated that the prosecution has not succeeded in showing that there was any dowry demand. According to us, the circumstances of the case, as pointed out by the prosecution are totally insufficient to hold that the accused had abetted the deceased to commit suicide.

22. Let us test the veracity of the version of PW-1, PW-2 and PW-3 from another angle. We have gone through the evidence of said witnesses and we find that except making bald statement of assault and demands of dowry, there is no evidence adduced by them to prove any particular act of cruelty or harassment, to which the deceased was subjected to by the accused or that any complaint was made to the police about any such assault or harassment before the death of the deceased. Therefore, also in our opinion, the learned trial Court was entitled to take a view that the prosecution story as advanced from the evidence of said witnesses was not established beyond reasonable doubt.

23. The Hon'ble Supreme Court has held in **Madivallappa V. Marabad and others Vs. State of Karnataka**, (2014) 12 Supreme Court Cases 448, that in a case where no evidence is adduced to prove any particular act of cruelty or harassment to which the deceased was subjected to and where no complaint was made to the police about any such assault or harassment before the death of the deceased, the conclusion arrived at by the trial Court that the prosecution story was not established beyond reasonable doubt was the correct view.

24. This Court cannot lose sight of the fact that it is a matter of record that deceased gave birth to a male child after six months of her marriage. It has come in the statement of brother of the deceased PW3 Mohan Lal that relations between the family of deceased and accused became strained after deceased gave birth to a child only 6 months after the marriage. It has also come on record that in fact deceased went back to her parental house after giving birth to the said child. In this view of the matter this possibility cannot be ruled out that the deceased was under stress on account of having given birth to a child after 6 months of marriage and her not being in a position to explain the same. Therefore, in view of above discussion we hold that prosecution was not able to prove its case against accused for commission of offence punishable under Section 498A of IPC.

25. In the present case the accused has also been charged for commission of offence punishable under Section 306 IPC.

26. It has been held by the Hon'ble Supreme Court in **Sangara Bonia Sreen Vs. State of Andhra Pradesh**, 1997 (5) Supreme Court Cases, 348, that the basic ingredients of offence under Section 306 are (a) suicidal death and (b) abetment thereof. In our considered view, in order to attract the ingredients of abetment the intention of the accused to aid or instigate or abet the deceased to commit suicide is necessary.

27. It is a unique legal phenomenon in the Indian Penal Code that the only act, the attempt of which alone will become an offence, is suicide. The person who attempts to commit suicide is guilty of the offence under Section 309 IPC, whereas the person who committed suicide cannot be reached at all. Section 306 renders the person who abets the commission of suicide punishable for which the condition precedent is that, suicide should necessarily have been

committed. Thus, the crux of the offence under Section 306 itself is abetment. In other words, if there is no abetment there is no question, the offence under Section 306 comes into play.

28. Hereinafter, we will apply these principles to the facts of the present case. A close scrutiny of the statements of the prosecution witnesses will demonstrate that none of them have mentioned any explicit act on account of the accused which can be termed to be an act of abetment on his behalf which led deceased Asha Devi to commit suicide. On the basis of the statements of the prosecution witnesses who were also interested witnesses, it cannot be said that the prosecution was successful in demonstrating and proving that the accused had committed any act which could be termed to be an act of abetment towards the commission of suicide by deceased Asha Devi.

29. In order to substantiate the charge under Section 306 I.P.C., it has to be established that the death by commission of suicide was desired object of the abettors and with that in view they must have instigated, goaded, urged or encouraged the victim in commission of suicide. The instigation may be by provoking or inciting the person to commit suicide and this instigation may be gathered by positives acts done by the abettors or by omission in the doing of a thing. Thus, the acts or omission committed by the abettors immediately before the commission of suicide are vital. In the present case, we are afraid that the prosecution was not able to substantiate any of the above ingredients. The prosecution could not prove any act of provocation or incitement or omission or commission on the part of the accused, vide which he had instigated the deceased to commit suicide.

30. The prosecution has not been able to establish any intention of the accused to aid or instigate or abet the deceased to commit suicide. Therefore, it cannot be said that the judgment passed by the learned trial Court whereby the accused has been acquitted is either perverse or the acquittal of the accused by the learned trial Court has amounted to travesty of justice.

Thus, we conclude by holding that the prosecution has failed to establish beyond reasonable doubt that accused was guilty of the offences alleged against him. We have gone through the judgment passed by the learned trial Court at length. The learned trial Court after due deliberation and due application of mind has come to the conclusion that the prosecution could not bring home the guilt against accused beyond reasonable doubt. We find no reason to disagree with the said conclusion arrived at by the learned trial Court. According to us also, the accused is entitled to the benefit of doubt as the prosecution has failed to prove beyond reasonable doubt the guilt of the accused. Therefore, we uphold the findings recorded by the learned trial Court and the appeal is dismissed being without any merit. Bail bonds, if any, furnished by the accused are discharged.

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BEFORE HON'BLE MR. JUSTICE SANDEEP SHARMA, J

Bhag Singh .....Appellant

Versus

Smt. Piar Dassi and others .....Respondent

RSA No. 505 of 2005
Decided on: March 27, 2017

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit for permanent prohibitory injunction pleading that K, his father had executed a Will in favour of the plaintiff and plaintiffs' brother - sister of the plaintiff (defendant No.1) was disinherited by the Will- defendants started interfering with the suit land without any right to do so- the defendants pleaded that they had become the owners by way of adverse possession- the execution of the Will was not disputed by

them- the suit was decreed by the Trial Court- an appeal was filed, which was partly allowed – held in second appeal that plaintiff had proved that one and half storeyedhouse exists on the suit land, which is owned and possessed by him – the defendants had failed to prove the adverse possession – the Appellate Court had wrongly appreciated the evidence – the Appellate Court should give reasons for reversing the findings of the Trial Court and should show as to how the findings recorded by Trial Court were erroneous – the Appellate Court had failed to assign reasons while reversing the decree – appeal allowed – judgment passed by Appellate Court set aside.(Para-10 to 21)

Case referred:
Laliteshwar Prasad Singh v. S.P. Srivastava, (2017) 2 SCC 415

For the appellant Mr. Raman Jamalta, vice Counsel.
For the respondents: Mr. C.S. Thakur, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:

Instant Regular Second Appeal is filed under Section 100 CPC against judgment and decree dated 17.8.2005 rendered by the learned ADJ.., Fast Track, Kullu, Himachal Pradesh in Civil Appeal No. 18/2005, whereby judgment and decree passed by the learned Civil Judge (Senior Division), Lahaul & Spiti at Kullu (HP) in Civil Suit No. 35 of 2004, has been modified.

2. Briefly stated the facts as emerge from the record are that the appellant-plaintiff (herein after, 'plaintiff') filed a suit for permanent prohibitory injunction restraining the respondents-defendants (hereinafter, 'defendants') from causing any sort of interference in his ownership and possession over land comprised in Khasra No. 117 contained in Khata Khatauni No. 456 min/496 min, as per Jamabandi for the year 1996-97 situated in Phati Palach, Kothi Palach, Tehsil Banjar, District Kullu, Himachal Pradesh (herein after, 'suit land') and residential house situated in the *Abadi* owned and possessed by the plaintiff. Plaintiff averred in the plaint that the suit land was earlier owned and possessed by his father, Shri Khinthu, who executed a registered Will dated 16.4.1985, in his favour as well as his brother Puran Singh. As per plaintiff, after death of their father, they became owner-in-possession of the suit land. Plaintiff further claimed that his father disinherited his daughter i.e. defendant No.1, who was married during his life time and, since then, she had been residing in the matrimonial house, with her husband. Plaintiff termed defendants to be strangers to the suit land/property stating that they have no right, title or interest over the suit land. But since defendants started interfering in the owner-in-possession of the plaintiff over the suit land, without there being any right or title, he was compelled to file instant suit seeking therein permanent prohibitory injunction restraining the defendants, as stated above.

3. Defendants, by way of detailed written statement, refuted aforesaid contentions of the plaintiff. Defendants stated that the residential house is not standing over the suit land, but the same has been constructed by them, over the Government land and for the last 30 years, they have been residing therein. Defendants claimed that their possession over the house, as mentioned above, is without interruption and to the notice and knowledge of the public at large as well as plaintiff, and, a such, they have become owners by way of adverse possession. Defendants neither disputed the execution of Will in favour of the plaintiff and his brother, nor their ownership and possession over the suit land. Rather, defendants claimed themselves to be owner of land adjoining to the suit land, which actually belonged to the Government. As per the defendants, Government land was encroached and made cultivable by defendant No.1 and plaintiff had no concern with the encroached land. While seeking dismissal of the suit of the plaintiff, defendants further claimed that they never interfered in the ownership of the plaintiff, rather, he wants to dispossess them from encroached land and house, which is under their

possession. Similarly, defendants claimed that crop was harvested from encroached land, which was sown by them.

4. Learned trial Court, on the basis of pleadings framed following issues:

"1. Whether the plaintiff is the owner in possession of the suit property as alleged? OPP

2. Whether the plaintiff is entitled to the prohibitory injunction prayed for? OPP

3. Whether the plaintiff has a cause of action? OPP

4. Whether the suit is not maintainable in the present form? OPD

5. Whether the plaintiff has not come to the Court with clean hands as alleged. If so, its effect? OPD

6. Whether the defendants are entitled to special costs under section 35-A CPC as claimed, if so, their quantum? OPD

7. Whether the defendants have become the owners of the property by way of adverse possession as alleged. If so, its effect? OPD

8. Relief."

5. Subsequently, learned trial Court, on the basis of pleadings as well as material and evidence adduced on record by the respective parties, decreed the suit of the plaintiff and restrained the defendants by a decree of perpetual injunction from interfering in the peaceful owner-in-possession of the plaintiff over the suit land, in any manner, whatsoever or dispossessing him, harvesting his crops. Feeling aggrieved, defendants filed an appeal before the Additional District Judge, Fast Track, Kullu under Section 90 CPC, which came to be registered as Civil Appeal No. 18/05/11/2005. Learned Additional District Judge, partly allowed the appeal of the defendants and set aside the judgment and decree passed by the trial Court restraining the defendants from interfering in the *Abadi*, whereas held plaintiff to be owner-in-possession suit land. In the aforesaid background, plaintiff approached this Court by filing the instant Regular Second Appeal, praying therein for setting aside judgment and decree of the first appellate Court and restoring the judgment and decree of learned trial Court.

6. Present regular second appeal was admitted on 6.10.2005, on the following substantial questions of law:

"1 Whether the learned Appellate Court below have totally misread and misappreciated the facts of the case and evidence on record, and whether judgment and decree based on misappreciated evidence is sustainable in law?

2. Whether the finding of the Lower Appellate Court in setting aside the finding of the learned Civil Judge (Senior Division) Kullu restraining the defendant from interfering in the "abadi'" is bad because it was never challenged by the defendant?"

7. Mr. Raman Jamalta, learned counsel representing the plaintiff vehemently argued that the impugned judgment and decree passed by the first appellate Court is not sustainable in the eyes of law as the same is not based upon correct appreciation of evidence adduced on record by the respective parties, rather same is result of misappreciation of pleadings as well as evidence available on record and as such same deserve to be set aside. With a view to substantiate his aforesaid argument, Mr. Jamalta invited attention of this Court to the plaint having been filed by the plaintiff to demonstrate that the plaintiff had specifically pleaded that he and his brother Shri Puran Singh, are owner-in-possession of suit land measuring 3-9-0 Bigha comprising of Khasra No. 117 alongwith residential house standing therein. Mr. Jamalta further invited attention of this Court to paragraph 20 of the judgment of first appellate Court to suggest that the findings returned in the same are contrary to the pleadings because plaintiff has specifically pleaded in para-1 of the plaint with regard to existence of residential house on the suit land but the learned first appellate Court wrongly concluded that the plaintiff has only

mentioned with regard to *Abadi* in the head note of the plaint and as such, findings being contrary to the record deserve to be set aside. Mr. Jamalta also made this Court to travel through the written statement having been filed by the defendants as well as evidence led on record by the respective parties to demonstrate that defendants themselves admitted the plaintiff to be owner-in-possession of the suit land as well as residential house situate on the same. While concluding his arguments, Mr. Jamalta forcefully contended that once there was a candid admission on the part of defendants with regard to ownership and possession of plaintiff on suit land as well as house, there was no occasion for the first appellate Court to set aside well reasoned judgment and decree of the learned trial Court as such he prayed that judgment and decree passed by first appellate Court may be set aside and that of learned trial Court be restored.

8. Mr. C.S. Thakur, learned counsel representing the defendants supported the impugned judgment and decree passed by the first appellate Court. Mr. Thakur, strenuously argued that there is no illegality or infirmity in the judgment and decree passed by first appellate Court, rather, same are based upon correct appreciation of evidence adduced on record by the respective parties, and as such there is no scope of interference. While inviting attention of this Court to the impugned judgment, Mr. Thakur forcefully contended that each and every aspect of the matter has been dealt with meticulously by the first appellate Court and as such there is no force in the contentions of the learned counsel representing the plaintiff that the first appellate Court has misappreciated and misconstrued the pleadings as well as evidence. Mr. Thakur further contended that onus was upon the plaintiff to prove on record that 1 ½ storeyed house, as claimed by him, existed on suit land, by placing on record cogent and convincing evidence, but, admittedly, there is no evidence, be it ocular or documentary, suggestive of the fact that 1 ½ storeyed house exists over the suit land, whereas, defendants specifically proved on record that two storeyed house exists over the land adjoining to the suit land, which is owned and possessed by them. In this background, Mr. Thakur, prayed that there is no merit in the appeal having been preferred by the plaintiff and as such same deserves to be dismissed.

9. I have heard the learned counsel for the parties and gone through the record carefully. Since both the substantial questions of law are interconnected, as such, same are being taken up together, to avoid repetition of discussion of evidence.

10. During the proceedings of the case, this Court had an occasion to peruse the pleadings as well as evidence available on record, be it ocular or documentary, perusal whereof certainly suggests that learned first appellate Court misdirected itself while scrutinizing/ analyzing judgment and decree passed by learned trial Court, who, on the basis of material available on record, rightly came to the conclusion that suit property belongs to the plaintiff and defendants have no right and interest over the same, as such, passed decree of injunction restraining the defendants from causing any interference in the suit land.

11. In nutshell, case of the plaintiff is that after expiry of Shri Khinthu, he and his brother Puran Singh became owner-in-possession of the disputed land, on the basis of Will dated 16.4.1985. Plaintiff has specifically stated in the plaint that even a residential house is standing over the suit land. Defendant No.1, who happens to be sister of the plaintiff, nowhere disputed ownership and possession of the plaintiff over the suit land, on the basis of registered Will, rather in unambiguous terms, defendants admitted the claim of the plaintiff with regard to his ownership and possession over the suit land. Plaintiff, by way of suit, claimed that the defendants have started interfering in the ownership and possession over the suit land, without there being any basis and have started forcefully harvesting wheat crop sown on the land in suit. Defendants have altogether set up a different case in the written statement that they have harvested wheat crop on the land adjoining to the suit land, which is owned by the Government but possessed by them. Defendants have gone one step ahead by stating that land adjoining to the suit land was actually encroached by defendant No.1, during the life time of Shri Khinthu and thereafter, they raised two storeyed house on the encroached land and for the last 30 years, they had been residing in the same. Similarly, written statement discloses that neither the defendants have encroached upon the suit land, nor they have any intention to do so.

12. Careful perusal of written statement having been filed by the defendants suggests that though there is denial with regard to existence of residential house over the suit land, which is admittedly owned and possessed by the plaintiff, but there is mention with regard to existence of house possessed by the defendants on the land adjoining to the suit land. But if the stand taken by the defendants is examined/analyzed vis-à-vis averments contained in the plaint, it nowhere emerges that the defendants have disputed the ownership and possession of the plaintiff over the suit land.

13. PW-1 Bhag Singh categorically has stated before the Court below that they became owner-in-possession of the suit land, on the basis of a registered Will dated 16.4.1985, after death of their father, Shri Khinthu and 1 ½ storeyed Slate roofed house is also situated over the suit land and defendants have no concern with disputed property.

14. Similarly, PW-2 Sangat Ram corroborated the version of PW-1, Bhag Singh. However, in his cross-examination, he stated that defendants No.1 and 2 also live in Village Palach but denied the suggestion that defendant No.2 built house at Palach. PW-3 Medh Ram stated that he simply went to the spot and prepared the site plan Mark X of the house in question as per the instructions o the plaintiff.

15. Careful perusal of the plaintiff's evidence certainly compels this Court to infer that plaintiff successfully proved on record that 1 ½ story house exists over the suit land, which is owned and possessed by him as admitted by the defendants.

16. DW-1 Pune Ram, has stated that they have become owners of the encroached land by way of adverse possession. There is nothing in his statement, from where it can be inferred that he disputed ownership of the plaintiff over the suit land pursuant to execution of Will dated 16.4.1985, allegedly executed by Shri Khinthu, in favour of the plaintiff. He simply stated that a double story house is standing over the suit land but in the same breath, he stated that his house is situated over the Government land and he denied that suit property is owned and possessed by the plaintiff. Most importantly, in his cross- examination, he admitted that he has no concern with the house, which is over the land in dispute, meaning thereby, he admitted that the defendants have no claim/right over the house standing on the suit land. Similarly, documentary evidence placed on record i.e. Ext. P1, copy of Jamabandi for the year 1996-1997, clearly suggests that late father of the plaintiff Shri Khinthu was exclusive owner in possession of land involved in the suit, which was ultimately mutated in favour of the plaintiff and his brother, Puran Singh vide mutation No. 2356 as stands reflected in the revenue entries made in Ext. D2 i.e. Jamabandi for the year 2001-02.

17. After careful examination of the pleadings as well as evidence led on record, this Court has no hesitation to conclude that learned first appellate Court failed to appreciate the pleadings as well as evidence available on record in right perspective, as a result of which, erroneous findings came to be recorded, to the detriment of plaintiff, who successfully proved on record that he is owner-in-possession of the suit land. It is admitted case of the parties that suit land is owned and possessed by the plaintiff. Though the defendants by way of pleadings as well as making statement before Court that two storeyed house exists over the suit land, made an attempt to create confusion that house exists over suit land but if evidence is read in its entirety, it clearly suggests that 1 ½ storeyed house exists over the suit land comprising of Khasra No. 117. It is not understood that when factum with regard to ownership of plaintiff over suit land was admitted by the defendants, wherein, defendants while admitting ownership also admitted existence of house over suit land, how the learned first appellate Court could set aside decree of injunction granted in favour of the plaintiff. Otherwise also, matter, if is viewed from another angle, that once Court had come to the conclusion that house is also situated over suit land and suit land is owned and possessed by the plaintiff, where was the occasion for the first appellate Court to restrain plaintiff from interfering in the *Abadi*, which is admittedly on his own land, as admitted by the defendants.

18. It has been repeatedly held by the Hon'ble Apex Court that first appeal is a valuable right of the parties and parties have right to be heard both on questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons in support of such findings. Though the first appellate Court may be justified in taking a different view on question of facts after adverting to the reasons given by the trial judge in arriving at findings in question. Court of first appeal must cover all important questions involved in the case and they should not be general and vague. Moreover, when first appellate court reverses findings of trial Court, it is expected to record findings in clear terms specifically stating therein, in what manner, reasoning of trial court is erroneous. The Apex Court in **Laliteshwar Prasad Singh** v. **S.P. Srivastava** reported in (2017) 2 SCC 415, has held as follows:

> "13. An appellate court is the final court of facts. The judgment of the appellate court must therefore reflect court's application of mind and record its findings supported by reasons. The law relating to powers and duties of the first appellate court is well fortified by the legal provisions and judicial pronouncements. Considering the nature and scope of duty of first appellate court, in Vinod Kumar v. Gangadhar (2015) 1 SCC 391, it was held as under:-
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> > "12. In Santosh Hazari v. Purushottam Tiwari (2001) 3 SCC 179, this Court held as under: (SCC pp. 188-89, para 15)
> >
> > > "15. ... The appellate court has jurisdiction to reverse or affirm the findings of the trial court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. ... while reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it."
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> > The above view has been followed by a three-Judge Bench decision of this Court in Madhukar v. Sangram (2001) 4 SCC 756, wherein it was reiterated that sitting as a court of first appeal, it is the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings.
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> > 13. In H.K.N. Swami v. Irshad Basith (2005) 10 SCC 243, this Court stated as under: (SCC p. 244, para 3) "3. The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard both on questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. Unfortunately, the High Court, in the present case has not recorded any finding either on facts or on law. Sitting as the first appellate court it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording the finding regarding title."
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> > 14. Again in Jagannath v. Arulappa (2005) 12 SCC 303, while considering the scope of Section 96 of the Code of Civil Procedure, 1908, this Court observed as follows: (SCC p. 303, para 2)
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> > 15. Again in B.V. Nagesh v. H.V. Sreenivasa Murthy (2010) 13 SCC 530, this Court taking note of all the earlier judgments of this Court reiterated the aforementioned principle with these words: (SCC pp. 530-31, paras 3-5)
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> > > "3. How the regular first appeal is to be disposed of by the appellate court/High Court has been considered by this Court in various decisions. Order 41 CPC deals with appeals from original decrees. Among

the various rules, Rule 31 mandates that the judgment of the appellate court shall state:

(a) the points for determination;

(b) the decision thereon;

(c) the reasons for the decision; and

(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled.

4. The appellate court has jurisdiction to reverse or affirm the findings of the trial court. The first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. Sitting as a court of first appeal, it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings. The first appeal is a valuable right and the parties have a right to be heard both on questions of law and on facts and the judgment in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings. (Vide Santosh Hazari v. Purushottam Tiwari (2001) 3 SCC 179, SCC p. 188, para 15 and Madhukar v. Sangram (2001) 4 SCC 756 SCC p. 758, para 5.)

5. In view of the above salutary principles, on going through the impugned judgment, we feel that the High Court has failed to discharge the obligation placed on it as a first appellate court. In our view, the judgment under appeal is cryptic and none of the relevant aspects have even been noticed. The appeal has been decided in an unsatisfactory manner. Our careful perusal of the judgment in the regular first appeal shows that it falls short of considerations which are expected from the court of first appeal. Accordingly, without going into the merits of the claim of both parties, we set aside the impugned judgment and decree of the High Court and remand the regular first appeal to the High Court for its fresh disposal in accordance with law."

14. The points which arise for determination by a court of first appeal must cover all important questions involved in the case and they should not be general and vague. Even though the appellate court would be justified in taking a different view on question of fact that should be done after adverting to the reasons given by the trial judge in arriving at the finding in question. When appellate court agrees with the views of the trial court on evidence, it need not restate effect of evidence or reiterate reasons given by trial court; expression of general agreement with reasons given by trial court would ordinarily suffice. However, when the first appellate court reverses the findings of the trial court, it must record the findings in clear terms explaining how the reasonings of the trial court are erroneous."

19. In the instant case also, first appellate court has not appreciated the evidence in its right perspective and while differing with the findings recorded by the trail Court, has failed to assign its reasons for doing so.

20. Substantial questions of law are answered accordingly.

21. Consequently, in view of the discussion above, present appeal is allowed. Judgment and decree dated 17.8.2005 rendered by the learned Additional District Judge, Fast

Track, Kullu, Himachal Pradesh in Civil Appeal No. 18/2005, is set aside. Judgment and decree passed by the learned Civil Judge (Senior Division), Lahaul & Spiti at Kullu (HP) in Civil Suit No. 35 of 2004, is upheld. Pending applications are disposed of. Interim directions, if any, are vacated.

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

Golf Link Finance and Resorts Pvt. Ltd. ...Petitioner.
Versus
Jagdev Singh ...Respondent.

Cr. Revision No.: 407 of 2016
Date of Decision: 27.03.2017

Code of Criminal Procedure, 1973- Section 256-The Magistrate dismissed the complainant for want of appearance of the complainant or its counsel – aggrieved from the order, present revision has been filed- held that the complainant had engaged a counseland it was the duty of the counsel to appear before the Court – sufficient reason was given in the petition for non-appearance – the revision allowed -order passed by Trial Court set aside. (Para-2 and 3)

For the petitioner: Ms. Seema K. Guleria, Advocate.
For the respondent: None.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge(Oral)

Respondent despite service not present either personally or through authorized counsel. Hence, proceeded against ex-parte.

The instant petition stands directed against the orders recorded on 9.11.2016 by the learned trial Magistrate whereby she for want of appearance thereat of the complainant or its counsel hence dismissed the apposite complaint for want of its prosecution.

2. The learned trial Magistrate in making the impugned pronouncement, had anvilled it upon the mandate held in Section 256 of the Cr.P.C, section whereof stands extracted hereinafter:-

> "256. Non- appearance or death of complainant.
>
> (1) If the summons has been issued on complaint, and on the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks it proper to adjourn the hearing of the case to some other day: Provided that where the complainant is represented by a pleader or by the officer conducting the prosecution or where the Magistrate is of opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case.
>
> (2) The provisions of sub- section (1) shall, so far as may be, apply also to cases where the non- appearance of the complainant is due to his death."

3. The power vested in sub-section (1) thereof upon the Magistrate concerned, gets awakened, on the complainant despite his standing served for a particular date for his recording his appearance, his not thereat recording his appearance whereupon the Magistrate concerned

holds the jurisdiction to acquit the accused, unless for a good reason, the Magistrate concerned in his wisdom deems it fit to adjourn the case to some other day. However, the aforesaid provisions appear to not availed by the Magistrate concerned, significantly when a reading of the petition instituted herebefore unravels qua the complainant company engaging a counsel for prosecuting the apposite complaint before the learned Magistrate whereupon the mandate held in the proviso to Section 256 stands rejuvenated arising from the demonstrable factum of the complainant hereat engaging a counsel to prosecute the apposite complaint whereupon it was incumbent upon the counsel concerned, to record his appearance before the learned trial Magistrate also when it stands not underscored in the impugned order qua hers holding a perception qua the personal appearance therebefore of the complainant being unnecessary, hence, it stood also enjoined upon the authorized representative(s) of the complainant, to, for obviating the apposite legal mischief arising from its non representation therebefore to hence ensure his presence therebefore alongwith the counsel for the complainant company. However, both the counsel for the complainant also its authorized representative(s) failed to record their respective appearance(s) on behalf of the complainant company before the learned Magistrate. However, in the petition, their occurs a narrative qua the good reason which deterred both the counsel for the complainant also its authorized representatives, to, on the relevant day, record their respective appearance(s) on behalf of the complainant company before the Magistrate concerned, reason whereof propounded in the petition when stands supported by an affidavit sworn by the authorized representative of the Company, thereupon it is befitting to impute credence thereto. In sequel, with a good reason standing propounded therein whereupon the counsel for the complainant and the authorized representative of the complainant company stood respectively deterred to record their appearance(s) on behalf of the complainant company on the relevant date before the learned trial Magistrate, thereupon this Court does conclude qua the relevant omission(s) of the learned counsel and of the authorized representative of the complainant to record their respective appearance on the relevant day before the learned Magistrate not arising from any deliberateness rather their relevant respective non appearance therebefore, being unintentional besides also standing engendered by good reason. Consequently, the impugned order is quashed and set-aside. The parties are directed to appear before the learned trial Court on 28th April, 2017.

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

State of H.P. .....Appellant

Versus

Ved Prakash & others ....Respondents.

Cr. Appeal No. 664 of 2008
Decided on : 27/03/2017

Indian Penal Code, 1860- Section 353 and 506 read with Section 34- Accused went to the blood bank where the complainant was discharging duty as in charge – they had donated blood in the morning and were to take blood in exchange for administration to a patient – the accused were late - technician and other officials had left the blood bank- the accused could not provide blood so the accused misbehaved with the complainant – they caught hold of the complainant, abused and threatened him- the accused were tried and convicted by the Trial Court- an appeal was filed, which was allowed and the judgment of Trial Court was reversed- aggrieved from the judgment of the Appellate Court, present appeal has been filed- held in appeal that complainant had not deposed about the presence of any person at the time of incident – hence, the statements of alleged eye witnesses cannot be believed- testimony of the complainant was not creditworthy – the Appellate Court had rightly acquitted the accused- appeal dismissed.(Para-9 to 12)

For the Appellant: Mr. R.S.Thakur, Addl. A.G.
For the Respondents: Mr. Narender Sharma, vice Mr. Namish Gupta, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The State of Himachal Pradesh standing aggrieved by the verdict recorded by the learned Additional Sessions Judge, Solan, whereby he reversed the findings of conviction recorded upon the accused by the learned Chief Judicial Magistrate, Solan, besides pronounced a verdict of acquittal upon them, stands hence constrained to institute the instant appeal herebefore.

2. The brief facts of the case are that on 24.7.2001 around 4 p.m the accused went to the blood bank in the hospital at Solan at Room No. 14 where Dr. V.B. Sood was present. They had donated blood in the morning and in exchange of that blood was to be taken by them to be got administered to one of their patient who was admitted in the hospital and had been asked to come by 3.00 p.m. They having turned late by the time the technician and other officials had left the place thereby Dr. V.B. Sood who was Incharge of the blood bank could not provide blood thereby they misbehaved with him. They caught hold of him from the neck, used word of abuse and also threatened him. It has also been alleged that all the three accused were under the influence of liquor. Immediately some officials of the Medical Department assembled and the police officials from the nearby security room also turned up. The matter was reported at the police station, Solan. The case was registered and after completing all codal formalities and on conclusion of the investigation into the offences, 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 theirs committing offences punishable under Sections 353 and 506 read with Section 34 IPC to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 12 witnesses. On closure of prosecution evidence, the 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 did not choose to lead evidence in defence.

5. On an appraisal of the evidence on record, the learned Appellate Court returned findings of acquittal in favour of the accused.

6. The learned Additional Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned Appellate 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 standing 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. The informant Dr. V.B.Sood in his apposite application comprised in Ext.PW-2/A, had unfolded therein the entire genesis of the prosecution case, in sequel whereof, the apposite F.I.R comprised in Ext.PW-10/D, stood registered with the Police Station concerned. In his application borne in Ext.PW-2/A, the informant did not mention therein qua the relevant incident standing eye witnessed by any ocular witness. In his testification embodied in his examination in chief, he did not make any disclosure qua the relevant incident standing eye witnessed by any of the

purported ocular witness thereto. Consequently, the testifications qua the occurrence of the purported ocular witnesses, prosecution witnesses whereof deposed as PW-1 and PW-8 hence do not acquire the virtue of creditworthiness. The further effect of the prosecution introducing the aforesaid ocular witnesses to the occurrence is qua its apposite concert spurring from its intention to purvey a false leverage to the charge put to the accused also thereupon it concerting to through a stratagem employed by it hence invent an exaggerated version qua the occurrence. The solitary testimony of the informant, if holding a tinge of naturalness also when the evidence attendant therewith, endorses the version qua the occurrence deposed by the complainant hence it was sufficient to constrain this Court to render a finding of conviction against the accused. However, with the prosecution introducing invented witnesses to the occurrence also erodes the efficacy of the testimony of the informant who deposed qua the occurrence as PW-2.

10. Erosion(s) qua the veracity of the testimony of the complainant embedded in his examination in chief stand highlighted by his in his cross-examination underscoring his acquiescence qua the factum of the accused demanding blood from him or beseeching him to release blood from the blood bank, for hence facilitating early resuscitation of their relative who then was in a critical condition. With PW-2 disclosing in his cross-examination qua his requesting the accused to with respect thereto meet him in his office at 3 O'clock, whereas theirs arriving at his office at 4 O'clock whereat he testifies qua the alleged occurrence taking place, does inherently hold a vice of falsity arising from the factum qua with his requesting them to record their presence, an hour prior to 4 O'clock, whereat they did not purportedly record their appearance before him, qua the complainant falsely echoing in his testification embodied in his examination in chief qua his refusing to purvey blood to them, refusal whereof prodded them to assault him besides actuated them to hurl abuses at him. Corollary thereof is qua the aforesaid factum colouring with a vice of falsity the entire unfoldments qua the occurrence held in the examination in chief of the complainant, thereupon the testification of PW-2 qua the occurrence does not hold any tinge of naturalness rather it does not acquire any virtue of creditworthiness. Dehors a vice of incredibility imbuing the testification of PW-2, the omission of the complainant to sustain his version qua the accused purportedly holding him from the neck also theirs dragging him towards the room, factum whereof for its acquiring sustenance necessitated his sustaining injuries or abrasions on his person, injuries whereof were required to stand borne on the apposite MLC prepared by the doctor concerned, on his holding him to medical examination. However, PW-2, the complainant did not get himself medically examined despite the fact qua the accused holding him from the neck and also theirs purportedly dragging him towards the room whereupon entailment of injuries thereon was imperative, contrarily when he did not permit his medical examination being conducted by the doctor concerned hence his ascriptions qua the accused qua theirs purportedly dragging him from the room also theirs holding from the neck, stands eroded of their probative efficacy. Moreover, the shirt of PW-2 as stood clutched by the accused whereupon he stood dragged also entailed some marks of tearing or blood to stand pronounced therein. However, the shirt of the complainant stood neither taken into possession by the Investigating Officer concerned nor obviously it came to be produced. Omission aforesaid of the Investigating Officer concerned, constrains a conclusion qua PW-2 exaggerating the version qua the relevant occurrence hence rendering his testification qua it to hold no creditworthiness.

11. For the reasons which stand recorded hereinabove, this Court holds that the learned Appellate Court has appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of material on record by the learned Appellate Court does not suffer from any perversity or absurdity of mis-appreciation and non appreciation of evidence on record, rather it has aptly appreciated the material available on record whereupon its judgement warrants no interference.

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

Kameshwar Sharma and others ...Petitioners.
Versus
State of H.P. and others ...Respondents.

RP No. 45 of 2015
Reserved on: 21.03.2017
Decided on: 28.03.2017

Code of Civil Procedure, 1908- Order 47 Rule 1- An application for review of judgment was filed – held that power of review is to be exercised sparingly in accordance with Section 114 and Order 47 – Revision Petition can be entertained only on the ground of error apparent on the face of record – re-hearing of matter is not permissible while reviewing the judgment– the applicant has failed to show any error apparent on the face of record – petition dismissed. (Para- 5 to 14)

Cases referred:

Inderchand Jain (deceased by L.Rs.) versus Motilal (deceased by L.Rs.), 2009 AIR SCW 5364

Haryana State Industrial Development Corporation Ltd. versus Mawasi & Ors. Etc. Etc., 2012 AIR SCW 422

Akhilesh Yadav versus Vishwanath Chaturvedi & Ors., 2013 AIR SCW 1316

Union of India & others versus Paras Ram, I L R 2015 (III) HP 1397 (D.B.)

Surjeet Kumar and others versus State of H.P. and others, I L R 2016 (II) HP 335 (D.B.)

State of Himachal Pradesh and others versus Sh. Jitender Kumar Mahindroo (since deceased) through LRs, I L R 2016 (III) HP 746 (D.B.)

For the petitioners: Mr. Sanjeev Bhushan, Senior Advocate, with Mr. Rajesh Kumar, Advocate.

For the respondents: Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals, and Mr. J.K. Verma, Deputy Advocate General, for respondents No. 1 to 4.
Nemo for respondent No. 5.
Mr. Narender Thakur, Advocate, vice Mr. Pranay Pratap Singh, Advocate, for respondent No. 6.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

By the medium of this review petition, the review petitioners have invoked the jurisdiction of this Court in terms of the mandate of Order 47 Rule 1 of the Code of Civil Procedure (for short "CPC") seeking review of judgment and order, dated 23rd March, 2015, made by this Court in CWP No. 1282 of 2012, titled as Kameshwar Sharma & others versus State of Himachal Pradesh & others, whereby the writ petition filed by the petitioners came to be dismissed.

2. The respondents have filed objections and resisted the review petition on the grounds taken therein.

3. Learned Senior Counsel appearing on behalf of the petitioners was asked to show as to what was the mistake or error apparent on the face of the record. He argued that this Court has committed an illegality while making the judgment under review as the petitioners had not prayed for shifting of the headquarter of Gram Panchayat, Dadoghi.

4. Heard.

5. It is beaten law of the land that the power of review has to be exercised sparingly and as per the mandate of Section 114 read with Order 47 Rule 1 CPC.

6. A reference may be made to Section 114 CPC and Order 47 Rule 1 CPC herein:

> ***"114. Review.*** *- Subject as aforesaid, any person considering himself aggrieved,—*
>
> *(a) by a decree or order from which an appeal is allowed by this Code, but from which no appeal has been preferred,*
>
> *(b) by a decree or order from which no appeal is allowed by this Court, or*
>
> *(c) by a decision on a reference from a Court of Small Causes, may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit."*
>
> *"ORDER XLVII*
>
> ***REVIEW***
>
> ***1. Application for review of judgment. –***
>
> ***(1****) Any person considering himself aggrieved—*
>
> *(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,*
>
> *(b) by a decree or order from which no appeal is allowed, or*
>
> *(c) by a decision on a reference from a Court of Small Causes,*
>
> *and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.*
>
> *(2) A party who is not appealing from a decree on order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applies for the review.*
>
> *Explanation—The fact that the decision on a question of law on which the judgment of the Court is based has been reversed or modified by the subsequent decision of a superior Court in any other case, shall not be a ground for the review of such judgment."*

7. One of us (Mansoor Ahmad Mir, Chief Justice) as a Judge of the Jammu and Kashmir High Court, while sitting in Division Bench, authored a judgment in case titled as **Muzamil Afzal Reshi versus State of J&K & Ors., Review (LPA) No.16/2009,** decided on 29th March, 2013, in which it was laid down that power of review is to be exercised in limited circumstances and, that too, as per the mandate of Section 114 read with Order 47 CPC. It was further held that the review petition can be entertained only on the ground of error apparent on the face of the record. The error apparent on the face of record must be such which can be unveiled on mere looking at the record, without entering into the long drawn process of reasoning.

8. A Division Bench of this Court has also laid down the similar principle in **Review Petition No. 4084 of 2013**, titled as **M/s Harvel Agua India Private Limited versus State of**

H.P. & Ors., decided on **9th July, 2014**, and observed that for review of a judgment, error must be apparent on the face of the record; not which has to be explored and that it should not amount to rehearing of the case. It is apt to reproduce paragraph 11 of the judgment herein:

> *"11. The error contemplated under the rule is that the same should not require any long-drawn process of reasoning. The wrong decision can be subject to appeal to a higher form but a review is not permissible on the ground that court proceeded on wrong proposition of law. It is not permissible for erroneous decision to be "re-heard and corrected." There is clear distinction between an erroneous decision and an error apparent on the face of the record. While the former can be corrected only by a higher form, the latter can be corrected by exercise of review jurisdiction. A review of judgement is not maintainable if the only ground for review is that point is not dealt in correct perspective so long the point has been dealt with and answered. A review of a judgement is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. A mere repetition of old and overruled arguments cannot create a ground for review. The present stage is not a virgin ground but review of an earlier order, which has the normal feature of finality."*

9. The Apex Court in case titled as **Inderchand Jain (deceased by L.Rs.) versus Motilal (deceased by L.Rs.),** reported in **2009 AIR SCW 5364,** has observed that the Court, in a review petition, does not sit in appeal over its own order and rehearing of the matter is impermissible in law. It is profitable to reproduce paragraph 10 of the judgment herein:

> *"10. It is beyond any doubt or dispute that the review court does not sit in appeal over its own order. A re-hearing of the matter is impermissible in law. It constitutes an exception to the general rule that once a judgment is signed or pronounced, it should not be altered. It is also trite that exercise of inherent jurisdiction is not invoked for reviewing any order. Review is not appeal in disguise. In Lily Thomas v. Union of India [AIR 2000 SC 1650], this Court held:*
>
> *"56. It follows, therefore, that the power of review can be exercised for correction of a mistake and not to substitute a view. Such powers can be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated an appeal in disguise.""*

10. The Apex Court in case titled as **Haryana State Industrial Development Corporation Ltd. versus Mawasi & Ors. Etc. Etc.,** reported in **2012 AIR SCW 4222,** has discussed the law on the subject right from beginning till the pronouncement of the judgment and laid down the principles how the power of review can be exercised. It is apt to reproduce paragraphs 9 to 18 of the said judgment hereunder:

> *"9. At this stage it will be apposite to observe that the power of review is a creature of the statute and no Court or quasi-judicial body or administrative authority can review its judgment or order or decision unless it is legally empowered to do so. Article 137 empowers this Court to review its judgments subject to the provisions of any law made by Parliament or any rules made under Article 145 of the Constitution. The Rules framed by this Court under that Article lay down that in civil cases, review lies on any of the grounds specified in Order 47 Rule 1 of the Code of Civil Procedure, 1908 which reads as under:*
>
> > *"Order 47, Rule 1:*
> >
> > *1. Application for review of judgment.-*
> >
> > *(1) Any person considering himself aggrieved-*
> >
> > *(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,*
> >
> > *(b) by a decree or order from which no appeal is allowed, or*

(c) by a decision on a reference from a Court of Small Causes,

and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the court which passed the decree or made the order.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case of which he applies for the review.

Explanation- The fact that the decision on a question of law on which the judgment of the Court is based has been reversed or modified by the subsequent decision of a superior Court in any other case, shall not be a ground for the review of such judgment."

10. The aforesaid provisions have been interpreted in several cases. We shall notice some of them. In S. Nagaraj v. State of Karnataka 1993 Supp (4) SCC 595, this Court referred to the judgments in Raja Prithwi Chand Lal Choudhury v. Sukhraj Rai AIR 1941 FC 1 and Rajunder Narain Rae v. Bijai Govind Singh (1836) 1 Moo PC 117 and observed:

"Review literally and even judicially means re-examination or re-consideration. Basic philosophy inherent in it is the universal acceptance of human fallibility. Yet in the realm of law the courts and even the statutes lean strongly in favour of finality of decision legally and properly made. Exceptions both statutorily and judicially have been carved out to correct accidental mistakes or miscarriage of justice. Even when there was no statutory provision and no rules were framed by the highest court indicating the circumstances in which it could rectify its order the courts culled out such power to avoid abuse of process or miscarriage of justice. In Raja Prithwi Chand Lal Choudhury v. Sukhraj Rai the Court observed that even though no rules had been framed permitting the highest Court to review its order yet it was available on the limited and narrow ground developed by the Privy Council and the House of Lords. The Court approved the principle laid down by the Privy Council in Rajunder Narain Rae v. Bijai Govind Singh that an order made by the Court was final and could not be altered:

"... nevertheless, if by misprision in embodying the judgments, by errors have been introduced, these Courts possess, by Common law, the same power which the Courts of record and statute have of rectifying the mistakes which have crept in .... The House of Lords exercises a similar power of rectifying mistakes made in drawing up its own judgments, and this Court must possess the same authority. The Lords have however gone a step further, and have corrected mistakes introduced through inadvertence in the details of judgments; or have supplied manifest defects in order to enable the decrees to be enforced, or have added explanatory matter, or have reconciled inconsistencies."

Basis for exercise of the power was stated in the same decision as under:

> *"It is impossible to doubt that the indulgence extended in such cases is mainly owing to the natural desire prevailing to prevent irremediable injustice being done by a Court of last resort, where by some accident, without any blame, the party has not been heard and an order has been inadvertently made as if the party had been heard."*
>
> *Rectification of an order thus stems from the fundamental principle that justice is above all. It is exercised to remove the error and not for disturbing finality. When the Constitution was framed the substantive power to rectify or recall the order passed by this Court was specifically provided by Article 137 of the Constitution. Our Constitution-makers who had the practical wisdom to visualise the efficacy of such provision expressly conferred the substantive power to review any judgment or order by Article 137 of the Constitution. And clause (c) of Article 145 permitted this Court to frame rules as to the conditions subject to which any judgment or order may be reviewed. In exercise of this power Order XL had been framed empowering this Court to review an order in civil proceedings on grounds analogous to Order XLVII Rule 1 of the Civil Procedure Code. The expression, 'for any other sufficient reason' in the clause has been given an expanded meaning and a decree or order passed under misapprehension of true state of circumstances has been held to be sufficient ground to exercise the power. Apart from Order XL Rule 1 of the Supreme Court Rules this Court has the inherent power to make such orders as may be necessary in the interest of justice or to prevent the abuse of process of Court. The Court is thus not precluded from recalling or reviewing its own order if it is satisfied that it is necessary to do so for sake of justice."*

11. In Moran Mar Basselios Catholicos v. Most Rev. Mar Poulose Athanasius AIR 1954 SC 526, the three-Judge Bench referred to the provisions of the Travancore Code of Civil Procedure, which was similar to Order 47 Rule 1 CPC and observed:

> *"It is needless to emphasise that the scope of an application for review is much more restricted than that of an appeal. Under the provisions in the Travancore Code of Civil Procedure which is similar in terms to Order 47 Rule 1 of our Code of Civil Procedure, 1908, the court of review has only a limited jurisdiction circumscribed by the definitive limits fixed by the language used therein.*
>
> *It may allow a review on three specified grounds, namely, (i) discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the decree was passed, (ii) mistake or error apparent on the face of the record, and (iii) for any other sufficient reason.*
>
> *It has been held by the Judicial Committee that the words "any other sufficient reason" must mean "a reason sufficient on grounds, at least analogous to those specified in the rule". See Chhajju Ram v. Neki AIR 1922 PC 12 (D). This conclusion was reiterated by the Judicial Committee in Bisheshwar Pratap Sahi v. Parath Nath AIR 1934 PC 213 (E) and was adopted by on Federal Court in Hari Shankar Pal v. Anath Nath Mitter AIR 1949 FC 106 at pp. 110, 111 (F). Learned counsel appearing in support of this appeal recognises the aforesaid limitations and submits that his case comes within the ground of "mistake or error apparent on the face of the record" or some ground analogous thereto."*

12. In Thungabhadra Industries Ltd. v. Govt. of A.P. (1964) 5 SCR 174, another three-Judge Bench reiterated that the power of review is not analogous to the appellate power and observed (Para 11):

> *"A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. We do not consider that this furnishes a suitable occasion for dealing with this difference exhaustively or in any great detail, but it would suffice for us to say that where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions, entertained about it, a clear case of error apparent on the face of the record would be made out."*

13. In Aribam Tuleshwar Sharma v. Aibam Pishak Sharma (1979) 4 SCC 389, this Court answered in affirmative the question whether the High Court can review an order passed under Article 226 of the Constitution and proceeded to observe (Para 3):

> *"But, there are definitive limits to the exercise of the power of review. The power of review may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a court of appeal. A power of review is not to be confused with appellate powers which may enable an appellate court to correct all manner of errors committed by the subordinate court."*

14. In Meera Bhanja v. Nirmala Kumari Choudhury (1995) 1 SCC 170, the Court considered as to what can be characterised as an error apparent on the fact of the record and observed (Para 8):

> *".....it has to be kept in view that an error apparent on the face of record must be such an error which must strike one on mere looking at the record and would not require any long-drawn process of reasoning on points where there may conceivably be two opinions. We may usefully refer to the observations of this Court in the case of Satyanarayan Laxminarayan Hegde v. Mallikarjun Bhavanappa Tirumale AIR 1960 SC 137 wherein, K.C. Das Gupta, J., speaking for the Court has made the following observations in connection with an error apparent on the face of the record:*
>
> *"An error which has to be established by a long-drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Where an alleged error is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by a writ of certiorari according to the rule governing the powers of the superior court to issue such a writ."*

15. In Parsion Devi v. Sumitri Devi (1997) 8 SCC 715, the Court observed:

> *"An error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the Court to exercise its power of review under Order 47 Rule 1 CPC..... A review petition, it must be remembered*

has a limited purpose and cannot be allowed to be "an appeal in disguise"."

16. In Lily Thomas v. Union of India (2000) 6 SCC 224, R.P. Sethi, J., who concurred with S. Saghir Ahmad, J., summarised the scope of the power of review in the following words (Para 15):

"Such powers can be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated like an appeal in disguise. The mere possibility of two views on the subject is not a ground for review. Once a review petition is dismissed no further petition of review can be entertained. The rule of law of following the practice of the binding nature of the larger Benches and not taking different views by the Benches of coordinated jurisdiction of equal strength has to be followed and practised."

17. In Haridas Das v. Usha Rani Banik (2006) 4 SCC 78, the Court observed (Para 13):

"The parameters are prescribed in Order 47 CPC and for the purposes of this lis, permit the defendant to press for a rehearing "on account of some mistake or error apparent on the face of the records or for any other sufficient reason". The former part of the rule deals with a situation attributable to the applicant, and the latter to a jural action which is manifestly incorrect or on which two conclusions are not possible. Neither of them postulate a rehearing of the dispute because a party had not highlighted all the aspects of the case or could perhaps have argued them more forcefully and/or cited binding precedents to the court and thereby enjoyed a favourable verdict."

18. In State of West Bengal v. Kamal Sengupta (2008) 8 SCC 612, the Court considered the question whether a Tribunal established under the Administrative Tribunals Act, 1985 can review its decision, referred to Section 22(3) of that Act, some of the judicial precedents and observed (Para 14):

"At this stage it is apposite to observe that where a review is sought on the ground of discovery of new matter or evidence, such matter or evidence must be relevant and must be of such a character that if the same had been produced, it might have altered the judgment. In other words, mere discovery of new or important matter or evidence is not sufficient ground for review ex debito justitiae. Not only this, the party seeking review has also to show that such additional matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court earlier.

The term "mistake or error apparent" by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 47 Rule 1 CPC or Section 22(3)(f) of the Act. To put it differently an order or decision or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment / decision.""

11. The Apex Court in another judgment in the case titled as **Akhilesh Yadav versus Vishwanath Chaturvedi & Ors.,** reported in **2013 AIR SCW 1316**, has held that scope of review

petition is very limited and submissions made on questions of fact cannot be a ground to review the order. It was further observed that review of an order is permissible only if some mistake or error is apparent on the face of the record, which has to be decided on the facts of each and every case. Further held that an erroneous decision, by itself, does not warrant review of each decision. It is apt to reproduce paragraph 1 of the said judgment hereunder:

> *"Certain questions of fact and law were raised on behalf of the parties when the review petitions were heard. Review petitions are ordinarily restricted to the confines of the principles enunciated in Order 47 of the Code of Civil Procedure, but in this case, we gave counsel for the parties ample opportunity to satisfy us that the judgment and order under review suffered from any error apparent on the face of the record and that permitting the order to stand would occasion a failure of justice or that the judgment suffered from some material irregularity which required correction in review. The scope of a review petition is very limited and the submissions advanced were made mainly on questions of fact. As has been repeatedly indicated by this Court, review of a judgment on account of some mistake or error apparent on the face of the record is permissible, but an error apparent on the face of the record has to be decided on the facts of each case as an erroneous decision by itself does not warrant a review of each decision. In order to appreciate the decision rendered on the several review petitions which were taken up together for consideration, it is necessary to give a background in which the judgment and order under review came to be rendered."*

12. The same principle has been laid down by this Court in **Review Petition No. 65 of 2015,** titled as **Union of India & others versus Paras Ram,** decided on 25th June, 2015; **Review Petition No. 115 of 2015,** titled as **Surjeet Kumar and others versus State of H.P. and others,** decided on 16th March, 2016; **Review Petition No. 20 of 2016,** titled as **Onkar Singh versus Executive Engineer, HPSEB Ltd. and another,** decided on 12th May, 2016; and **Review Petition No. 54 of 2015,** titled as **State of Himachal Pradesh and others versus Sh. Jitender Kumar Mahindroo (since deceased) through LRs,** decided on 12th May, 2016.

13. Coming to the case in hand, learned counsel for the petitioners has failed to show any mistake apparent on the face of the record. The reliefs sought in the writ petition have been reproduced in the first para of the judgment, thus, there is no ambiguity as to what reliefs were sought by the petitioners. The grounds urged by the petitioners are the grounds which can be made foundation for making an appeal and not for review.

14. Having said so, no such ground has been projected in this review petition, which can be made basis for reviewing the judgment.

15. Viewed thus, no case for review is made out and the review petition merits to be dismissed. Accordingly, the review petition is dismissed alongwith all pending applications, if any.

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

Achhri Bibi ....Petitioner

Versus

State of Himachal Pradesh and others ....Respondents

CWP No. 5812 of 2011.
Reserved on : 24.03.2017.
Date of decision: 29.03.2017.

Constitution of India, 1950- Article 226- Petitioner was appointed as anganwari helper- her selection was assailed by the private respondent by filing an appeal, which was allowed – a direction was issued to conduct fresh interview – the respondent was selection as anganwari helper – Appellate Authority held the respondent to be ineligible for appointment – a direction was issued to conduct fresh interview – aggrieved from the order, the petitioner filed the present writ petition – held that once the Appellate Authority concluded that the respondent was not eligible, a direction should not have been issued to hold the fresh interview, in which the respondent would also participate - the order of the Appellate Authority set aside and direction issued to re-engage the petitioner. (Para-9 to 13)

For the petitioner:	Mr. Ajay Sharma, Advocate.
For respondents No. 1 to 3:	Mr. V.S. Chauhan, Addl. AG with Mr. Vikram Thakur, Dy. AG.
For respondent No. 4:	Mr. N.K. Thakur, Sr. Advocate with Mr. Divya Raj Singh, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge

By way of this writ petition, the petitioner has prayed for the following reliefs:

"a) That impugned orders, Annexure P-6, dated 22.06.2011 may very kindly be quashed and set aside with direction to respondents No. 1 to 3 to allow the petitioner to continue working as Anganwari Helper at Anganwari Centre No. 6 in villahe Ambota, Tehsil Amb, District Una, H.P. with all consequential benefits in favour of the petitioner and against respondents.

b) That respondents No. 1 to 3 may very kindly be directed to release the honorarium fixed in favour of the petitioner from the date the same has not been released to her till date forthwith;

c) That the entire record pertaining to the case may also be summoned by this Hon'ble Court for its kind perusal.

d) That cost of the writ petition may also be awarded in favour of the petitioner;

e) Any other or further relief as this Hon'ble Court may deem just and proper keeping in view the facts and circumstances of the case may also be passed in favour of the petitioner Bar Association and against the respondent."

2. Brief facts necessary for the adjudication of the present writ petition as culled out from the pleadings are as under. The petitioner was selected as Anganwari Helper, Anganwari Centre Ward No. 6 village Ambota, in the year 2007 and her selection as such was assailed by the private respondent. In the appeal so filed by the private respondent against the selection of the present petitioner, the Appellate Authority set aside the appointment of the present petitioner as Anganwari Helper. Pleadings further demonstrate that in Appeal No. 34 of 2008, Divisional Commissioner Kangra passed orders for conducting fresh interviews for selection of the candidate, in which the petitioner as well as private respondent participated. On the basis of fresh interviews so conducted, the private respondent was selected as Anganwari Helper and accordingly, vide order dated 05.12.2009 (Annexure P-5), the petitioner was intimated that her services stood terminated with immediate effect.

3. Feeling aggrieved, the petitioner filed CWP No. 4712 of 2009 in this Court which was disposed of by this Court vide common judgment dated 17.05.2010 by remanding the matter back to the Appellate Authority i.e. Deputy Commissioner concerned for decision afresh in the matter as per the guidelines laid down by this Court in its judgment dated 17.05.2010.

4. Appellate Authority/Deputy Commissioner, Una vide order dated 22.06.2011 held private respondent to be ineligible to be considered for being engaged as Anganwari Helper in Ward No. 6 on the ground that it stood established that Shanti Devi i.e. private respondent in fact belonged to Ward No. 8 and thus she was not eligible to be considered for being engaged as Anganwari Helper in Anganwari Centre for Ward No. 6. Said authority also held that it was clear that in the earlier interview Shanti Devi had been given more weightage as she was a widow and she belonged to OBC category but these factors would have been counted only if she was otherwise eligible to appear in the interview as per guidelines issued by the Government. Appellate Authority thereafter held that interview chart reflected inconsistency as far as date of interview was concerned as two dates were mentioned therein i.e. 30.01.2009 and 06.07.2009 which gives rise to doubt. On these bases, it directed fresh interviews between two candidates i.e. the present petitioner and the private respondent as per criteria existing on 01.01.2004.

5. Feeling aggrieved by the order so passed by the Appellate Authority dated 22.06.2011 (Annexure P-6), the petitioner has filed this writ petition.

6. Reply to the petition has been filed by respondents No. 1 to 3. Respondent No. 4 has adopted the reply filed on behalf of respondents No. 1 to 3.

7. During the course of arguments, learned counsel for the petitioner has drawn the attention of this Court to the averments made in preliminary submission No. 2 in its reply filed by respondents No. 1 to 3, which are quoted hereinbelow.

> *"The Deputy Commissioner, Una heard the case and after carefully going through the arguments adduced by the parties concerned concluded that family of the respondent No. 4 has separated on 17.10.2006 i.e. after the cut of date 1.1.2004 and that the respondent No. 4 belongs to Ward No. 8 whereas the post was meant for ward No. 6. Further there was inconsistency reported in the date of interview held on 30.01.2009 and 6.7.2009 which creates doubt, hence in view of the circumstances ordered fresh interview between these two candidates (petitioner and respondent No. 4) vide order dated 22.6.11. Against this order the present petition has been filed by the petitioner."*

8. I have heard learned counsel for the parties and have also gone through the pleadings as well as the records of the case.

9. Though this Court is not oblivious to the fact that under the guidelines in issue order passed by first Appellate Authority i.e. Deputy Commissioner concerned was challengeable by way of second appeal before the concerned Divisional Commissioner, however, in my considered view, keeping in view the fact that entire selection was made in the year 2007 and the present writ petition is also pending adjudication since the year 2011, no purpose will be served by relegating the petitioner back to second Appellate Authority and interest of justice will be served in case the case is adjudicated on merits by this Court itself. Besides this neither any objection with regard to maintainability was taken at the time of arguments and even otherwise there is no inherent lack of jurisdiction as far as this Court is concerned in adjudicating upon the present petition on merit taking into consideration its peculiar facts and circumstances.

10. Vide impugned order dated 22.06.2011, Annexure P-6, Deputy Commissioner Una/Appellate Authority under the scheme known as ICDS has categorically concluded that respondent No. 4 stood separated from family on 17.10.2006 i.e. after the cut off date of 01.01.2004 and it stood established that respondent No. 4 was a resident of Ward No. 8 and post in issue was for Ward No. 6. It further correctly held that it appeared that as Shanti Devi was a widow and belongs to OBC category and on that premise, she had been given weightage which could not have had otherwise been given as she was not eligible to appear in the interview as per guidelines for Ward No. 6. However, after holding that respondent No. 4 was not eligible to be considered for appointment as Anganwari Helper, in an Anganwari Centre for Ward No. 6, the Appellate Authority has ordered that as there was inconsistency as far as interview date is

concerned in the interview chart, fresh interview for the post be conducted as per eligibility criteria on 01.01.2004 intra the petitioner and respondent No. 4.

11. In my considered view, learned Appellate Authority has erred in issuing directions to the effect that on account of alleged inconsistency of interview date in the interview chart, fresh interview should be conducted between the petitioner and private respondent No. 4. This is for the reason that when the said appellate Authority itself had come to the conclusion that respondent No. 4 was not eligible to be considered for a post belonging to Ward No. 6, then there was no occasion for the Appellate Authority to have had ordered a fresh interview in which the said ineligible candidate was also directed to participate. While issuing these directions, learned Appellate Authority lost sight of the fact that as respondent No. 4 was ineligible to be considered for the post in issue, no purpose was to be served by directing her to participate in the interview to be conducted afresh. Besides this, findings returned by the learned Appellate Authority that there was inconsistency in the interview date is concerned it has not been elaborated that as to what inconsistency had occurred and the same neither was the bone of contention between the parties. Therefore, in my considered view though there is no infirmity with the findings returned by the learned Appellate Authority to the effect that respondent No. 4 was ineligible to be considered for the post of Anganwari Helper in Ward No. 6, however, said authority has erred in issuing directions to the effect that fresh interview be conducted intra the petitioner and respondent No. 4.

12. Therefore, while upholding order dated 22.06.2011 (Annexure P-6) passed by the Appellate Authority to the extent it has held respondent No. 4 ineligible to be considered for appointment against the post of Anganwari Helper in Ward No. 6, the part of the order whereby Appellate Authority has issued directions for holding fresh interview qua the petitioner and respondent No. 4 is quashed and set aside and respondent/competent authority is directed to re-engage the petitioner as Anganwari Helper at Anganwari Centre, Ward No. 6 with immediate effect if she is not already serving and permit her to continue if she is already serving.

13. Accordingly, this writ petition is allowed and impugned order passed by Appellate Authority dated 22.06.2011, Annexure P-6, is upheld to the extent it has held respondent No. 4 ineligible to be considered for appointment against the post of Anganwari Helper in Anganwari Centre Ward No. 6 and the part of order whereby Appellate Authority has issued directions for holding fresh interview intra the petitioner and respondent No. 4 is quashed and set aside. Respondent/competent authority is directed to permit the petitioner to continue to serve as Anganwari Helper at Anganwari Centre, Ward No. 6 in village Ambota, Tehsil Amb, District Una, H.P. if she is presently serving as such and to engage her forthwith if she is not presently serving. Arrears of honorarium, if any, be also released forthwith.

14. The writ petition disposed of in above terms. Pending miscellaneous application(s), if any, also stand disposed of. No order as to costs.

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

M/s. Sukhjit Starch and Chemicals Ltd. ....Petitioner.

Vs.

The Agriculture Produce Market Committee, Una,
Himachal Pradesh, through its Secretary .....Respondent.

CWP No.: 1473 of 2009
Reserved on: 11.01.2017
Date of Decision: 29.03.2017

Himachal Pradesh Agricultural & Horticultural Produce Marketing (Development and Regulation) Act, 2005- Section 40- Petitioner, a company registered under Indian Companies Act, 1956, has a manufacturing unit at Una and is exclusively engaged in the manufacture of Liquid Glucose, Dextrose, Monohydrate, Liquid MaltoDextrine, MaltoDextrine Powder, Maize Glutane, Maize Germ and Maize Husk out of Maize –it was asked to get itself registered under H.P. Agricultural & Horticultural Produce Marketing (Development and Regulation) Act, 2005- the petitioner contended that it is not engaged in the processing of any agriculture produce and is not covered under the Act – an amount of Rs. 22,52,535/- was recovered and a prayer was made for the refund of the amount – it was stated in the reply that maize is an agricultural produce and the petitioner is duty bound to pay the fee and get itself registered- held that there is a distinction between manufacturing and processing activity – in case of manufacturing, there is complete transformation of the original articles to produce a commercially different article or commodity having its own character, use and name, whereas in case of processing, the identity remains exactly the same- the end product produced by the petitioner is totally different from the original product namely, maize- petitioner is carrying out manufacturing activity and not processing activity and is not covered under the Act- it is not liable to pay any market fee – therefore, a direction issued to refund market fee realized from the petitioner within three months.

(Para-7 to 43)

Cases referred:

Orient Paper & Industries Ltd. Vs. State of M.P. and others (2006) 12 Supreme Court Cases 468

Manganese Ore India Ltd. Vs. State of M.P and others 2016 SCC Online SC 1280

Edward Keventer Pvt. Ltd. Vs. Bihar State Agricultural Marketing Board, (2000) 6 SCC 264

M/s. Vardhman Textiles Ltd. & etc. Vs. State of H.P. and others, AIR 2006 Himachal Pradesh 53

Godavari Sugar Mills Limited Vs. State of Maharashtra and others, (2011) 2 Supreme Court Cases 439

Orissa Cement Ltd. Vs. State of Orissa, 1991 Supp. (1) SCC 430

Suganmal Vs. State of M.P., AIR 1965 SC 1740

U.P. Pollution Control Board and others Vs. Kanoria Industrial Ltd. and another, (2001) 2 Supreme Court Cases 549

For the petitioner: Mr. Arjun K. Lal, Advocate.
For the respondent: Mr. Navlesh Verma, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge:

By way of this writ petition, the petitioner has *inter alia* prayed for issuance of directions to the respondent-Committee not to call upon the petitioner-Company and/or its manufacturing unit to register itself under the provisions of Section 40 of the Himachal Pradesh Agricultural & Horticultural Produce Marketing (Development and Regulation) Act, 2005 and for issuance of a mandamus to the effect that the petitioner-Company and/or its manufacturing unit is not required to pay any market fee to the respondent qua its manufacturing activities being carried out through its manufacturing unit known as Sukhjit Agro Industries at Village Gurplah, Tehsil Haroli, District Una. Petitioner has also prayed for a direction to the respondent Market Committee not to raise any demand of market fee from the petitioner-Company and/or its manufacturing unit, i.e., Sukhjit Agro Industries at Village Gurplah, Tehsil Haroli, District Una and also for a direction to the respondent Market Committee to refund a sum of `22,52,535/- alongwith interest @11.5% per annum from 25th October, 2007 to the petitioner-Company which has been realized from the petitioner-Company illegally by the respondent-market ommittee on account of market fee.

2. The case of the petitioner-Company is that it is a Company incorporated under the provisions of the Indian Companies Act, 1956 and is having several manufacturing units

including a unit, i.e. Sukhjit Agro Industries at Village Gurplah, Tehsil Haroli, District Una, Himachal Pradesh. As per the petitioner, its manufacturing unit, i.e. Sukhjit Agro Industries is exclusively engaged in the business of manufacture of Liquid Glucose, Dextrose, Monohydrate, Liquid Malto Dextrine, Malto Dextrine Powder, Maize Glutane, Maize Germ and Maize Husk out of Maize at Village Gurplah, Tehsil Haroli, District Una. It is further the case of the petitioner-Company that its aforesaid unit is registered under the Central Sales Tax (Registration Turnover) Rules, 1957 and the said unit is also registered under the Himachal Pradesh General Sales Tax Act, 1970 and certificates issued in this regard by the authorities demonstrate that the business of the unit is manufacturing of Maize Starch, Liquid Glucose, Dextrose, Monohydrate, Liquid Malto Dextrine, Malto Dextrine Powder, Maize Glutane, Maize Germ and Maize Husk out of Maize. It is further the case of the petitioner that General Manager, District Industries Centre, District Una has also issued a certificate in Form-1 for the year 2007-2008 in favour of the petitioner-Company, dated 23.09.2008 (Annexure-PE), wherein it has been certified that Sukhjit Agro Industries is a manufacturing unit of Sukhjit Starch and Chemicals Ltd. for the manufacture of Liquid Glucose, Dextrose, Monohydrate, Liquid Malto Dextrine, Malto Dextrine Powder, Maize Glutane, Maize Germ and Maize Husk out of Maize. On these bases, it has been contended by the petitioner-Company that the Company and its unit in issue is only engaged in the manufacture of abovementioned items alone and it is not engaged in any activity which could be said to be covered by the provisions of Section 40 of the Himachal Pradesh Agricultural & Horticultural Produce Marketing (Development and Regulation) Act, 2005 and none of the manufacturing activities being carried out by the unit of the petitioner-Company attract the necessity of registration under the provisions of the Himachal Pradesh Agricultural & Horticultural Produce Marketing (Development and Regulation) Act, 2005. It is further the case of the petitioner-Company that its unit is not engaged in the processing of any agriculture produce in District Una and that the petitioner-Company at no point of time has operated in the past, neither it is operating in the market area as a trader, commission agent, weighman, hamal, surveyor, ware houseman, contract farming sponsor, owner or occupier of a processing factory or any other market functionary. Further, as per the petitioner-Company, its unit is not engaged in the business of "Processing" as defined in Section 2(zg) of the Act nor the unit is engaged in the business of processing any agricultural product or a scheduled item under the Act and thus the provisions of Section 44 of the Act are not attracted as far as the petitioner or its unit is concerned. As per the petitioner, in its mistaken belief, it applied for renewal of its registration in the year commencing 1st April, 2009 up to 31.03.2010 to the respondent-Market Committee, but after it realized the illegality of the acts of omission and commission of the respondent-Market Committee, it withdrew its application for renewal by issuing a legal notice dated 21.04.2009, which included the details of inter-State maize purchased and quantity wise details of market fee deposited. According to the petitioner-Company, an amount of `22,52,535/- stood illegally recovered and received by the respondent-Market Committee from the petitioner and its manufacturing unit, which the respondent-market committee was liable to refund back to the petitioner alongwith interest. In this background, the petitioner-Company has filed this writ petition praying for the following reliefs:

> "(a) Issue directions to the respondent to the effect that the petitioner/company and/or particularly its Manufacturing Unit i.e. Sukhjit Agro Industries at village Gurplah, Tehsil Haroli, District Una, Himachal Pradesh being a manufacturer, was at no point of time earlier and even at present, is not required to register itself under the provisions of The Himachal Pradesh Agricultural & Horticultural Produce Marketing (Development and Regulation) Act, 2005.
>
> (b) Further direct the respondent not to call upon or require the petitioner Company, and/or its manufacturing unit, to register itself under Section 40 of The Himachal Pradesh Agricultural & Horticultural Produce Marketing (Development and Regulation), Act, 2005 and consequently it is not required to pay any market fee to the respondent for and qua its (petitioner's) manufacturing

activities carried out through its Manufacturing Unit Sukhjit Agro Industries at Village Gurplah, Tehsil Haroli, District Una, Himachal Pradesh.

(c) Direct the respondent Market Committee not to raise any demand against the Petitioner Company and/or its manufacturing unit, i.e. Sukhjit Agro Industries at Village Gurplah, Tehsil Haroli, District Una, Himachal Pradesh, in any manner whatsoever or to demand or receive any market fees from the petitioner Company and particularly its manufacturing unit known as Sukhjit Agro Industries, Gurplah, Tehsil Haroli, District Una, Himachal Pradesh.

(d) Direct the respondent Market Committee to refund a sum of Rs. 22,52,535/- alongwith interest @ 11.5% per annum from 25th of October, 2007 till the date of payment to the petitioner Company through its manufacturing unit i.e. Sukhjit Agro Industries, Gurplah, Tehsil Haroli, District Una, Himachal Pradesh, realized by it (Respondent Market Committee) on account of market fees.

(e) Call upon the respondent to produce the entire record pertaining to the case and also the subject matter touching upon the same.

(f) Allow any other relief deemed fit by this Court in favour of petitioner and against respondents in the peculiar facts and circumstances attending to the case.

(g) All costs of the petition in favour of the petitioner and against the respondents"

3. It its reply, the stand taken by the respondent-Committee is that the petitioner is dealing in agricultural produce and is bringing, selling and purchasing Notified Agricultural Produce within the market area of the respondent-Committee and therefore, the market committee is duty bound to levy, charge and collect market fee on the sale and purchase of its Notified Agricultural Produce as per the provisions of Section 44 of the Act. It is further the case of the respondent-Committee that item "Maize" *(Makki)* is a specified "Agricultural Produce" within the terms of the Act and petitioner is thus obliged under Section 27 of the Act not to use any place in the area for the purpose of marketing of Notified Agricultural Produce except in accordance with the provisions of the Act and Rules or by laws framed thereunder and the petitioner being "purchaser" and a "trader" and market functionary is thus duty bound to deposit the market fee within 14 days and to submit annual accounts qua the statement of transactions undertaken by or through it during the previous Financial Year. Respondent-Committee has denied that the business of the petitioner unit is that of manufacturing and as per the respondent-Committee, petitioner was processing the maize and obtaining maize starch, maize glutane, maize germs and maize husk out of the said maize. It is further the case of the respondent-Committee that the petitioner-Company was dealing in the business of purchasing, selling, stocking, processing, transporting and value auditioning of agriculture produce, i.e. *"Maize*", which was a scheduled agricultural produce under item head No. 1 viz cereals and Sr. No. 4 thereof in the schedule under Section 2(a) and Section 71 of the Himachal Pradesh Agricultural and Horticultural Produce Marketing (Development & Regulation) Act.

4. By way of its rejoinder, petitioner-Company reiterated its case put forth in the petition and denied the stand of the respondent-Committee.

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

6. Though a preliminary objection has been taken in its reply by the respondent-Committee about petitioner having alternative remedy, however, this point was not stressed and both the parties addressed the Court on merit.

7. The moot issue involved in this writ petition is whether the activity being carried out by the petitioner-Company, subject matter of the writ petition, for which the petitioner-

Company as per its version is purchasing maize, which is a Notified Agricultural Produce, is a "manufacturing activity" or is it a "processing activity" being carried out by it.

8. As per the petitioner-Company, it has a manufacturing unit at Village Gurplah, Tehsil Haroli, District Una, Himachal Pradesh and is engaged in the business of manufacture of Maize Starch, Liquid Glucose, Dextrose, Monohydrate, Liquid Malto, Dextrine, Malto Dextrine Powder, Maize Glutane, Maize Germ and Maize Husk etc. out of the Maize and for said manufacturing purpose, the said Company purchases maize which is a Notified Agricultural Produce from outside the State of Himachal Pradesh and which thereafter is brought within the market area only for the purpose of manufacturing and besides this, for the maize which is purchased from within the market area for the purpose of manufacturing, petitioner-Company deposits market fee with the Committee. As per the respondent, the activity being carried out by the petitioner with the said Notified Agricultural Produce, is a "processing activity".

9. Before proceeding further, it is relevant to refer to the statutory provisions of the Himachal Pradesh Agricultural and Horticultural Produce Marketing (Development and Regulation) Act, 2005, which are germane for the adjudication of the present writ petition.

10. Act defines "agricultural produce" as:

"2(a) "agricultural produce" means all produce and commodities, whether processed or unprocessed, of agriculture, horticulture, apiculture, sericulture, livestock and products of live stock, fleeces (raw wool) and skins of animals, forest produce and fisheries as are specified in the Schedule to this Act or declared by the Government by notification under section 19 of this Act and also includes a mixure of two or more than two such products;"

business as:

"2(d) "business" means purchase, sale, processing, value addition, storage, transportation and connected activities of agricultural produce;"

buyer as:

"2(e) "buyer" means a person, a firm, a company or a Cooperative Society or Government Agency, Public Undertaking/ Public Agency or Corporation, commission agent, who himself or on behalf of any other person or agent buys or agrees to buy agricultural produce in the notified market area;"

committee as:

"2(i) "Committee" means an Agricultural Produce Market Committee established under section 29;"

market as:

"2(u) "market" means a market established under section 19 of this Act which includes market area, market yard/ sub yards and principal market yard;"

market area as:

"2(v) "market area" means area notified under section 19 of this Act;"

market charges as:

"2(w) "market charges" includes charges on account of or in respect of commission, brokerage, weighing, measuring, hamaling (loading, unloading or carrying), cleaning, drying, sieving, stitching, stacking, hiring, gunny bags, stamping, bagging, storing, warehousing, grading, surveying, transporting and processing;"

notified agricultural produce as:

"2(zc) "notified agricultural produce" means any agricultural produce notified under section 19 of this Act;"

producer as:

"2(ze) "producer" means a person, who in his normal course of avocation, grows, manufactures, rears or produces, as the case may be, agricultural produce personally, through tenants or otherwise, but does not include a person who works as a trader or a broker or who is a partner of a firm of traders or brokers is otherwise engaged in the business of disposal or storage of agricultural produce other than that grown, manufactured, reared or produced by himself through his tenants or otherwise: Provided that no person shall be disqualified from being a producer merely on the ground that he is a member of a Co-operative Society; Explanation.– The term "producer" shall also include tenant;[

processing as:

'2(zg) "processing" means any one or more of a series of treatments relating to powdering, crushing, decorticating, dehusking, parboiling, polishing, ginning, pressing, curing, cleaning, or any other manual, mechanical, chemical or physical treatments to which raw agricultural produce or its product is subjected to;"

seller as:

"2(zn) "seller" means a person who sells or agrees to sell any agricultural produce;"

trader as:

"2(zo) *"trader" means a person who in his normal course of business buys or sells any notified agricultural produce and includes a person engaged in processing of agricultural produce but does not include an agriculturist;"*

11. Section 40 of the Act provides as under:

"**40. Registration of market functionaries**.-

(1) Every person who, in respect of notified agricultural produce, desires to operate in the market area as trader, commission agent, weighmen, hamal, surveyor, ware housemen, contract farming sponsor, owner or occupier of processing factory or any other market functionary, shall apply to the Secretary of the Committee for registration or renewal of registration in such manner and within such period as may be prescribed. The Secretary of the Committee shall be the authority to grant registration certificate with the prior approval of the Committee:

Provided that any person may buy agricultural produce in the Market yard/ sub- market yard on day to day basis even without getting registered:

Provided further that any person who desires to trade or transact or deal in any notified agricultural produce in more than one market area, shall get registered, for respective function from the Managing Director of the Board.

(2) No broker, trader, weighmen, surveyor, godown keeper or other functionaries shall, unless duly registered, carry on his occupation in a notified market area in respect of the notified agricultural produce under this Act.

(3) Every application for such registration shall be accompanied with such fee as may be prescribed.

(4) The Committee may register or renew the registration or refuse registration or renewal of the registration or cancel the registration on any of the following grounds:-

(i) if the applicant is a minor;

(ii) if the applicant has been declared defaulter; or

(iii) if the applicant has been found guilty under this Act, the rules and byelaws made thereunder."

12. Section 44 of the Act provides as under:

> ***"44. Levy of Market fee**.- Every Committee shall levy, charge and collect market fee in the manner as may be prescribed on ad-valorem basis at the rate not exceeding two rupees for every one hundred rupees as may be fixed by the State Government,-*
>
> *(i) on the sale or purchase of notified agricultural produce, whether brought from within the State or from out side the State into the market area; and*
>
> *(ii) on the notified agricultural produce whether brought from within the State or from out side the State into the market area for processing.*

13. Section 44 thus authorizes a Committee constituted under this Act to levy, charge and collect market fee in the manner as may be prescribed on sale or purchase of the notified agricultural produce, whether brought from within the State or from outside the State into the market area; and on notified agricultural produce whether brought from within the State or from outside the State into the market area for processing. In other words, under the provisions of this Section, market fee can be collected by the committee;

> (a) on the sale or purchase of notified agricultural produce, which takes place in that market committee irrespective of the fact whether notified agricultural produce is brought from within the State or from outside the State into the market area; and
>
> (b) on notified agricultural produce whether brought from within the State or from outside the State into the market area for the purpose of processing.

14. It is neither the case of the petitioner nor the case of the respondent-State that the notified agricultural produce in this particular case, which is maize, is being brought by the petitioner-unit into the market area for the purpose of sale *per se*. Therefore, the petitioner-unit is not liable to pay any market fee on account of sale of notified agricultural produce by it in the market area.

15. As far as the factum of petitioner-unit being liable to pay market fee on notified agricultural produce which is being purchased by it within the market area is concerned, during the course of arguments, learned counsel for the petitioner-unit fairly stated that because Clause (i) of Section 44 envisages charges and collection of market fee by committee on purchase of notified agricultural produce which finds place inside the market area irrespective of its end use, therefore, petitioner-unit cannot escape from its liability of paying market fee to the respondent-committee qua that notified agricultural produce, which is purchased by it in the market area itself.

16. Therefore, in this background, the issue which remains for the purpose of adjudication is whether the notified agricultural produce which is being brought by the petitioner-unit into the market area may be from within the State or from outside the State, is being utilized by it in the activity being carried out by it for the purpose of processing, as is the case of the market committee or the same is being brought by it for the purpose of manufacturing as is the case put forth by the petitioner. This assumes significance for the reason that Section 44 of the Act does not confer any authority on the committee to purchase and collect market fee of notified agricultural produce whether brought from within the State or from outside the State into the market area for the purpose of manufacturing.

17. Section 2 of the Act does not define "manufacturing", though it defines "processing". Section 2(zg) defines "processing" as under:

> *"2(zg) "processing" means any one or more of a series of treatments relating to powdering, crushing, decorticating, dehusking, parboiling, polishing, ginning, pressing, curing, cleaning, or any other manual, mechanical, chemical or physical treatments to which raw agricultural produce or its product is subjected to;"*

18. The petitioner has appended with the petition Annexure-PB, certificate of registration issued on Form-B under Rule 5(1) of the Central Sales Tax (Registration and Turnover) Rules, 1957, as per which, the unit of the petitioner is registered as dealer under Sections 7(1) and 7(2) of the Central Sales Tax Act, 1956 for the purpose of manufacturing of Maize Starch, Liquid Glucose, Liquid Malta Dextrin, Glucose M.D.P., Glucose D.M.H., Dextrin's, Maize Gluten, Poultry Feed, Maize Oil, Maize Oil Cake Cattle Feed and Maize Husk Cattle Feed. Petitioner has also placed on record as Annexure-PC, Form S.T.III, which is a certificate of registration issued under Rule 6 of the Himachal Pradesh General Sales Tax Act, 1970, as per which also, the petitioner-unit is registered as a dealer under the Himachal Pradesh General Sales Tax Act, 1968 and whose business is manufacturing of Maize Starch, Liquid Glucose, Liquid Malta Dextrin, Glucose M.D.P., Glucose D.M.H., Dextrin's Maize Gluten, Poultry Feed, Maize Oil, Maize Oil Cake Cattle Feed and Maize Husk Cattle Feed. Petitioner has also placed on record as Annexure-PE, Form-1 Certificate issued for the year 2007-2008 by the office of General Manager, District Industries Centre, Una, certifying that the petitioner-unit is a registered unit for the purpose of manufacture of Liquid Glucose, Dextrose Monotrydrate, Liquid Malto Dextine, Malto Dextrine Powder, Maize Gluten, Maize Germ & Husk. The above documents demonstrate that the petitioner-unit in fact is registered and acknowledged as a manufacturing unit.

19. A perusal of the aforesaid documents demonstrates that it is not as if the petitioner-unit has been registered as manufacturing and processing unit, it is singularly registered as a manufacturing unit only.

20. Though in order to substantiate that the petitioner-unit is a manufacturing unit, the petitioner has appended the documents which have been referred to above, but there is no material placed on record by the respondent-committee to substantiate its contention that the petitioner-unit in fact is a processing unit. Alongwith its reply, the respondent-committee has appended three annexures, none of which is to the effect that the petitioner-unit is a processing unit. In its reply, the contention of the respondent-committee is that as the petitioner is a processing factory as well as a processor and stockiest of notified agriculture produce, namely maize which is a scheduled item, therefore, the petitioner-company has been rightly and legally registered under the Act.

21. This Court vide its order dated 02.12.2016 had directed Secretary, Agriculture Produce Market Committee, Una to file his personal affidavit mentioning therein as to what is "processing activity" being carried out by the petitioner-unit within the market area. Rather than answering the query which was posed by this Court to the respondent-Committee vide its order dated 02.12.2016, an affidavit has been filed by the Secretary concerned, relevant extract of which is quoted hereinbelow:

> "*4. That "processing" means any one or more of a series of treatments relating to powdering, crushing, decorticating, dehusking, parboiling, polishing, ginning, pressing, curing, cleaning, or any other manual, mechanical, chemical or physical treatment to which raw agricultural produce or its product is subjected to.*
>
> *5. That keeping in view the above definitions of the word "Processing" and the word "Agricultural Produce" and the treatment given to the specified agriculture produce "Maize" by the writ petitioner the writ petitioner is liable to pay market fee on Maized starch, Maize Gluten, Maize husk which are result of processing activity."*

22. Alongwith this affidavit, respondent has appended a communication addressed to them from Director of Horticulture and on the strength of said communication, respondent-Committee has tried to impress that the activity being carried out by the unit of the petitioner-Company is processing activity. However, no document has been placed on record from which it can be concluded or inferred that the unit in issue is in fact carrying out processing activity only and not manufacturing activity.

23. As I have already mentioned above, the word 'manufacturing' has not been defined in the Act. In *Black's Law Dictionary*, the word 'Manufacture' is defined as under:

> *"Manufacture.: The process or operation of making goods or any material produced by hand, by machinery or by other agency; anything made from raw materials by the hand, by machinery, or by art. The production of articles for use from raw or prepared materials by giving such materials new forms, qualities, properties or combinations, whether by hand labor or machine."*

24. The word 'Process' has been defined in *Black's Law Dictionary* as under:

> *"Process: A series of actions, motions, or occurrences; progressive act or transaction; continuous operation; method, mode or operation, whereby a result of effect is produced; normal or actual course of procedure; regular proceeding, as, the process of vegetation or decomposition; a chemical process; processes of nature."*

25. Hon'ble Supreme Court in **Orient Paper & Industries Ltd**. Vs. **State of M.P. and others** (2006) 12 Supreme Court Cases 468 has held:

> "13. *The distinction between 'manufacturing' and 'processing' has been examined by this Court in several cases.*
>
> 14. According to Oxford Dictionary one of the meanings of the word 'process' is "a continuous and regular action or succession of actions taking place or carried on in a definite manner and leading to the accomplishment of some result". The activity contemplated by the definition is perfectly general requiring only the continuous or quick succession. It is not one of the requisites that the activity should involve some operation on some material in order to effect its conversion to some particular stage. There is nothing in the natural meaning of the word 'process' to exclude its application to handling. There may be a process, which consists only in handling and there may be a process, which involves no handling or not merely handling but use or also use. It may be a process involving the handling of the material and it need not be a process involving the use of material. The activity may be subordinate but one in relation to the further process of manufacture. Any activity or operation, which is the essential requirement and is so related to the further operations for the end result, would also be a process in or in relation to manufacture. (See: *C.C.E. v. Rajasthan State Chemical Works* (1991) 4 SCC 473).
>
> 15. In Black's Law Dictionary, (5th Edition), the word 'manufacture' has been defined as, "The process or operation of making goods or any material produced by hand, by machinery or by other agency; by the hand, by machinery, or by art. The production of articles for use from raw or prepared materials by giving such materials new forms, qualities, properties or combinations, whether by hand labour or machine".
>
> Thus by manufacture something is produced and brought into existence which is different from that out of which it is made in the sense that the thing produced is by itself a commercial commodity capable of being sold or supplied. The material from which the thing or product is manufactured may necessarily lose its identity or may become transformed into the basic or essential properties. (*See Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam v. M/s. Coco Fibres* (1992 Supp. (1) SCC 290).
>
> 16. Manufacture implies a change but every change is not manufacture, yet every change of an article is the result of treatment, labour and manipulation. Naturally, manufacture is the end result of one or more processes through which the original commodities are made to pass. The nature and extent of processing may vary from one class to another. There may be several stages of processing, a different kind of processing at each stage. With each process

suffered the original commodity experiences a change. Whenever a commodity undergoes a change as a result of some operation performed on it or in regard to it, such operation would amount to processing of the commodity; but it is only when the change or a series of changes takes the commodity to the point where commercially it can no longer be regarded as the original commodity but instead is recognized as a new and distinct article that a manufacture can be said to take place. Process in manufacture or in relation to manufacture implies not only the production but also various stages through which the raw material is subjected to change by different operations. It is the cumulative effect of the various processes to which the raw material is subjected to that the manufactured product emerges. Therefore, each step towards such production would be a process in relation to the manufacture. Where any particular process is so integrally connected with the ultimate production of goods that but for that process processing of goods would be impossible or commercially inexpedient, that process is one in relation to the manufacture. (*See Collector of Central Excise, Jaipur v. Rajasthan State Chemical Works, Deedwana, Rajasthan* (1991 (4) SCC 473).

17. 'Manufacture' is a transformation of an article, which is commercially different from the one, which is converted. The essence of manufacture is the change of one object to another for the purpose of making it marketable. The essential point thus is that in manufacture something is brought into existence, which is different from that, which originally existed in the sense that the thing produced is by itself a commercially different commodity whereas in the case of processing it is not necessary to produce a commercially different article. (See M/s. Saraswati Sugar Mills and others v. Haryana State Board and others (1992 (1) SCC 418).

18. The prevalent and generally accepted test to ascertain that there is 'manufacture' is whether the change or the series of changes brought about by the application of processes take the commodity to the point where, commercially, it can no longer be regarded as the original commodity but is, instead, recognized as a distinct and new article that has emerged as a result of the process. There might be borderline cases where either conclusion with equal justification can be reached. Insistence on any sharp or intrinsic distinction between 'processing and manufacture', results in an oversimplification of both and tends to blur their interdependence. (See Ujagar Prints v. Union of India (1989 (3) SCC 488).

19. To put differently, the test to determine whether a particular activity amounts to 'manufacture' or not is: Does new and different goods emerge having distinctive name, use and character. The moment there is transformation into a new commodity commercially known as a distinct and separate commodity having its own character, use and name, whether be it the result of one process or several processes 'manufacture' takes place and liability to duty is attracted. Etymologically the word 'manufacture' properly construed would doubtless cover the transformation. It is the transformation of a matter into something else and that something else is a question of degree, whether that something else is a different commercial commodity having its distinct character, use and name and commercially known as such from that point of view is a question depending upon the facts and circumstances of the case. (See Empire Industries Ltd. v. Union of India (1985 (3) SCC 314)."

26. In **Manganese Ore India Ltd.** Vs. **State of M.P and others** 2016 SCC Online SC 1280, the Hon'ble Supreme Court has held:

"20. We are absolutely conscious that noscitur a sociis rule is not applied when the language is clear and there is no ambiguity, which according to

us does exist and perceptible in the Explanation in question. A very broad and a wide definition of the term 'processing' if applied, would include manufacture of a new or distinct product. Manufacture normally involves a series of processes either by hand or machine. If a restricted construction is not applied it would create and give rise to unacceptable consequences. It is not the intent to treat and regard manufacturing activities as processing. Manufacturing, as is understood, means a series of processes through different stages in which the raw material is subjected to change by different operations. [For different between process and manufacturing see CIT v. Tara Agency[16], Orient Paper and Industries v. State of M.P. and Anr.[17] and Aspinwall & Co. Ltd. v. Commissioner of Income Tax, Ernakulam[18].] 20.....

26. Learned counsel for the appellants would contend that in numerous decisions, this Court has reiterated that if a new substance is brought into existence or if a new or different article having a distinctive name, character or use results from particular processes, such process or processes would amount to manufacture. In the case of Gramophone Co. of India Ltd. v. Collector of Customs, Calcutta[19], this Court held:- "11. The term "manufacture" is not defined in the Customs Act. In the allied Act, namely the Central Excise Act, 1944 also, the term "manufacture" is not to be found defined though vide clause (f) of Section 2 an inclusive definition is given of the term "manufacture" so as to include certain processes also therein. 12. "Manufacture" came up for the consideration of the Constitution Bench in Ujagar Prints v. Union of India (1989) 3 SCC 488. It was held that if there should come into existence a new article with a distinctive character and use, as a result of the processing, the essential condition justifying manufacture of goods is satisfied. The following passage in the Permanent Edition of Words and Phrases was referred to with approval in Delhi Cloth and General Mills, AIR 1963 SC 791 at p. 795: "'Manufacture' implies a change, but every change is not manufacture and yet every change of an article is the result of treatment, labour and manipulation. But something more is necessary and there must be transformation; a new and different article must emerge having a distinctive name, character or use." 13. In a series of decisions [to wit, Decorative Laminates (India) (P) Ltd v. CCE, (1996) 10 SCC 46, Union of India v. Parle Products (P) Ltd. 1994 Supp. (3) SCC 662, Laminated Packings (P) Ltd v. CCE, (1990) 4 SCC 51 and Empire Industries Ltd. v. CCE, (1985) 3 SCC 314] the view taken consistently by this Court is that the moment there is transformation into a new commodity commercially known as a distinct and separate commodity having its own character, use and name whether it be the result of one process or several processes, manufacture takes place; the transformation of the goods into a new and different article should be such that in the commercial world it is known as another and different article. Pre-recorded audio cassettes are certainly goods known in the market as distinct and different from blank audio cassettes. The two have different uses. A pre- recorded audio cassette is generally sold by reference to its name or title which is suggestive of the contents of the audio recording on the cassette. The appellant is indulging in a mass production of such pre-recorded audio cassettes. It is a manufacturing activity. The appellant's activity cannot be compared with a person sitting in the market extending the facility of recording any demanded music or sounds on a blank audio cassette brought by or made available to the customer, which activity may be called a service. The Tribunal was not right in equating the appellant's activity with photoprocessing and holding the appellant a service industry."

27. In Aspinwall & Co. Ltd. (supra) this Court has held as follows:- "13. The word "manufacture" has not been defined in the Act. In the absence of a definition of the word "manufacture" it has to be given a meaning as is understood

in common parlance. It is to be understood as meaning the production of articles for use from raw or prepared materials by giving such materials new forms, qualities or combinations whether by hand labour or machines. If the change made in the article results in a new and different article then it would amount to a manufacturing activity. 14. This Court while determining as to what would amount to a manufacturing activity, held in CST v. Pio Food Packers, 1980 Supp. SCC 174 : that the test for determination whether manufacture can be said to have taken place is whether the commodity which is subjected to the process of manufacture can no longer be regarded as the original commodity, but is recognized in the trade as a new and distinct commodity. It was observed: (SCC p. 176, para 5) "Commonly manufacture is the end result of one or more processes through which the original commodity is made to pass. The nature and extent of processing may vary from one case to another, and indeed there may be several stages of processing and perhaps a different kind of processing at each stage. With each process suffered, the original commodity experiences a change. But it is only when the change, or a series of changes, take the commodity to the point where commercially it can no longer be regarded as the original commodity but instead is recognized as a new and distinct article that a manufacture can be said to take place." 15. Adverting to facts of the present case, the assessee after plucking or receiving the raw coffee berries makes it undergo nine processes to give it the shape of coffee beans. The net product is absolutely different and separate from the input. The change made in the article results in a new and different article which is recognized in the trade as a new and distinct commodity. The coffee beans have an independent identity distinct from the raw material from which it was manufactured. A distinct change comes about in the finished product. 16. Submission of the learned counsel for the Revenue that the assessee was doing only the processing work and was not involved in the manufacture and production of a new article cannot be accepted. The process is a manufacturing process when it brings out a complete transformation in the original article so as to produce a commercially different article or commodity. That process itself may consist of several processes. The different processes are integrally connected which results in the production of a commercially different article. If a commercially different article or commodity results after processing then it would be a manufacturing activity. The assessee after processing the raw berries converts them into coffee beans which is a commercially different commodity. Conversion of the raw berry into coffee beans would be a manufacturing activity.

28. This Court in Servo-Med Industries Pvt. Ltd. v. Commissioner of Central Excise[20] has held as under:- "27.(1) Where the goods remain exactly the same even after a particular process, there is obviously no manufacture involved. Processes which remove foreign matter from goods complete in themselves and/or processes which clean goods that are complete in themselves fall within this category." "27.(4) Where the goods are transformed into goods which are different and/or new after a particular process, such goods being marketable as such. It is in this category that manufacture of goods can be said to take place."

27. In **Orient Paper & Industries Ltd**. Vs. **State of M.P.,** (2006) 12 SCC 468, it has been held by the Hon'ble Supreme Court while interpreting the provisions of M.P. Krishin Upaj Mandi Adhiniyam Act 1972, provisions of which are akin to the local Act of this State that:

"16. Manufacture implies a change but every change is not manufacture, yet every change of an article is the result of treatment, labour and manipulation. Naturally, manufacture is the end result of one or more processes through which the original commodities are made to pass. The nature and extent of processing may vary from one class to another. There may be several stages of processing, a different kind of processing at each stage. With each process suffered

the original commodity experiences a change. Whenever a commodity undergoes a change as a result of some operation performed on it or in regard to it, such operation would amount to processing of the commodity; but it is only when the change or a series of changes takes the commodity to the point where commercially it can no longer be regarded as the original commodity but instead is recognized as a new and distinct article that a manufacture can be said to take place. Process in manufacture or in relation to manufacture implies not only the production but also various stages through which the raw material is subjected to change by different operations. It is the cumulative effect of the various processes to which the raw material is subjected to that the manufactured product emerges. Therefore, each step towards such production would be a process in relation to the manufacture. Where any particular process is so integrally connected with the ultimate production of goods that but for that process processing of goods would be impossible or commercially inexpedient, that process is one in relation to the manufacture. (See Collector of Central Excise, Jaipur v. Rajasthan State Chemical Works, Deedwana, Rajasthan (1991 (4) SCC 473).

17. 'Manufacture' is a transformation of an article, which is commercially different from the one, which is converted. The essence of manufacture is the change of one object to another for the purpose of making it marketable. The essential point thus is that in manufacture something is brought into existence, which is different from that, which originally existed in the sense that the thing produced is by itself a commercially different commodity whereas in the case of processing it is not necessary to produce a commercially different article. (See M/s. Saraswati Sugar Mills and others v. Haryana State Board and others (1992 (1) SCC 418).

18. The prevalent and generally accepted test to ascertain that there is 'manufacture' is whether the change or the series of changes brought about by the application of processes take the commodity to the point where, commercially, it can no longer be regarded as the original commodity but is, instead, recognized as a distinct and new article that has emerged as a result of the process. There might be borderline cases where either conclusion with equal justification can be reached. Insistence on any sharp or intrinsic distinction between 'processing and manufacture', results in an oversimplification of both and tends to blur their interdependence. (See Ujagar Prints v. Union of India (1989 (3) SCC 488).

19. To put differently, the test to determine whether a particular activity amounts to 'manufacture' or not is: Does new and different goods emerge having distinctive name, use and character. The moment there is transformation into a new commodity commercially known as a distinct and separate commodity having its own character, use and name, whether be it the result of one process or several processes 'manufacture' takes place and liability to duty is attracted. Etymologically the word 'manufacture' properly construed would doubtless cover the transformation. It is the transformation of a matter into something else and that something else is a question of degree, whether that something else is a different commercial commodity having its distinct character, use and name and commercially known as such from that point of view is a question depending upon the facts and circumstances of the case. (See Empire Industries Ltd. v. Union of India (1985 (3) SCC 314)."

28. In **Edward Keventer Pvt. Ltd.** Vs. **Bihar State Agricultural Marketing Board**, (2000) 6 SCC 264, it has been held by the Hon'ble Supreme Court that even if the basic ingredients might be the same, but the end product is a different commodity, then it has to be treated as a separate item and if the product loses its initial identity, then the end product will not fall under the first category and it would amount to manufacture.

29. Relying upon the above two judgments of the Hon'ble Supreme Court, the Division Bench of this Court in **M/s. Vardhman Textiles Ltd. & etc.** Vs. **State of H.P. and others**, AIR 2006 Himachal Pradesh 53 while dealing with a similar situation, which had also arisen under this very Act has held as under:

> *"18. The provisions of the H.P. Agricultural Produce Markets Act, 1969 which was repealed by the Act now in consideration were considered by the Apex Court in Himachal Pradesh Marketing Board and others vs. Shankar Trading Co. Pvt.Ltd. and others, (1997) 2 SCC 496. In that case though katha was a distinct and separate product derived from the agricultural produce (Khair wood), the Court held that even katha was included since the State had included katha in the schedule to the Act. It is nobody's case that cotton yard has been included in the Act. This judgment, therefore, does not help the respondent. Even under the present Act katha is included. Katha is not raw agricultural produce but it is the end product of a raw agricultural produce, namely, khair wood. The State has included it in the schedule and therefore it would be agricultural produce within the meaning of the Act.*
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> *19. Reliance has been placed by Sh.Navlesh Verma on a Division Bench judgment of the Punjab and Haryana High Court rendered in M/s.Bindra Feed Mills vs. State of Haryana and others, 1994 PLJ 188. However, before we refer to this judgment it would be apposite to mention that the Punjab Agricultural Produce Markets Act as initially enacted was considered by a Division Bench of the Punjab and Haryana High Court in Parkash Woollen Industries Panipat vs. The State of Haryana and others, 1980 PLJ 54. The Court held that a dealer who brings agricultural produce for the purpose of manufacturing is not liable to pay market fees under the provisions of the Act. The Court held that giving the ordinary meaning to the word "processing", there was distinction between processing and manufacture. The Court held that the processing means 'such treating of an agricultural commodity so as to make it consumable while the commodity remaining substantially the same' while 'manufacturing' envisages turning of original commodity into a different commodity with different use and marketable character thereof being different and distinct from that of the original agricultural commodity. With a view to over come this judgment the legislature amended the definition of the word processing and the new definition included "manufacturing out of an agricultural produce". It is thus obvious that the legislature by definition created a legal fiction and included manufacturing in the definition of processing. It is due to this definition that in Bindra Mills case the Punjab and Haryana High Court upheld the levy of market fee on goods brought for processing though the processing is an interim stage of manufacturing.*
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> *20. We cannot accept the contention of Sh. Navlesh Verma that cotton yarn is agricultural produce and is only produced by way of a process. As noted above certain Acts such as the Karnataka and Punjab Acts have included the word "manufacture" and "manufacturing" in their Acts and therefore even when agricultural produce is used for manufacturing a new product market fees may be levied. However, the legislature in the present case has purposely not used the words manufacture or manufacturing. The words process and processing have been used in the various definition clauses as well as the sections but the legislature in its wisdom chose not to use the words manufacture and manufacturing.*
>
> *21. Every manufacture will necessarily include a series or number of processes. If agricultural produce is only processed and the resultant product is not very different then the resultant product may also be included in the definition of agricultural produce. However, as held by the Supreme Court in Edward Keventer's and Orient Paper & Industry's cases (supra) where the end product has*

a distinct and separate identity then it cannot be said that the notified agricultural produce is only being processed. It is by a series of processing being manufactured into something new; something having a totally different identity.

22. Petitioners have alleged which fact is not denied that when the cotton bales are brought into their spinning mills they are first taken to the blow room then carding is done thereafter combing takes place then the product goes through the various processes of being drawn through the draw frame, speed frame and ring frame and the resultant product which is cotton yarn is then wound and packed. It has been urged by Sh.Navlesh Verma that no chemical processes are involved unlike in the case of manufacture of paper from wood. However, this is not what is crucial to decide whether the processes amount to manufacture or just amount to processing. We have quoted in detail the judgment of the Apex Court giving the vital difference between the two. The main point of differention between processing and manufacturing is whether the end product has a totally different identity. In our considered view cotton yarn has a totally different identity from cotton. The series of process which are undertaken when combined together result in the manufacture of a totally different product, namely, cotton yarn.

23. In view of the above discussion we are of the considered view that the petitioners are manufacturing a non-agricultural product, namely, cotton yarn from agricultural produce and therefore do not fall within the ambit of the Act. We accordingly allow the writ petitions and hold that the petitioners are not liable to get themselves registered under Section 40 of the Act and they are not liable to pay market fees on the manufacture of cotton yarn. We consequently quash the notices issued to the petitioners to get themselves registered and to pay market fees."

30. Therefore, it is evident from the judgments which have been referred to above that in fact the essential difference between manufacturing and processing is that in the case of manufacturing, there is a complete transformation in the original article so as to produce a commercially different article or commodity, which is marketable as such and there is a transformation into a new commodity commercially known as a distinct and separate commodity having its own character, use and name, whereas in the case of processing, the identity of the goods remain exactly the same and though the goods may undergo certain processes, however, the original identity of the good so processed remains the same.

31. Coming to the facts of the present case, the notified agricultural produce, which is maize in the present case, when is subjected to manufacture by the petitioner-company, the produce so manufactured by it are recognized differently both in terms of commercial marketability and usage as compared to notified agricultural produce, which is maize.

32. Therefore, what emerges from the law discussed above is that what is crucial to be decided is whether the process which is undertaken by the petitioner amounts to manufacturing or just amounts to processing. The main point of differention between processing and manufacturing is whether the end product has a totally different identity or not. In the present case, the end product being manufactured by the petitioner-company is Maize Starch, Liquid Glucose, Dextrose, Monohydrate, Liquid Malto Dextrine, Malto Dextrine Powder, Maize Glutane, Maize Germ and Maize Husk etc. No material has been produced on record by the respondent-committee from which it can be inferred that the end product which is so manufactured by the manufacturing activity undertaken by the petitioner–company does not has a totally different identity as compared to notified agricultural produce, i.e. maize, whereas in my considered view, the end produce so manufactured by the petitioner-unit in fact results in a totally different product being manufactured, i.e. Maize Starch, Liquid Glucose, Dextrose, Liquid Malto Dextrine etc.

33. Accordingly, in view of the discussion held above as well as law cited above, it is evident that the petitioner is not undertaking the activity of "processing" but is undertaking the activity of "manufacturing", which results in the manufacture of a totally different product in the

shape of Maize Starch, Liquid Glucose, Dextrose, Monohydrate, Liquid Malto Dextrine, Malto Dextrine Powder, Maize Glutane, Maize Germ and Maize Husk etc. and therefore, the petitioner-unit is not liable to pay any market fee for manufacturing of the said produce under Section 44 of the Act. Held accordingly.

34. As far as the applicability of Section 40 of the Act is concerned, in my considered view, it is in fact incumbent for the petitioner-unit to get itself registered under Section 41 of the said Act, because though I have held that the petitioner-unit is not engaged in any process activity and the activity with which it is engaged is a manufacturing activity, which is not registered under Section 41 of the Act, but still because the petitioner-unit is purchasing notified agricultural produce within the market area as well as from outside, so it does fall within the definition of 'trader' as defined under Section 2(zo) and for this limited purpose it has to get itself registered and it is also liable to pay market fee to the Market Committee for the purchase of notified agricultural produce within the market area.

35. Now, I will address the issue as to what relief can be granted to the petitioner-unit qua prayer made by it for issue of a writ of mandamus to the respondent-Committee to refund a sum of `22,52,535/- deposited by it alongwith interest.

36. I have already held above that the petitioner-company is not liable to pay any market fee to the respondent-Committee, as is envisaged under Section 44 (ii), though the petitioner-company is liable to pay market fee to the respondent-Market Committee as envisaged under Section 44(i).

37. In **Godavari Sugar Mills Limited** Vs**. State of Maharashtra and others**, (2011) 2 Supreme Court Cases 439, the Hon'ble Supreme Court has held:

> *"8. The observations in Suganmal related to a claim for refund of tax and have to be understood with reference to the nature of the claim made therein. The decision in Suganmal has been explained and distinguished in several subsequent cases, including in U.P. Pollution Control Board Vs. Kanoria Industrial Ltd. and ABL International Ltd. Vs. Export Credit Guarantee Corpn. of India Ltd. The legal position becomes clear when the decision in Suganmal is read with the other decisions of this Court on the issue, referred to below:*
>
> *(i) Normally, a petition under Article 226 of the Constitution of India will not be entertained to enforce a civil liability arising out of a breach of a contract or a tort to pay an amount of money due to the claimants. The aggrieved party will have to agitate the question in a civil suit. But an order for payment of money may be made in a writ proceeding, in enforcement of statutory functions of the State or its officers. (Vide Burmah Construction Co. Vs. State of Orissa.)*
>
> *(ii) If a right has been infringed-whether a fundamental right or a statutory right-and the aggrieved party comes to the Court for enforcement of the right, it will not be giving complete relief if the Court merely declares the existence of such right or the fact that existing right has been infringed. The High Court, while enforcing fundamental or statutory rights, has the power to give consequential relief by ordering payment of money realized by the Government without the authority of law. (Vide State of M.P. V. Bhailal Bhai.)*
>
> *(iii) A petition for issue of writ of mandamus will not normally be entertained for the purpose of merely ordering a refund of money, to the return of which the petitioner claims a right. The aggrieved party seeking refund has to approach the civil court for claiming the amount, though the High Courts have the power to pass appropriate orders in the exercise of the power conferred under Article 226 for payment of money (Vide Suganmal Vs. State of M.P.).*

(iv) There is a distinction between cases where a claimant approaches the High Court seeking the relief of obtaining only refund and those where refund is sought as a consequential relief after striking down the order of assessment, etc. While a petition praying for mere issue of a writ of mandamus to the State to refund the money alleged to have been illegally collected is not ordinarily maintainable, if the allegation is that the assessment was without a jurisdiction and the taxes collected was without authority of law and therefore, the respondents had no authority to retain the money collected without any authority of law and therefore the respondents had no authority to retain the money collected without any authority of law, the High Court has the power to direct refund in a writ petition. (Vide Salonah Tea Co. Ltd. Vs. Supdt. of Taxes).

(v) It is one thing to say that the High Court has no power under Article 226 of the Constitution to issue a writ of mandamus for making refund of the money illegally collected. It is yet another thing to say that such power can be exercised sparingly depending on facts and circumstances of each case. For instance, where the facts are not in dispute, where the collection of money was without the authority of law and there was no cause of undue enrichment, there is no good reason to deny a relief of refund to the citizens. But even in cases where collection of cess, levy or tax is held to be unconstitutional or invalid, refund is not an automatic consequence but may be refused on several grounds depending on facts and circumstances of a given case. (Vide U.P. Pollution Control Board V. Kanoria Industrial Ltd.).

(vi) Where the lis has a public law character, or involves a question arising out of public law functions on the part of the State of its authorities, access to justice by way of a public law remedy under Article 226 of the Constitution will not be denied. (Vide Sanjana M. Wig V. Hindustan Petroleum Corpn. Ltd.).

We are therefore of the view that reliance upon Suganmal was misplaced, to hold that the writ petition filed by the appellant was not maintainable.

38. In **Orissa Cement Ltd.** Vs. **State of Orissa,** 1991 Supp. (1) SCC 430, the Hon'ble Supreme Court has held that once the principle that the Court has a discretion to grant or decline refund is recognized, the ground on which such discretion should be exercised is a matter of consideration for the Court having regard to all the circumstances of the case.

39. In **Suganmal** Vs. **State of M.P.**, AIR 1965 SC 1740, the Hon'ble Supreme Court has held:

"6. On the first point, we are of opinion that though the High Court have power to pass any appropriate order in the exercise of the powers conferred under article 226 of the Constitution, such a petition solely praying for the issue of a writ of mandamus directing the State to refund the money is not ordinarily maintainable for the simple reason that a claim for such a refund can always be made in a suit against the authority which had illegally collected the money as a tax. We have been referred to cases in which orders had been issued directing the state to refund taxes illegally collected, but all such had been those in which the petitions challenged the validity of the assessment and for consequential relief for the return of the tax illegally collected. We have not been referred to any case in which the courts were moved by a petition under article 226 simply for the purpose of obtaining refund of money due from the State on account of its having made illegal exactions. We do not consider it proper to extend the principle justifying the consequential order directing the refund of amounts illegally realised, when the order under which the amounts had been collected has been set aside, to cases in which only orders for the refund of money are sought. The parties had the right to question the illegal assessment orders on the ground of their illegality or

unconstitutionality and, therefore, could take action under Art. 226 for the protection of their fundamental right and the Courts, on setting aside the assessment orders exercised their jurisdiction in proper circumstances to order the consequential relief for the refund of the tax illegally realised. We do not find any good reason to extend this principle and, therefore, hold that no petition for the issue of a writ of mandamus will be normally entertained for the purpose of merely ordering a refund of money to the return of which the petitioner claims a right."

40. The Hon'ble Supreme Court in **U.P. Pollution Control Board and others** Vs. **Kanoria Industrial Ltd. and another**, (2001) 2 Supreme Court Cases 549 has held:

"17.....It is one thing to say that the High Court has no power under Article 226 of the Constitution to issue a writ of mandamus for making refund of the money illegally collected. It is yet another thing to say that such power can be exercised sparingly depending on facts and circumstances of each case. For instance, in the cases on hand where facts are not in dispute, collection of money as cess was itself without the authority of law; no case of undue enrichment was made out and the amount of cess was paid under protest; the writ petitions were filed within a reasonable time from the date of the declaration that the law under which tax/cess was collected was unconstitutional. There is no good reason to deny a relief of refund to the citizens in such cases on the principles of public interest and equity in the light of the cases cited above...."

41. Thus, the legal principle which has been carved out by the Hon'ble Supreme Court is that while enforcing fundamental or statutory rights, the High Court has the power to give consequential relief by ordering payment of money realized by the Government without the authority of law and a petition for issue of writ of mandamus will not normally be entertained for the purpose of merely ordering a refund of money, to the return of which the petitioner claims a right, however, there is a distinction between cases where a claimant approaches the High Court seeking the relief of obtaining only refund and those where refund is sought as a consequential relief after striking down the order of assessment etc. It is not as if High Court has no power under Article 226 of the Constitution to issue a writ of mandamus for making refund of the money illegally collected, however, this power can be exercised sparingly depending on facts and circumstances of each case.

42. Now, when we apply the above legal principles enumerated by the Hon'ble Supreme Court to the facts of the present case, the inevitable conclusion is that it is not as if the petitioner has approached this Court praying for issue of writ of mandamus that money which it has deposited as market fee to the Market Committee may be ordered to be refunded in its favour. The main relief which has been sought by the petitioner is for issuance of mandamus to the effect that respondent-Committee is not entitled to levy any market fee on the manufacturing activity being carried out by the petitioner-Company under Section 44(ii) of the Act and the prayer for refund is a consequential relief. Keeping in view the fact that the principal prayer of the petitioner has found merit with this Court, therefore, in my considered view, the petitioner-Company is also entitled for refund of the amount which has been paid by it to the respondent-Committee and which has been illegally collected by the respondent-committee as market fee under Section 44(ii) of the Act.

43. Therefore, while holding that the petitioner-Company is not liable to pay any market fee for the manufacturing activities being carried out by it, respondent-Committee is directed to refund excess market fee which stands deposited with it by the petitioner-Company after deducting the amount, which it is entitled to collect from the petitioner-Company under Section 44(i) of the Act. It is further directed that the said refund shall be made by the respondent-Committee to the petitioner-Company within a period of three months from today, failing which, respondent-Committee shall be liable to pay interest @6% (simple) from the date of judgment.

With the said directions, writ petition stands disposed of, so also miscellaneous applications, if any. No order as to costs.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Prem Singh Chauhan ...Petitioner

Versus

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

CWP No. 1489 of 2016
Reserved on: March 22, 2017
Decided on: March 29, 2017

Constitution of India, 1950- Article 226- The Office of Naib Tehsildar was functioning at Village Chandol – office of Kanungo is already located at Village Salech– the Government has issued a notification establishing the headquarters of newly created sub-Tehsil Pajhota at Nohri- it was contended by the petitioner that there is insufficient accommodation at Nohri for establishing the headquarters – offices are already working at Villages Salech/Chandol and they are appropriate places for setting up the headquarters – Gram Panchayats have also passed resolution for establishing the headquarters at Salech/Chandol – residents have also offered 2.5 bighas of land and there is no justification for issuance of notification – respondents contended that the decision was taken to establish headquarters at Nohri for providing better services – held that petitioner is not authorized by the public to file the present writ petition – the decision to establish headquarters at Nohri has been taken in public interest – people had made land available free of cost to establish headquarters at Nohri – Courts cannot interfere in the policy decision unless the decision is capricious or arbitrary – the decision is not shown to be arbitrary or based upon irrational consideration- petition dismissed.(Para-7 to 12)

Cases referred:

Census Commissioner and others vs. R. Krishnamurthy, (2015) 2 SCC 796

Nand Lal and another Vs. State of H.P., reported in 2014(2) HLR (DB) 982

For the petitioner Mr. O.P. Sharma, Senior Advocate with Mr. Naveen K. Dass, Advocate.

For the respondents: Mr. Shrawan Dogra, Advocate General with Mr. Anup Rattan, Mr. Romesh Verma and Mr. Rupinder Singh, Additional Advocate Generals and Mr. J.K. Verma, Deputy Advocate General.

The following judgment of the Court was delivered:

Per Sandeep Sharma, Judge:

Petitioner, who claims himself to be the Vice President, Gram Panchayat Koti Padhog, Tehsil Rajgarh, District Sirmaur, Himachal Pradesh, being aggrieved with the issuance of Notification dated 11.2.2014 (Annexure P-1), wherein, headquarters of newly created Sub Tehsil Pajhota has been shown to be at Nohri, approached this Court by way of instant writ petition, praying therein for quashing and setting aside Annexure P-1 i.e. Notification, with further prayer to issue directions to the respondents to station the headquarters of newly created Sub-Tehsil, Pajhota at Salech/Chandol.

2. As per petitioner, prior to Notification dated 11.2.2014, office/Court of Naib Tehsildar was functioning at Village Chandol, as is evident from Annexures P-2 and P-3.

Petitioner further claims that the office of Kanungo is already at Village Salech for the last 25 years and there is sufficient land available between Salech and Chandol, for the construction of office/residences and parking place and stationing headquarters of newly created Sub-Tehsil, Pajhota at Salech or Chandol.

3. In nutshell, case of the petitioner is that there is no sufficient accommodation available at Nohri for stationing headquarters of newly created Sub-Tehsil, Pajhota, whereas, a PWD Rest House is situated at Village Chandol, Panchayat Headquarters is situated at Village Salech and Kanungo Circle is also working there for the last 25 years, as such, Villages Salech /Chandol are the most appropriate places for setting up headquarters of newly created Sub-Tehsil, Pajhota. As per petitioner, since Patwar Circle of eight Panchayats is easily accessible at Salech, villages of Pajhota Illaqua and Rasumandar passed resolution dated 19.2.2012, vide Annexure P-6 and specifically demanded therein that Sub Tehsil office may be opened near Gram Panchayat Kufar /Pajhota. Petitioner and residents of eight Panchayats also passed resolution, praying therein that headquarters of said Tehsil should be at Salech/Chandol, which is/are on national highway and in all respects, convenient for the residents of that area. As per the petitioner, residents of the area have offered 2.5 Bigha of land as demanded by the respondents, through Tehsildar, Rajgarh and as such there is no justification in issuance of Notification, dated 11.2.2014, wherein a conscious decision has been taken by the authorities to open headquarters of newly created Sub-Tehsil, Pajhota at Nohri. In the aforesaid background, petitioner approached this Court, for issuance of direction to the respondents to station headquarters of newly created Sub-Tehsil, Pajhota at Salech/Chandol instead of Nohri.

4. Respondents, by way of a detailed reply, refuted aforesaid claim of the petitioner by stating that decision to set up headquarters at Nohri has been taken to provide better services to the concerned people of nearby villages and to have better administrative control. Government of Himachal Pradesh, vide Notification dated 11.2.2014, has created a new Sub Tehsil, Pajhota with its headquarters at Nohri consisting of eight Patwar Circles. Reply having been filed by the respondents also suggests that distance of Patwar Circles of newly created Sub Tehsil do not create any difference as Chandol is only 2 kms from Nohri and similarly, land measuring 2-00-00 Bigha has also been gifted by the local people of Nohri for the construction of Sub Tehsil building, and, land has been mutated in the name of Revenue Department. It further emerges from the reply that the Government has granted administrative approval and expenditure sanction amounting to ` 1,98,21,000/- for the construction of the office/residential building of Sub Tehsil Pajhota at Nohri. Respondents, while specifically denying the claim of the petitioner that injustice has been caused to the residents of eight Panchayats, stated that selection of site for Sub Tehsil Pajhota at Nohri was made keeping in view the demand of the local people and availability of land made by way of gift deed, dated 6.5.2016, in favour of the Revenue Department, for the construction of Sub Tehsil building. Para-4 of the reply further suggests that site of Sub Tehsil Nohri is well connected by road and site is easily accessible by road i.e. Solan-Dhamla road. Moreover, Naib Tehsildar has been posted at Nohri since 20.1.2016 and he is presently stationed at Nohri itself. Respondents have also stated that the distance between Chandol and Nohri is hardly 2 kms and, more particularly, there are Senior Secondary School, newly created Sub Tehsil office and Veterinary Hospital, besides Primary Health Centre, Ayurvedic Aushdhalaya, Forest Chowki, UCO Bank, Patwar Khana and office of HIMFED at Dhamla, which is only 1 km from Sub Tehsil headquarter, Nohri. Respondents, while praying for dismissal of petition, also stated that no gift deed of land, as claimed by petitioner, was ever executed in the name of Revenue Department at Salech/Chandol, whereas land at Nohri was made available by the residents of the area, vide gift deed No. 221 /2016 dated 6.5.2016 and land has been mutated in favour of the Revenue Department vide mutation No. 417 dated 27.5.2016.

5. Mr. O.P. Sharma, learned Senior Advocate duly assisted by Mr. Naveen K. Dass, Advocate, vehemently argued that Notification, dated 11.2.2014, (Annexure P-1) issued by the respondents is not in the interests of the residents of newly created Sub Tehsil, because, relevant factors have not been properly taken care of by the authorities concerned while deciding upon the headquarters of the Sub Tehsil at Nohri.

6. Mr. Shrawan Dogra, learned Advocate General duly assisted by Mr. Romesh Verma, learned Additional Advocate General, while inviting attention of this Court to their reply, specifically contended that Notification, dated 11.2.2014, has been issued by the authorities, in the interests of public at large, as such, there is no illegality, if any, in the same. While refuting the claim of the petitioner, Mr. Dogra strenuously argued that the distance of all Patwar Circles of newly created Sub Tehsil at Chandol is hardly 2 kms from Nohri and, decision to station headquarters of Sub Tehsil Pajhota at Nohri has been taken by the authorities for proper and better services to the people of area. Mr. Dogra further contended that the Government has already granted approval and expenditure sanction amounting to `1,98,21,000/- for the construction of office of Sub Tehsil Pajhota at Nohri and at present, Naib Tehsildar has been posted at Nohri. Apart from above, Mr. Dogra contended that Notification, dated 11.2.2014, is a policy decision by the Government and petitioner has no right to lay challenge to the same, especially when it stands duly proved on record that policy decision is in the interests of public at large.

7. After having carefully gone through the record and hearing the submissions of the learned counsel representing the parties, this Court sees no merit in the present petition, rather this Court has no hesitation to conclude that instant writ petition is a sheer abuse of process of law. This Court was unable to lay its hands on any document available on record, suggestive of the fact that petitioner, who claims himself to be Vice President of Gram Panchayat, Koti Padhog, is authorized on behalf of general public to file instant petition. As such, present petition deserves to be dismissed on the ground of locus standi itself. Though, petitioner by way of placing on record certain resolutions passed by certain Associations of area including a few Panchayats, (Annexures P-5 to P-14) has attempted to demonstrate before this Court that residents of Pajhota area and Rasumandar Illaqua are against the issuance of Notification dated 11.2.2014, wherein a conscious decision has been taken to station headquarters of newly created Sub-Tehsil, Pajhota at Nohri, but, admittedly, no material, whatsoever, has been placed on record in support of the contentions as raised in the petition, whereby it has been stated that facilities at Village Salech/Chandol are more than the facilities at Nohri, where headquarters of newly created Sub-Tehsil, Pajhota has been stationed/set up by the authorities. Perusal of reply having been filed by the respondents clearly suggests that decision to set up headquarter of newly created Sub-Tehsil, Pajhota at Nohri has been taken by the Government in the larger public interests. It also emerges from the documents available on record that site selected for newly created Sub Tehsil is well connected by road and is easily accessible. Moreover, Naib Tehsildar has been posted at Nohri, who is performing duties since 20.1.2016. Apart from above, it also emerges from the reply filed by the respondents that there are better facilities available at Nohri and it is hardly 2 kms away from Chandol, which is on the same road.

8. Leaving everything aside, it stands clearly established from the record that local people of Nohri area made available land measuring 2-00-00 Bigha to the authorities at Nohri for setting up headquarters of newly created Sub Tehsil, free of cost. This Court, after carefully examining the reply of the respondents, sees no force, much less to say substantial force in the arguments having been made by the learned counsel representing the petitioner that decision of respondents as reflected in Notification is not in the interests of general public. Apart from above, this Court sees no reason, more particularly, in light of material available on record to interfere in the policy decision taken by the Government, which otherwise appears to be in larger public interests.

9. Admittedly, the decision of the authorities in setting up headquarter of newly created Sub Tehsil Pajhota at Nohri is a policy decision, which is not open to judicial review. In this regard, it would be profitable to place reliance upon judgment passed by three Judges of the Hon'ble Supreme Court of India in **Census Commissioner and others vs. R. Krishnamurthy**, (2015) 2 SCC 796, wherein it was held that it is not within the domain of the Courts to embark upon enquiry as to whether a particular public policy is wise and acceptable or whether better policy could be evolved. Court can only interfere if the policy framed is absolutely capricious or not informed by reasons or totally arbitrary. It is 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.

25. 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.

26. In this context, we may refer to a three-Judge Bench decision in Suresh Seth V. Commr., Indore Municipal Corporation, (2005) 13 SCC 287 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: (SCC pp. 288-89, para 5)

> "5……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 (1989) 4 SCC 187 (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, 1992 Supp (1) SCC 548. In A.K. Roy v. Union of India, (1982) 1 SCC 271, it was held

that no mandamus can be issued to enforce an Act which has been passed by the legislature."

27. At this juncture, we may refer to certain authorities about the justification in interference with the policy framed by the Government. It needs no special emphasis to state that interference with the policy, though is permissible in law, yet the policy has to be scrutinized with ample circumspection.

28. In N.D. Jayal and Anr. V. Union of India & Ors.(2004) 9 SCC 362, the Court has observed that in the matters of policy, when the Government takes a decision bearing in mind several aspects, the Court should not interfere with the same. In Narmada Bachao Andolan V. Union of India (2000) 10 SCC 664, it has been held thus: (SCC p. 762, para 229)

> " 229. "It is now well settled that the courts, in the exercise of their jurisdiction, will not transgress into the field of policy decision. Whether to have an infrastructural project or not and what is the type of project to be undertaken and how it has to be executed, are part of policy-making process and the courts are ill-equipped to adjudicate on a policy decision so undertaken. The court, no doubt, has a duty to see that in the undertaking of a decision, no law is violated and people's fundamental rights are not transgressed upon except to the extent permissible under the Constitution."

29. In this context, it is fruitful to refer to the authority in Rusom Cavasiee Cooper V. Union of India, (1970) 1 SCC 248, wherein it has been expressed thus: (SCC p. 294, para 63)

> "63....It is again not for this Court to consider the relative merits of the different political theories or economic policies... This Court has the power to strike down a law on the ground of want of authority, but the Court will not sit in appeal over the policy of Parliament in enacting a law".

30. In Premium Granites V. State of Tamil Nadu, (1994) 2 SCC 691 while dealing with the power of the courts in interfering with the policy decision, the Court has ruled that: (SCC p.715, para 54)

> "54. it is not the domain of the court to embark upon unchartered ocean of public policy in an exercise to consider as to whether a particular public policy is wise or a better public policy could be evolved. Such exercise must be left to the discretion of the executive and legislative authorities as the case may be. The court is called upon to consider the validity of a public policy only when a challenge is made that such policy decision infringes fundamental rights guaranteed by the Constitution of India or any other statutory right."

31. In M.P. Oil Extraction and Anr. V. State of M.P. & Ors.(1997) 7 SCC 592, a two-Judge Bench opined that: (SCC p. 611, para 41)

> "41..... The executive authority of the State must be held to be within its competence to frame a policy for the administration of the State. Unless the policy framed is absolutely capricious and, not being informed by any reason whatsoever, can be clearly held to be arbitrary and founded on mere ipse dixit of the executive functionaries thereby offending Article 14 of the Constitution or such policy offends other constitutional provisions or comes into conflict with any statutory provision, the Court cannot and should not outstep its

limit and tinker with the policy decision of the executive functionary of the State."

32. In State of M.P. V. Narmada Bachao Andolan & Anr.(2011) 7 SCC 639, after referring to the State of Punjab V. Ram Lubhaya Bagga (1998) 4 SCC 117 , the Court ruled thus: (SCC pp. 670-71, para 36)

"36. The Court cannot strike down a policy decision taken by the Government merely because it feels that another decision would have been fairer or more scientific or logical or wiser. The wisdom and advisability of the policies are ordinarily not amenable to judicial review unless the policies [pic]are contrary to statutory or constitutional provisions or arbitrary or irrational or an abuse of power. (See Ram Singh Vijay Pal Singh v. State of U.P., (2007) 6 SCC 44, Villianur Iyarkkai Padukappu Maiyam v. Union of India, (2009) 7 SCC 561 and State of Kerala v. Peoples Union for Civil Liberties, (2009) 8 SCC 46.)"

33. from the aforesaid pronouncement of law, it is clear as noon day that it is not within the domain of the courts to embark upon an enquiry as to whether a particular public policy is wise and acceptable or whether a better policy could be evolved. The court can only interfere if the policy framed is absolutely capricious or not informed by reasons or totally arbitrary and founded ipse dixit offending the basic requirement of Article 14 of the Constitution. In certain matters, as often said, there can be opinions and opinions but the Court is not expected to sit as an appellate authority on an opinion."

10. Reliance is also placed upon recent judgment rendered by Apex Court in case **Center for Public Interest Litigation** Vs. **Union of India** W.P.(C) No. 382 of 2014, decided on 8.4.2016, wherein it was reiterated that unless a policy decision is found to be arbitrary or based on irrational consideration or malafide or against statutory provisions, same can not be interfered by the Court in exercise of powers of judicial review. It is held as under:

"19. Such a policy decision, when not found to be arbitrary or based on irrelevant considerations or mala fide or against any statutory provisions, does not call for any interference by the Courts in exercise of power of judicial review. This principle of law is ingrained in stone which is stated and restatedtime and again by this Court on numerous occasions. In Jal Mahal Resorts (P) Ltd. v. K.P. Sharma, 2014 8 SCC 804, the Court underlined the principle in the following manner:

116. From this, it is clear that although the courts are expected very often to enter into the technical and administrative aspects of the matter, it has its own limitations and in consonance with the theory and principle of separation of powers, reliance at least to some extent to the decisions of the State authorities, specially if it is based on the opinion of the experts reflected from the project report prepared by the technocrats, accepted by the entire hierarchy of the State administration, acknowledged, accepted and approved by one Government after the other, will have to be given due credence and weightage. In spite of this if the court chooses to overrule the correctness of such administrative decision and merits of the view of the entire body including the administrative, technical and financial experts by taking note of hair splitting submissions at the instance of a PIL petitioner without any evidence in support thereof, the PIL petitioners shall have to be put to strict proof and cannot be allowed to function as an extraordinary and extra-judicial ombudsmen questioning the entire exercise undertaken by an extensive body which include administrators, technocrats and financial experts. In

our considered view, this might lead to a friction if not collision among the three organs of the State and would affect the principle of governance ingrained in the theory of separation of powers. In fact, this Court in M.P. Oil Extraction v. State of M.P., (1997) 7 SCC 592 at p. 611 has unequivocally observed that:

> "41. The power of judicial review of the executive and legislative action must be kept within the bounds of constitutional scheme so that there may not be any occasion to entertain misgivings about the role of judiciary in outstepping its limit by unwarranted judicial activism being very often talked of in these days. The democratic set-up to which the polity is so deeply committed cannot function properly unless each of the three organs appreciate the need for mutual respect and supremacy in their respective fields."

117. However, we hasten to add and do not wish to be misunderstood so as to infer that howsoever gross or abusive may be an administrative action or a decision which is writ large on a particular activity at the instance of the State or any other authority connected with it, the Court should remain a passive, inactive and a silent spectator. What is sought to be emphasised is that there has to be a boundary line or the proverbial laxman rekha while examining the correctness of an administrative decision taken by the State or a central authority after due deliberation and diligence which do not reflect arbitrariness or illegality in its decision and execution. If such equilibrium in the matter of governance gets disturbed, development is bound to be slowed down and disturbed specially in an age of economic liberalisation wherein global players are also involved as per policy decision."

20. Minimal interference is called for by the Courts, in exercise of judicial review of a Government policy when the said policy is the outcome of deliberations of the technical experts in the fields inasmuch as Courts are not well-equipped to fathom into such domain which is left to the discretion of the execution. It was beautifully explained by the Court in Narmada Bachao Andolan v. Union of India, (2000) 10 SCC 664 and reiterated in Federation of Railway Officers Assn. v. Union of India (2003) 4 SCC 289 in the following words:

> "12. In examining a question of this nature where a policy is evolved by the Government judicial review thereof is limited. When policy according to which or the purpose for which discretion is to be exercised is clearly expressed in the statute, it cannot be said to be an unrestricted discretion. On matters affecting policy and requiring technical expertise the court would leave the matter for decision of those who are qualified to address the issues. Unless the policy or action is inconsistent with the Constitution and the laws or arbitrary or irrational or abuse of power, the court will not interfere with such matters."

21. Limits of the judicial review were again reiterated, pointing out the same position by the Courts in England, in the case of G. Sundarrajan v. Union of India[6] in the following manner: 15.1. Lord MacNaughten in Vacher & Sons Ltd. v. London Society of Compositors (1913 AC 107: (1911-13) All ER Rep 241 (HL) has stated:

> "... Some people may think the policy of the Act unwise and even dangerous to the community. But a judicial tribunal has nothing to

do with the policy of any Act which it may be called upon to interpret. That may be a matter for private judgment. The duty of the court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction."

15.2. In Council of Civil Service Unions v. Minister for the Civil Service (1985 AC 374, it was held that it is not for the courts to determine whether a particular policy or particular decision taken in fulfilment of that policy are fair. They are concerned only with the manner in which those decisions have been taken, if that manner is unfair, the decision will be tainted with what Lord Diplock labels as "procedural impropriety."

15.3 This Court in M.P. Oil Extraction v. State of M.P. (1997) 7 SCC 592 held that unless the policy framed is absolutely capricious, unreasonable and arbitrary and based on mere ipse dixit of the executive authority or is invalid in constitutional or statutory mandate, court's interference is not called for.

15.4 Reference may also be made of the judgments of this Court in Ugar Sugar Works Ltd. v. Delhi Admn. (2001) 3 SCC 635, Dhampur Sugar (Kashipur) Ltd. v. State of Uttaranchal (2007) 8 SCC 418 and Delhi Bar Assn. v. Union of India (2008) 13 SCC 628.

15.5. We are, therefore, firmly of the opinion that we cannot sit in judgment over the decision taken by the Government of India, NPCIL, etc. for setting up of KKNPP at Kudankulam in view of the Indo-Russian Agreement."

22. When it comes to the judicial review of economic policy, the Courts are more conservative as such economic policies are generally formulated by experts. Way back in the year 1978, a Bench of seven Judges of this Court in Prag Ice & Oil Mills v. Union of India and Nav Bharat Oil Mills v. Union of India, (1978) 3 SCC 459 carved out this principle in the following terms:

"We have listened to long arguments directed at showing us that producers and sellers of oil in various parts of the country will suffer so that they would give up producing or dealing in mustard oil. It was urged that this would, quite naturally, have its repercussions on consumers for whom mustard oil will become even more scarce than ever ultimately. We do not think that it is the function of this Court or of any court to sit in judgment over such matters of economic policy as must necessarily be left to the government of the day to decide. Many of them, as a measure of price fixation must necessarily be, are matters of prediction of ultimate results on which even experts can seriously err and doubtlessly differ. Courts can certainly not be expected to decide them without even the aid of experts.

23. Taking aid from the aforesaid observations of the Constitution Bench, the Court reiterated the words of caution in Peerless General Finance and Investment Co. Limited v. Reserve Bank of India, (1992) 2 SCC 343 with the following utterance:

"31. The function of the court is to see that lawful authority is not abused but not to appropriate to itself the task entrusted to that authority. It is well settled that a public body invested with statutory powers must take care not to exceed or abuse its power. It must keep within the limits of the authority committed to it. It must act in good

> faith and it must act reasonably. Courts are not to interfere with economic policy which is the function of experts. It is not the function of the courts to sit in judgment over matters of economic policy and it must necessarily be left to the expert bodies. In such matters even experts can seriously and doubtlessly differ. Courts cannot be expected todecide them without even the aid of experts.
>
> 24. It cannot be doubted that the primary and central purpose of judicial review of the administrative action is to promote good administration. It is to ensure that administrative bodies act efficiently and honestly to promote the public good. They should operate in a fair, transparent, and unbiased fashion, keeping in forefront the public interest. To ensure that aforesaid dominant objectives are achieved, this Court has added new dimension to the contours of judicial review and it has undergone remendous change in recent years. The scope of judicial review has expanded radically and it now extends well beyond the sphere of statutory powers to include diverse forms of 'public' power in response to the changing architecture of the Government. (See : Administrative Law: Text and Materials (4th Edition) by Beatson, Matthews, and Elliott) Thus, not only has judicial review grown wider in scope; its intensity has also increased. Notwithstanding the same,
>
> > "it is, however, central to received perceptions of judicial review that courts may not interfere with exercise of discretion merely because they disagree with the decision or action in question; instead, courts intervene only if some specific fault can be established for example, if the decision was reached procedurally unfair.
> >
> > 25. The raison d'etre of discretionary power is that it promotes decision maker to respond appropriately to the demands of particular situation. When the decision making is policy based judicial approach to interfere with such decision making becomes narrower. In such cases, in the first instance, it is to be examined as to whether policy in question is contrary to any statutory provisions or is discriminatory/arbitrary or based on irrelevant considerations. If the particular policy satisfies these parameters and is held to be valid, then the only question to be examined is as to whether the decision in question is in conformity with the said policy."

11. Apart from aforesaid judgments having been passed by the Apex Court, Division Bench of this Court relying upon aforesaid judgments, also held in case **Nand Lal and another** Vs. **State of H.P.**, reported in 2014(2) HLR (DB) 982, that policy decision is not open to judicial review. In the aforesaid case, petitioner had laid challenge to a decision taken by the Government to open Degree College at Diggal, District Solan instead of Ramshehar (Nalagarh) and it was held that since it was a policy decision, the same was not open to judicial review. Division Bench of this Court specifically held that it is beaten law of land that government decisions and policies cannot be subject matter of litigation unless arbitrariness is shown in the decision making process.

12. This Court, after carefully examining the reply of the respondents, is convinced and satisfied that policy decision to station/set up headquarters of newly created Sub-Tehsil, Pajhota at Nohri has been taken in the larger public interests and there is no arbitrariness in the same, rather decision has been taken keeping in view relevant parameters and factors. Petitioner has not been able to specifically point out, in what manner, decision of the Government in setting up headquarters of Sub Tehsil Pajhota at Nohri is arbitrary or based upon irrational considerations or is malafide or against any statutory provisions, and, as such, this Court sees no reason to interfere with the aforesaid policy decision.

13. In view of the discussion made herein above as also the law laid down by the Apex Court(supra), relied by Division Bench of this Court, petition at hand lacks merit and is dismissed accordingly. Pending applications are also disposed of.

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

Prem Singh .....Appellant.
Versus
Narotam Singh & others. .....Respondents.

RSA No. 400 of 2006
Reserved on: 22.03.2017
Date of Decision: 29.03.2017

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit for injunction pleading that plaintiff and his family members reside in a house- the defendants are having their residential house in the same area located at a distance of 20 meters – the defendants are cultivating/growing mushroom in their courtyard and are using mixture of water, wheat husk and chicken manure – this mixture is emitting foul smell and it is difficult to reside in the house due to the foul smell – the defendants pleaded that mushroom industry is not injurious to human health – the suit was decreed by the Trial Court- an appeal was preferred, which was allowed- aggrieved from the judgment, present appeal has been filed- held in second appeal that local commissioner had found foul smell emitting from the mixture – this was causing nuisance to the plaintiff and other inhabitants – the Appellate Court had wrongly reversed the findings of the Trial Court – appeal allowed- judgment of the Appellate Court set aside and that of the Trial Court restored.(Para-9 to 16)

Case referred:
Darshan Ram and another v.s Nazar Ram, AIR 1989 Punjab & Haryana 253

For the petitioner: Ms. Aarti, Advocate, vice Mr. Naresh Kaul, Advocate.
For the respondents: Mr. Neeraj Gupta, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present regular second appeal has been maintained by the appellant/plaintiff (hereinafter referred to as 'the plaintiff') against the judgment dated 16.12.2005 passed by the learned Additional District Judge, Fast Track Court, Kangra at Dharamshala, H.P. in Civil Appeal No. 65-N/04/01, whereby the judgment, dated 31.05.2001, of the learned Sub Judge 1st Class, Nurpur, District Kangra, H.P., passed in Civil Suit No. 312 of 1997, was set aside.

2. Brief facts of the case, as per the plaintiff, are that the plaintiff maintained a suit for permanent prohibitory injunction against the respondents/defendants (hereinafter referred to as 'the defendants'). The plaintiff averred in the plaint that he is owner-in-possession of a residential house situated in Khasra No.505, Mohal and Mauza Dainkwan, Tehsil Nurpur, District Kangra (hereinafter referred to as 'the suit land'). He has further averred that he and his family members reside in the above house. The defendants are also having their residential house in the same area, which is situated in nearby Khasra No. 502 and the distance between their houses is only 20 meters. The defendants are cultivating/growing mushrooms in their courtyard and for this cultivation they use mixture of water, wheat husk and chicken manure. This said mixture is fermented for a month and thereafter mushroom seeds are sown in the said

mixture. As per the plaintiff, the mixture of water, wheat and chicken manure emits foul smell causing unhygienic conditions. The plaintiff has further averred that due to the foul smell it is very difficult to reside in the house. This cultivation of mushrooms is being carried out by the defendants from September to December and from January to March every year and due to this cultivation the plaintiff and his family members face difficulty to breath, eat and sleep with comfort. As per the plaintiff, it is impossible to reside in his residence and cultivation of mushrooms causes continuous nuisance to him. Despite repeated requests, the defendants are not desisting from their acts, thus the plaintiff was compelled to maintain the suit.

3. The defendants, by way of filing written statement, resisted the suit of the plaintiff. The defendants raised the preliminary objection of maintainability and estoppel. On merits, the defendants contended that the house of the plaintiff is at a distance of 40 meters from their house. As per the defendants, they started the business of growing mushrooms in the year 1986-87 when the plaintiff was Pradhan of the Gram Panchayat, however, he never objected the same and due to enmity the suit is filed. The defendants have further contended that in 1995 the plaintiff initiated proceedings against them in the Gram Panchayat, which was dismissed, as the defendants produced a certificate of Assistant Scientist, Plant Pathologist, Dr. Y.S. Parmar, University of Horticulture and Forestry, Jachh, which revealed that the mushroom industry is not injurious for human beings and animals.

4. The learned Trial Court on 20.04.1998 framed the following issues:

"1. Whether the plaintiff is entitled for the relief of permanent prohibitory injunction, as prayed? OPP

2. Whether the suit is not maintainable? OPD

3. Whether the plaintiff is estopped by his act and conduct to file the present suit? OPD

4. Relief."

5. After deciding issue No. 1 in favour of the plaintiff and issues No. 2 and 3 against the defendants, the suit of the plaintiff was decreed. Consequently, the defendants preferred an appeal before the learned First Appellate Court, which was allowed and the judgment and decree passed by the learned Trial Court was set aside, hence the present regular second appeal, which was admitted for hearing on 15.09.2006 on the following substantial question of law:

"Whether the mixing of the manure within 100 m of the house of the appellant-plaintiff would be a source of nuisance to the plaintiff and other inhabitants of the house and the finding to the contrary given by the first Appellate Court is erroneous and based upon misreading and misappreciation of the evidence?"

6. I have heard the learned vice counsel for the appellant and the learned counsel for the respondents.

7. The learned vice counsel appearing on behalf of the appellant has argued that the judgment and decree of the learned First Appellate Court is the result of mis-appreciation of documents and evidence on record and the same is the result of misreading of the pleadings of the parties. She has referred to the evidence of the plaintiff and also relied upon the law as settled by the Hon'ble High Court of Punjab and Haryana in case titled ***Darshan Ram and another vs. Nazar Ram, AIR 1989 Punjab and Haryana 253,*** wherein, as per her, in the similar set of circumstances the Hon'ble High Court of Punjab and Haryana has laid down the law that such type of act is nuisance and injunction is required to be issue. Conversely, the learned counsel for the respondents has argued that the action of the defendants is not at all causing any nuisance to the plaintiff and he has further argued that the defendants have right to do business of their choice. Moreover, as per the learned counsel for the respondents, the plaintiff has failed to prove any nuisance and thus the regular second appeal may be dismissed. In rebuttal, the learned vice counsel appearing on behalf of the appellant has argued that the

learned First Appellate Court has failed to appreciate the pleadings, evidence and also misread the same, thus the judgment and decree passed by the learned First Appellate Court may be set-aside and the judgment and decree passed by the learned Trial Court may be restored by allowing the present regular second appeal.

8. In order appreciate the rival contention of the parties, I have gone through the records.

9. PW-1, Shri Prem Singh (plaintiff), has deposed that his house is at a distance of 25-30 meters from the house of the defendants. As per this witness, defendants used to sow mushrooms in their house and for that they use mixture of wheat husk, water and chicken manure and the said mixture emits foul smell. As per this witness, this foul smell is unhealthy and causes nuisance. He has further deposed that earlier the defendants used to work 100 meters away from their house. Local Commissioner has also found that the foul smell was emitting from the house of the defendants. This witness in his cross-examination deposed that defendants are doing the work of mushroom cultivation for the last 10-12 years and he complained the matter in the Panchayat, however, he could not deposed whether any report from any doctor was called or not. He had also complained to S.D.M., however, as per him, no notice was given to the defendants. He did not file any report demonstrating that foul smell is injurious to health.

10. Shri Jaswanth (PW-2), Ward Member, deposed that mixture prepared by the defendants was emitting foul smell. As per the statement of this witness, said mixture is being fermented for 25-28 days. He visited the house of the plaintiff and found presence of flies and foul smell. He has further stated that earlier the defendants used to do their business 80 meters away, however, before filing of the suit they started creating nuisance. This witness in his corss-examination deposed that his house is at a distance of 125 yards from the spot and the Panchayat did not call for any report from the Doctor qua the nuisance. Shri Govinder Singh (PW-3) deposed that the mixture prepared by the defendants emits foul smell and due to this smell it is difficult to eat or sleep. He has further stated that this foul smell is injurious to health. As per this witness defendants also used to do their business about 100-110 meters away but thereafter they started working at that place as well as in their house. The defendants were asked by the Panchayat to work on the old site, however, they raised a demand that water facility should be provided there. This witness in his cross-examination deposed that his house is one kilometer away from the spot and no doctor was called for inspecting the spot.

11. Shri A.K. Jhanjee, Advocate (PW-4), who was appointed as Local Commissioner, deposed that on 12.10.1998 he went to the spot and prepared report, Ex. PW-4/A, and map, Ex. PW-4/B. This witness, in his cross-examination, deposed that he did not pass any examination with respect to cultivation system of mushrooms. His report reveals that foul smell was emitting from the mixture, which is intolerable and the said mixture was prepared at a distance of 80 feet from the house of the plaintiff. Ex.PW-4/B (spot map) demonstrates that the houses of the parties are adjacent.

12. Dr. Harender Raj (DW-1), through his report, Ex. DW-2/A, opined that manure prepared for mushroom cultivation is not injurious to health. This witness, in his cross-examination, deposed that Plant Pathology is the study of diseases of plants and he is not an expert in diseases of humans, however, he denied that he has no practical knowledge with regard to mushroom cultivation. Defendant, Shri Narottam Singh (DW-3), deposed that the plaintiff never objected to the act of the defendants when he remained Pradhan of the Gram Panchayat during the year 1987-88. As per this witness, a complaint was made in the Panchayat and report from the doctor was also called. He deposed that mushroom cultivation does not adversely affect health. He, in his cross-examination, denied that house of the defendants is at a distance of 20-25 meters, but voluntarily stated that their houses are at a distance of 80-90 feet. He denied that they started mushroom cultivation in the year 1997 and as per this witness they leave the mixture for fermentation for 28 days. He has denied that owing to fermentation, foul smell emits, which causes nuisance. He has also denied that due to foul smell it is difficult to live there.

13. As per the report of the Local Commissioner (PW-4) Shri A.K. Jhanjee, Advocate, foul smell was emitting from the mixture, which is there on the spot and the same was intolerable. This witness was not cross-examined on this point, which means that the report of the Local Commissioner is to be accepted in totality. As far as the report of the Regional Horticultural Research Station, Jachh, Ex. DW-2/A, is concerned, the same nowhere suggests that emission of foul smell is tolerable for humans, especially when they reside nearby. Admittedly, the defendants prepare mixture of water, wheat and chicken manure for the growth of mushroom on their own land, however the said process of mixing water and wheat with chicken manure is causing foul smell and thus creating nuisance to the plaintiff and other inhabitants of the vicinity. The report of the Local Commissioner, Ex. DW-2/A, further reveals that the foul smell is not tolerable.

14. The learned counsel for the appellant has relied upon the judgment rendered by Hon'ble High Court of Punjab & Haryana in case titled ***Darshan Ram and another v.s Nazar Ram, AIR 1989 Punjab & Haryana 253,*** wherein the plaintiff was held entitled to the permanent injunction restraining the operation of the furnace. Relevant paras of the judgment are reproduced hereinbelow:

> ***7. The plaint is not happily worded. It is contended that in the heading of the plaint, the plaintiff has stated that they are praying for permanent injunction restraining the defendants from committing attempted nuisance by the Cupla furnace newly erected. It is a settled rule of law that the averments made in the pleadings drafted in the Mufissal has to be liberally construed. In the evidence at the trial, the plaintiff has proved by positive evidence that as a result of the working of the furnace recently installed by the defendants, he and his family members are worst affected. Thus, in fact it is not the case of attempted nuisance but a case where nuisance has resulted from an accomplished fact. The parties had led catena of evidence both documentary and oral to prove and disprove their respective contentions and as held by the learned appellate Court, the new furnace has been recently installed by the appellants and this has resulted in nuisance to the plaintiff. Merely because a particular word was not used in the plaint is in-consequential. It is well settled that if the parties know that a point arise in a case and they produce evidence on it, though it does not find place in the pleadings and no specific issue has been framed on it, the Court can still adjudicate thereon. Reference can be usefully made to a Privy Council decision reported as Rani Chandra Kanwar v. Narpat Singh,(1907) 34 Ind App 27, followed by the Apex Court in Nagubai Ammal v. B. Shama Rao, AIR 1956 SC 593 and to a Division Bench decision of this Court in Ram Niwas v. Rakesh Kumar, (1982) 84 Pun LR 9 : (AIR 1981 Punj & Har 397, where the above proposition was reiterated.***
>
> ***8. In the light of the ratio of this judgment I hold that the defendants cannot make much capital out of the loose wordings used in the pleadings. The parties led evidence fully knowing the case projected by each of them. Even otherwise, I am of the considered opinion that once the parties have led evidence, it is for the Court to mould the relief on the basis of the case proved. The other submission made by Mr. Verma is that the plaintiff has not been able to prove that as a result of the public nuisance any particular injury has been caused to him. I am afraid the submission is not sustainable. No one can be allowed to use his own property in such a manner that it creates a nuisance for his***

neighbours. The The basic authority for this proposition is reported as John Rylands and Jehu Horrocks vs. Thomas Fletcher, (1868) LR 3 HL 330. Their Lordships of the House of Lords held as under:-

"We think that the true rule of law is, that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or, perhaps, that the escape was the consequence of vis major, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient.....'

As stated supra, the learned appellate Court has arrived at a firm finding of fact that as a result of the working of the furnace installed in the premises of the defendants the plaintiff and members of his family are worst affected. The ratio of the judgment rendered in John Rylands's case (supra) is fully attracted to the facts of the present case. The defendant cannot be permitted to use his property in a manner which creates nuisance to his neighbour. The working of the furnace has caused nuisance to the plaintiff.

.....

11. The learned counsel for the appellants has placed strong reliance on Bhagwan Dass v. Town Mag Budaun, AIR 1929 All 767 and Behari Lal v. James Maclean, AIR 1924 All 392. The principle laid down in these authorities is not remotely attracted to the facts of the instant case. In Bhagwan Dass's case (supra), the Allahabad High Court held that a person founding a cause of action on public nuisance must establish a particular injury to himself beyond what has been suffered by the rest of the public. In Behari Lal's case (supra) what was laid down was that in order to establish nuisance actionable discomfort must be substantiated. The ratio of the judgment in Atma Singh's case (supra) is fully attracted to the facts of the present case. Relying upon the same, I hold that the plaintiff has fully established his case for grant of permanent injunction. I do not find any infirmity in the judgment of the learned Additional District Jude and uphold the same and dismiss the appeal filed by the defendants."

The judgment referred to hereinabove is fully applicable in the present case, as the facts of the judgment (supra) and present one are to some extent akin, thus the ratio of the judgment (supra) is attractable in present case as well. Therefore, the judgment of the learned Trial Court, whereby injunction was granted in favour of the plaintiff, is required to be allowed.

15. The statement defendant, Shri Narottam Singh (DW-3) is not reliable as he is suppressing the truth. The statement of the plaintiff is reliable and trustworthy as PW-4, Shri A.K. Jhanjee, Local Commissioner, who is an independent witness, has specifically stated that the process of preparation of manure for mushroom cultivation was emitting foul smell, making living of the inhabitants impossible, thus this Court finds that the present is a fit case to issue injunction and the judgment passed by the learned Lower Appellate Court is without appreciation of pleadings, evidence of the expert witness has not been appreciated to its right perspective, documents have not been interpreted correctly and there is complete mis-appreciation of the

evidence by the learned Lower Appellate Court. Therefore, the only substantial question of law is answered holding that the mixing of manure near the house of the plaintiff by the defendants is a continuous nuisance to the inhabitants of the vicinity and the findings of the learned Lower Appellate Court are erroneous and also based upon misreading and mis-appreciation of evidence.

16. In view of the above discussion, the findings recorded by the learned Lower Appellate Court, whereby the findings of the learned Trial Court were set aside, are held to be the result of misreading, mis-appreciation of facts and the same are quashed and set-aside. Accordingly, the findings recorded by the learned Trial Court are upheld and the appeal is allowed. However, in view of peculiar facts and circumstances of the case, the parties are left to bear their own costs.

17. The appeal, so also pending miscellaneous application(s), if any, also stand(s) disposed of.

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

Vikram Singh and others ....Appellants.

Versus

Tota Ram (since deceased) through L.Rs ... Respondents.

RSA No. 392 of 2005.
Reserved on: 02.03.2017.
Decided on: 29.03.2017.

Indian Succession Act, 1925- Section 63- Plaintiff filed a civil suit pleading that B was owner in possession of the suit land – the defendant No.1 set up a Will stated to have been executed by B and got the mutation attested – B had not executed any Will and was not in sound disposing state of mind prior to his death – the defendant No.1 had alienated some portion of the land and the alienation is not binding upon the plaintiff – the suit was dismissed by the Trial Court- an appeal was preferred, which was allowed- the judgment and decree passed by the Trial Court were set aside- held in second appeal that propounder of the Will had taken an active role at the time of the execution of the Will - scribe of the Will was not examined – the marginal witness stated that he had identified the executant and thus he cannot be called to be a marginal witness – B was more than 95 years at the time of alleged execution of the Will – the Will was shrouded in suspicious circumstances – the sale deeds were executed when the defendant No.1 was recorded as the owner in the revenue record – the sale deeds were also not challenged – the plea of the purchasers that they were bona-fide purchasers for consideration appears to be probable – appeal partly allowed. (Para-15 to 26)

For the appellants. Mr. G.D. Verma, Sr. Advocate with Mr. B.C. Verma, Advocate.
For the respondents Ms. Ruma Kaushik, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge.

By way of this appeal, the appellant/defendant has challenged the judgment and decree passed by the Court of learned District Judge, Hamirpur, in Civil Appeal No. 110 of 2004, dated 18.06.2005, vide which, learned Appellate Court has set aside the judgment and decree passed by the Court of learned Civil Judge (Jr. Divn.) Barsar, in Civil Suit No. 204 of 1997 (RBT No. 141/98), dated 30.09.2004, whereby learned trial Court had dismissed the suit of plaintiff seeking relief of declaration and consequential relief of permanent prohibitory injunction.

2. Brief facts necessary for the adjudication of this case are that plaintiff Tota Ram (since deceased) filed a suit that he was owner in possession of land comprising Khata No. 26, Khatauni No. 26, Khasra Nos. 208, 221, 365 and 381, Kita 4, area measuring 5 kanals 4 marlas, situated in tika Nohan, Tappa Dhatwal, Tehsil Barsar, District Hamirpur, (HP) (hereinafter referred to as 'suit land'). As per plaintiff, Beli Ram s/o Lala, resident of tika Khalawat, Tappa Dhatwal, Tehsil Barsar, District Hamirpur, (HP) was the last male holder in possession of suit land who died on 11.07.1994. Plaintiff and defendant No. 3 were from the family of Beli Ram and Beli Ram was his real uncle. As per plaintiff, Beli Ram was looked after and maintained by him and was provided all the amenities of life, love and care by him. Plaintiff used to cultivate the suit land alongwith land situated in tika Khalawat on behalf of Beli Ram for last more than 30 years and at the time of filing of suit, he was in possession of the land. As per plaintiff, out of love and affection, Beli Ram had executed a valid registered Will in his favour when he was in sound disposing mind. Beli Ram died on 11.07.1994 in his house at the age of 95 years. According to plaintiff, defendant No. 1 Vikram Singh had no concern with deceased Beli Ram nor defendant No. 1 took care of Beli Ram or maintained him during his life time. As per plaintiff, defendant No. 1 at his back got mutation No. 201 attested in his favour on 17.01.1996 on the basis of a forged and fictitious Will purported to have been executed by Beli Ram. As per plaintiff, Beli Ram at the time of his death was suffering from Asthma and he was bed ridden and six months before his death he had lost all his senses and he was thus neither in a position to execute any Will nor he had executed any Will in favour of defendant No. 1. It was further the case of plaintiff that on the basis of said fictitious, wrong and illegal mutation bearing No. 201, defendant No. 1 transferred some part of suit land in favour of Smt. Saroj Kumari (defendant No. 2) not only at the back of plaintiff but without any right, title or interest over the suit land which transfer was null and void. As per plaintiff, defendant No. 1 also transferred some part of suit land in favour of defendants No. 4 and 5 on 21.04.1997, which transfer was also null and void and was not binding on the plaintiff as defendant No. 1 had no right to alienate the property. As per plaintiff, in the first week of April, 1997, defendants No. 1 and 2 entered upon the suit land and forcibly cut and lopped some branches of Biyuhal trees standing on the same and plaintiff was threatened with dire consequences if plaintiff entered and tried to harvest wheat crop sown by plaintiff on the suit land. Accordingly, the suit was filed by the plaintiff praying for the following reliefs.

> *"It is, therefore, prayed that a decree for declaration with the consequential relief of permanent prohibitory injunction that the plaintiff is owner in possession of land comprising Khata No. 26, Khatauni No. 26, Khasra Nos. 208, 221, 365 and 381, Kita 4 area measuring 5 kanals 4 marlas, according to jamabandi for the year 1991-92 situated in tika Nohan, Tappa Dhatwal, Tehsil Barsar, District Hamirpur (HP) and the defendants have no right or title to it. The defendants No. 1, 2, 4 and 5 be restrained from interfering or alienating the suit land in any manner on the basis of false, illegal and fictitious mutation No. 201, dated 17.01.1996 and 207 dated 7.6.1996, may kindly be passed in favour of plaintiff and against the defendants No. 1, 2, 4 and 5 alongwith costs of the suit."*

3. In their written statement, defendants No. 1 and 2 contested the suit of the plaintiff on the ground that plaintiff in fact was never in possession of the suit land and rather the land which was owned by deceased Beli Ram stood inherited by defendant No. 1 and as he was in possession of the same, accordingly, he sold the same to defendant No. 2 and one Pawan Kumar and Pankaj who thereafter were in possession of the same. Preliminary objection was also taken that as necessary parties were not impleaded as defendants, the suit was bad for non-joinder of necessary parties. On merits, it was mentioned that defendant No. 1 was son of the daughter of deceased Beli Ram and plaintiff had no concern and no relation with the deceased. As per defendant No. 1, he had looked after Beli Ram and even performed his last rites and when Will was executed by Beli Ram in his favour on 16.05.1994, deceased was in disposing state of mind and the Will was executed by Beli Ram voluntarily and was a genuine document. It was further the case of defendants No. 1 and 2 that no Will was executed by Beli Ram on 12.12.1988 in favour of plaintiff and said document was not genuine. It was further mentioned in the written

statement that if Will executed by Beli Ram in favour of plaintiff was proved to have been executed in accordance with law, even then the last Will, which was in favour of defendant No. 1 should prevail. On these grounds, the suit was contested by defendants No. 1 and 2.

4. Defendant No. 3 admitted the case of the plaintiff whereas defendants No. 4 and 5 Pankaj Kumar and Pawan Kumar also contested the same on the ground that plaintiff was never in possession of the suit land and the same was owned by Beli Ram which was succeeded by defendant No. 1 who remained in possession thereof and who sold the same to defendants No. 4 and 5, who thereafter were in exclusive possession of the same.

5. On the basis of pleadings of the parties, learned trial Court framed the following issues:-

"1. Whether the plaintiff is the owner in possession of the suit land as alleged? OPP.

2. Whether late Shri Beli Ram executed a valid 'Will' on 12.12.1988 in favour of the plaintiff as alleged? OPP.

3. Whether the mutations No. 201 and 207 are wrong and illegal as alleged? OPP.

4. Whether the plaintiff is entitled to the injunction as prayed for? OPP

5. Whether the plaintiff has a cause of action? OPP

6. Whether the plaintiff has the locus-standi to sue? OPP

7. Whether the suit is bad for non-joinder of necessary parties? OPD

8. Whether the suit is time barred? OPD

9. Whether the suit is not maintainable in the present form? OPD

10. Whether the late Shri Beli Ram executed a valid 'Will' on 16.05.1994 in favour of the defendant No. 1 as alleged, if so, its effect? OPD.

11. Whether the defendants No. 2, 4 and 5 bonafide purchasers for consideration as alleged. If so, its effect? OPD

12. Whether the defendants are entitled to special costs u/s 35-A of C.P.C. as claimed. If so, their quantum? OPD.

13. Relief."

6. On the basis of evidence led by the parties both ocular as well as documentary in support of their respective cases, the issues so framed were answered by the learned trial Court in the following manner:-

"Issue No.1 : No.
Issue No. 2 : Yes.
Issue No. 3 : No.
Issue No.4 : No.
Issue No.5 : Yes.
Issue No. 6 :Yes.
Issue No. 7 :Not pressed.
Issue No. 8 :Not pressed.
Issue No. 9 :Not pressed.
Issue No. 10 :Yes.
Issue No. 11 :Yes.
Issue No. 12 :Not pressed.
Relief :The suit of the plaintiff is dismissed as per operative part of the judgment."

7. Learned trial Court vide its judgment and decree dated 30.09.2004 dismissed the suit of the plaintiff by holding that though late Beli Ram had executed a valid Will dated

12.12.1988 in favour of plaintiff but he had later on executed a valid Will in favour of defendant No. 1 on 16.05.1994. Learned trial Court also held that plaintiff was not owner in possession of the suit land and mutation No. 201 and 207 were neither wrong nor illegal. It further held that defendants No. 2, 4 and 5 were bonafide purchasers of the suit land from defendant No. 1 on consideration. While returning the said findings, it was held by learned trial Court that during the course of arguments learned counsel for defendants had not disputed the factum of execution of Will dated 12.12.1988 Ext. PW2/A. Thereafter, learned trial Court observed that bone of contention thus remained as to whether Beli Ram had in fact executed a valid Will dated 16.05.1994 in favour of defendant No. 1 or not. It further held that defendant No. 1 Vikram Singh who had entered the witness box as DW1 deposed that Beli Ram had looked after his education and expenses of his marriage were also borne by him (Beli Ram) and later all basic amenities of life were provided to Beli Ram by him. Learned trial Court also held that Beli Ram had executed a legal and valid Will on 16.05.1994 in favour of defendant No. 1 when he was in a sound disposing mind. Learned trial Court further held that Dev Raj (DW2), Registration Clerk in the office of Registrar, Barsar had produced Will dated 16.05.1994 Ext. DW2/A and DW3 Laxmi Dutt, who was Registrar, Barsar at the time of execution of Will Ext. DW2/A had also stated that said Will was registered in his presence in accordance with law. Learned trial Court further held that this witness deposed in his cross examination that testator was identified to his satisfaction by Shri G.D. Sharma, Advocate. Learned trial Court also held that DW4 Shri G.D. Sharma, Advocate had stated that he identified late Shri Beli Ram before the Registrar and Will was drafted by Shri R.C. Bhardwaj, Advocate and read over and explained to the testator who thereafter affixed his thumb impression on the same. Learned trial Court also held that DW5 Prithi Singh also deposed that Beli Ram was looked after by defendant No. 1. It further held that it had nowhere come in evidence that testator Beli Ram was not in sound disposing mind at the time of execution of Will dated 16.05.1994. It was thus held by learned trial Court that there was nothing on record to prove suspicious circumstances nor there was anything to prove that will dated 16.05.1994 was not executed in accordance with law and on these bases, learned trial Court dismissed the suit filed by the plaintiff.

8. In appeal, learned Appellate Court set aside the judgment and decree so passed by the learned trial Court and decreed the suit of the plaintiff. Learned Appellate Court declared plaintiff to be owner in possession of the suit land on the basis of Will executed by Beli Ram, dated 12.12.1988, Ext. PW2/A and also declared mutation No. 201, dated 17.01.1996 to be wrong, illegal and void and it also set aside mutation No. 207, dated 07.06.1996. Learned appellate Court also restrained defendants No. 1, 2, 4 and 5 from interfering with the ownership and possession of the plaintiff of suit land by issuing a decree of perpetual injunction.

9. While arriving at the said conclusions, it was held by the learned Appellate Court that Will Ext. DW2/A purported to have been executed by Beli Ram in favour of defendant No. 1 was shrouded in highly suspicious circumstances and defendant No. 1 had failed to repel the said suspicious circumstances surrounding due execution of said Will. Learned appellate Court held that in fact defendant No. 1 was present with the testator of Will at the time of execution of Will Ext. DW2/A. Learned Appellate Court held that testator in the presence of defendant No. 1 could not have had understood the implications of a document like Will. Learned Appellate Court disbelieved defendant No. 1 that in fact testator had visited Tehsil headquarters of his own. Learned Appellate Court also held that it appeared that defendant No. 1 was interested in grabbing the estate of Shri Beli Ram and had taken him from his house to Tehsil office. Learned Appellate Court held that defendant No. 1 had played an active and leading part in arranging the execution of Will and he was the sole legatee under the Will. Learned Appellate Court also held that unlike other documents, Will speaks from the death of the testator and, therefore, as the executor of the Will was never available for deposing as to what were the circumstances in which the Will came to be executed, this aspect introduced an element of solemnity in the decision of question whether the document propounded is proved to be the last Will and testament of the testator or not. Learned Appellate Court also held that there was no explanation for revocation of the registered Will dated 12.12.1988 Ext. PW2/A. Learned Appellate Court also held that there

was no explanation in the Will as to why the sole surviving daughter of the testator was excluded from the estate of the testator. Learned Appellate Court also disbelieved the version of defendant No. 1 that he was living with Beli Ram since the age of four years on the ground that this was not so recorded in the Will and further defendant No. 1 in his cross examination had admitted that in the books of Gram Panchayat, he was recorded as separate in mess and worship from Shri Beli Ram. Learned Appellate Court also held that Beli Ram was reflected as the only member of his family in the Parivar Register. Learned Appellate Court also held that Beli Ram in fact was putting up in village Khalawat, Tappa Dhatwal, Tehsil Barsar whereas defendant No. 1 was putting up in village Guan, Pargana Ajmerpur, Tehsil Ghumarwin and there was no documentary evidence for establishing that defendant No. 1 had his schooling in the area of Tappa Dhatwal. Learned Appellate Court also held that records revealed that Will Ext. DW2/A was attested by DW4 Shri G.D. Sharma, Advocate and one Shri Ravinder Singh who was the real brother of defendant No. 1. Learned Appellate Court also held that in his cross examination defendant No. 1 admitted that he knew Shri G.D. Sharma, Advocate for last many years and in any case prior to the execution of the impugned Will.

10. Learned Appellate Court further held that in fact the factum of registration of Will dated 12.12.1988 by Beli Ram in favour of plaintiff was duly established as defendant No. 1 had conceded issue No. 2 before learned Lower Court. Learned Appellate Court also held that scrutiny of records demonstrated that defendant No. 1 wanted to keep Will Ext. DW2/A a closely guarded secret and that is why, said Will was got prepared from a Lawyer as Lawyers did not maintain the record of documents/prepared by them. It further held that immediately after attestation of mutation of the suit land in favour of defendant No. 1 on 17.01.1996 he sold portion of same in favour of defendant No. 2 on 26.02.1996. Learned Appellate Court thus concluded that on the basis of available documents on record defendant No. 1 had miserably failed to establish due execution of Will Ext. DW2/A by Shri Beli Ram in his favour and said Will was in fact shrouded with suspicious circumstances which defendant No. 1 had failed to repel. On these bases, learned Appellate Court held that learned trial Court had not correctly appreciated oral and documentary evidence on record and had erroneously answered Issues No. 1, 3, 4, 9, 10 and 11 against the plaintiff. Learned Appellate Court also held that after the death of Beli Ram, plaintiff had become owner in possession of the suit land and thus, attestation of mutation No. 201 of the suit land in favour of defendant No. 1 on 17.01.1996 was wrong, illegal and not binding on the plaintiff. It further held that Will Ext. DW2/A executed by Shri Beli Ram in favour of defendant No.1 was wrong, illegal and void.

11. Feeling aggrieved by the said judgment, defendants/ respondents have filed this appeal.

12. I have heard learned counsel for the parties and also gone through the records of the case as well as the judgments passed by both the learned Courts below.

13. This appeal was admitted on 02.08.2005 on the following substantial questions of law:

"1. Whether appellant No. 1 has pleaded and established on record due execution of Will Exhibit DW2/A and this document is legal and valid.?

2. Whether respondent No. 1 has neither pleaded nor proved due execution of Exhibit PW2/A, therefore, he acquired no right title and interest of any kind over property in suit?

3. Whether the sale-transactions on behalf of appellant NO. 1, in favour of appellants No. 2 to 4 having not been challenged specifically by respondents, therefore, he is not entitled to any relief because without getting the same cancelled, title continue to vest in appellants No. 2 to 4?

4. Whether the Will Ext. DW-2/A could not be held to be invalid on the founds that deceased Beli Ram was 95 years of age and that he was not having sound disposing mind, whereas on the contrary, the witness as produced by the

appellants about good senses, sound disposing mind and good helath of late Shri Beli Ram have not been cross examined nor any challenge has been thrown?"

14. For the sake of brevity and to avoid repetition, I will deal with substantial questions of law No. 1 and 4 together.

Substantial questions of law No. 1 and 4:

15. Will Ext. DW2/A has been propounded by defendant No. 1 which as per defendant No. 1 was executed by testator Beli Ram in his favour on 16.05.1994. Learned trial Court while deciding Issue No. 10 held that Beli Ram had executed valid Will Ext. DW2/A dated 16.05.1994 in favour of defendant No. 1. However, learned Appellate Court has reversed the said findings returned by the learned trial Court and has held that Will Ext. DW2/A was shrouded in highly suspicious circumstances and that defendant No. 1 failed to repel the suspicious circumstances surrounding the due execution of said Will by Beli Ram in his favour.

16. Will Ext. DW2/A is stated to be witnessed by Shri G.D. Sharma, Advocate and Shri Ravinder Singh s/o Shri Piar Singh. Incidentally, Shri Ravinder Singh is the real brother of propounder of said Will, namely, Shri Vikram Singh (defendant No. 1). Vikram Singh deposed in the Court as DW1 that testator Beli Ram was his grand father "Nana". He further deposed that Beli Ram had two daughters, namely, Santokhu and Dharmi Devi and that Beli Ram had no son. He further deposed that Santokhu was his mother. This witness further deposed that he was staying with his "Nana" from the tender age of 4 years and Beli Ram had educated him and also his marriage also took place under Beli Ram. He further deposed that Beli Ram was looked after by him. This witness deposed that Will Ext. DW2/A, dated 16.05.1994 was in fact executed by Beli Ram in his favour and mutation on the basis of which was attested in his favour. In his cross examination, this witness deposed that said Will was executed by Beli Ram in his favour about 3 months before his death. He denied the suggestion that Beli Ram had not executed any Will as Beli Ram was not in his senses to have had executed the said Will. Further in his cross examination, he admitted that Beli Ram was an ex-serviceman and was drawing his pension from PNB, branch Maharal. He also admitted the suggestion that there was a ration card in the name of Beli Ram. He further stated in his cross examination that in Panchayat Parivar Register, name of Beli Ram was entered alone. He further stated that Tota Ram (plaintiff) was the nephew of Beli Ram. This witness further stated that when Beli Ram bequeathed the property in his favour by way of execution of Will, he (defendant No. 1) had brought Beli Ram for the said purpose. He further stated that at the time of attestation of mutation, no intimation was sent to Tota Ram or the daughters of Beli Ram as the Will was in his (defendant No. 1) favour. He denied the suggestion that Beli Ram was very weak on account of his illness and that Beli Ram was not in a position to move. He further stated that he had not asked Beli Ram to call for Pradhan or any Panchayat member at the time of execution of Will. He further deposed that Beli Ram had asked the witnesses to remain present for the purpose of attesting the Will and that the witnesses had come to Tehsil of their own. He further stated that he knew the witnesses quite well. He denied the suggestion that land of Beli Ram was cultivated by Tota Ram and stated that it was cultivated by Beli Ram himself. He denied that no Will was executed in his favour.

17. DW2 Dev Raj, Registration Clerk in the office of Tehsildar Barsar entered the witness box as DW2 and he proved Will, photocopy of which is Ext. DW2/A.

18. DW3 Shri Laxmi Dutt s/o Shri Bihari Singh entered the witness box as DW3 and stated that he served as Tehsildar/Sub Registrar, Barsar from the year 1990 to 1994 and Will Ext. DW4/A was read over by him to Beli Ram, who after acknowledging it to be correct had appended his thumb impression over the same in front of witnesses G.D. Sharma and Ravinder Singh and thereafter they had appended their signatures on the same and at that time Beli Ram was in his senses. In his cross examination, he stated that he did not know Beli Ram and he admitted the suggestion that word "shinakhat karta" was not mentioned on the Will. He self stated that G.D. Sharma, Advocate (witness No. 1) had identified the testator and that he was construed by him as an identifier.

19. DW4 G.D. Sharma, Advocate deposed in the Court that Will in issue was drafted by Shri R.C. Bhardwaj, Advocate and the Will was thereafter read over and explained to Beli Ram who after acknowledging it to be correct appended his thumb mark over the same and thereafter said Will was presented before the Tehsildar and Tehsildar also read the same to the Executor who after acknowledging the contents of same to be correct appended his thumb mark on the endorsement over the same. Incidentally, in his examination in chief this witness deposed that he had identified the testator. He also stated that Ravinder Singh was the other witness. In his cross examination, he stated that he knew the propounder of the Will Ext. DW2/A Shri Vikram Singh for the last 4-5 years. He further stated that he did not remember who came alongwith Beli Ram on the relevant day. He also stated that he knew witness Ravinder for more than 1 ½ years before the Will was executed.

20. Now, one thing which is apparent from the perusal of statements referred to above is that in the present case, propounder of the Will admittedly has played an active role at the time of the execution of the Will. Propounder of the Will has in fact admitted that he took the testator of the Will for the purpose of executing the same. The scribe of the Will R.C. Bhardwaj, Advocate was not examined in the Court as he was no more. Out of two so called marginal witnesses of Will Ext. DW2/A, DW4 Shri G.D. Sharma, Advocate was examined whereas other marginal who happened to be the real brother of propounder of Will was not examined by defendant No. 1 in the Court. DW4 G.D. Sharma, Advocate deposed in the Court that he had in fact identified the executor and his signatures were also on the Will. In other words, he has not deposed in the Court that he had appended his signatures upon the Will as witness to execution of the same. It is well settled principle of law that a person who is a marginal witness to a Will cannot *ipso facto* also deemed to be identifier of the testator until and unless it is so specifically mentioned in the Will itself by way of an express endorsement to this effect. A perusal of Will Ext. DW2/A demonstrates that name of Shri G.D. Sharma, was mentioned therein as witness No. 1. Concerned Registrar before whom the said Will was purportedly registered has stated that he did not know Beli Ram personally. It has not been disputed during the course of arguments by the learned counsel for the parties that Beli Ram was more than 95 years old at the time when alleged Will Ext. DW2/A was executed. Now, as per DW1 Vikram Singh, testator of the Will was in good health at the time of execution of the Will. However, a perusal of contents of this Will (Ext. DW2/A) demonstrates that it is mentioned therein that testator was in fact an aged man and as he was apprehensive that death may occur any time as he always remained sick, therefore, in these circumstances, he was executing the Will. The reason given by the propounder as to why Will was executed in his favour by testator Beli Ram was that he was residing with Beli Ram since the age of four years and had been brought up and educated and even married by Beli Ram and thereafter he had in fact looked after Beli Ram. However record demonstrates that in the Parivar register of Beli Ram, defendant No. 1 did not find mention therein. In these circumstances, taking into consideration the fact that the testator of the Will was more than 95 years old and further that the propounder of the Will has played a very significant role in execution of the Will and that both the witnesses were personally known to the propounder of the Will, one of whom happened to be his real brother and the other witness though recorded in the Will Ext. DW2/A as a marginal witness to the Will has deposed that he in fact had identified the executor, all these factors shroud the said Will with suspicious circumstances and the findings returned to this effect by the learned Appellate Court that the Will was in fact shrouded with suspicious circumstances cannot be termed to be perverse as the same are borne out from the records of the case and the propounder of the Will has not been able to satisfactorily explain the said suspicious circumstances.

21. The contention of the appellant that learned Appellate Court ignored the fact that no suggestion was put to defendant No. 1 that Beli Ram was suffering from ill health is incorrect as there was a specific suggestion put to this witness in the cross examination that no Will was executed in his favour and that Beli Ram was not in his senses and both these suggestions were denied by him. Not only this, he also admitted in his cross examination that at the time of his

death, Beli Ram was 96 years old and before his death, Beli Ram was suffering from loose motions and also from fever.

22. Therefore, I hold that appellant No. 1 failed to prove on record due execution of Will Ext. DW2/A and he also failed to prove that said Will was not shrouded with suspicious circumstances or that testator therein Shri Beli Ram, who was about 95 years old, was having a sound disposing mind at the time when Will Ext. DW2/A was purportedly executed. The findings returned by the learned Appellate Court to this effect are duly borne out from the records of the case and learned Appellate Court has rightly come to the conclusion that defendant No. 1 was not able to explain the suspicious circumstances which shrouded Will Ext. DW2/A. Therefore, I uphold the findings returned by the learned Appellate Court to the effect that Will Ext. DW2/A was shrouded with suspicious circumstances and defendant No. 1 failed to prove it in accordance with law and that the propounder of the Will was not able to prove that Beli Ram was not in a sound disposing statement of mind when he purportedly executed Will Ext. DW2/A. The said substantial questions of law are answered accordingly

Substantial Question of law No. 2:

23. Learned trial Court had framed issue No. 2 to the effect that as to whether late Shri Beli Ram had executed a valid Will on 12.12.1988 in favour of plaintiff as alleged? Said issue was decided in favour of plaintiff by the learned trial Court. This was done by returning the following findings.

> *"During the course of arguments the Ld. Counsel for the defendant has not disputed the factum of execution of Will dated 12.12.1988 Ext. DW2/A. Rather he has stated that defendant succeeded to the Estate of plaintiff on the basis of Will dated 16.05.1994 Ext. DW3/A. It is a valid and genuine document and as such mutation No. 201 and 207 have been entered in accordance with law."*

24. As learned trial Court dismissed the suit filed by the plaintiff, the judgment and decree so passed by the learned trial Court was assailed by him. The findings returned on Issue No. 2 by the learned trial Court were neither assailed by the present appellants either by way of any independent appeal or by way of cross-objections in the appeal filed by plaintiff Tota Ram before the learned first Appellate Court. At the cost of repetition it is reiterated that findings on Issue No. 2 were not returned by learned trial Court on merit but these findings were returned on the basis of admission made on behalf of the defendants. There is nothing on record from which it can be inferred that any review was filed against the findings so returned by the learned trial Court. This demonstrates that the findings returned by the learned trial Court that the execution of Will Ext. PW2/A was in fact admitted by defendants is a correct finding based on the admission so made by the defendants before the learned trial Court. It has also been so held by the learned Appellate Court. Therefore, now it is not open to the appellants to challenge the findings so returned by the learned trial Court, especially in view of the fact that the findings so returned by the learned trial Court were based on the admission made by the defendants to the effect that they did not dispute the factum of execution of Will Ext. PW2/A dated 12.12.1988 and rather that their claim was that they had succeeded to the estate of plaintiff on the basis of Will dated 16.05.1994 Ext. DW2/A. The said substantial question of law is answered accordingly.

Substantial Question of Law No. 3:

25. Sale transactions subject matter of the present litigation made by defendant No. 1 in favour of defendant No. 2 Smt. Saroj Kumari and defendants No. 4 and 5 Shri Pankaj Kumar and Shri Pawan Kumar respectively are dated 26.02.1996 and 21.04.1997 which are mark A and mark B on the records of the case. It is a matter of record that no relief of declaration has been sought by the plaintiff to the effect that these two sale deeds be declared as null and void and bad in law. Record further demonstrates that the suit was instituted by the plaintiff before the learned trial Court on 25.04.1997 and amended plaint was filed on 28.03.1998. Sale deeds in issue pertain to the years 1996 and 1997, therefore, it is but apparent and evident that both the sale deeds stood executed before the filing of suit by the plaintiff. The fact of defendant No. 1 having alienated some portion of suit property in favour of defendant No. 2 and defendants No. 4 and 5

was categorically mentioned in the written statement so filed by the defendants before the learned trial Court, but even then, no declaration was sought thereafter by the plaintiff to the effect that the two sale deeds be declared bad in law. Be that as it may, in the present case, when sale deeds were executed in favour of defendant No. 2 and defendants No. 4 and 5 respectively by defendant No. 1, he was as per records owner of the property as the property stood mutated in his favour on the basis of Will Ext. DW2/A which Will as on the dates of sale deeds was holding field as the same had not yet been assailed by the plaintiff at that time. Therefore, as on the dates when defendant No. 2 and defendants No. 4 and 5 purchased land vide their respective sale deeds from defendant No. 1, as per the revenue records, defendant No. 1 was the owner of the property in issue as per records and plaintiff was in fact nowhere in picture. Therefore, in my considered view, as on the dates when the sale deeds were executed, revenue records reflected defendant No. 1 to be owner of the suit land, in the abovementioned background as defendant No. 1 was being reflected as owner in possession of the suit property in all revenue records on the strength of Will Ext. DW2/A it can be reasonably held that the sale deeds were entered into by defendant No. 2 and defendants No. 4 and 5 by purchasing the land from defendant No. 1 after taking reasonable care that transferor had power to make the transfer. There is nothing on record to infer that the transferees had not acted in good faith. Accordingly, in my considered view, besides the fact that said sale deeds were not assailed by way of civil suit, the sale transactions which were entered into between defendant No. 1 and defendant No. 2 and defendants No. 4 and 5 respectively are protected under Section 41 of the Transfer of Property Act. However, remaining suit land, if any left out would obviously dwell upon the plaintiff and defendant No. 1 shall have no right, title or interest over the same on the basis of Will Ext. DW2/A. It goes without saying that the remedy of the plaintiff otherwise also is to recover the consideration received by defendant No. 1 from defendants No. 2, 4 and 5 from defendant No. 1. This substantial question of law is answered accordingly.

26. In view of my findings returned above, the judgment and decree passed by learned Appellate Court is upheld to the extent that plaintiff is held to be owner in possession of the suit land pursuant to Will dated 12.12.1988, Ext. PW2/A and further Will Ext. DW2/A, dated 16.05.1994 is declared as wrong and illegal. It is further held that sale transactions entered into between defendant No. 1 with defendant No. 2 and defendants No. 4 and 5 are valid as protected under Section 41 of the Transfer of Property Act and judgment and decree passed the learned Appellate Court declaring mutation No. 207, dated 07.06.1996 as null and void is accordingly set aside. Judgment and decree passed by learned Appellate Court restraining defendants No. 2, 4 and 5 from interfering with the suit land is modified to the extent that the said defendants are injuncted from interfering with the suit land less the land which they have bonafidely purchased from defendant No. 1. Judgment and decree passed by learned Appellate Court holding mutation No. 201, dated 17.01.1996 to be bad in law is upheld but with clarification that the same has no effect on sale deeds executed by defendant No. 1 with defendant No. 2 and defendants No. 4 and 5 and judgment and decree passed by learned Appellate Court restraining defendant No. 1 from interfering over the suit land is also upheld. Appeal is partly allowed in the above terms. Pending miscellaneous application(s), if any, also stand disposed of. No orders as to costs.

****

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

Achhar Singh .... Petitioner.

-Versus-

Kapoor Singh and others .....Respondents.

Cr. Revision No. 77 of 2016
Date of decision: 30.03.2017

Code of Criminal Procedure, 1973- Section 311- An application for leading additional evidence was filed, which was dismissed on the ground that the need for examination of the witness was

not specified and the application cannot be filed to fill up the lacuna – aggrieved from the order, the present application has been filed- held, that the examination of the witness is necessary to adjudicate the dispute - the prosecution evidence is being led and no prejudice would be caused to the other side as it will have a right of cross-examination- therefore, the revision petition is allowed subject to the payment of cost of Rs.10,000/-. (Para-6 to 13)

Cases referred:
Raja Ram Prasad Yadav Versus State of Bihar and another, (2013) 14 SCC 461
Anil Chauhan Vs. Education Society, Mandi, Latest HLJ 2014 (HP) 1080

For the petitioner: Ms. Leena Guleria, Advocate, vice Mr. G.R. Palsra, Advocate.
For the respondents: Mr. Narender Reddy, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge*(Oral)**:*

By way of this petition, the petitioner has challenged the order passed by the Court of learned Judicial Magistrate 1st Class, Chachiot at Gohar in Private Complaint No. 221-1-2013, dated 20.02.2016, vide which learned Court below has dismissed an application filed under Section 311 of the Code of Criminal Procedure by the present petitioner/complainant.

2. A perusal of the impugned order demonstrates that learned Court below has rejected the application so filed by the present petitioner on the ground that the applicant has not been able to make out as to what was the relevance of the documents as well as the evidence of the witnesses which the complainant intended to examine. Learned trial Court also held that provisions of Section 311 of the Code of Criminal Procedure could not be invoked to fill up the lacunae. Learned trial Court further held that it was for the complainant to plead in the application as to what was the need of examination of these witnesses and there was nothing specific mentioned in the application qua the requirement of examining these witnesses. On these bases, learned trial Court dismissed the application so filed by the present complainant by holding that the application so filed on the basis of averments made therein was not tenable.

3. During the course of arguments, Ms. Leena Guleria, learned counsel appearing for the petitioner submitted that the complainant be permitted to examine witnesses, as were prayed by way of application which has been dismissed, in the interest of justice and no prejudice in fact shall be caused to the respondents in case the witnesses are permitted to be examined and rather, it will be in the interest of justice, as the same would enable the learned trial Court also to arrive at a fair and just decision in the matter.

4. Mr. Narender Reddy, learned counsel appearing for the private respondents submitted that a perusal of the application so filed under Section 311 of the Code of Criminal Procedure by the complainant which stands rejected by the learned trial Court itself demonstrates that the ingredients of Section 311 of the Code of Criminal Procedure were not met on the basis of averments which were so made in the said application and he further submitted that if this Court was inclined to allow the complainant to examine witnesses as were mentioned in the said application, then some exemplary costs be imposed upon the complainant.

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

6. Admittedly, the trial pending before the learned Court below pertains to a complaint which has been filed by the present petitioner under Sections 147, 148, 149, 455, 427,504, 506 read with Section 34 of the Indian Penal Code.

7. Learned trial Court has dismissed the application so filed by the present petitioner under Section 311 of the Code of Criminal Procedure primarily on the ground that it

was not pleaded in the said application that as to what was the need for examination of these witnesses and further the provisions of Section 311 of the Code of Criminal Procedure could not be invoked to fill up the lacunae. A perusal of the application so filed by the petitioner before the learned trial Court under Section 311 of the Code of Criminal Procedure demonstrates that the witnesses whom the complainant intends to examine are:

> *(i) Record Keeper, Tehsil Thunag, District Mandi, H.P. alongwith record of demarcation file No. 52 dated 28/11/2013, decided on 13/01/2014.*
>
> *(ii) Patwari, Patwar Circle Tehsil Thunag, District Mandi, H.P.*
>
> *(iii) Field Kanungo, Tehsil Thunag, District Mandi, H.P.*
>
> *(iv) Dumani Ram, son of Shri Karam Dass, R/o Village Junghand, P.O. Jarol, Tehsil Thunag, District Mandi, H.P.*

8. Records of the trial Court also demonstrate that the case is at the stage of examining complainant's witnesses. Therefore, in these circumstances, in my considered view, the findings returned by the learned trial Court that the complainant under the garb of the said application was in fact trying to fill up lacunae, which was not permissible, are ill founded, because the other party would always have a right to cross-examine the witnesses.

9. Hon'ble Supreme Court in ***Raja Ram Prasad Yadav*** Versus ***State of Bihar and another***, (2013) 14 SCC 461 has held:

> "17.1. Whether the Court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the Court for a just decision of a case? 17.2. The exercise of the widest discretionary power under Section 311 Cr.P.C. should ensure that the judgment should not be rendered on inchoate, inconclusive speculative presentation of facts, as thereby the ends of justice would be defeated. 17.3. If evidence of any witness appears to the Court to be essential to the just decision of the case, it is the power of the Court to summon and examine or recall and re-examine any such person. 17.4. The exercise of power under Section 311 Cr.P.C. should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case. 17.5. The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the Court would result in causing serious prejudice to the accused, resulting in miscarriage of justice. 17.6. The wide discretionary power should be exercised judiciously and not arbitrarily. 17.7. The Court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case. 17.8. The object of Section 311 Cr.P.C. simultaneously imposes a duty on the Court to determine the truth and to render a just decision. 17.9. The Court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered. 17.10 Exigency of the situation, fair play and good sense should be the safe guard, while exercising the discretion. The Court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified. 17.11. The Court should be conscious of the position that after all the trial is basically for the prisoners and the Court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution

against possible prejudice at the cost of the accused. The Court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results. 17.12. The additional evidence must not be received as a disguise or to change the nature of the case against any of the party. 17.13 The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party. 17.14. The power under Section 311 Cr.P.C. must therefore, be invoked by the Court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. The Court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right."

10. Relying upon the said judgment of Hon'ble Supreme Court, a coordinate Bench of this Court in ***Anil Chauhan*** Vs. ***Education Society, Mandi***, Latest HLJ 2014 (HP) 1080, in a case wherein almost similar facts were involved has held as under:

> *"15. The only ground taken by the petitioner is that the complainant under the garb of the order would now fill up the lacuna in his case and create and manipulate the documents. To my would always have a right to cross-examine the witnesses. Moreover, in terms of the principles as laid down by the cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.*
>
> *16. Since the petitioner has a right of cross-examination, therefore, I find that no prejudice much less serious prejudice shall be caused to the petitioner which may result in miscarriage of justice in case the order passed by the learned Magistrate is upheld. This Court is required to bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court is required to be magnanimous in permitting such mistakes to be rectified (17.10 of Raja Ram's case (supra)."*

11. Therefore, keeping in view the principles which have been laid down by the Hon'ble Supreme Court in Raja Ram's case (supra) as well as the judgment passed by a coordinate Bench of this Court, I am of the considered view that no prejudice shall be caused to the respondents, which may result in miscarriage of justice in case petitioner is permitted to examine the witnesses, which find mention in the application so filed by him under Section 311 of the Code of Criminal Procedure before the learned Court below. In fact if the application is allowed, the complainant will have the satisfaction that he was given full opportunity by the Court to put forth his case and respondents would obviously have the right to cross-examine complainant witnesses. This Court can also not loose sight of the fact that justice should not only be done, it should also seem to have been done.

12. At this stage, Mr. Narender Reddy, learned counsel for the respondents again reiterated that if this Court intends to set aside order passed by learned trial Court, dated 20.02.2016 and permits the petitioner to examine witnesses which find mention in the application so filed under Section 311 of the Code of Criminal Procedure, then some exemplary cost may be imposed upon the petitioner.

13. Accordingly, in view of my findings returned above as well as law cited above, order dated 20.02.2016, passed by the Court of learned Judicial Magistrate 1st Class, Chachiot at Gohar in Private Complaint No. 221-1-2013 is set aside and the application filed under Section 311 of the Code of Criminal Procedure is allowed, subject to cost of `10,000/- payable to the

respondents. It is clarified that only one opportunity shall be granted by the learned trial Court for the purpose of examining the witnesses which so find mention in the application which has been filed by the present petitioner under Section 311 of the Code of Criminal Procedure and if the cost which has been determined by this Court is not deposited by the petitioner before the learned trial Court to be released in favour of the respondents on or before the next date of hearing, which is being fixed by the Court today itself, the order so passed by this Court granting permission to the petitioner to examine the witnesses in his favour shall cease to operate and impugned order shall become operative as if it was never set aside by this Court. Parties are directed through their learned counsel to appear before the learned trial Court on ***24.04.2017.*** Registry is directed to forthwith return back the records of the case to the learned trial Court. Petition stands disposed of in above terms, so also miscellaneous application(s), if any.

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

Karam Singh ....Appellant.
Versus
Piara Singh and others ... Respondents.

RSA No.: 396 of 2003
Reserved on: 02.03.2017
Decided on: 30.03.2017

Specific Relief Act, 1963- Section 34- Plaintiff filed a civil suit pleading that S was original owner of the suit land and he had mortgaged the same to A, father of the parties, with possession for a sum of Rs.2,600/-- sons of A succeeded to him and after his death the mortgaged was not redeemed within the prescribed period- mortgagee had become owner by afflux of time- sons of S sold his interest in favour of defendant No.2 to the extent of 3/4th share and in favour of defendant No.1 to the extent of 1/4th share- defendants lost their title with the passage of time – fake redemption entries of mortgage were got attested behind the back of plaintiffs – suit was decreed by the Trial Court- an appeal was filed, which was also dismissed- held in second appeal that the period of limitation to redeem the mortgage is thirty years from the date of mortgage – however, no limitation has been provided for redemption of usufructuary mortgages- the mortgagee is entitled to receive the rent and profits and to appropriate the same in lieu of payment of the mortgage money – the possession is to be delivered on the liquidation of mortgage money - there is no evidence in the present case that mortgagee was authorized to receive the interest towards the payment of interest- Court had rightly appreciated the evidence and law- appeal dismissed. (Para-17 to 19)

Cases referred:

Singh Ram (dead) through Legal representatives versus Sheo Ram and Others, (2014) 9 Supreme Court Cases 185

Jangali Singh v. Ramjag Singh, AIR 1944, Allahabad 198

Narpatchand A. Bhandari, v. Shantilal Moolshankar Jani and another, AIR 1993 Supreme Court 1712

For the appellant Mr. N.K. Thakur. Sr. Advocate with Mr. Divya Raj Singh, Advocate.
For the respondents Mr. Ajay Sharma, Advocate for respondent No. 1.
Names of respondents No. 2 to 10 already stand deleted.
None for respondents No. 11 and 12.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge

By way of this appeal, the appellant/defendant has challenged the judgment and decree passed by the Court of learned District Judge, Una, in Civil Appeal No. 76 of 1997, dated 12.05.2003, vide which, learned Appellate Court while dismissing the appeal so filed by the present appellant upheld the judgment and decree passed by the Court of learned Sub Judge 1st Class, Court No. 1, Una, in Civil Suit No. 175/89, RBT No. 505/95/89, dated 30.04.1997, whereby learned trial Court had decreed the suit so filed by the present respondents/plaintiffs and held parties to be joint owner in possession of the suit land in equal shares as parties had perfected their title into ownership by afflux of time and it further held that mutations No. 1 and 2 were illegal and defendants were restrained from ousting the plaintiffs from the suit land.

2. This appeal was admitted on 08.10.2003 on the following substantial questions of law:

"1. Whether the findings of the learned trial Court and first Appellate Court are based on misinterpretation and misreading of the evidence?

2. Whether the findings of the learned trial Court and first Appellate Court are perverse?"

3. Brief facts necessary for the adjudication of this appeal are that respondent/plaintiff (hereinafter referred to as 'plaintiff') filed a suit to the effect that Shiba @ Shiv Ram s/o Bhupa was the original owner of the suit land and in June 1950, he mortgaged the same with possession for a sum of Rs. 2,600/- to Atma Singh, father of the parties. Atma Singh remained in possession of same as a mortgagee till his death in the year 1980 and thereafter his five sons succeeded to his estate as his legal heirs and were in joint possession of the suit land in equal share. Khasra No. 1699 was a Tubewell which was sunk by plaintiffs at their own cost. Mortgage created by Shiba remained unredeemed and as the land was not redeemed within the prescribed period, the mortgagee had become full owner of the same by afflux of time. As per plaintiffs, Lakha son of Shiba on 11.11.1964 sold his interest in the suit land in favour of defendant No. 2 to the extent of ¾ share and in favour of defendant No. 1 to the extent of 1/4th share and mortgage money was kept with them. Defendants after such purchase of the suit land from Lakha had several occasions to redeem the suit land by releasing the mortgage amount to mortgagee. As per plaintiffs, after the death of Atma Singh, parties to the suit succeeded to the same as mortgagee and came in possession of the same and mortgage remained unredeemed during the period of limitation, as a result of which, parties of the suit became full owners of the suit land by afflux of time who earlier were mortgagees of the suit land. Thus, as per plaintiffs, defendants lost their all rights under sale deeds dated 11.11.1964. As per plaintiffs, defendants had secured fake redemption entries of mortgage in dispute vide mutations No. 1 and 2, dated 14.04.1988 by colluding with local Patwari and revenue authorities which mutations were attested at the back of plaintiffs. As per plaintiffs neither they received notice of mutation nor they had appeared before any authority or had received their monetary share in mortgage. As per plaintiffs order passed by Collector 2nd Grade, dated 14.4.1988 was thus illegal and without jurisdiction and in fact no redemption could be ordered after expiry of period of limitation. On these bases, the plaintiffs filed the suit praying for the following relief.

"It is, therefore, prayed that decree for declaration to the effect that the parties are joint owners and joint possession of the land in suit in equal shares as detailed in the headnote of the plaint, situated in village Behdala Tehsil and District Una as entered in Jamabandi for the year 1987-88 having perfected ownership in it as mortgagee with possession by afflux of time and mutation No. 1 and 2 procured by defendants with the collusion of the revenue authorities are illegal without jurisdiction and have no binding effect on the rights of the plaintiffs with a consequential relief of permanent injuncti9on restraining the defendants from ousting the plaintiff from the suit land may please be passed in favour of the

plaintiff and against the defendants with cost and any other relief the court may deem fit may please also be granted."

4. Defendants No. 1 and 2 denied the claim of plaintiffs and stated in their written statement that defendant No. 2 was in possession of the suit land as its owner since the time of purchasing the same and that plaintiffs and defendants No. 1, 3 to 4 had no right or interest in the suit land. As per defendants No. 1 and 2 suit land was validly redeemed by defendant No. 2 on payment of Rs. 2600/- as redemption money to Shri Atma Singh vide receipt dated 01.06.1976 and plaintiffs and remaining defendants had no right or interest over the suit land and it was in fact defendant No. 2 who was exclusive owner in possession of the same. It was further the case of the defendants No. 1 and 2 that suit land was redeemed in the year 1976 well within the period of limitation and mutation was rightly attested in their favour.

5. On the basis of pleadings of the parties, learned trial Court framed the following issues.

"1. Whether the parties are joint owners in possession of the suit land in equal shares, as alleged? OPP.

2. Whether defendant No. 2 is exclusive owner in possession of the suit land, as alleged? OPD2

3. Whether the plaintiff is not entitled to the equitable relief as alleged in preliminary objection No. 4 of the W.S.? OPD.

4. Whether the suit in the present form is not maintainable? OPD.

5. Whether plaintiffs have no locus-standi to file the present suit? OPD.

6. Whether plaintiffs have no cause of action? OPD.

7. Whether defendants are entitled to specific costs, as alleged? OPD

8. Relief."

6. On the basis of evidence led by the parties both ocular as well as documentary in support of their respective cases, the issues so framed were answered by the learned trial Court as under.

"Issue No.1	*: Yes.*
Issue No. 2	*: No.*
Issue No. 3	*: No.*
Issue No. 4	*: No.*
Issue No. 5	*: No.*
Issue No. 6	*: No.*
Issue No. 7	*: No.*
Issue No. 8 (Relief)	*: The suit is decreed as per operative portion of the Judgment."*

7. Vide its judgment and decree dated 30.04.1997, learned trial Court held that the execution of mortgage in favour of Atma Singh, father of the parties and further execution of sale deed in favour of defendants No. 1 and 2 by Lakha s/o Shiba is not in dispute. Dispute was only regarding the validity of redemption of the suit land. Learned trial Court held that the case of the defendants was that they had purchased the suit land from Lakha s/o Shiba vide sale deed allegedly executed in the year 1964 and the payment of redemption was alleged to have been made on 01.06.1976. Learned trial Court further held that it was not understood as to what prevented the said defendants to make payment before 1976 and even if it was presumed that any payment was made in the year 1976 even then nothing was brought on record to show as to why mutation of redemption was not got sanctioned during the life time of mortgagee Atma Singh. Learned trial Court also held that plaintiffs had specifically pleaded that when sale deed was executed in the year 1964 then why suit land was not got redeemed till the year 1976 and if

payment was presumably made in the year 1976 then why mutation of redemption was not sanctioned during the lifetime of Atma Singh. Learned trial Court also held that the written documents mentioned by DW1 which were purportedly executed before Tehsildar Una regarding payment made by his brothers were not produced by DW1. Learned trial Court also held that the receipt was also silent on the subject matter for which same was executed and no description of land which was redeemed was mentioned on it. Learned trial Court also held that defendants had not produced any witness in support of validity of receipt Ext. D-1 and as such, receipt Ext. D-1 seemed to be suspicious. It further held that if payment was in deed made then it was for the defendants to have had redeemed the land as early as possible but they took no steps to get suit land mutated during the life time of their father. On these bases, it was held by the learned trial Court that inference which could be drawn was against the defendants that no receipt of redemption/payment was executed by them in favour of their father Atma Singh. Learned trial Court also held that defendants had not produced any local witness of the village to support their contentions that they were the owners in possession of the suit land. It further held that as redemption of the suit land by the defendants was not proved, it could not be said that mutations were rightly sanctioned in their favour. It further held that as defendants had failed to prove redemption and their contention regarding payment of mortgage amount having been made by defendant No. 2 to their father did not appear to be correct and appeared to be suspicious, therefore it was for the defendants to have had proved receipt Ext. D-1 but they had miserably failed to prove the redemption. On these bases, it was held by the learned trial Court that inference that could be drawn was that as the suit land had not been redeemed within the period of limitation by the mortgagor, the parties are joint owners and in joint possession of the suit land in equal shares and defendant No. 2 had failed to prove his exclusive possession as owner over the suit land.

8. Feeling aggrieved by the findings so returned by the learned trial Court, defendant No. 2 Karam Singh filed the appeal.

9. Learned Appellate Court vide its judgment and decree dated 12.05.2003 held that pleadings demonstrated that suit land was admittedly mortgaged by one Shiba in the year 1950 in favour of Atma Singh, father of the original parties to the suit and Atma Singh admittedly had died in the year 1980 and during his life time there was no sanction of mutation regarding redemption of suit land. Learned Appellate Court also held that there was no mention of receipt Ext. D-1 dated 01.06.1976 in mutations Ext. D-3 and Ext. D-4 dated 14.04.1988 which was being relied upon by the defendants. Learned Appellate Court also held that it was settled principle of law that mortgage can be redeemed with or without intervention of the Court and a mortgagee can always pay mortgage consideration or money without the intervention of the Court and if this fact is proved from the evidence on record, the mortgage would be deemed to be redeemed. Learned Appellate Court further held that since Atma Singh had admittedly died on 20.04.1980, which was evident from death certificate Ext. D-2 and Ext. D-1, the purported receipt was written on 01.06.1976, however the same was never brought to the notice of Revenue Officers for the purpose of sanctioning of mutation and mutations Ext. D-3 and Ext. D-4, dated 14.4.1988 also demonstrated that there was no mention of receipt Ext. D-1, dated 01.06.1976 at the time of sanctioning as the said mutations. Learned Appellate Court held that had the mortgage consideration of ` 2600/- been paid to Atma Singh on the basis of receipt Ext. D-1, dated 1.6.1976, then the revenue officer would have certainly mentioned this fact in mutations Ext. D-3 and Ext. D-4. Learned Appellate Court held that there was nothing in the said mutations to show as to when the mortgage consideration of ` 2600/- was received by Atma Singh during his life time and strangely immediately after death of Atma Singh the question of payment of mortgage consideration was raised by the defendants. On these bases, it was concluded by learned Appellate Court that mortgage consideration was not proved to be paid on the basis of receipt Ext. D-1 or on the basis of mutations Ext. D-3 and Ext. D-4. Learned Appellate Court further held that due execution of receipt Ext. D-1 had not been proved as the same was shrouded with suspicious circumstances and much reliance could not be placed upon the testimony of Hardev Singh (DW2) who appeared to be an interested witness being close to

defendant Karam Singh. It further held that after conclusion of arguments on application filed by respondent/plaintiff Piar Singh under Section 151 of the Code of Civil Procedure, one affidavit was sought to be filed by plaintiff Piar Singh and filing of said affidavit was not opposed by the appellant.

10. Learned Appellate Court also held that it was clear from the contents of said affidavit of Piar Singh that plaintiff had made a declaration that land measuring 0-16-38 sq. metres comprised in Khewat No. 286, Khatauni No. 529 and Khasra No. 1241 as entered in jamabandi for the year 1987-88 had never been part of the mortgaged land with the father of deponent by Shiv Ram son of Bhupa in the year 1950, thus the controversy stood narrowed down as it is made clear that land mentioned in para 2 of the said affidavit shall not be deemed to be part of mortgaged land. It further held that the land sold by Avtar Singh and Jagtar Singh sons of defendant No. 1 Dharam Singh vide sale deed dated 20.06.2002 bearing Khasra No. 1241, measuring 0-16-38 sq. metres situate in village Behdala, Tehsil and District Una as entered in jamabandi for the year 1987-88 shall be free from encumbrances and plaintiffs would have no legal right or interest over this parcel of land. On these bases, learned Appellate Court dismissed the appeal filed by the present appellant and upheld the judgment and decree passed by the learned trial Court.

11. I have heard learned counsel appearing for the parties and also gone through the records of the case as well as judgments passed by both the learned Courts below.

12. I will deal with both substantial questions of law together.

13. A perusal of the plaint demonstrates that the case set up by the plaintiffs was that the suit land was mortgaged by its original owner namely Shiba @ Shiv Ram, s/o Bhupa with possession for a sum of ` 2600/- in favour of Atma Singh, father of the parties and that Atma Singh remained in possession of suit land as a mortgagee till his death in the year 1980 and his five sons succeeded to his estate as his legal heirs and were coming thereafter in joint possession of the same in equal share. It was however the case put up in the written statement by defendants that mortgage so created by Shiba was redeemed before the filing of the suit. Contention of plaintiff has find favour with both learned Courts below who have concurrently held that mortgage created by Shiba remained unredeemed within the prescribed period and thus mortgagees had become full owner of the suit land by afflux of time.

14. Article 61 of the Limitation Act prescribes that period of limitation to redeem or recover possession of immoveable property mortgaged is 30 years from the time when the right to redeem or recovery of possession accrues.

15. A three judge Bench of Hon'ble Supreme Court in ***Singh Ram (dead) through Legal representatives versus Sheo Ram and Others, (2014) 9 Supreme Court Cases 185*** has held that while Article 61 of the Limitation Act refers to right to redeem or recover possession, right of mortgagor to redeem is dealt with under Section 60 of the Transfer of Property Act and Section 62 of the same was only applicable only to usufructuary mortgages and not to any other mortgage. Hon'ble Supreme Court has held that right of usufructuary mortgagor though styled as "right to recover possession" is for all purposes, the right to redeem or recover possession. It has further held that thus while in case of any other mortgage, right to redeem is covered under Section 60 of Transfer of Property Act, however, in case of usufructuary mortgage, right to redeem and recover possession is dealt with under Section 62 of Transfer of Property Act and special right of usufructuary mortgagor to recover possession commences in the manner specified therein i.e. when mortgage money is paid out of rents and profits or partly out of rents and profits and partly by payment or deposit by mortgagor. Hon'ble Supreme Court has further held that this distinction in a usufructuary mortgage and any other mortgage is clearly borne out from the provisions of Sections 58, 60 and 62 of the Transfer of Property Act read with Article 61 of the Schedule to the Limitation Act. Hon'ble Supreme Court has further held that usufructuary mortgage cannot be treated on par with any other mortgage, as doing so would defeat the scheme of Section 62 of the Transfer of Property Act and said right of usufructuary mortgage is not

equitable right but it has statutory recognition under Section 62 of the Transfer of Property Act. It has been further held by Honble Supreme Court that in case of usufructuary mortgage, mere expiry of a period of 30 years from the date of creation of the mortgage does not extinguish the right of the mortgagor under Section 62 of the Transfer of Property Act. Hon'ble Supreme Court further held in para 62 of the judgment as under.

> *"Right of usufructuary mortgagor to recover possession.- In the case of a usufructuary mortgage, the mortgagor has a right to recover possession of the property together with the mortgage deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee-*
>
> *a) where the mortgagee is authorized to pay himself the mortgage money from the rents and profits of the property,-- when such money is paid;*
>
> *b) where the mortgagee is authorized to pay himself from such rents and profits or any part thereof a part only of the mortgage money, when the term (if any) prescribed for the payment of the mortgage money has expired and the mortgagor pays or tenders to the mortgagee the mortgage money or the balance thereof or deposits it in court hereinafter provided."*

16. By placing heavy reliance upon this judgment, Mr. N.K. Thakur, learned senior counsel appearing for the appellant has argued that as it has been clearly and categorically laid down by Hon'ble Supreme Court that the period of limitation to redeem the mortgage is not to commence from the date of creation of mortgage, the judgment and decrees passed by both the learned Courts below are perverse as they are contrary to the law as it stands declared on the subject by Hon'ble Supreme Court of India. Mr. Thakur urged that this appeal was liable to be allowed on this count alone.

17. On the other hand, Mr. Ajay Sharma, learned counsel for respondent No. 1 argued that the judgment being relied upon by the appellants was not applicable in the facts of the present case because the law laid down by Hon'ble Supreme Court was only in case of usufructuary mortgage and the present case is not case of usufructuary mortgage. On these bases, it was urged by Mr. Sharma that as the appellant otherwise could not point out any infirmity or perversity with the findings returned by both learned Court below vis-à-vis the material placed on record by the parties, the judgments and decrees passed by both the learned Courts below do not warrant any interference.

18. In the background of submissions made above, it has to be decided by this Court firstly as to whether the mortgage in issue is usufructuary mortgage or not.

19. Section 58 of the Transfer of Property Act contemplates various kinds of mortgages i.e. simple mortgage, mortgage by conditional sale, usufructuary mortgage etc. Section 58 of the Transfer of Property Act provides that where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee and authorizes him to retain such possession until payment of the mortgage money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest, or in payment of the mortgage money, or partly in lieu of interest or partly in payment of the mortgage money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee.

20. Thus conditions precedent for a mortgagee to be an usufructuary mortgagee *inter alia* are that a mortgagee either delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee and authorizes him to retain such possession until payment of the mortgage money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest, or in payment of the mortgage money, or partly in lieu of interest or partly in payment of the mortgage money. Such transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee.

21. Coming to the facts of the present case. It stands established on record that possession of the mortgaged property was delivered by the mortgagor to the mortgagee and it can also be inferred from the records that mortgagor had authorized the mortgagee to retain such possession until payment of mortgage money. However, there is no material on record from which it can be inferred that the mortgagor had authorized mortgagee to receive rents and profits accruing from the property and appropriate the same in lieu of interest, or in payment of the mortgage money or partly in lieu of interest or partly in payment of mortgage money.

22. Section 62 of the Transfer of property Act provides as under.

> *"62. In the case of a usufractuary mortgage, the mortgagor has a right to recover possession of the property together with the mortgage deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee,--*
>
> *a) where the mortgagee is authorized to pay himself the mortgage money from the rents and profits of the property,-- when such money is paid;*
>
> *b) Whether the mortgage is authorized to payment himself from such rents and profits or any part thereof a part only of the mortgage money, when the term (if any) prescribed for the payment of the mortgage money has expired and the mortgagor pays or tenders to the mortgagee the mortgage money or the balance thereof or deposits it in Court hereinafter provided."*

Thus, as per Section 62 of the Transfer of Property Act right of usufructuary mortgagor to recover possession of the property accrues if all the conditions as contemplated in clause (a) or Clause (b) of the said Section are fulfilled.

23. The mere fact that possession was given by the mortgagee over certain property does not necessarily show that the mortgage was a usufructuary mortgage as defined in the Transfer of Property Act (*see* ***Jangali Singh v. Ramjag Singh, AIR 1944, Allahabad 198***).

24. Mere possession of land does not amounts to a mortgage being usufructuary mortgage unless it is shown that the income of the land was to be apportioned towards the payment of interest or partly towards the payment of principal or partly towards payment of interest.

25. Hon'ble Supreme Court in ***Narpatchand A. Bhandari, v. Shantilal Moolshankar Jani and another, AIR 1993 Supreme Court 1712*** has held that as could be seen from the definition of 'usufructuary mortgagee' in clause (d) of Section 58 of the Transfer of Property Act, 1882, an usufructuary mortgagee is a transferee of a right to possession of the mortgaged property and the right to receive the rents and profits accruing from such property.

26. In view of above discussion and law cited above including law declared by three judge Bench of Hon'ble Supreme Court in Singh Ram's case referred supra, it is evident that it is only in a case of usufructuary mortgagee that special right of usufructuary mortgagor to recover possession commences in the manner specified therein i.e. when mortgage money is paid out of rents and profits or partly out of rents and profits and partly by payment or deposit by mortgagor, until limitation does not start for purposes of Article 61 of the Schedule to the Limitation Act. However, this is not so for other mortgages.

27. Coming to the facts of the present case. It is apparent and evident from the material on record including the averments made in the plaint and the written statement that the mortgage in issue was not usufructuary mortgage as defined in clauses (a) to (d) of Section 58 of the Transfer of Property Act. In the absence of said mortgage being a usufructuary mortgage, the law declared by the Hon'ble Supreme Court in Singh Ram's case is not applicable to the facts of the present case. Therefore, there is no merit in the contention of learned senior counsel appearing for the appellant that the findings returned by both the learned Courts below to the

effect that suit land has not been redeemed within the period of limitation by the mortgagor and accordingly, the parties are joint owners and in joint possession of the suit land in equal shares.

28. Besides this, there are concurrent findings returned against the present appellant by both the learned Courts below that defendant No. 2 failed to prove his exclusive possession as owner over the suit land. There are also concurrent findings returned against the appellant by both the learned Courts below that defendant No. 2 has failed to adduce any direct evidence qua the execution of receipt Ext. D-1. Both learned Courts below have held that plaintiffs have successfully proved that execution of receipt of payment Ext. D-1 was doubtful and defendants failed to explain as to why the suit land was not got mutated if the same was in fact redeemed on 01.06.1976 during the life time of their father Atma Singh.

29. During the course of arguments, learned senior counsel appearing for the appellant also could not demonstrate as to how these findings returned by both learned Courts below were contrary to the records and thus perverse or are bad in terms of law laid down by the *Hon'ble Supreme Court in Singh Ram's case* referred to above. Therefore, it cannot be said that the judgments and decrees passed by both the learned Courts below are based on misinterpretation and misreading of the evidence or are perverse. The substantial questions of law are answered accordingly.

30. In view of discussion held above, as there is no merit in the present appeal, the same is therefore dismissed. No orders as to costs. Pending miscellaneous application(s), if any, also stands disposed of.

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

Subhadra Kumari ....Petitioner/accused.

Versus

State of Himachal Pradesh ....Respondent.

Cr.R. No. 111 of 2008.
Reserved on 22.3.2017.
Decided on: 30.3.2017.

Indian Penal Code, 1860- Section 228- Accused was appearing as a prosecution witness in the Court of the complainant – she started quarreling with defence counsel – she was requested to remain calm – she started shouting that she had no faith in the system and especially in the Court of the complainant- she was advised to maintain decorum in the Court but she continued with her behaviour – she was informed that her behaviour amounted to contempt of Court but she replied that she did not care for anyone – the complainant took cognizance and filed a complaint before the Court- the accused was tried and convicted by the Trial Court- an appeal was preferred pleading that the same be treated as a mercy petition on which the Appellate Court reduced the sentence imposed by the Trial Court- held in revision that the conviction of the accused was not challenged in appeal on merit and it was pleaded that the appeal be treated as a mercy petition – the Appellate Court has reduced the sentence and it is not open to the accused to agitate the matter on merit –however, considering the fact that the complaint was filed by a judicial officer, the matter re-examined on merit – it was duly proved by the prosecution witnesses that accused was asked to remain calm and to maintain the decorum of the Court but the accused continued to disrupt the proceedings- the defence version was not probable – the accused was rightly convicted by the Courts- revision dismissed. (Para-8 to 18)

For the petitioner. Mr. Divya Raj Singh Thakur, Advocate.
For the respondent. Ms. Parul Negi, Dy. Advocate General.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge.

By way of this revision petition, the petitioner has challenged the judgment passed by the Court of learned Additional Sessions Judge, Fast Track Court, Shimla in Appeal No. 7-S/10 of 2008 dated 26.6.2008, whereby learned appellate court while maintaining the conviction of petitioner/accused under Section 228 of IPC, has modified the sentence imposed upon her by the learned trial court and has ordered the accused to undergo simple imprisonment till rising of the Court and to pay fine of Rs. 300/- and to further undergo simple imprisonment for a period of 07 days for want of payment of fine. Petitioner/accused has also laid challenge to the judgment passed by learned trial court i.e. the Court of learned Judicial Magistrate 1st Class (4), Shimla dated 20.3.2008 vide which learned trial court convicted the accused for commission of offence punishable under Section 228 of IPC and sentenced her to undergo simple imprisonment for a period of one month and to pay fine of Rs. 300/- and to further undergo simple imprisonment for a period of 07 days in case of default of payment of fine.

2. Brief facts necessary for adjudication of the present case are that a complaint was filed against the present petitioner by Addl. Chief Judicial Magistrate, Court No.1, Shimla to the effect that on 24.8.2005 at around 12:00 noon when complainant was performing his duties as Addl. CJM, Shimla and was dealing with criminal cases, one case titled State Vs. Suresh Kumar bearing No. 281/2 of 2004 was listed for recording the evidence of witnesses. In the said case when statement of Subhadra Kumari (hereinafter referred to as 'the accused') was being recorded as prosecution witness, she started quarreling with Sh. M.L. Brakta, Advocate who was the defence counsel for accused Suresh Kumar. As per the complainant, accused interfered in the proceedings time and again. On the asking of complainant to remain calm, accused started shouting and stating that she had no faith in the system and particularly in the court of the complainant. Accused shouted that her case be closed and thrown in the dustbin. Accused was advised by the complainant as well as by learned Assistant Public Prosecutor who was conducting the case on behalf of the prosecution as well as other lawyers present in the Court to maintain the decorum in the Court, however, she continued her belligerent behavior. Accused was also informed that the said behavior of her would amount to contempt of Court but accused stated that she did not care for anyone. In these circumstances a lady constable was called by the complainant. Thereafter cognizance was taken of the said contemptuous behavior of accused by the complainant for offence punishable under Section 228 of IPC as per the provisions of Section 345 Cr.P.C and preferred a complaint under Section 346 of Cr. P.C. As accused did not furnish any security before the complainant, accused was forwarded in the custody of lady constable Versha along with the complaint to the court of learned Chief Judicial Magistrate, who assigned the case to the court of learned Judicial Magistrate 1st Class (4), Shimla.

3. On consideration of the complaint, notice of accusation was put to the accused for having committed offence punishable under Section 228 of IPC to which she pleaded not guilty and claimed trial.

4. On the basis of evidence produced on record both ocular as well as documentary by the prosecution, learned trial court held that it stood proved on record that accused had interfered in the court proceedings and had cast aspersion by shouting that she had no faith in the system and that her file be thrown into the dustbin. Leaned trial court also negated the plea of the accused that the procedure prescribed under Section 346 of Cr.P.C. was not followed in the matter. Learned trial court also held that there was no merit in the contention of the accused that the non examination of lady constable Versha demolished the case of the prosecution or that no notice of accusation was put to her as there was no mention in the zimni order. Learned trial court held that a detailed notice of accusation was placed on the file on which signatures of the accused were there which demonstrated that proper notice of accusation was put to her for having committed offence punishable under Section 228 of the IPC. On these basis it was held by learned trial court that evidence on record proved beyond all reasonable doubt that accused had

interfered in the court proceedings being conducted by Sh. Varinder Kumar Sharma, the then Addl. CJM, Shimla in case titled as State Vs. Suresh Kumar and she also shouted in the Court that she had no faith in the system of the Court and her case file be thrown into the dustbin. Learned trial court convicted the accused for commission of offence punishable under Section 228 of IPC and sentenced her to undergo simple imprisonment for a period of one month and to pay fine of Rs. 300/- by taking a lenient view in the matter on the count that accused was sole bread earner in the family and had no previous history of involvement of any offence.

5. In appeal, learned appellate court while upholding the judgment of conviction passed against the accused by learned trial court reduced the sentence imposed upon her from one month simple imprisonment to imprisonment till rising of the court and fine of Rs. 300/- by holding that sending the convict to jail will serve no fruitful purpose and rather she would be exposed to the unhealthy atmosphere of the jail and her career would be ruined and upbringing of her minor daughter would also be adversely affected. A perusal of the judgment passed by learned appellate court demonstrates that when the appeal was heard by learned appellate court, learned counsel appearing for the appellant therein, i.e., the present petitioner had prayed that the appeal be treated as mercy petition and it was on this background the learned appellate court without dwelling on the merits of the case, while upholding the conviction of accused modified the sentence imposed upon her by the learned trial court.

6. Feeling dis-satisfied, the accused has filed the present petition.

7. I have heard learned counsel for the parties and have also gone through the records of the case as well as the judgments by both the learned courts below.

8. Records demonstrate that the judgment of conviction passed against the petitioner by the learned trial court was not agitated on merit by her before the learned appellate court. During the course of arguments before the learned appellate court, a prayer was made on behalf of the accused that her appeal be treated as a mercy petition. In view of the prayer so made on her behalf, learned appellate court reduced the sentence imposed upon the petitioner/accused. A perusal of the grounds of revision petition demonstrates that there is no averments made therein to the effect that no such concession was made on behalf of the petitioner/accused before the learned appellate court that her appeal be treated as a mercy petition, therefore, in these circumstances when the petitioner did not contest the judgment passed by the learned trial court on merit before the learned appellate court and had prayed for mercy and learned appellate court had sympathetically thereafter reduced the punishment so imposed upon her by the learned trial court it is not now open to the petitioner to agitate the judgment of conviction so passed against her by the learned trial court and affirmed by the learned appellate.

9. However, in the interest of justice, so that the petitioner does not carries the impression that this court has not gone into the legality of the judgment passed by the learned trial court as complainant happens to be a Judicial Officer, I have gone through the records in order to satisfy the judicial conscious of this court as to whether the findings returned by the learned trial court are borne out from the records of the case or not.

10. Records demonstrate that the notice of accusation was in fact duly put to the accused on 26.9.2005 and the same bears the signature of the accused.

11. In order to prove its case prosecution examined six witnesses whereas defence also examined three witnesses.

12. Mr. Sandeep Atri who was then serving as Assistant Public Prosecutor in the court of the then Addl. Chief Judicial Magistrate entered the witness box as PW1 and deposed in the Court about the factum of initially the accused started a quarrel with Sh. M.L. Brakta learned counsel who was appearing as a defence counsel in the case titled State Vs. Suresh Kumar in which case accused was present and was deposing as a complainant. This witness further deposed that the accused was called upon by the Presiding Officer to remain calm, however,

accused started shouting and abusing. He further stated that complainant stated in the court that she had no faith in the court or the system and that her case be closed and dumped into a dustbin. He further deposed that she kept on shouting loudly in the court corridor and was requested by other counsels also but she did not heed to anyone and thereafter a lady constable was called.

13. Madhu Sharma who was serving as a Reader at the relevant time in the Court of learned Addl. Chief Judicial Magistrate entered the witness box as PW2 and deposed about the disruption which was created by the accused during court proceedings.

14. Sh. M.L. Brakta, Advocate entered the witness box as PW3 to support the case of the prosecution and he also deposed about the disruption behaviour of the accused.

15. Sh. Y.P.Sood, Advocate who was present in the court room appeared as PW4 and Presiding Officer entered the witness box as PW5. Besides them Sh. Vijay Pandit, Advocate who was also present in the court deposed as PW6.

16. A perusal of the statements of these witnesses demonstrates that they have in unison deposed in the court about the factum of the accused disrupting the court proceedings by initially entering into a quarrel with Sh. M.L. Brakta learned defence counsel in the case concerned and thereafter by shouting and by using derogatory language. All these witnesses were subjected to cross-examination, however, their credibility could not be impeached by the defence.

17. Out of three witnesses examined by the defence, DW2 Mohinder Razta has stated that he was not present in the court when the alleged incident took place. DW3 Shish Pal has stated that he was not aware as to what happened on the fateful day as he came to know about the incident when he reached his house as he had left the court after receiving a phone call. DW1 Sanjeev has deposed that he was present in the court on 24.8.2005 and accused had not created any noise in front of him and that the Presiding Officer had threatened the accused and had called her characterless which lead to the quarrel. However, a perusal of his cross examination demonstrates that he has stated therein that he was not aware as to whether when the accused was standing in the court she was accompanied by any lawyer or not and he was not aware as to what was happening in the court. Though he denied the suggestion that he was not in the court at the relevant date but he self stated that he was standing outside the court. Firstly except his bald statement that he was present in the court premises, there is no other evidence from which it can be inferred that he was present in the court on the fateful day. Besides this his testimony to the effect that learned Presiding Officer threatened the accused and called her characterless does not inspire any confidence as one hand he has deposed that he was standing outside the court and was not aware as to what were the proceedings etc. going on in the court but still he deposed that the Presiding Officer threatened the accused and called her characterless. This otherwise also was not the defence of the accused. This version of DW1 has not been corroborated by any other evidence on record, therefore, in my considered view, it cannot be said from the material placed on record by the prosecution that the finding of guilt returned by learned trial court against the accused is not borne from the records of the case.

18. At the cost of repetition this court reiterates that though it is aware of its limitations while exercising its revisional jurisdiction, however, this court has re-appreciated the evidence keeping in view the fact that as the conviction of the accused is on the basis of complaint filed by a Presiding Officer of a Court, therefore, the judicial conscious of the court had to be satisfied that the findings so arrived at by the learned trial court were borne out from the records of the case or not.

In view of my findings returned above, I do not find any perversity either with the judgment passed by learned appellate court or with the judgment passed by learned trial court and accordingly as there is no merit in this revision petition, the same is therefore dismissed. Pending miscellaneous application(s), if any also stands disposed of.

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

Shri Prem Chand .....Petitioners.

-Versus-

State of Himachal Pradesh .....Respondent.

Cr. Revision No. 63 of 2008
Reserved on : 17.03.2017
Date of decision: 31.03.2017

Indian Penal Code, 1860- Section 279, 337 and 338- Accused was driving a Mahindra Jeep with a high speed – the complainant and his brother-in-law were waiting for a bus on the side of the road – the jeep hit the complainant due to which the complainant fell down- he sustained injuries on his legs – the accused was tried and convicted by the Trial Court for the commission of offences punishable under Sections 279, 337 and 338 of IPC – an appeal was preferred, which was dismissed – held in revision that the accused admitted in his statement recorded under Section 313 Cr.P.C that he was driving the vehicle slowly, which shows that the fact that accused was the driver was not in dispute- PW-4 and PW-5 expressly stated that accused was driving the vehicle in a rash and negligent manner – medical evidence corroborated the version of the prosecution – the Courts had rightly convicted the accused, in these circumstances- however, considering the time, which has elapsed since the date of incident, sentence modified.

(Para-10 to 14)

Case referred:
State of Karnataka Vs. Satish, (1998) 8 Supreme Court Cases 493

For the petitioner: Mr. Ajay Chandel, Advocate.
For the respondent: Mr. Vikram Thakur and Ms. Parul Negi, Deputy Advocate Generals.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge:

By way of this revision petition, the petitioner has challenged the judgment passed by the Court of learned Additional Sessions Judge, Fast Track Court, Kullu in Cr. Appeal No. 30/07, dated 19.03.2008, vide which learned appellate Court while dismissing the appeal so filed by the present petitioner, has upheld the judgment passed by the Court of learned Judicial Magistrate, 1st Class, Manali in Criminal Case No. 77-1/07-26-11/07, dated 12.12.2007, whereby learned trial Court while convicting the present petitioner for commission of offence punishable under Sections 279, 337 and 338 of the Indian Penal Code, sentenced him to undergo simple imprisonment for a period of three months and to pay a fine of Rs. 1,000/- and in default of payment of fine, to undergo simple imprisonment for a period of one month under Section 279 of the Indian Penal Code, to undergo simple imprisonment for a period of three months and to pay a fine of Rs. 500/- and in default of payment of fine, to undergo simple imprisonment for a period of one month under Section 337 of the Indian Penal Code and to undergo simple imprisonment for a period of six months and to pay a fine of Rs. 1,000/- and in default of payment of fine, to undergo simple imprisonment for a period of one month under Section 338 of the Indian Penal Code. Sentences so imposed were ordered to run concurrently by the learned trial Court.

2. The case of the prosecution was that on 01.11.2006, complainant Jai Chand alongwith his brother-in-law Uggar Sen were going towards Manali and when they were standing at a place known as 15 Mile on the side of the road, while waiting for a bus for Manali at 1:30 p.m., a Mahindra jeep bearing registration No. HP-34B-0745 came from the side of Manali, which was being driven in high speed and bumper of the said jeep hit the complainant, as a result of

which, complainant Jai Chand fell on the ground. The driver of the jeep stopped the same at some distance from the spot of occurrence of the accident and after glancing at the complainant, he fled away towards Kullu alongwith the jeep. The complainant sustained injuries on both his legs on account of the jeep so striking against him. At the relevant time, complainant was not aware about name of the driver of the jeep. Thereafter, the complainant was brought to Kullu Valley Hospital by his brother-in-law for the purpose of treatment. As per the prosecution, the accident took place due to high speed, rash and negligent driving of jeep by its driver, i.e. the present petitioner/accused.

3. On 02.11.2006 at around 11:30 a.m., information was received at Police Station, Kullu qua the said road accident, on the basis which, *rapat* No. 33 was registered and HC Upender Singh and Constable Teja Singh were sent to Kullu Valley Hospital. These police officials after reaching the hospital, recorded statement of the complainant under Section 154 of the Code of Criminal Procedure. On the basis of said statement, FIR was lodged and investigation was carried out by the police. In the course of investigation, MLC Ex. PW1/A of the complainant, X-ray film Ex. PW1/B and Ex. PW1/C were taken on record. In the MLC, Medical Officer gave his opinion that injury No. 1 sustained by the complainant was grievous. Site plan was also prepared. The offending vehicle was taken into possession by the police. Mechanical examination of the same was also conducted and report of the same Ex.-PB was also obtained. Statements of witnesses were also recorded as per their versions and after completion of investigation, challan was filed in the Court. Notice of Accusation was put to the accused for commission of offences punishable under Sections 279, 337 and 338 of the Indian Penal Code and under Sections 181 and 187 of the Motor Vehicles Act, to which he pleaded not guilty and claimed trial.

4. On the basis of evidence produced on record by the prosecution, learned trial Court held that it stood proved that accused was driving the offending vehicle in a rash and negligent manner and he did not take due, proper and reasonable care and precaution while driving the said vehicle on the relevant date and time and it was on account of rash and negligent driving of the offending vehicle by the accused that he caused simple as well as grievous injuries to the complainant. On these bases, learned trial Court held the accused guilty of offences punishable under Sections 279, 337 and 338 of the Indian Penal Code, whereas learned trial Court did not found accused to be guilty of other offences with which he was charged. While arriving at the said conclusion, it was held by the learned trial Court that complainant Jai Chand, who entered the witness box as PW-4, had fully supported and corroborated the case of the prosecution and that this witness had asserted that the occurrence took place due to fault and negligence of the accused. Learned trial Court also held that the statement of complainant Ex. PW2/A was recorded in Kullu Valley Hospital and during the course of his examination there was hardly anything to impeach and discredit his testimony. Learned trial Court further held that the testimony of the complainant in fact remained un-dented and un-shattered and he had clearly established that on the relevant date and time, it was accused who was driving Mahindra jeep in a rash and negligent manner and at a high speed, which had resulted in the accident. Learned trial Court also held that the case put forth by the defence that the accident occurred on account of the brother-in-law of the complainant striking his scooter with a danga was categorically denied by the complainant. Learned trial Court also held that the statement of PW-4 stood corroborated from the testimony of PW-5 Uggar Sen, who in fact was an eye witness and who clearly stated in the Court as to how the accident occurred on account of the rash and negligent driving of the accused. Learned trial Court further held that in the course of cross-examination of the said witness, this witness did not depose contrary to what he had deposed in his main examination. Learned trial Court took note of the fact that this witness had categorically asserted in his cross-examination that it was the accused who was driving the offending vehicle. Learned trial Court also held that this witness had also categorically denied that it was he who was coming on his scooter and dashed the same against the *danga* on the fateful day and that the offending vehicle was being driven by one Ram Lal and not by the accused. Learned trial Court also took note of the fact that though it stood proved on record that PW-4 and PW-5 were related to each other, but this fact itself did not warrant to discard the testimony of PW-5 as his

statement was consistent and firm and he was in fact an eye witness of the alleged occurrence. Learned trial Court also held that there was nothing on record from which it could be inferred that complainant Jai Chand had reasons to falsely implicate the accused in this case. Learned trial Court also held that Dr. N.K. Prasher, who entered the witness box as PW-1 had stated that he had medically examined the complainant in Kullu Valley Hospital and had issued MLC Ex. PW1/A and X-ray film Ex. PW1/B and Ex. PW1/C and that he found injury No. 1 sustained by the complainant to be grievous in nature and injury No. 2 as simple and the said injury could be sustained in a vehicular accident. Learned trial Court also took note of the fact that this witness was not cross-examined on behalf of the accused. Learned trial Court further held that prosecution had produced on record mechanical report Ex. PB and the same demonstrated that there was no mechanical defect in the offending vehicle. Learned trial Court also held that PW-7 HC Sher Singh, who was Investigating Officer in the case, had duly proved site plan which demonstrated that place 15 Mile was a chowk/junction where there was a diversion over the river Beas through a bridge and there was also a rain shelter which meant that at the place of occurrence, people used to assemble to go to different directions. On these bases, it was held by the learned trial Court that it was imperative on the part of the accused to have had driven the vehicle cautiously with all reasonable care and precautions. Learned trial Court also held that the defence of the accused that it was not he who was driving the offending vehicle on the relevant date and time and it was one Ram Lal who was driving the vehicle, was incorrect, as in his statement recorded under Section 313 of the Code of Criminal Procedure, accused had stated that he was driving the vehicle slowly and a false case had been made out against him. On these bases, it was held by the learned trial Court that the accused had rather contradicted his stand with the statement recorded under Section 313 of the Code of Criminal Procedure. Learned trial Court also held that the accused failed to probablise his defence that it was PW-5 Uggar Sen, who was driving the scooter in a rash and negligent manner, on which complainant was also seated and he dashed the same with a *danga,* due to which complainant sustained injuries. On these bases, learned trial Court convicted the accused for the commission offences punishable under Sections 279, 337 and 338 of the Indian Penal Code.

5. In appeal, learned appellate Court upheld the findings so returned by the learned trial Court. It was held by the learned appellate Court that the testimonies of PW-4 and PW-5 on oath were clear and categorical on the point that the accident took place on account of rash and negligent driving of the vehicle by the accused. Learned appellate Court also held that both these witnesses were subjected to lengthy cross-examinations by the accused, but nothing could be elicited from the same which could have rendered their depositions unworthy of reliance. Learned appellate Court also held that the defence pleas taken by the accused that it was not he who was driving the vehicle, but the same was driven by Ram Lal, son of Mehar Chand stood falsified from the statement of the accused recorded under Section 313 of the Code of Criminal Procedure, wherein the accused took the stand that he was driving the vehicle in question at a normal speed. Learned appellate Court held that said false defence pleas also negated the innocence of the accused in the case. Learned appellate Court also held that there was nothing on record to suggest that the accused was falsely implicated in the case and the depositions of prosecution witnesses coupled with the contents of M.L.C. proved the involvement of the accused. With regard to statement of Constable Teja Singh, who had deposed that HC Upender Singh had gone to Zonal Hospital, Kullu to investigate the matter and that statement of Jai Chand was recorded there, it was held by the learned appellate Court that statement of PW-1 Dr. N.K. Prasher clearly demonstrates that the injured was admitted at Kullu Valley Hospital, where he was medically examined and that records further demonstrate that report No. 33 was recorded in *rojnamcha* on 02.11.2006 on the basis of *rukka* received in the Police Station to the effect that an injured had been admitted in Kullu Valley Hospital, who had met with an accident. On these bases, it was held by the learned appellate Court that the discrepancy in the testimony of Constable Teja Singh was trivial in nature and was incapable of rendering entire prosecution story doubtful. Learned appellate Court also held that as far as the contention of defence that no opportunity was afforded to the accused to lead defence evidence was concerned, the same was without

foundation as records demonstrated that on 05.10.2007, statement of accused was recorded to the effect that he did not want to lead any defence evidence. On these bases, learned appellate Court while dismissing the appeal so filed by the accused, upheld the judgment of conviction passed by the learned trial Court.

6. Feeling aggrieved, the accused had filed the present appeal.

7. Mr. Ajay Chandel, learned counsel for the petitioner/appellant has argued that the findings returned by both the learned Courts below were perverse and not based on the records of the case as both the learned Courts below had failed in not appreciating that the prosecution had failed to link the accused with the alleged occurrence. Prosecution had also failed to prove that it was accused who was driving the offending vehicle at the relevant date, time and place. He further argued that the statements of PW-4 and PW-5 were also totally misread and mis-appreciated by both the learned Courts below as they erred in not appreciating that it had not come in the statement of either of these two witnesses that the vehicle was driven in a rash and negligent manner by the accused which led to the occurrence of the alleged incident. He further argued that both the learned Courts below had also erred in not appreciating that there was delay in lodging the FIR, which remained unexplained and it stood proved that complainant in fact had sustained injuries on account of the scooter being driven by PW-5 having hit against a *danga,* on which the complainant was also the pillion rider. On these bases, it was prayed by Mr. Chandel that the judgments of conviction passed against the accused by both the learned Courts below be set aside. In the alternative, Mr. Chandel has submitted that in case this Court is not inclined to interfere with the findings returned by both the learned Courts below on merit, then this Court may sympathetically consider modification of sentences imposed upon the petitioner, keeping in view the fact that the petitioner is undergoing trauma of trial for the last more than 10 years.

8. On the other hand, Mr. Vikram Thakur, learned Deputy Advocate General has argued that there was neither any infirmity nor any perversity with the findings of conviction returned by both the learned Courts below against the accused. Mr. Thakur urged that the statements of PW-4 and PW-5 read with statement of Investigating Officer and the Medical Officer clearly demonstrated beyond the shadow of doubt that it was the accused who was driving the offending vehicle at the relevant date, time and place in a rash and negligent manner, which resulted in the accident, on account of which, both simple as well as grievous injuries were sustained by the complainant. Mr. Thakur submitted that the factum of accused driving the vehicle at the date, time and place was not only proved from the statement of the complainant, but also stood proved from the statement of the accused recorded under Section 313 of the Code of Criminal Procedure. Mr. Thakur further urged that the accused had failed to probablise his defence that the accident in fact took place on account of a scooter being driven by PW-5 which hit with a *danga*. Mr. Thakur further urged that delay in lodging the FIR also stood sufficiently explained before the learned Courts below. On these bases, it was submitted by Mr. Thakur that there was no merit in the revision petition and the same be dismissed.

9. I have heard the learned counsel for the parties and have also gone through the judgments passed by both the learned Courts below and the records of the case.

10. In the present case, the first perversity which has been pointed out by the learned counsel for the petitioner is that as far as the judgments passed by the learned Courts below are concerned, both the learned Courts below erred in not appreciating that the factum of offending vehicle being driven by the accused was not proved by the prosecution. I will deal with his this contention first. A perusal of the statement of PW-4 complainant demonstrates that he has deposed in the Court that on 01.11.2006, when he was waiting for a bus at 15 Mile for Manali at around 1:30 p.m., a Mohindra jeep bearing registration No. HP-34B-0745 which was coming from Manali side in fast speed hit him, as a result of which, he sustained injuries. In his main examination, this witness has also categorically stated that the accident took place on account of rash and negligent driving on the part of the driver of the vehicle, i.e. accused. In his

cross-examination, this witness has deposed that before the accident and before lodging of the case, he did not knew the accused and he also stated that on the date when the accident took place he had seen the accused while driving the vehicle. He denied the suggestion that after the alleged accident took place, he had become unconscious. He also categorically denied the suggestion that on the day when the accident took place the offending vehicle was not driven by the accused but was driven by some other person. Now if one peruses the statement of the accused recorded under Section 313 of the Code of Criminal Procedure, the answer given by the accused to question No. 14 which was ''*why the present case has been made up against you?''*, was *"Gari aaram se chela raha tha".* Similarly, in answering question No. 16 which was *"do you want to say anything else?"*, his answer was "*Gari aaram se chela raha tha. Case jhutha banaya hai."* The statement of the accused so recorded under Section 313 of the Code of Criminal Procedure coupled with the testimony of PW-4 clearly demonstrates that the stand of the accused that he was not driving the offending vehicle at the time when the accident took place and that the same was being driven by some other person is false and incorrect. Therefore, in my considered view, it cannot be said that the findings returned by both the learned Courts below to the effect that it was the accused who was driving the offending vehicle when the accident took place are perverse findings.

11. The second contention of the learned counsel for the petitioner that both the learned Courts below erred in not appreciating that it has not come on record that the vehicle in question was driven by the accused in a rash and negligent manner, which resulted in the unfortunate accident also deserves to be rejected. Before dwelling on this point, I would like to refer to a judgment of the Hon'ble Supreme Court in **State of Karnataka** Vs. **Satish**, (1998) 8 Supreme Court Cases 493, on which learned counsel for the petitioner has relied upon while stressing this point. Mr. Chandel has argued that Hon'ble Supreme Court has held that in the absence of any material on record, no presumption of rashness and negligence can be drawn and merely because the vehicle was being driven at a high speed does not bespeak of either negligence or rashness.

12. Now, when we advert to the statements of PW-4 and PW-5, it has come in the statement of PW-4 that the offending vehicle which hit him came from Manali side in a high speed and that accident took place because of the negligence of the driver of the vehicle. PW-5 Uggar Sen also deposed in the Court that the accident took place on account of the vehicle which was being driven by the accused in a high speed. In his examination-in-chief, this witness has also deposed that the accident took place on account of the negligence of its driver. In the judgment which has been cited by Mr. Chandel, Hon'ble Supreme Court has held that in the absence of any material on record, no presumption of rashness or negligence can be drawn. Coming to the facts of this case, the factum of the vehicle being driven by the accused in a rash and negligent manner has been expressly stated in the Court both by PW-4 and PW-5. Not only this, this Court can also not ignore the fact that the accused has taken the defence that it was not he who was driving the vehicle at the time when the accident took place, however, the accused has miserably failed to probablise this defence of his and it has been established on record that it was accused who was driving the offending vehicle when the accident took place. In this background, in my considered view, as the factum of accident having taken place on account of rash and negligent driving of the offending vehicle by the accused stands duly proved on record by the statements of PW-4 and PW-5, it cannot be said that the findings recorded by the learned Courts below to the said effect are perverse. Even otherwise, the conduct of the accused is also self speaking. It stood proved on record that after the accident took place, he run away from the spot. In my considered view, if the accused was not guilty, then there was no occasion for him to have had run away from the spot. Therefore, the second contention of the learned counsel for the petitioner is also without merit.

13. The third contention of the petitioner that there was delay in lodging of the FIR also, is without any merit because it stands satisfactorily proved on record that after the accident took place on 01.11.2006 at 1:30 p.m., the injured was taken by PW-5 to Kullu Valley Hospital, where he was treated upon and the police machinery was moved next day on the information

which was so provided to the police from the hospital itself. Besides this, the statement of Dr. N.K. Prasher, who entered the witness box as PW-1 clearly demonstrates that the injured was examined by him on 01.11.2006 at around 2:30 p.m. and that he had prepared the MLC and the injuries sustained by the injured/complainant could have been sustained in a vehicular accident. Incidentally, PW-1 was not cross-examined by the accused. Therefore, it cannot be said that there was inordinate delay in lodging FIR which has remained unexplained.

14. Therefore, the above discussion clearly demonstrates that the findings of conviction returned by the learned trial Court and appellate Court, are neither perverse nor illegal and the conclusions arrived at by both the learned Courts below are duly borne out from the records of the case.

15. Now, coming to the alternative submission of the learned counsel for the petitioner, in my considered view, taking into consideration the fact that the petitioner has been undergoing the trauma of trial since the year 2006, it will be in the interest of justice in case the sentence of imprisonment imposed upon the petitioner under Section 279 of the Indian Penal Code is modified from three months' simple imprisonment to two months' simple imprisonment, under Section 337 of the Indian Penal Code from three months' simple imprisonment to two months' simple imprisonment and that imposed under Section 338 of the Indian Penal Code from six months' simple imprisonment to two months' simple imprisonment. Ordered accordingly. However, the fine imposed under the said Sections by the learned trial Court is not modified nor is the sentence imposed in default of payment of fine. All the sentences shall run concurrently, as has been ordered by learned trial Court.

With the abovesaid modification in the sentence imposed upon the present petitioner, revision petition is dismissed.

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

State of Himachal Pradesh ....Appellant
Versus
Mohar Singh and others ....Respondents

Cr. Appeal No. 465 of 2009
Judgment reserved on 24th March 2017
Date of Decision 31st March 2017

Indian Penal Code, 1860- Sections 498-A and 306 read with Section 34- Deceased was married to accused D – S was the mother-in-law of the deceased- she used to harass the deceased continuously by saying that she would solemnize second marriage of D- she did not send the deceased to attend the marriage of her cousin – deceased was found hanging with the fan – the accused were tried and acquitted by the Trial Court- held in appeal that prosecution witnesses had improved upon their original version – payment of Rs.40,000/- was not proved – it was not proved that accused S had threatened to get her son re-married – vague allegations made by the prosecution witnesses do not amount to cruelty – Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed.(Para-5 to 30)

Case referred:
Gurcharan Singh vs. State of Punjab, (2017)1 SCC 433

For the Appellant: Shri D.S. Nainta and Mr. M.A.Khan, Additional Advocates General.
For the Respondents: Shri N.S. Chandel, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.

State has preferred present appeal against acquittal of respondents by learned Additional Sessions Judge (1), Kangra at Dharamshala, vide judgment dated 26.3.2009, passed in sessions trial No. 32-K of 2005, title State vs. Mohar Singh and others, in case FIR No. 8 of 2005, dated 2.1.2005 registered at Police Station Kangra, under Sections 498-A and 306 read with Section 34 of Indian Penal Code.

2. In memo of parties of impugned judgment, five accused persons have been reflected, whereas, as a matter of fact, Sandeep Kumar accused had expired during the pendency of trial on 6.11.2005. However, his name has been reflected in the impugned judgment and as a result of which, same was arrayed as party in present appeal, as respondent No.2, whose name was deleted in appeal herein.

3. Case of the prosecution is that investigating agency was set in motion on telephonic information received in police station from Up-Pardhan Surender Billa, Gram Panchayat, Tarsuh whereby he informed that daughter-in-law of respondent No. 1, Mohar Singh, had committed suicide by hanging. The said information was recorded in DDR No. 38 dated 1.1.2005 Ext.PW2/A and PW11 SI Daya Nand rushed to spot along with other police officials and found dead body of deceased Puja @ Kanta Devi hanging with ceiling fan in her room. PW3 Karam Chand, paternal uncle of deceased, had made his statement Ext.PW1/A under Section 154 of Code of Criminal Procedure stating therein that father of deceased namely PW8 (Jamna Dass) was serving at Ropar and her mother had also gone there. He further stated in his statement that his niece Puja Devi was married to Davinder Kumar (son of respondent No.1 and serving in army) on 4.12.2003, whose mother namely Subhadra Devi (respondent No.4) had been continuously harassing deceased by saying that she will solemnise second marriage of her son Davinder Kumar and about one and a half months ago, respondent Subhdra Devi did not send deceased to attend the marriage of her cousin and today (day of occurrence) at about 7.30 AM deceased telephonically wished him for New Year and at about 6.30 PM a telephonic information was received that deceased Puja has died by hanging with fan, whereupon he along with approximately fifty persons of his village including Sushil Kumar, Trilok Chand and Madan Lal etc. came respondents' village and found Puja Devi hanging with ceiling fan and there was no noticeable injury on dead body of Puja but blue spots on her private parts were there. It was alleged that deceased Puja Devi had committed suicide due to harassment of her in-laws i.e. respondents. This statement was sent to police station as ruka and pursuance to which, FIR Ext.PW1/A was recorded and case file was sent to spot and further investigation was carried out. Dead body of deceased was sent for post mortem and PW10 Dr.A.K. Sharma along with Dr. Anju Puri had conducted post mortem of dead body of deceased and found injuries on and around neck of deceased. He found no mark of struggle i.e. scratches etc. on face, neck and other parts of body. On completion of investigation, prima facie finding complicity of respondents in committing offence under Sections 498-A and 306 read with Section 34 of Indian Penal Code challan was presented in Court.

4. Prosecution has examined twelve witnesses to prove its case. Statements of respondents were recorded under Section 313 of Code of Criminal Procedure. No defence witness was examined on their bahalf. On conclusion of trial, respondents stand acquitted.

5. PW3 is paternal uncle of deceased, PW7 Sudershna Devi is paternal aunt (wife of PW3), PW6 Samrita Devi is mother of deceased, PW8 Jamna Dass is father of deceased and PW9 Mandeep Kumar is real brother of deceased Puja @ Kanta Devi. PW4 Mohinder is relative of deceased who is a resident of village of her in-laws. PW5 Madan Lal is villager, who is amongst those villagers, who visited her in-laws house after her death. PW10 Dr.A.K. Sharma has conducted post mortem of deceased. PWs 1 and 2 are official witnesses, who recorded DDR and

registered FIR in present case. PW11 SI Dayanand and PW12 Inspector Sanjeev are investigating officers in present case.

6. PW8 Jamna Dass, father of deceased, was serving at Ropar in Punjab and his wife PW6 Samrita Devi had been shuttling between Ropar and native village and in their absence PWs 3 and 7 were attending deceased on her visits in her parental village and deceased also used to stay with them.

7. In his statement under Section 154 of Code of Criminal Procedure, PW3 has alleged continuous harassment, threat of solemnising second marriage of husband of deceased and not allowing the deceased to attend marriage of cousin by mother-in-law and there is sweeping allegation against other respondents that deceased committed suicide on account of harassment by all accused by naming them in the said statement. During examination in Court, prosecution witnesses alleged harassment of deceased for insufficient dowry, intervention of mother-in-law in telephonic conversation of deceased and not allowing deceased to use telephone by mother-in-law, demand of Rs.40,000/- and further demand of money after payment of Rs.40,000/-.

8. In his statement Ext.PW11/A, PW3 Karam Chand had alleged harassment by respondent Subhdra Devi stating that deceased was not sent to attend marriage of her cousin and was being threatened to solemnise second marriage of her son by respondent Subhdra Devi. However, in his deposition in Court, not only this witness but also PW6 Samrita Devi, mother of deceased, stated that deceased was being harassed by respondents for insufficient dowry. Both of them also stated that respondent Subhdra Devi did not allow deceased to interact on telephone calls. PW3 and PW6 though have alleged harassment of deceased by demanding dowry, but PW4 is silent about said demand and PW8 Jamna Dass, father of deceased, has also not alleged harassment on account of dowry, but he alleged that deceased Puja told him that her mother-in-law used to keep her in room and also did not allow her to make telephone calls. PW9 Mandeep Kumar, brother of deceased, is also silent about harassment of her sister on account of dowry. He only alleged that deceased had been telling him that her mother-in-law and father-in-law had been harassing her.

9. It has come in statement of PW6 that respondents Mohar Singh and Subhdra Devi had raised demand of Rs.40,000/- which was paid to them and thereafter more money was demanded by respondents. So far as harassment of deceased for insufficient dowry is concerned, there is no such allegation in his statement under Section 154 of Code of Criminal Procedure. This statement was made by PW3 who is paternal uncle of deceased residing in her parental village and whose house was regularly visited by deceased for the reason that her parents were not available in village for all the time as her father was serving at Ropar in Punjab. Therefore, deceased was having intimacy with PW3 and had there been harassment on account of insufficient dowry, the deceased definitely would have disclosed the said fact to him. But, at the time of making complaint at first instance immediately after death of deceased, no such allegation was levelled by him in his complaint and except the sweeping allegation, there is no allegation against other family members except respondent Subhdra Devi (mother-in-law of deceased) by stating that respondent Subhdra Devi was harassing deceased continously by extending threats of solemnisation of second marriage of her son and also not allowing her to attend the marriage of her cousin.

10. PW6 mother has alleged demand of dowry. However PW8 Jamna Dass, father of deceased, is silent about demand of dowry but only deposed about demand of Rs.40,000/- by respondents and further demand of money in December, 2004. No other demand has been disclosed by him in his statement, whereas his wife PW6 alleged demand of dowry, demand of Rs.40,000/- and also demand of further money after receiving Rs.40,000/- but on *Bhai Duj*. PW9 Mandeep Kumar, who is real brother of deceased, is also silent about demand of dowry. He only stated that when he was returning from house of respondents on 22/23rd December, 2004 after

inviting his sister, she had asked him to arrange money. He also made sweeping statement that after marriage respondents used to harass his sister. As per him, he visited house of in-laws of deceased 4/5 times to leave her there. He only referred one demand of money on 22/23rd December, 2004. Except this, he is completely silent about insufficient dowry, threat of solemnisation of second marriage, not allowing the deceased to attend the marriage of her cousin and also demand of Rs.40,000/- and payment thereof by his parents. He, real brother of deceased, in his cross examination has stated that his sister had not disclosed to him the purpose for which she demanded money and no payment of money was made in his presence by his father to the respondents. Despite being real brother of deceased, he has shown his ignorance about the fact that his sister and her husband had purchased a tractor. He further told that he had never made any complaint to his brother-in-law about alleged harassment of his sister by respondents. He has stated that deceased had visited their house for 4/5 times.

11. With respect to payment of Rs.40,000/- to the respondents, PW6 Samrita Devi firstly deposed that amount was paid to father-in-law of deceased, but thereafter she stated that the said amount was paid to mother-in-law of deceased. Whereas PW8 Jamna Dass stated that at the time of payment of amount, his daughter and her mohter-in-law were present and amount was given by him to his daughter, who had paid the said amount to her mother-in-law. PW6 has shown her inability to say that whether a sum of Rs.40,000/- was paid in cash or through cheque. PW3 and PW7 are totally silent about payment of Rs.40,000/- and also about payment of said amount to the respondents. PW9, brother of deceased, has not uttered a single word of payment of Rs.40,000/- to the respondents or any other demand by respondents. As per PWs 3 and 4, an amount of Rs.40,000/- was demanded during visit of their daughter in the month of August/September, 2004 which they have referred in their statements as a black month (Kala mahina, a customary name), which, is month of Bhadrapad of Indian calender. PW9 deposed about request of his sister to arrange money but thereafter he stated that his sister had not disclosed to him the purpose for which she was demanding money. As per PW6, demand of further amount was alleged to be made during visit of deceased on the occasion of *Bhai Duj,* which comes immediately after two days of Diwali. But in her cross examination PW6 was confronted with her statement recorded under Section 161 of Code of Criminal Procedure, wherein it was not recorded that respondents had demanded a sum of Rs.40,000/- which was told to her by deceased when she had come to parental house during *Kala* month (*Bhadrapad*) i.e. in August/September, 2004. She was also confronted with her statement made to police wherein she had not stated that amount of Rs.40,000/- was paid to mother-in-law of deceased. According to PW8, further amount was demanded in the last week of December i.e. one week prior to commiting suicide by deceased. PW8 in cross examination stated that he had not got recorded in his statement under Section 161 of Code of Criminal Procedure that respondents had demanded money during *Kala* month when his daughter had visited their house. He further stated that he did not remember that whether he had disclosed to police that his daughter had handed over Rs.40,000/-, given to her by him, to her mother-in-law. He further stated that he had not disclosed to police in his statement that respondents had demanded money from him. He had explained it by saying that he did not disclose this fact because he wanted his daughter to be settled in house of respondents. But he admitted that his statement was recorded only after the death of daughter. In these circumstances, the facts regarding demand of Rs.40,000/-, payment thereof and further demand of another amount are under clouds of suspicion.

12. PW8, father of deceased, only alleged that deceased disclosed to him during *Kala Mahina* (*Barsata* period i.e. rainy season) that her father-in-law and mother-in-law used to demand money and he had visited house of respondents to make payment of Rs.45,000/- to his daughter, which was handed over by his daughter to her mother-in-law and as both of them were present in house at that time and he alleged that this amount was demanded for purchase of tractor by respondents. PW6 and PW8 alleged that on the eve of *Bhaiduj* again deceased told that respondents are harassing her and are making demand of money. PW9 has also introduced a new incident of demand of money by respondents after payment of Rs.40,000/- in the month of December, 2004 from deceased. They also alleged that on 1st January, 2005, they made

telephonic call to respondents for greeting for New Year and the said phone was attended by mother-in-law of deceased but mother-in-law did not allow their daughter to talk with them and on that day, they again tried to contact their daughter on telephone, which was attended by her father-in-law, who also did not allow their daughter to talk with them and disconnected the call. PW6 stated that second call was also attended by respondent Subhdra and again she did not allow her to talk with her daughter. There is contradiction in statements of PW6 and PW8 on this issue. Further, prosecution has also not placed on record any record of telephonic details so as to corroborate the said fact.

13. Though in statement under Section 154 Cr.P.C., Ext.PW11/A, PW3 had not alleged harassment on account of insufficient dowry but in his statement in Court he alleged harassment on account of insufficient dowry. PW6 is silent about harassment on account of insufficient dowry but has alleged demand of money only and she stated that deceased had also disclosed to her that respondents were harassing her by taunting her. PW6, who is mother of deceased, had alleged harassment of deceased by taunting and not for want of sufficient dowry. PW7, who is wife of PW3, also remained silent about demand of dowry. She stated that deceased told her about harassment by respondents, whereupon she (this witness) had asked her to bear with such small matters as such things happen in the family. Deposition of PW7 indicates that deceased was feeling harassed not for insufficient dowry but for adjustment with her in-laws on small matters for which she was advised by PW7 to reconcile, who was real paternal aunt of deceased. PW8, father of deceased, in deposition in Court is also silent about harassment of her daughter for want of sufficient dowry. He only stated that deceased had told him about her harassment by her mother-in-law Subhdra. He is silent about harassment by father-in-law or other members of family and manner of harassment as per him as disclosed by deceased was that her mother-in-law used to keep her in a room and also did not allow her to make calls on telephone. PW8 deposed that he had asked mother-in-law of deceased not to harass deceased in such a way. The allegations of keeping deceased in a room have not been made by any other witness. PW9 brother of deceased has only stated that after marriage respondents used to harass her sister. He had not disclosed manner of harassment or reason for subjecting his deceased sister to harassment. Every witness is telling a different story contrary to statements of other prosecution witnesses. Therefore, allegation of harassment of deceased for insufficient dowry is also not inspiring confidence.

14. PW3, in his statement Ext.PW11/A and also in deposition in Court, alleged that mother-in-law of deceased used to threaten deceased Kanta that she would arrange second marriage of her son Davinder. But none of other witnesses including his wife PW7 and parents as well as brother of deceased (PW6, PW8 and PW9) had corroborated this allegation. In their statements there is not even a murmur about such threatening extended by mother-in-law of deceased.

15. PW3, in his statement Ext.PW11/A as well as in his deposition in Court, alleged that deceased was not allowed to attend marriage of her cousin by respondents posing that there were restrictions on the movement of deceased amounting to her harassment. In his own statement in examination-in-chief in Court he stated that respondents had never refused deceased Puja to visit their house but they did not send her to attend the marriage. The restriction on movements is also falsified from statements of PW6, PW7, PW8 and PW9 in which it has come on record that during first year of her marriage deceased had visited her parental village from five to seven times and also during the month of *Bhadrapad* (August-September), she stayed in her parental village for one or two months. Further, PW7 who is wife of PW3 is silent about not sending deceased to attend the marriage. PW9 is also silent about this restriction alleged to be imposed by respondents upon his sister. Not only this, her parents i.e. PW6 and PW8 are also conspicuously silent on this issue. Therefore, this allegation also seems to be untrue.

16. PW3, in his examination in chief, alleged that deceased had complained intervention in telephonic calls by her mother-in-law alleging that she was not allowing deceased to have telephonic conversation. But in his statement Ext.PW11/A, no such allegation was made. PW7 also stated that respondents did not allow deceased to have telephonic talk with them. Brother of deceased PW9 also remained silent on this issue. PW6 alleged that during telephonic conversation of deceased her mother-in-law used to stand with her and was not allowing deceased to talk freely as a result of which deceased was not able to talk with her relatives on parental side. PW6 further alleged that on the occasion of New Year i.e. 1.1.2005 she called her daughter in the morning but telephone was picked up by her mother-in-law who did not allow her to talk with her daughter and during day time between 11 AM to 12 Noon the same behaviour was repeated by mother-in-law of deceased. In her cross examination she admitted that at that time there was no telephone in their house. PW8 also alleged that on 1.1.2005 he made telephonic call to his daughter to greet for New Year but call was attended by mother-in-law of deceased and despite his request, she did not allow his daughter to talk with him and on the same day at about 3 PM the same thing was repeated by father-in-law of deceased. This version of these witnesses also does not inspire confidence as it is the case of prosecution itself as deposed by PW3 and PW7 that deceased had greeted them on occasion of New Year in the morning of 1st January 2005. It is specifically stated by PW3 that on 1.1.2005 in the morning at about 7.30 AM deceased Puja telephonically greeted them for New Year. PW6 stated that there was no telephone in their house at that time. PW3 Karam Chand, in his cross examination, admitted that Devender, husband of deceased Puja, had provided a mobile phone to deceased but self stated that it was used to be kept by her mother-in-law who had snatched it from her. PW6 denied that husband of deceased had purchased telephone for deceased 5/6 days before her death. PW8 expressed his ignorance about the fact that his son-in-law had provided one mobile phone to his daughter. From these depositions of these witnesses, the only inference which can be drawn is that they are not telling the truth.

17. PW4 Mohinder Singh, a resident of village of in-laws of deceased, was relative of deceased. He was called by mother-in-law of deceased when deceased had confined herself in a room bolting it from inside. This witness opened the door by using force and found deceased hanging with ceiling fan. He claimed that he had come to know from villagers that respondents were harassing and torturing the deceased and once or twice he had also prevailed upon respondents not to harass and torture the deceased. But respondents had not paid any heed to his advise resulting into suicide of deceased. He stated that deceased was regular visitor to his house but admitted that she never told him about any dispute. He further admitted that parents of deceased, her uncle, her aunt and villagers had never told him about harassment or torture of deceased.

18. PW5 Madan Lal, a co-villager of parents, deposed on the basis of hear-say information claimed to be received from them. In cross examination, he admitted that he had not disclosed in his statement to police that it was told to him and neighbours by parents of deceased that respondents had been harassing and torturing the deceased. He stated that except 1.1.2005 and at the time of marriage of deceased, he had never visited house of respondents.

19. It has also come in evidence as admitted by prosecution witnesses including investigating officers that respondents had provided a separate room to deceased in which articles belonging to her, gifted by parents during marriage, were also kept. Parents, PW3 and PW4 admitted this fact whereas brother PW9 denied the said fact and PW7, despite claiming that she had visited with deceased to her in-laws house, expressed ignorance about providing separate room by respondent. PW2 Investigating officer also admitted that articles belonging to deceased were returned to parents of deceased and a separate room was provided to deceased by her in-laws.

20. PW4 a relative of deceased was a resident of village of her in-laws. PW3 admitted that they had many relatives in village of in-laws of deceased. PW8 admitted that his aunt Kesari

Devi, who is grand-mother of deceased in relation, was also resident of village of in-laws of deceased. However, for the reasons best known to PW6, she refused to have any relative residing in village of in-laws of deceased. PW3, PW5 and PW6 also admitted that within five to seven days after death of deceased respondents had returned the articles of dowry of deceased to parents of deceased.

21. In his statement Ext.PW1/A and deposition in Court, PW3 claimed that there were blue spots of injury on private parts of deceased. However, other prosecution witnesses did not allege so in their statements. PW10 Dr.A.K. Sharma conducted post mortem of deceased had noticed injuries on and around neck of deceased but he specifically stated that no mark of struggle i.e. scratches, abrasions, finger nails marks were present on face, neck and other parts of body. Perusal of his statement made in Court and also post mortem report, it is found that there was no injury on body of deceased except the injury on and around the neck. Therefore, this claim of PW3 is also negated.

22. PW11 SI Dayanand admitted that it had come in their investigation that deceased had telephonic conversation with her parental family members in the morning of day of incident and that husband of deceased had gone back to his place of service one day before the death of deceased after spending his holidays. PW12 Inspector Sanjeev Chauhan another investigating officer admitted that as per his investigation no complaint was made by parents of deceased to husband of deceased about alleged harassment and parents of deceased were having cordial relations with her husband.

23. Respondents were chargesheeted under Sections 498-A and 306 read with Section 34 of Indian Penal Code for abetting deceased Kanta to commit suicide by subjecting her cruelty and harassment for their demands and also on account of willful conduct for driving her to commit suicide. However, it is not a case of prosecution that suicide by deceased was dowry death punishable under Section 304-B IPC. Sections 498-A and 306 of Indian Penal Code reads as under:-

> ***"498A. Husband or relative of husband of a woman subjecting her to cruelty.—Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.***
>
> ***Explanation.—For the purpose of this section, "cruelty" means—***
>
> ***(a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or***
>
> ***(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.***
>
> ***306 Abetment of suicide-If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment or either description for a term which may extent to ten years, and shall also be liable to fine."***

24. Cruelty, as explained in Explanations (a) and (b) of Section 498-A of Indian Penal Code, is an essential ingredient for punishing the accused under Section 498-A of Indian Penal Code. Under Explanation (a), there must be willful conduct of accused so as to either drive a woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of a woman, whereas under Explanation (b), cruelty is explained as harassment for unlawful demand from a woman by her in-laws or harassment on failure to fulfill

such demands. Section 306 of Indian Penal Code provides punishment for abetment to commit suicide. Abetment has been defined in Section 107 of Indian Penal Code, which reads as under:-

> ***"107. Abetment of a thing.—A person abets the doing of a thing, who—***
>
> ***(First) — Instigates any person to do that thing; or***
>
> ***(Secondly) —Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or***
>
> ***(Thirdly) — Intentionally aids, by any act or illegal omission, the doing of that thing.***
>
> ***Explanation 1.—A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.***
>
> ***Explanation 2.—Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitate the commission thereof, is said to aid the doing of that act."***

25. For holding an abetment in commission of a crime, it is necessary that accused either instigates to do a thing or engages with someone else in conspiracy for doing an act or for illegal omission or intentionally aids any act or illegal ommission. So far as engaging with someone else or intentionally aiding any act or illegal omission is concerned, in such eventuality, that act or omission must have taken place.

26. Legislature has also enacted Sections 113-A and 113-B of Indian Evidence Act permitting presumption as to abetment of suicide by a married woman when suicide is committed within a period of seven years and her in-laws had subjected her to cruelty (Section 113-A) and also as to dowry death when it is shown that soon before death of a woman, she had been subjected to cruelty or harassment for or in connection with any demand for dowry (Section 113-B). In Section 113-A by using words 'Court may presume' discretion to the Court has been provided to presume, having regard to all other circumstances of the case, that such suicide had been abetted by in-laws of a woman, whereas in Section 113-B, if cruelty or harassment soon before death for or in connection with any demand of dowry is proved, then Court shall presume that accused had caused dowry death which is punishable under Section 304-B IPC for which respondents have not been charge sheeted. However, provisions of these Sections are attracted only whence necessary ingredients required in these Sections are proved by prosecution beyond reasonable doubt. In present case, prosecution has miserably failed to discharge its onus.

27. Hon'ble Apex Court in recent judgment titled as ***Gurcharan Singh vs. State of Punjab, (2017)1 SCC 433*** has held as under:-

> ***"26. Though for the purposes of the case in hand, the first limb of the explanation is otherwise germane, proof of the willful conduct actuating the woman to commit suicide or to cause grave injury or danger to life, limb or health, whether mental of physical, is the sine qua non for entering a finding of cruelty against the person charged.***
>
> ***27. The pith and purport of Section 306 IPC has since been enunciated by this Court in Randhir Singh vs. State of Punjab (2004)13 SCC 129, and the relevant excerpts therefrom are set out hereunder.***

"12. Abetment involves a mental process of instigating a person or intentionally aiding that person in doing of a thing. In cases of conspiracy also it would involve that mental process of entering into conspiracy for the doing of that thing. More active role which can be described as instigating or aiding the doing of a thing is required before a person can be said to be abetting the commission of offence under Section 306 IPC.

13. In State of W.B. Vs. Orilal Jaiswal (1994) 1 SCC 73, this Court has observed that the courts should be extremely careful in assessing the facts and circumstances of each case and the evidence adduced in the trial for the purpose of finding whether the cruelty meted out to the victim had in fact induced her to end the life by committing suicide. If it transpires to the court that a victim committing suicide was hypersensitive to ordinary petulance, discord and differences in domestic life quite common to the society to which the victim belonged and such petulance, discord and differences were not expected to induce a similarly circumstanced individual in a given society to commit suicide, the conscience of the court should not be satisfied for basing a finding that the accused charged of abetting the offence of suicide should be found guilty."
(emphasis supplied)

28. Significantly, this Court underlined by referring to its earlier pronouncement in Orilal Jaiswal (supra) that courts have to be extremely careful in assessing the facts and circumstances of each case to ascertain as to whether cruelty had been meted out to the victim and that the same had induced the person to end his/her life by committing suicide, with the caveat that if the victim committing suicide appears to be hypersensitive to ordinary petulance, discord and differences in domestic life, quite common to the society to which he or she belonged and such factors were not expected to induce a similarly circumstanced individual to resort to such step, the accused charged with abetment could not be held guilty. The above view was reiterated in Amalendu Pal @ Jhantu vs. State of West Bengal (2010) 1 SCC 707.

29. That the intention of the legislature is that in order to convict a person under Section 306 IPC, there has to be a clear mens rea to commit an offence and that there ought to be an active or direct act leading the deceased to commit suicide, being left with no option, had been propounded by this Court in S.S. Chheena vs. Vijay Kumar Mahajan (2010) 12 SCC 190.

30. In Pinakin Mahipatray Rawal vs. State of Gujarat (2013) 10 SCC 48, this Court, with reference to Section 113A of the Indian Evidence Act, 1872, while observing that the criminal law amendment bringing forth this provision was necessitated to meet the social challenge of saving the married woman from being ill-treated or forcing to commit suicide by the husband or his relatives demanding dowry, it was underlined that the burden of proving the preconditions permitting the presumption as ingrained therein, squarely and singularly lay on the prosecution. That the prosecution as well has to establish beyond reasonable doubt that the deceased had committed suicide on being abetted by the person charged under Section 306 IPC, was emphasised." (at pages 441-443)

28. Present case is of no evidence against respondent No.3 and respondent No.5 for subjecting deceased with cruelty except vague assertions that all respondents used to harass deceased. No allegation of any kind of physical torture against respondents. Prosecution witnesses have alleged demand of money and also restrictions on telephonic calls by respondent No. 1 and respondent No. 4, but there are lot of material contradictions and descrepancies in their depositions hitting trustworthiness of prosecution witnesses. These allegations find no mention in elaborate statement of PW3 recorded under Section 154 Cr.P.C. It has also been alleged that mother-in-law snatched mobile phone and did not allow deceased to make telephonic calls but the said fact has really not established. Evidence led by prosecution to prove demand of money, payment thereof and re-demand, more particularly subjecting deceased to cruelty on that account is not satisfactory but cloudy. Though prosecution has also failed to establish restrictions on movement and telephonic calls of deceased by leading credible and convincing evidence. The evidence brought on record against respondents with regard to cruelty is absolutely sketchy and not convincing. Prosecution has failed to bring reliable evidence on record to show that respondents had conducted in such a manner to drive deceased to commit suicide. There is no evidence on record that soon before incident of suicide or even otherwise, respondents subjected deceased to cruelty. Facts and circumstances brought on record do not make out a case to bring it in ambit and scope of Section 113-A and/or 113-B of Indian Evidence Act. Before inferring presumptions, involving these Sections, prosecution has to prove the cruelty on part of accused and also nexus of conduct of accused with suicide committed by deceased. There is no evidence on record that respondents anyway instigated deceased to commit suicide or engaged with someone else or with each other in conspiracy or intentionally aided to any act or illegal omission so as to drive the deceased to commit suicide.

29. In view of above discussion the only inference which can be drawn is being aggrieved by suicide committed by deceased, her parents and other relatives from parental side had lodged the complaint firstly against mother-in-law and thereafter involved all the respondents. There is not an iota of evidence, ever murmur in statements of prosecution witnesses about harassment of deceased by her brother-in-laws. The evidence with regard to allegations levelled against mother-in-law and father-in-law is also not trustworty and credible. On scrutiny of evidence on record, version of prosecution witnesses does not inspire confidence. Therefore, learned trial Court has committed no error in arriving at a conclusion that prosecution has failed to prove its case beyond reasonable doubt. Learned trial Court has completely and correctly appreciated the evidence on record and no ground for interference has been made out in present appeal. The view taken by learned trial Court is plausible and warrants no interference.

30. Acquittal of respondents has strengthen the presumption of innocence in favour of them and to rebut the same onus lies heavily on prosecution. From evidence on record it cannot be said that acquittal of respondents has caused miscarriage of justice or resulted into travesty of justice. Therefore, appeal is dismissed being devoid of any merit including all pending miscellaneous application(s), if any. Bail bonds furnished by respondents are discharged and record of learned trial Court be sent back forthwith.

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