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SUBJECT INDEX

'C'

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.

Title: Chain Singh Vs. Piar Singh and others Page-328

Code of Civil Procedure, 1908- Section 96- A suit for redemption was filed, which was decreed and a preliminary decree for redemption was passed- it was directed that the principal money be depositedalong with interest @ 6% per annum within three months– an appeal was preferred, which was allowed on the ground that plaintiffs had failed to deposit the mortgage amount within the specified period – aggrieved from the decree, second appeal has been filed- held in appeal that the judgment and decree were passed on 16.12.1995- period of three months was granted to deposit the money – however, a stay order was issued by the Appellate Court prior to the expiry of the period – there was no willful disobedience on the part of the plaintiffs in not complying with the decree- the Appellate Court had wrongly allowed the appeal- judgment and decree of appellate court set aside.

Title: Tripta Devi and ors.Vs. Chuni Lal and ors. Page-581

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 State – appeal dismissed. (Para-7 to 9)

Title: Leela Dutt and another Vs. State of H.P. and others Page-139

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 aside and the suit of the plaintiff dismissed.

Title: Bhagat Ram Vs. Bal Krishan Page- 264

Code of Civil Procedure, 1908- Section 114- An application for seeking permission to produce evidence was filed which escaped the notice of the Court- it was contended that additional evidence was necessary for adjudication of the dispute pending between the parties – the appeal could not have been decided without deciding the application – hence, it was prayed that order be reviewed and the appeal be decided afresh- held that jurisdiction to review an order or judgment should be exercised sparingly - a party cannot seek review of judgment on merits- review is permissible on the discovery of new evidence or when there is some error or mistake apparent on record – the dismissal of appeal without considering the application under Order 41 Rule 27 is an error apparent on the face of record – petition allowed – the judgment recalled and matter posted for hearing on merits.

Title: Sauju and ors.Vs. Gulab Singh &ors. Page-725

Code of Civil Procedure, 1908- Section 151- The evidence of the defendants was ordered to be closed but certified copies of judgment and decree passed in previous suit were received in evidence – it was contended that the document could not have been received without recalling the order- held that the certified copies of the judgment and decree are per se admissible- permission was sought to produce the documents, which was granted – therefore, no illegality was committed by the exhibition of the documents- petition dismissed.

Title: Singho Ram and others Vs. Balbir Singh and others Page-726

Code of Civil Procedure, 1908- Order 6 Rule 17- An application for amendment of the objection petition was filed, which was dismissed- subsequently, the objection petition was also dismissed by the Trial Court- aggrieved from the order, present revision has been filed- held thatthe order passed in the application had merged in the final order- if the order on application was wrong, it would affect the final order as well–revision allowed.

Title: Surjit Singh Vs. Harmohinder Singh & others Page-736

Code of Civil Procedure, 1908- Order 6 Rule 17- An application for amendment was filed pleading that defendants started raising construction near the house of the plaintiff during the course of hearing 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)

Title: Dilbag Singh Vs. Surjeet Singh and another Page-199

Code of Civil Procedure, 1908- Order 6 Rule 17- Order 8 Rule 6A- A civil suit for recovery of arrears of rent along with interest and also the use and occupation charges was filed – separate applications for pleading a counter-claim and amendment of written statement were filed by the tenant – the applications were dismissed by the Trial Court- aggrieved from the order, present revision has been filed – held that earlier an order of eviction was passed against the tenant on the ground of arrears of rent- he had not filed any counter-claim and had not taken any plea resisting the petition- the order of eviction was successfully executed- the tenant is estopped from raising any counter-claim– further the application for amendment could have been filed after the commencement of trial on establishing sufficient cause for not seeking the amendment earlier - the documents sought to be filed with the counter-claim were also available earlier- the counter-claim is also barred by the provision of Order 2 Rule 2 of C.P.C. – petition dismissed.

Title: Naresh Sharma Vs. Shiv Ram Sharma Page-537

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.

Title: Jai Pal and others Vs. The State of HP and others (D.B.) Page-98

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.

Title: Tulsi Ram Vs. State of H.P. & others Page-222

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.

Title: Vijaya Shakti Gupta Vs. Rakesh Khanna Page-223

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.

Title: Kamal Kant Bhatia & another Vs. Roop Singh Verma Page-216

Code of Civil Procedure, 1908- Order 21 Rule 30- An execution for recovery of money was filed- the notice was served upon the daughter of J.D.- however, the process server did not record that J.D. could not be found at the residence within a reasonable time – hence, the service was not proper- however, the ex-parte order was not sought to be set aside by the J.D. - further, the property was ordered to be sold and the notice required under Order 21 Rule 66 (2) was not served – however, the compliance of Order 21 Rule 54(1A) was made- hence, no prejudice was caused to the J.D. – petition dismissed.

Title: Parma Nand Vs. Kasturi Lal & others Page-488

Code of Civil Procedure, 1908- Order 21 Rule 37- Petitioner/judgment debtor was ordered to be detained in civil imprisonment for a period of two months- aggrieved from the order, the present revision petition has been filed – held that the judgment debtor can be ordered to be detained in civil imprisonment on service of show cause notice to him and after giving an opportunity of being heard- judgment debtor pleaded that he is a man of no means and is not in a position to satisfy the decree – there is no evidence that judgment debtor had disposed of his property after institution of the suit or had neglected to pay the decretal amount intentionally and deliberately – merely because judgment debtor does not have any movable and immovable property is not sufficient to detain him – order set aside.

Title: Ashok Kumar Vs. Social Mutual Benefits Company Ltd. Page-477

Code of Civil Procedure, 1908- Order 22 Rule 4- Respondent No.30 died during the pendency of the appeal before the Appellate Court, while the respondent No.38, 50 and 51 had died during the pendency of the civil suit before the Trial Court- the judgments passed by the Courts are nullity – hence, they are set aside and matter remanded to the Appellate Court.

Title: Jai Kishan and others Vs. Mehar Chand and others Page-668

Code of Civil Procedure, 1908- Order 26 Rule 9- An application for demarcation was filed pleading that the defendant had encroached upon suit land by raising construction during the pendency of suit – he had also cut a Biuhal tree- application was filed to determine the extent of encroachment – demarcation was conducted by the Field Kanungo after filing the application- the demarcation report was affirmed by the Competent Authority – Trial Court dismissed the application on the ground that there was no necessity of demarcation by the Courtin view of the demarcation having been conducted by the Revenue Authorities, - aggrieved from the order, present petition has been filed- held that once the demarcation has been conducted, no permission to demarcate the land afresh can be granted – Trial Court had rightly dismissed the application – petition dismissed.

Title: Jai Chand Vs. Jagdish Chand Page-877

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.

Title: Satya Devi Vs. Jagir Singh and others Page-146

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.

Title: Bhisham Lal Garg Vs. Hardei and Ors. Page-28

Code of Civil Procedure, 1908- Order 43 Rule 1(d)- An ex-parte decree was passed against the appellant – they filed an application for setting aside ex-parte decree along with an application for condonation of delay – the application for condonation of delay was dismissed – aggrieved from the order, present appeal was filed – it was contended that appeal is not maintainable- held that an appeal lies against the order dismissing the application for condonation of delay- objection overruled and appeal ordered to be listed for arguments.

Title: M/s Isotech Electrical & Civil Projects (P) Ltd. and anotherVs. M/s Sturdy Industries Ltd. (D.B.) Page-815

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.

Title: Kameshwar Sharma and others Vs. State of H.P. and others (D.B.) Page-352

Code of Civil Procedure, 1908- Order 47 Rule 1- Section 114- An application was filed for review of the judgment passed by the Court vide which the appeal filed by the petitioner was dismissed with a cost of Rs.10,000/- - it was pleaded that there is an error apparent on the face of record as the Court had wrongly concluded that allotment was not questioned – held that review proceedings are not similar to the appeal – an error which is self-evident can be called to be an error apparent on the face of record – the error which is to be established by long drawn reasoning is not an error apparent on face of record – it was contended that the order was challenged in a civil suit before Learned Civil Judge- however, no declaration was sought regarding its invalidity – the Court had rightly concluded that the order was not challenged- the review petition is an abuse of the process of the Court- hence, dismissed with the cost of Rs.50,000/-.
Title: Balbir Singh Vs. State of H.P. and others (D.B.) Page-662

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 month in 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.
Title: Bala Devi Vs. Ved Prakash Page-252

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.
Title: Anil Sharma Vs. Alka Sharma and others Page-42

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.
Title: Chain Singh Vs. Kavita Page-239

Code of Criminal Procedure, 1973- Section 169- An FIR was registered for the commission of offences punishable under Sections 419, 420, 467, 468 read with Section 34 of I.P.C – the police filed a cancellation report- notice was issued to the complainant but complainant had died prior to issuance of the notice- notice was issued to general power of attorney- held that a general power of attorney had expired on the death of the complainant and general power of attorney could not have represented the complainant during the proceedings – order set aside.
Title: Hitesh Bisht and others Vs. State of H.P. Page-812

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 had 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.

Title: State of Himachal Pradesh Vs. Mohinder Singh and others Page-153

Code of Criminal Procedure, 1973- Section 228- Police filed a charge sheet for the commission of offence punishable under Section 307 of I.P.C- the Court framed the charge- aggrieved from the order, present revision has been filed- held that the Court is not required to make a formal opinion that accused is certainly guilty of the commission of offence– the Court had not properly appreciated the material on record- revision allowed- order of the Trial Court set aside.

Title: Varun Bhardwaj Vs. State of H.P. Page-847

Code of Criminal Procedure, 1973- Section 256-The Magistrate dismissed the complaint 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.

Title:Golf Link Finance and Resorts Pvt. Ltd. Vs. Jagdev Singh Page-348

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/-.

Title: Achhar Singh Vs. Kapoor Singh and others Page-402

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.

Title: Anju Thakur Vs. State of H.P. & ors. Page-115

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.
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.
Title: Veerdeen @ Biru Vs. State of Himachal Pradesh Page-278

Code of Criminal Procedure, 1973- Section 439- Accused has been charged for the commission of offences punishable under Sections 364-A, 420 and 342 read with Section 120-B of I.P.C and Section 66 (d) of I.T. Act, 2000- an FIR was registered on the basis of complaint made by A stating that he was made to travel to Delhi on the pretext of taking him abroad but he was taken to Bagdogra and forced to part with a sum of Rs.22 lakhs- he was kept in confinement and was physically assaulted- petitioner seeks bail on the ground that witnesses examined by the prosecution do not establish the charged offences and he is in custody for more than one year, he is permanent resident of Himachal Pradesh and is a student having bright future- held that the grant or refusal of bail lies in the discretion of the Court- the primary purposes of bail are to relieve the accused in imprisonment, to relieve the State of the burden of keeping him pending trial and to keep the accused constructively in the custody of the Court- accused has wrongly stated that he is permanent resident of Himachal Pradesh- he is actual resident of Orissa – petitioner was traced and brought back from his native place after the lapse of two years- there is nothing on record to establish that petitioner has got roots in the society-hence, he is not entitled to the concession of the bail- petition dismissed.
Title: Amit Jha Vs. State of Himachal Pradesh Page-527

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the accused for the commission of offences punishable under Sections 376, 354-A, 328 and 506 of I.P.C. and Sections 4 and 8 of POCSO Act – the petitioner filed an application seeking bail pleading that he is innocent and has been falsely implicated – he is behind bar for a long time and he be released from custody – held that the Court has to consider nature of crime, seriousness of the offence, character of the evidence, circumstances of the case, possibility of securing the presence of the accused, apprehension of the witnesses being tampered with and the larger interest of the public – prosecutrix had made material improvements in her statement- no injury was found on her person- there was delay in recording the FIR – hence, the bail application allowed and petitioner ordered to be released on bail of Rs.25,000/- with one surety for the like amount.
Title: Rahul Thakur @ Lucky Vs. State of Himachal Pradesh Page-684

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.
Title: Bhoop Ram Garg Vs. United India Insurance Company Ltd.and others
Page-124

Constitution of India, 1950- Article 226- A process for filling 500 temporary posts of Transport Multipurpose Assistantswas initiated – it was contended that notification and rules are in violation of Section 45 of Road Transport Corporation Act, 1950- the applications were allowed and the process was held to be bad – aggrieved from the order, the present writ petition has been filed – held that preliminary objections were raised, which went to the root of the case- the locus standi of the applicants was challenged – no discussion was made regarding the objection- the writ petition allowed, order of the Tribunal set aside and matter remanded to the Tribunal for disposal in accordance with law.
Title: Himachal Road Transport Corporation and another Vs. Bhupinder Singh and another (D.B.)
Page-818

Constitution of India, 1950- Article 226- An application was filed for placing on record the identity card and other documents to show that the status of the petitioner was not of a trainee but of a workman – the Labour Court did not pass any order on the application but non suited the petitioner on the ground that he was unable to prove his status as a workman - held that the Labour Court should have passed an order on the application and should not have non-suited the petitioner without considering his application- writ petition allowed and award of the Labour Court set aside- matter remanded with a direction to decide the same afresh after passing an order on the application.
Title: Mukesh Kumar Vs. M/s Ansysco through its MD Page-814

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.
Title: Srijan Sharma Vs. Union of India and Ors. Page-241

Constitution of India, 1950- Article 226- Deceased was standing- he was caught by electric wire, which was hanging very low- deceased was shifted to Hospital but he succumbed to the injuries- a writ petition was filed for seeking compensation- held that where there is prima facie evidence of negligence, the Court cannot grant relief in exercise of writ jurisdiction- deceased was a boy of 13 years whose life was curtailed due to accident- there is violation of right of life- respondent stated that deceased had died due to his own negligence but a person undertaking an activity involving hazardous or risky exposure to human life, is liable to compensate other person for the injury sustained by the other person – contributory negligence is no defence in such situation **-** considering the age of the deceased, respondent directed to pay a compensation of Rs.6 lacs with interest @ 7.5% per annum.

Title: Rekha Vs.The H.P. State Electricity Board & another Page- 558

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.

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- **Industrial Disputes Act, 1947-** Section 25- The workman was engaged as field man in the year 1989 on daily wage basis- he was posted as conductor in a truck- he made a representation against his postings and his services were terminated – a reference was made and the Industrial Tribunal dismissed the claim of the workman- aggrieved from the order, present writ petition was filed- held thatthe workman had failed to prove that he had completed 240 days in the preceding 12 months period- it was proved by the respondents that workman was habitual absentee and did not respond to the notices issued by the Corporation to join his duties and his services were rightly terminated – the Writ Court has limited jurisdiction while deciding the writ petition and it cannot re-appreciate the evidence – the Industrial Tribunal had rightly dismissed the reference- writ petition dismissed.

Title: Prem Singh Vs. H.P. State Forest Development Corporation Page-432

Constitution of India, 1950- Article 226- Petitioner applied for an appointment as anganwari worker – petitioner was declared selected while respondent No.4 was kept in the waiting list – respondent No.4 preferred objection before Competent Authority – a writ petition was filed, in which a direction was issued to decide the representation of respondent No.4 within two months – Deputy Commissioner set aside the appointment of the petitioner on the ground that marks were not awarded properly – aggrieved from the order, present writ petition has been filed- held that the reasoning of the Deputy Commissioner on the basis of broad guidelines is not sustainable as no guidelines were brought to the notice of the Court – there is no practice or law to bind interview committee to award certain minimum percentage of marks in an interview- the Court will not sit in appeal over the assessment of an individual candidate- writ petition allowed- order of the Deputy Commissioner set aside.

Title: Reeta Devi Vs. State of Himachal Pradesh & others Page-788

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.

Title: Raj Kumar Vs. Bharat Sanchar Nigam Limited and others (D.B.) Page-101

Constitution of India, 1950- Article 226- Petitioner has done his B.Sc. in Medical Laboratory Technology from Janardhan Rai Nagar, Rajasthan Vidyapith University, Udaypur- he applied for registration but the registration was declined – aggrieved from the order of non-registration, the present writ petition was filed – the respondent pleaded that the university is not competent to run extension Centre/study Centre/learning Centre outside the State of its origin – the University did not have recognition to run the course in the year 2005 – the recognition was given in the year 2007-08- the degree obtained by the petitioner is not valid – held thata person cannot be registered as a paramedical practitioner unless he possesses a recognized qualification- Centre in Kurukeshtra was an authorized Distance Education Study Centre of the University - ex post facto approval/recognition was granted till 2005 – thereafter provisional approval was granted for the year 2007-08 – the qualification gained by the petitioner between 2005 to 2007 cannot be said to be recognized- respondent No.2 had rightly declined the recognition to the petitioner – writ petition dismissed.

Title: Arvind Sharma Vs. State of Himachal Pradesh and another Page-585

Constitution of India, 1950- Article 226- Petitioner has purchased the land from the previous owners who were inducted as non-occupancy tenants and had become the owners on the commencement of H.P. Tenancy and Land Reforms Act- the petitioner constructed a site office and a store after obtaining permission from Municipal Corporation, Nahan- the respondent directed the Jawans to obstruct the passage leading to the land in dispute – demarcation was conducted and the path was found to be owned by M.C., Nahan- army jawans trespassed into the suit land and demolished the site office, store and retaining wall – FIR was registered – the petitioner restarted the construction but it was also demolished - a civil suit was filed, which was decreed- proceedings for eviction of the petitioner were initiated under Public Premises (Eviction of Unauthorized Occupants) Act, 1971 and an order of eviction was passed – an appeal was filed, which was dismissed- aggrieved from the order, present writ petition has been filed- held that the land was in the ownership of the State Government - proprietary rights could not have been conferred upon the tenants – the plea of the petitioner that he had acquired ownership from the previous owner is not tenable- the petitioner is a trespasser – civil court has already held the Government to be the owner and liberty was granted to initiate proceedings for eviction of the tenants in accordance with law – the appeal was dismissed – hence, the proceedings for eviction under the Act are maintainable – the orders passed by the estate officer and appellate authority are legal – writ petition dismissed.

Title: Manish Kumar Aggarwal Vs. Union of India &ors.(D.B.) Page-700

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.

Title: Dalip Kumar Vs. H.P. Public Service Commission (D.B.) Page-267

Constitution of India, 1950- Article 226- Petitioner was appointed as a clerk in H.P. Vidhan Sabha Secretariat- he was promoted and was placed against the post of Superintendent (Ex-Cadre) in the year 2000- Himachal Pradesh Vidhan Sabha Secretariat (Recruitment and Condition of Service) Amendment Rules, 2008 were notified in the year 2008 – eight posts of Section Officers were to be filled on the basis of seniority – petitioner was promoted as Superintendent Grade-II on 1.7.2009 – respondent No.2 who was shown at Serial No.6 was promoted as Section Officer w.e.f. 1.4.2008 on notional basis – notional promotion of respondent

No.2 was regularized and he was promoted on regular basis as Section Officer w.e.f. 1.10.2010 – respondent No.2 was wrongly promoted against ST category – respondent No.1 stated in the reply that the promotion was made in accordance with 13 points roster and in accordance with the instructions issued by Government from time to time – held that actual representation of incumbents belonging to different categories in a cadre isto be determined at the time of initial operation of the roster – any excess representation is to be adjusted at the time of future recruitment – respondent no.1 had wrongly adjusted a candidate belonging to ST category against the post meant for unreserved category – ST candidate was to be adjusted against 7threplacement point and was adjusted against 6th replacement point – respondent No.2 could not have been adjusted against the reserved post for ST as it was already occupied by ST candidate- the petitioner was not unfit and was entitled to promotion – writ petition allowed- direction issued to consider the case of the petitioner for promotion in accordance with law and if the petitioner is found entitled to promotion, to grant him the consequential relief.
Title: Ran Singh Vs. Himachal Pradesh Vidhan Sabha, Shimla and another
Page-594

Constitution of India, 1950- Article 226- Petitioner was appointed as anganwadi worker- her appointment was quashed and set aside in an appeal filed by respondent No.6- the petitioner filed an appeal, which was initially allowed but the order was set aside in review- aggrieved from the order, the present writ petition has been filed- held that Divisional Commissioner had set aside his order in review but there is no provision of review in the scheme – writ petition allowed and the order passed by Divisional Commissioner set aside.
Title: Ruma Devi Vs. State of H.P.& others Page-564

Constitution of India, 1950- Article 226- Petitioner was appointed as Lecturer – she applied for extraordinary leave for three years and did not turn up to join her services after 15.3.1999 – she claimed the arrears on account of revision of pay till the date of service –held that no representation was made by the petitioner seeking revision of her pay- no explanation was given for the delay on the part of the petitioner – writ petition dismissed.
Title: Neelam Sharma Vs. Baba BalakNath Temple Trust & Others Page-542

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.
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.

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.

Title: Achhri Bibi Vs. State of Himachal Pradesh and others Page-359

Constitution of India, 1950- Article 226- Petitioner was selected as a drawing master by PTA – respondent No.5 filed a complaint before Inquiry Committee stating that merit was ignored at the time of selection – the Inquiry Committee concluded that the proper procedure was not adopted by the PTA and held the appointment of the petitioner to be bad- an appeal was filed before Deputy Commissioner, which was dismissed- a writ petition was filed and the matter was remitted to the Inquiry Committee who concluded that petitioner had secured 8th position while the complainant had secured 6th position – the appointment was not proper – aggrieved from the report, present writ petition was filed – held that the appointment of the petitioner is not in accordance with the direction issued by the Government – the Inquiry Committee had rightly concluded that petitioner was not the most meritorious person- writ petition dismissed.

Title: Kamal Kishore Vs. State of H.P. & Others Page-533

Constitution of India, 1950- Article 226- Petitioner worked as Balwadi teacher in Balwadi Centre, Bathmana- respondent No.3 sanctioned an Anganwadi Centre – applications were invited from the eligible candidates- petitioner submitted her candidature but the respondent No.3 refused to entertain her application- respondent No.6 was appointed by way of transfer- notification was issued to fill up the post, which had fallen vacant due to the transfer- she filed an appeal, which was rejected as time barred- a further appeal was filed, which was also dismissed as time barred- aggrieved from the orders, present writ petition has been filed- held that clause 4 of the terms and conditions reads that under the ICDS programme there is no provision of transfer of Anganwadi Workers/ Helpers as these are honorary workers- it has been stated that in case of marriage of Anganwadi workers or helpers, if any vacancy exists, she would be transferred or adjusted in that Anganwadi Centre - only a female who is resident of the Village/Ward, where Anganwadi Centre is located or who belongs to feeder area is eligible for appointment- adjustment of respondent No.6 by way of transfer is arbitrary and colourable exercise of power- once the discretionary power had been exercised by adjustment, it was not incumbent to adjust her again- application for second adjustment is contrary to guidelines – petition allowed- direction issued to initiate the process to fill up the post of Anganwadi worker.

Title: Manju Sharma Vs. State of Himachal Pradesh and others Page-483

Constitution of India, 1950- Article 226- Petitioners were appointed as Safaiwalas in Rashtriya Military School, Chail – they were on probation of two years – they were issued warnings for unauthorized absence –their services 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.

Title: Narender Kumar Vs. Union of India and others (D.B.) Page-16

Constitution of India, 1950- Article 226- Respondent is a consumer of electricity supplied by the petitioner and had agreed to pay the tariff levied upon it in accordance with the prevalent rules – the petitioner sought demand and energy charges from the respondent- a dispute was raised before Forum for Rederessal for Grievances of HPSEB Consumers, who decided that the final claim raised by the petitioners is not based upon actual figures and facts - aggrieved from the order, present writ petition has been filed – held that respondent had agreed to pay the electricity tariff as per the prevalent rules - it had sought assured contract demand of 754.08 KVA– demand and energy charges were in accordance with the prevalent rates – there is no infirmity in the demand of charges from the respondent- petition allowed.

Title: HPSEB and others Vs. Agro Industrial Packaging India Ltd. Page-875

Constitution of India, 1950- Article 226- Respondents invited expression of interest for construction, operation/maintenance and running of parking complexes in Shimla under Public Private Partnership Mode (PPP) – petitioners submitted the expressions of interest which were accepted – sanction for construction of complex was accorded subject to conditions - a dispute arose, which was referred to Arbitrator who commenced proceedings – separate writ petitions were filed by the petitioners – held that the matter was referred to the sole arbitrator in accordance with the request for proposal – the arbitrator was bound to proceed in accordance with law and to pronounce the award within stipulated time – reference was made prior to the amendment in Arbitration and Conciliation Act and will not apply to the pending arbitral proceedings – writ petition is not maintainable and proceedings in accordance with Arbitration and Conciliation Act have to be taken regarding the arbitration matters- the High Court does not have the power to intervene in the proceedings/orders passed by Arbitral Tribunal – petition dismissed.

Title: M/s P K Construction Co and another Vs. The Shimla Municipal Corporation and others (D.B.) Page-706

Constitution of India, 1950- Article 226- The father of the petitioner was having a shop-cum-residence, which was acquired for the construction of Bhakra Dam Project – compensation of Rs.556/- was paid to him and he fell in the definition of oustee – the petitioner claimed that he was entitled for allotment of plot in new Bilaspur Township but no plot was allotted to him - hence, he filed the writ petition- held that no document was placed on record to show that the petitioner had raised the issue from 1979 till 30th August, 2011, the date of filing of writ petition – the petition is hopelessly barred by time – the relief cannot be granted to a person who does not approach the Court within time- petition dismissed.

Title: Durga Dass Sharma Vs. State of H.P. & Others Page-530

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.

Title: Prem Singh Chauhan Vs. The State of H.P. and others (D.B.) Page-380

Constitution of India, 1950- Article 226-Respondent No.4 was engaged by the petitioner – a dispute arose between different societies, which was ultimately referred to Divisional Commissioner- work was re-distributed and the petitioner was left with no work – a decision was taken to remove respondent No.4- a demand was raised by respondents No. 4 and 5– Labour Inspector-cum-Conciliation Officer directed the petitioner to re-engage the respondents No. 4 and 5– aggrieved from the order, present writ petition has been filed – held that conciliation had not taken place and the Conciliation Officer has no adjudicatory powers- his duties are administrative and not judicial – petition allowed – order of the Labour Officer set aside.

Title: The Kohinoor Sarvahitkari Parivahan Sahkari Sabha Samiti Vs. State of Himachal Pradesh and others Page-630

Constitution of India, 1950- Article 226-The Notification providing calendar for preparation of electoral roll has been issued- any aggrieved person can approach the authority for inclusion/exclusion of the names from the rolls – parties can file their claims/objections, which would be considered by the authority concerned – petition disposed of.

Title: Om Prakash Vs. State Election Commission Himachal Pradesh & others (D.B.) Page-882

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.

Title: Tripta Devi Vs. Sub Divisional Officer (Kangra) Page-197

Contempt of Courts Act, 1971- Section 12- A consent order was passed by the Writ Court directing the respondents to convene a general house in the presence of Assistant Registrar of the Co-operative Societies after following due process of law- a contempt petition was filed pleading that the respondents have not obeyed the order passed by the Writ Court – held that the respondent had taken all possible steps for convening of general house – the petitioners frustrated the managing committee meeting so that general house meeting could not be held – the respondents have not violated the order passed by writ court- Contempt petition dismissed.

Title: Shyam Lal & Others Vs. Praveen Verma & Others (D.B.) Page-437

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.
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.
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.
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 an 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.
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.
Title: New India Assurance Company Ltd. Vs. Bhim Chhring Maghar & ors.
Page-99

Employees Compensation Act, 1923- Section 4- S was employed as additional foreman-cum-driver with H.P. Power Corporation Limited – he died while discharging his duties- Commissioner assessed the compensation as Rs.2,71,120/- and awarded the same without interest- aggrieved from the award, present appeal has been filed- held that where an employer is in default in paying due compensation, the Commissioner shall award the interest @ 12% per annum or higher – the interest of 12% per annum is statutory and has to be awarded along with compensation- appeal allowed- interest awarded @ 12% per annum from a date after one month when the same fell due.

Title: Hazar Mani Vs. The Secretary, H.P. State Electricity Board & another

Page-641

'H'

H.P. Excise Act, 2011- Section 39- A vehicle was seized for transporting 7 bottles of English Wine - An application for release of vehicle was filed, which was dismissed by the Trial Court- aggrieved from the order, present revision has been filed- held that there is provision of confiscation of the vehicle under Section 60 of the Act – however, this power can be exercised only after final adjudication of the case – this provision is not relevant while deciding the interim custody of the vehicle - there is no bar for the interim release of the vehicle – the order set aside and direction issued to the Trial Court to decide the same afresh.

Title: Kuldeep Singh Vs. State of H.P. Page-670

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.

Title: Ashok Thakur and another Vs. M.C. Shimla and others Page-226

H.P. Urban Rent Control, 1987- Section 14- An eviction petition was filed on the ground of arrears of rent, the premises being more than 100 years old having outlived its life, the premises having become unfit and unsafe for human habitation, the tenant having sublet the premises and the premises being required bonafide for reconstruction, which cannot be carried out without vacating the building – the petition was allowed by the Rent Controller- an appeal was filed, which was allowed and the order of the Rent Controller was set aside- held in revision that the eviction petition has been filed for eviction of the tenant from the ground floor but no eviction petition was filed for eviction of the tenant residing on the upper floor- the premises is owned by various co-owners and all of them have not been impleaded- the Appellate Authority had not taken into consideration the relevant factors while deciding the appeal- revision allowed and order of Appellate Authority set aside.

Title: Anil Kumar Vs. Vijay Kumar and another Page-632

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 Malto Dextrine, Malto Dextrine 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.

Title: M/s. Sukhjit Starch and Chemicals Ltd. Vs. The Agriculture Produce Market Committee, Una, Himachal Pradesh, through its Secretary Page-362

Himachal Pradesh Panchayati Raj Act, 1994- Section 163- Petitioner was elected as ward panch- election was challenged before authorized officer by filing an election petition- petitioner was held to be disqualified to hold the post- an appeal was filed, which was dismissed- aggrieved from the order, present writ petition has been filed- held that election petition filed before the prescribed authority was beyond the period of limitation as election petition can be filed within thirty days only- authorized officer erred in entertaining the petition after the period of limitation- writ petition allowed and the order of disqualification of the petitioner set aside subject to payment of cost of Rs.10,000/-.

Title: Veena Devi Vs. State of Himachal Pradesh and others Page-523

Hindu Adoption and Maintenance Act, 1956- Section 18 and 23- Trial Court granted interim maintenance of Rs.1,000/- per month to each of the plaintiffs/applicants- aggrieved from the order, the present petition was filed- held thatTrial Court had relied upon the pleadings to grant interim relief- although issues have been framed, parties were not called upon to produce the evidence – the reliance placed upon the pleadings is improper as in case of dismissal of main suit, recovery proceedings would have to be initiated – petition allowed- order of the Trial Court set aside.

Title: Sanjay Kumar Vs. Sumna Kumari & others Page-464

Hindu Marriage Act, 1955- Section 13- Wife filed a petition on the ground that her husband is a known patient of Schizophrenia and had treated herwith cruelty – the husband pleaded that he was suffering from depression, which is curable – the petition was dismissed – aggrieved from the order, the present appeal has been preferred- held that wife has to prove that the disease with which the spouse is suffering is not curable and it is not possible to live with the ailing spouse – the Doctor was not examined to prove the nature of ailment – it was not proved that the disease was not curable – the respondent suffered first attack after 4½ years of marriage, which reveals that respondent was not suffering from the attacks regularly – the husband is prepared to live with the petitioner in a matrimonial home- the divorce petition was rightly dismissed- appeal dismissed.

Title: Suchita Bhaik Vs. Rajesh Kumar Bhaik Page-452

'I'

Income Tax Act, 1961- Section 260-A- Respondent is an assessee and a credit institution within the meaning of Section 2(5A) of the Interest Tax Act, 1974- assessee failed to furnish the return within the stipulated period- a notice was issued on which return was filed – an assessment order was passed raising tax demand – Commissioner of Income Tax set aside the assessment - an appeal was filed which was dismissed as infructuous – however, penalty was imposed upon the assessee by the Deputy Commissioner of Income Tax – an appeal was filed and the penalty was modified – separate appeals were filed against this order- the Appellate Authority cancelled the order of penalty – aggrieved from the order, an appeal was filed before the High Court – the matter was remanded to Assessing Authority, who imposed the fresh penalty- appeal was preferred against this order, which was dismissed – further appeal was allowed – aggrieved from the order of Appellate Authority, the present appeal has been filed- held that penalty can be imposed against assessee in case the Assessing Officer comes to a definite conclusion that assessee had concealed particulars of chargeable interest or had furnished inaccurate particulars of such interest- the return was accepted in its entirety – advance tax was paid by the assessee before the closure of Financial year – return was delayed on account of non-availability of return form - there was no concealment on the part of the assesse- assesse had furnished complete particulars of income in the profit and loss account – the Tribunal had passed the order rightly- appeal dismissed.

Title: Commissioner of Income Tax, Shimla Vs. M/s H.P. State Co-operative Bank Ltd., Shimla (D.B.) Page-797

Indian Forest Act, 1927- Section 52-A- The vehicle of the respondent was seized for transporting the forest produce – an application for release of vehicle was filed before Authorized Officer-cum-Divisional Forest Officer, which was rejected- a revision was filed before Additional Sessions Judge, which was converted into an appeal and the order of Authorized Officer was set aside – aggrieved from the order, present revision has been filed- held that no report of seizure was made to the Authorized Officer – a challan was filed before the Magistrate who had jurisdiction to release the vehicle – order of release can be passed by a Court which had taken cognizance of the charge sheet- however, in the peculiar facts and circumstances of the case, the order of Authorized Officer upheld.

Title: State of Himachal Pradesh Vs. Prakash Chand Page-765

Indian Partition Act, 19- Section 4- Plaintiff filed a civil suit seeking partition of the property pleading that the property is jointly owned by large number of co-sharers and it is difficult to enjoy the same- the suit was decreed by the Trial Court- an appeal was filed, which was allowed – held in second appeal that when a partition is sought, the entire joint property owned by the co-owners must be brought into hotchpot for division amongst the co-sharers –however, partial partition is permissible in certain circumstances provided that no prejudice is caused to the other side – the Appellate Court had made a general observation that the suit was bad for partial partition and no prejudice was pointed out –appeal allowed – judgment of the Appellate Court set aside and that of the Trial Court restored.

Title: Pradeep Chand Sharma and others Vs. Budhi Devi and others Page-545

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.

Title: State of Himachal Pradesh Vs. Hardev Singh & ors. Page-213

Indian Penal Code, 1860- Section148, 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 complainant's car 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.

Title: Subhadra KumariVs. State of Himachal Pradesh Page-413

Indian Penal Code, 1860- Section 279- Accused was driving a tanker with a high speed in a rash and negligent manner – the accused was tried and acquitted by the Trial Court – an appeal was filed, which was dismissed- held in revision that there are contradictions regarding the vehicle being driven by the witnesses – this fact was ignored by the Courts – revision allowed – orders of the Courts set aside.

Title: Ravinder Kumar Vs. State of H.P. Page-784

Indian Penal Code, 1860- Section 279 and 304-A- Accused was driving a Maruti van in a rash and negligent manner and hit P who died at the spot – the accused was tried and convicted by the Trial Court- an appeal was filed which was also dismissed – held in appeal that the prosecution version was proved by PW-1 - PW-4 and PW-5 did not support the prosecution version – however, none of the witnesses had identified the accused – owners said that he had employed three persons as drivers and the possibility of some other person driving the vehicle at the time of accident cannot be ruled out- it was not proved that rashness and negligence of the accused had caused the accident- revision allowed- accused acquitted.

Title: Karam Chand Vs. The State of Himachal Pradesh Page-756

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.
Title: State of H.P.Vs. Akhilesh Kumar Page-32

Indian Penal Code, 1860- Section 279 and 337- Complainant and her aunt were going to temple in a bus – when the complainant tried to get down from the bus, the conductor whistled - the complainant fell down and sustained injuries – the accused was tried and acquitted by the Trial Court- held in appeal that presence of PW-2 was suspect due to which the whole prosecution case also became suspect- it was admitted by the complainant in cross-examination that there was a heavy congestion of the passengers – possibility of complainant having fallen down cannot be ruled out –the Trial Court had correctly appreciated the evidence- appeal dismissed.
Title: State of H.P. Vs. Hukam Chand and another Page-576

Indian Penal Code, 1860- Section 279 and 338- Accused was driving HRTC Bus in a rash and negligent manner – he struck driver side of the bus with a wall due to which minor R sustained injury on his arm – the accused was tried and convicted by the trial Court- an appeal was preferred, which was dismissed- held in revision that photographs show that there was sufficient space for driving the bus after keeping sufficient distance from the wall – there are scratches on the back side of the bus starting from the rear tyre of the bus – scratches were also visible on the wall against which the driver side of the bus was struck – this shows that the bus was taken to the extreme right side of the Road due to which child sustained injuries – it was the duty of the accused driving the bus to keep in mind the possibility of the passengers having some part of their body outside of the bus – rashness and negligence of the accused was duly proved- revision dismissed.
Title: Jiwa Nand Vs. State of Himachal Pradesh Page-878

Indian Penal Code, 1860- Section 279, 337 and 201- Accused was driving a truck in a rash and negligent manner – the complainant was riding a scooter- the truck hit the scooter from the side as a result of which the complainant sustained injuries- accused was tried and convicted by the Trial Court- an appeal was preferred, which was allowed- held in appeal that it was duly proved that accused was driving the truck - accused had sped away from the spot which is inconsistent with his innocence – the Appellate Court had wrongly held that the identity of the accused was not established – the appeal allowed- judgment of Appellate Court set aside and judgment of Trial Court restored.
Title: State of H.P. Vs. Pradeep Singh Page-579

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.
Title: State of H.P. Vs. Hari Singh Page-309

Indian Penal Code, 1860- Section 279, 337 and 338- Accused was driving a bus – he took it to the wrong side and the bus fell down – the complainant sustained injuries – the accused was tried and acquitted by the Trial Court- held in appeal that according to mechanical expert the steering and braking system of the vehicle had suffered break down– he was not cross-examined at all- hence, the defence version is probable – Trial Court had rightly acquitted the accused- appeal dismissed.

Title: State of H.P. Vs. Bhim Singh Page-502

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.

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 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.

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 had 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.

Title: Prem Chand Vs. State of Himachal Pradesh Page-417

Indian Penal Code, 1860- Section 279, 337 and 338-Accused was driving a truck in a rash and negligent manner and hit the car causing hurt to the occupants of the car- the accused was tried and acquitted by the Trial Court- held in appeal that the injured has supported the prosecution version – his testimony was not shaken in cross-examination- no mechanical defect was found in the vehicle- the Trial Court had not properly appreciated the evidence- appeal allowed and judgment of Trial Court set aside- accused convicted of the commission of offences punishable under Sections 279, 337 and 338 of I.P.C.

Title: State of Himachal Pradesh Vs. Roop Lal Page-733

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 version 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 Courts set aside and the accused acquitted of the charged offences.

Title: Diwan Chand Vs. State of Himachal Pradesh Page-1

Indian Penal Code, 1860- Section 279, 337, 338 and 304-A- Accused was driving a bus in a rash and negligent manner – the bus hit a car due to which one occupant of the car sustained injuries and another died at the spot- the accused was tried and acquitted by the Trial Court- held in appeal that the vehicles were moved after the accident and site plan does not reflect the position at the time of accident– however, the pieces of glass were found in the middle of the road, which shows that bus was being driven on inappropriate side of the road – identity of the accused was established – the Trial Court had not properly appreciated the evidence- appeal allowed- judgment of the Trial Court set aside.

Title: State of H.P.Vs. Narender Chand Page-627

Indian Penal Code, 1860- Section 279, 337, 338, 304-A and 201-Accused was driving a truck in a rash and negligent manner – the truck hit S, who sustained injuries below the abdomen – the accused was tried and acquitted by the Trial Court- held in appeal that the testimonies of the prosecution witnesses did not establish that accused had an opportunity to see the deceased and despite that he had hit the deceased– the author of the FIR was not examined- no blood stain was found on the tyre of the truck – the prosecution case became suspect due to all these infirmities – the Trial Court had properly appreciated the evidence- appeal dismissed.

Title: State of Himachal Pradesh Vs. Manohar Lal Page-449

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 abused the accusedunder the influence of liquor - 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 his non-examination – extra judicial confession and recovery were not established – the Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed.

Title: State of H.P. Vs. Dalip Kumar (D.B.) Page-34

Indian Penal Code, 1860- Section 302- Dead body of wife of accusedwas found- it was revealed that accused had murdered the deceased by giving multiple blows with a rod- accused was subjecting the deceased to cruelty for more than 10 years- accused was tried and convicted by the Trial Court- held in appeal that incident was witnessed by PW-14 who called PW-1, PW-2, PW-3, R and also K to the spot- they did not support the prosecution version- witnesses to the recovery also did not support the prosecution version- Trial Court had relied upon the circumstantial evidence to convict the accused, whereas, it was a case of direct evidence – it was not obligatory for the accused to explain the presence of the blood stains- further, prosecution witness has stated that accused took the deceased on his lap and tried to wake her, which would explain the presence of blood on the person of the accused - the possibility of involvement of others cannot be ruled out- it was not established that weapon of offence contained the blood of the deceased- prosecution evidence did not prove the guilt of the accused- Trial Court had erred in convicting the accused- appeal allowed and accused acquitted.

Title: Rajender Kumar Vs. State of Himachal Pradesh (D.B.) Page-566

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.

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.

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.

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.

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.

Title: State of H.P. Vs. Bhag Singh Page-148

Indian Penal Code, 1860- Section 326 and 506- Complainant and accused are residing in the same building – the room of the accused is above the room of the complainant - complainant noticed that water was dripping from the room of the accused , which was falling on her bed – the complainant went to the room of the accused to complain about this fact- the accused started abusing her – her husband came on the spot – the accused took out a knife and stabbed the husband of the complainant – the accused was tried and convicted for the commission of the offence punishable under Section 326 of IPC – an appeal was preferred, which was dismissed – held in revision that medical evidence proved the injuries – the statement of accused was not recorded prior to recovery and the recovery is not admissible – there are contradictions in the statements of PW-2 and PW-6- report of the FSL did not say that the blood found on the knife belonged to the accused – the possibility of sustaining injury by falling upon nails cannot be ruled out – the Courts had wrongly convicted the accused – appeal allowed – judgments of the Courts set aside- accused acquitted of the offences charged.

Title: Dharam Chand Vs. State of H.P. Page-480

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 .

Title: Kamal Kishore Vs. State of Himachal Pradesh Page- 293

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 had stated that he had lost gold chain and money, but 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.

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.

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.

Title: State of H.P. Vs. Mahinder Singh Page-170

Indian Penal Code, 1860- Section 363,366 and 376- Prosecutrix was returning from School – she was kidnapped by the accused with an intent to compel her to marry him- she was sexually assaulted against her will in the house of the uncle of the accused- police was informed- prosecutrix and accused were recovered – the accused was tried and acquitted by the Trial Court- aggrieved from the judgment, present appeal has been filed- held that prosecutrix was proved to be aged 16 years 11 months and 12 days on the date of incident – Medical Officer found the evidence of sexual intercourse – the prosecutrix had not complained to any person in the bus that she was being taken away forcibly– prosecutrix had a mobile phone but did not complain to any person – hence, her consent was proved – she had left the home voluntarily- the Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed.

Title: State of Himachal Pradesh Vs. Subhkaran (D.B.) Page-831

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.

Title: Bihari Lal Vs. State of H.P. (D.B.) Page-158

Indian Penal Code, 1860- Section 363, 366, 376(2) and 506(1)- **Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989-** Section 3(2)(v)-**Protection of Children from Sexual Offences Act,, 2012**- Section 6-Prosecutrix belongs to scheduled caste- accused used to harass her on the way to school- one day the accused took her to the upper storey of his sweet shop and raped her under threat – the accused took one photograph of her and used to abuse her by threatening to show the photograph – the accused and another boy came to the house of the prosecutrix and threatened the prosecutrix and her sister - they raised alarm on which people gathered- the accused was tried and convicted by the Trial Court for the

commission of offence punishable under Section 363- the accused was acquitted of the commission of remaining offences- aggrieved from the acquittal, the State filed the present appeal- held that there are inconsistencies in the statement of the prosecutrix and her mother regarding the incident, which were not explained – the prosecution case became suspect due to these discrepancies – no explanation was provided for the delay in lodging the FIR – sister of the prosecutrix was not examined and no explanation was provided for the same – the Trial Court had taken a reasonable view while acquitting the accused – appeal dismissed.

Title: State of Himachal Pradesh Vs. Gorkha alias Vijay Kumar (D.B.) Page-727

Indian Penal Code, 1860- Section 376-Prosecutrix left the house at 9:30 A.M. on the pretext that her result was to be declared on internet – she returned at 1:30- P.M. but did not disclose the reason for late arrival – Subsequently, she told that accused had taken her to hotel during day time and had raped her – the accused was tried and acquitted by the Trial Court- held in appeal that prosecutrix did not support the prosecution version – the testimonies of the parents were not satisfactory – the prosecutrix was more than 16 years of age at the time of incident – Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed.

Title: Roma SharmaVs. Sameer Beg and another (D.B.) Page-761

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.

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.

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.

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- Deceased was married to the son of the respondent – respondent used to taunt the deceased for not delivering a male child and for not giving gifts- respondent used to quarrel with the deceased on insignificant issues- the deceased got burnt – the accused was tried and acquitted by the Trial Court –aggrieved from the order, the present appeal has been filed – held that witnesses except PW-16 turned hostile – there are discrepancies in the testimony of PW-16 – the deceased had also made contradictory statements in the dying declaration due to which the dying declaration cannot be relied upon – an inference can be drawn that the deceased may have put herself on fire on account of daily quarrel but a suspicion cannot take the place of proof – the abetment or cruelty has not been established – the prosecution had failed to prove its case beyond reasonable doubt and the Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed.

Title: State of Himachal Pradesh Vs. Bimla Devi (D.B.) Page-508

Indian Penal Code, 1860- Section 498-A and 306- Deceased was married to the accused – the accused started harassing the deceased for not delivering a child and for not bringing sufficient dowry- a son was born but the harassment continued – the deceased committed suicide- the accused was tried and acquitted by the Trial Court- aggrieved from the order, present appeal has been filed- held in appeal that prosecution has to establish instigation by the accused to commit suicide or conspiracy with others for the commission of the suicide- PW-2 and PW-3 did not support the prosecution version- testimonies of PW-1 and PW-8 are vague and there is no reference to the time, place and manner of harassment – the statements are not sufficient to prove the prosecution version- Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed.

Title: State of Himachal Pradesh Vs. Raj Kumar (D.B.) Page-825

Indian Penal Code, 1860- Section 498-A and 306 read with Section 34- Deceased S was married to accused M – the accused treated her with cruelty – she consumed poison and committed suicide – the accused was tried and acquitted by the Trial Court- held in appeal that parties were married for 9 years – according to prosecution cruelty started after 5-6 months of the marriage- the cause of cruelty was not given – the deceased was asked to return to her matrimonial home, which shows that that the situation was not grave otherwise Panchayat would not have asked her to return to her matrimonial home – the children of the deceased were not associated to prove the cruelty – the Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed.

Title: State of H.P. Vs. Madan Lal &ors.(D.B.) Page-505

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.
Title: Varinder Singh Vs. State of Himachal Pradesh &ors. (D.B.) Page-319

Indian Penal Code, 1860- Section 498-A- Complainant was married to the petitioner – petitioner and the other accused started maltreating the complainant- she was not provided with clothes and shoes and when she demanded them, petitioner and other accused misbehaved with her – she was told that she had not brought any dowry – she replied that her parents were poor and unable to give anything – petitioner and other accused started beating the complainant - the matter was reported to the police- petitioner and other accused were tried - petitioner was convicted by the Trial Court while other accused were acquitted- an appeal was preferred, which was dismissed – aggrieved from the judgment, present petition has been filed – held that the Court has very limited power to re-appreciate the evidence while exercising revisional jurisdiction- however, where there is failure of justice or misuse of judicial mechanism, it is the duty of the High Court to prevent miscarriage of justice – no specific allegation of cruelty was made against the petitioner- no specific allegation of demand of dowry was made against the petitioner – there was delay in reporting the matter to the police for which no explanation was provided – the allegations were made against all members of the family and once the members of the family were acquitted, there was no occasion for convicting the petitioner on the same set of evidence – the Courts had wrongly convicted the accused – revision allowed and accused acquitted.
Title: Ramesh Chand Vs. State of Himachal Pradesh Page-687

Indian Penal Code, 1860- Section 498-A read with Section 34- Prosecutrix was married to accused- she was being tortured for not bringing sufficient dowry- dressing table, sewing machine, refrigerator etc. were given to the accused by the father of the prosecutrix, who is a labourer – the accused continued to harass her and demanded Rs. 2 lacs for enabling the husband of the prosecutrix to start a business –the accused was tried and convicted by the Trial Court- an appeal was preferred, which was allowed and the accused was acquitted- held in appeal that there was delay in recording of FIR, which was not properly explained – no specific time of making the demand was given – the evidence of the prosecutrix that accused attempted to assault her is not trustworthy- the Appellate Court had rightly acquitted the accused- appeal dismissed.
Title: State of Himachal Pradesh Vs. Sanjiv Kumar and others Page-838

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.
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.
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.
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.
Title: Jeet Singh Vs. Tilak Raj Page-280

Indian Succession Act, 1925- Section 63- Plaintiff pleaded that K had executed a Will in her favour– defendant No.1 executed a sale deed in favour of defendant No.2 in order to deprive the plaintiff of her rightful property – mutation was wrongly attested in favour of the defendant on the basis of the forged will – defendant No.1 pleaded that K was his legally wedded wife and had executed a Will in her sound disposing state of mind – suit was dismissed by the Trial Court- an appeal was filed which was dismissed – held in second appeal that version of the plaintiff that K was unmarried was not proved – the version of the defendant that K was married to defendant No.1 was duly proved – the Will of the plaintiff was shrouded in suspicious circumstances while the Will of the defendant was duly proved- the Courts had dealt with the matter in a proper manner- appeal dismissed.
Title: Loti Vs. Balak Ram & Another Page-648

Indian Succession Act, 1925- Section63- Plaintiffs filed a civil suit pleading that plaintiffs and proforma defendants are owners in possession of the suit land – the Will set up by defendant No.1 is a fake document- the suit was decreed by the Trial Court- an appeal was filed, which was

dismissed – held in second appeal thatthe Will was executed on 3.2.1986 and was registered on 5.2.1986 – the witnesses appeared before the Court in the year 2000 after more than 14 years – human memory can fade with the passage of time and due allowance has to be given to this fact – however, the Will was not produced at the time of attestation of mutation – the reason for disinheriting natural heir was not given - beneficiary had taken an active participation in the execution of the Will – scribe of the Will was not examined – attesting witness has not stated that the testator had put his signatures in his presence- the Courts had rightly appreciated the evidence- appeal dismissed.
Title: Gurbax Singh Vs. Kaushalya Devi & Ors. Page-806

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.
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.
Title: Pawan Kumar Vs. Himachal Pradesh State Electricity Board through its Secretary & Anr.
Page-306

Industrial Disputes Act, 1947- Section 25- K was engaged by Nagar Panchayat on 5.9.1999- he was disengaged on 30.6.2004 – he approached the authority under Industrial Disputes Act, which set aside the disengagement and directed re-engagement with consequential benefits- aggrieved from the said order, present writ petitionhas been filed – held that K was engaged for a work, which was continuously available – however, the nomenclature was contract assignment – some other person was engaged after dis-engaging K- the benefit of the legislation cannot be denied by using clever phraseology – no error was committed by the Labour Court by directing the re-engagement of K – however, keeping in view the fact that the work has been outsourced, direction issued to pay compensation of Rs.1 lac to K with interest @ 7.5% per annum from the date of award of Labour Court.
Title: Nagar Panchayat Santokhgarh Vs. Kamal Dev Page-678

Industrial Disputes Act, 1947- Section 25- The workman was employed as a helper on daily wage basis for a period of one month – the employment continued and the workman completed 240 days each year during the period of employment – his services were terminated by an oral order without assigning any reason- a reference was made and the Labour Court ordered the reinstatement of the workman with seniority and continuity of service – however, he was not held entitled for the back wages– aggrieved from the award, present writ petition has been filed- held that workman was employed on 12.12.1995 – an office order regarding the appointment being co terminus with the tenure of chairman was issued on 5.2.1997 –the order issued in 1997 cannot govern the appointment made in the year 1995 - workman had completed more than 240 days in

a calendar year and a notice under Section 25-F was required to be issued prior to the termination of his services – no notice was issued – the award was rightly passed – High Court has limited jurisdiction to re-appreciate the facts while deciding writ petition - no error of law was pointed out - writ petition dismissed.
Title: HP State Civil Supplies Corporation Ltd. Vs. Presiding Judge and another
Page-642

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 has 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.
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 practitioners - 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.
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.
Title: General Manager, Northern Railway Vs. Surinder Kumar & others Page- 167

Land Acquisition Act, 1894- Section 30- The land was acquired and a reference was made under Section 30 – Reference Court declared respondent No.3 to be the person entitled for compensation on the basis of entries in the jamabandi and missal hakiat – held in appeal that a reference was made under Section 28-A of the Act – petition under Section 30 was not forwarded to the reference Court – hence reference court had no jurisdiction to adjudicate the entitlement of respondent No.3 – it was wrongly held that respondent No.3 was gair maurusi over the acquired land – appeal allowed and the award of the reference Court modified.
Title: Umesh Chand Thakur & others Vs. Land Acquisition Collector and others
Page-496

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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.
Title: Oriental Insurance Company Limited Vs. Ramku and others Page-188

Motor Vehicles Act, 1988- Section 149- Claimant sustained injuries in an accident involving two cars - it was specifically pleaded that the drivers of both the cars were driving the vehicles rashly and negligently, which caused the accident – the Tribunal held both the drivers to be rash and negligent – the insurer had not led any evidence to absolve itself of liability – the injured had remained on leave for more than six months – the Tribunal had awarded just compensation- appeal dismissed.
Title: Deputy Commissioner, Bilaspur Vs. Mahender Kumar & others Page-605

Motor Vehicles Act, 1988- Section 149- Deceased died in a motor vehicle accident- claimants filed a claim petition, which was allowed- aggrieved from the award, present appeal has been filed contending that deceased was travelling as gratuitous passenger and Insurer is not liable – held that claimants had specifically pleaded that deceased had boarded the vehicle with his luggage and other household goods – this fact was admitted by the owners – thus, it was rightly held by the Tribunal that Insurer is liable – appeal dismissed.
Title: Oriental Insurance Company Vs. Sunita Devi and others Page-622

Motor Vehicles Act, 1988- Section149- **Insurance Act, 1938**- Section 64-VB- Insurer contended that the premium was paid by means of cheque which was dishonoured 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.
Title: The National Insurance Co. Ltd. Vs. Swarna Devi and another Page-80

Motor Vehicles Act, 1988- Section 149- It was contended by the Insurer that licence of the owner/insured-cum-driver had expired on 17.12.2007 – accident took place on 6.1.2008 and the Tribunal wrongly held the Insurer to be liable – held that as per proviso to Section 14 of Motor Vehicles Act, 1988 licence continues to be effective for a period of 30 days from the date of its expiry – the accident had taken place within 30 days from the date of expiry and the licence was valid – there was no requirement of endorsement – the insurer was rightly saddled with liability- appeal dismissed.
Title: Oriental Insurance Company Vs. Achari Devi and others Page-614

Motor Vehicles Act, 1988- Section 149- It was contended that driver did not possess a valid driving licence – held that owner/insured –cum- driver had a valid and effective driving licence to drive the offending vehicle – endorsement was not required and insurer was rightly saddled with liability- appeal dismissed.
Title: Bajaj Allianz General Insurance Company Limited Vs. Shrimati Reshma and others
Page-603

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.
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.
Title: Reliance General Insurance Company Limited Vs. Bulo Devi and others
Page-74

Motor Vehicles Act, 1988- Section149- 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.
Title: National Insurance Company Limited Vs. 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.
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.
Title: Karam Singh Vs. M/S The Kangra Ex-Serviceman TPT and 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.
Title: Oriental Insurance Company Limited Vs. 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 numbers- 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.
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.
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.
Title: ICICI Lombard General Insurance Company Limited Vs. Preeti and others Page-62

Motor Vehicles Act, 1988- Section 166- The Tribunal held that the deceased had contributed to the cause of accident as he was carrying two pillion riders in violation of Section 128(1) – held that Section 128 clearly provides that the driver of two wheeled motorcycle shall not carry more than one person in addition to himself – the deceased had violated this provision by carrying two pillion riders- the Tribunal had rightly saddled the insurer of the vehicle with liability to the extent of 70% - however, Tribunal fell in error in deducting 1/3rd towards personal expenses – claimants were four in number and 1/4th was to be deducted towards personal expenses – his salary was Rs.19,400/- per month after deducting 1/4th amount towards personal expenses, claimants have suffered loss of dependency to the extent of Rs.14,550/- per month – age of the deceased was 42 years and multiplier of 14 is applicable – thus, claimants are entitled to Rs.14,550 x 12 x 14= Rs. 24,44,400/- under the head loss of income- claimants are also entitled to Rs.10,000/- each under the heads loss of love and affection, loss of consortium, loss of estate and funeral expenses – since the deceased had contributed towards the accident to the extent of 30%, therefore, compensation of Rs.17,39,080/- awarded in favour of the claimants with interest @ 7.5% per annum.
Title: Sabita Sharma and others Vs. Amrit Pal Singh and others Page-623

'N'

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 1.5 kg. charas – the accused was tried and acquitted by the Trial Court- held in appeal thatthere are cuttings and over writings in record, which have not been properly explained – the witnesses had not given the detail of material particulars – PW-5 supported the prosecution version – the defence version was probablized by defence witnesses- the prosecution evidence creates doubts about the fairness of investigation – the Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed.

Title: State of Himachal Pradesh Vs. Mahesh Verma (D.B.) Page-518

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 450 grams charas – the accused was tried and convicted by the Trial Court- held in appeal that the testimonies of prosecution witnesses are credible and confidence inspiring – independent witnesses have not supported the prosecution version- however, they admitted their signatures on the seizure memos and are estopped from denying the contents of the same – samples were connected to the contraband recovered – option was given to the accused to get his premises searched by Executive Magistrate or Gazetted Officer – however, the accused consented for search by the police- the prosecution case was proved and the accused was rightly convicted- appeal dismissed.

Title: Fanki Ram Vs. State of H.P. Page-466

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 3 kg 600 grams charas- the accused was tried and convicted by the Trial Court- held in appeal that testimonies of eye witnesses are corroborating each other –the prosecution version cannot be doubted due to the fact that witnesses have turned hostile – the accused has to establish his innocence under Section 35 of N.D.P.S. Act, which he hasfailed to do- link evidence is complete- the prosecution has proved the guilt of the accused beyond reasonable doubt and the accused was rightly convicted- appeal dismissed.

Title: Jog RajVs. State of Himachal Pradesh (D.B.) Page-781

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 1.460 kg. of charas- the accused was tried and convicted by the Trial Court- held in appeal that police officials supported the prosecution version – the fact that independent witness had turned hostile is not sufficient to doubt the prosecution version- minor contradictions will also not make the prosecution case suspect – the plea of alibi was not established –link evidence was proved – the Trial Court had rightly appreciated the evidence – appeal dismissed.

Title: Umed Singh Vs. State of H.P. (D.B.) Page-794

N.D.P.S. Act, 1985- Section20- 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.

Title: Nageshwar Mehto Vs. State of Himachal Pradesh Page-141

Negotiable Instruments Act, 1881- Section 138- Accused and his mother approached the complainant offering to sell their land- an agreement was executed and an amount of Rs.1 lac was paid as earnest money – it was found subsequently that there was some litigation pertaining to the land and the agreement was cancelled – the accused subsequently obtained an amount of Rs.10,000/- as loan and issued a cheque for Rs.1,10,000/- - the cheque was dishonoured- the amount was not paid despite notice – hence, the complaint was filed before the Magistrate who

convicted and sentenced the accused – an appeal was preferred, which was allowed on the ground that the accused was unrepresented on the date of examination and the proceedings were not proper – the matter was remanded to the Trial Court for fresh adjudication- held in revision that no application was filed for deferring the cross examination of the complainant and his witnesses- no grievance was raised that accused was prejudiced by the absence of his counsel – no prayer was made to appoint a counsel as amicus curiae, which means that accused was satisfied with the proceedings– revision allowed and order of Appellate Court set aside.

Title: Yangain Singh Vs. Vijay Kumar Page-744

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 cheque 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.

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.

Title: Gulab Singh Shandil Vs. Vidya Sagar Sharma Page-179

Negotiable Instruments Act, 1881- Section 138- Accused was convicted by the Trial Court for the commission of offence punishable under Section 138 of N.I. Act- an appeal was filed, which was dismissed for non-appearance of the counsel – held that the Court should not have dismissed the appeal for want of appearance and should have issued the warrants to procure the presence of the appellant – revision allowed and order of the Appellate Court set aside.

Title: Kishori Lal Vs. Gian Chand & another Page-593

Negotiable Instruments Act, 1881- Section 138- Complainant advanced a sum of Rs.60,000/- to the accused- the accused issued a post dated cheque 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.

Title: Tula Ram Vs. Prem Singh Page-110

Negotiable Instruments Act, 1881- Section 138- Complainant handed over Rs.60,000/- to the accused and accused issued a cheque for the return of the amount- cheque was dishonoured – notice was issued but the amount was not paid – accused was tried and convicted by the Trial Court- an appeal was filed, which was partly allowed and the sentence was modified – held in revision that the power of revision can be exercised, when there is failure of justice or misuse of judicial mechanism or where procedure, sentence or order is not correct- issuance of cheque and signature on the same were admitted – advancing of money was also proved – the defence taken by the accused that cheque was issued as a security was not established – the accused was rightly convicted in these circumstances - revision dismissed.

Title: Sunil Dutt Vs. Mohan Lal Page-659

'P'

Partition Act, 1893- Section 4- Plaintiff filed a civil suit for partition of the joint property – the suit was decreed by the Trial Court- an appeal was filed, which was dismissed – held in second appeal that jamabandi shows that parties are recorded to be the joint owners – oral evidence also proved the joint ownership – prior partition was not proved – the preliminary decree was rightly passed- appeal dismissed.

Title: Govind Ram (Deceased) through LRs. Vs. Beli Ram and others Page-840

Public Premises (Eviction of Unauthorized Occupants) Act, 1971- Section 4 and 9- Various eviction petitionswere filed by Union of India seeking eviction and recovery of damages on account of unauthorized use and occupation of railway land situated in Shimla- the petitions were partially allowed and the appeals were dismissed- aggrieved from the order, writ petitions were filed- held that the respondents are in possession prior to the commencement of the Public Premises Act –the provision of the Act cannot be made applicable to them – the eviction petition were not maintainable – liberty granted to the petitioners to proceed against the respondents in accordance with the law.

Title: Union of India Vs. M/S Krishna Coal Company Page-740

'R'

Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013- Section 24- The Land was acquired, compensation was deposited and possession was taken – the acquisition was challenged by the petitioner pleading that the land was not utilized and amount of compensation was not paid to the claimant – held that the Act was notified on 1.1.2004 before which date all actions were completed by the acquirer and beneficiaries- the actions taken under the earlier Act are saved by the saving clause – writ petition dismissed.

Title: Surjit Singh Vs. Land Acquisition Collector, H.P. Housing and Urban Development Authority, Shimla Page-601

'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 there was no mens rea was probable – the Trial Court had properly appreciated the evidence – appeal dismissed.

Title: State of H.P. Vs. Ramesh Chand Page-254

Specific Relief Act, 1963- Section 20- Plaintiff entered into an agreement with the defendant for the sale of land for a total consideration of Rs.44,000/- - an amount of Rs.30,000/- was paid as part payment- the defendant failed to execute the sale deed in favour of the plaintiff – the suit was decreed by the Trial Court- an appeal was filed, which was dismissed – held in second appeal that there was no requirement of obtaining prior permission from TCP – plaintiff had presented himself before sub-registrar and had issued a legal notice for the execution of the sale deed – sub-registrar had directed the parties to appear before him on the next day and the plaintiff failed to appear before the sub-registrar - the Courts had wrongly held that plaintiff was ready and willing to perform his part of the agreement – appeal allowed- judgments and decree passed by the Court set aside and suit of the plaintiff dismissed.

Title: Tara Chand and others Vs. Madan Lal Page-768

Specific Relief Act, 1963- Section 34 and 38- Plaintiff filed a civil suit seeking declaration that order of ejectment passed by the Collector is wrong, illegal, null and void and he be declared owner in possession of the suit land – the suit was decreed by the Trial Court- an appeal was filed, which was allowed- held in appeal that the First Appeal is a valuable rights of the parties – the First Appellate Court is required to address itself to all issues and decide the appeal by giving reasons – no reasons were given for differing with the findings of the Trial Court – documents relied upon by the defendants were not referred – the judgment set aside- matter remanded to the Appellate Court for a fresh decision.

Title: Joginder Singh & another Vs. State of H.P. Page-606

Specific Relief Act, 1963- Section 34- Plaintiff filed a civil suit pleading that suit land is ancestral and coparcenary property of the parties – sale deeds executed in respect of the same are illegal, null and void and not binding on the rights of the parties – the suit was decreed by the Trial Court- an appeal was filed, which was partly allowed- aggrieved from the judgment, present appeal has been filed – held that the suit land was proved to be ancestral – the land was alienated without any legal necessity – the Courts had rightly appreciated the evidence- appeal dismissed.

Title: Chandermani Vs. Mia Ditta and others Page-750

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 efflux 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.

Title: Karam Singh Vs. Piara Singh and others Page-406

Specific Relief Act, 1963- Section 34- Plaintiff pleaded that half share of the suit land was owned by K and remaining half share was owned by D- plaintiff was recorded as tenant without the payment of rent with the consent of the owners – original owner D died and his daughter 'C' gifted her 1/4th share in favour of the plaintiff – plaintiff remained in possession as tenant over the remaining share- defendant purchased half share and became co-owner- after the death of

the plaintiff, his legal heirs succeeded to him- defendant is threatening to interfere with the suit land on the basis of revenue entries- suit was dismissed by the Trial Court- an appeal was filed, which was also dismissed- held in second appeal that the original owner was survived by four co-sharers including the plaintiff- one co-sharer had gifted 1/4th share to the plaintiff- plaintiff became owner of half share- entries were made during settlement after proper verification – original plaintiff was not recorded as a tenant after 1958-59 and the name of the legal representatives to the extent of half share is wholly misconceived – no bilateral agreement was proved- Courts had dealt with evidence in a proper manner- appeal dismissed.

Title: Girdhari Lal & Another Vs. Amin Chand Page-441

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.

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.

Title: Dr. V.P. Madhyak Vs. Inder Pal & others Page-312

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit pleading that he is owner in possession of the suit land and defendant is interfering with the same without any right to do so- the suit was dismissed by the Trial Court- an appeal was filed, which was also dismissed- held in second appeal that Courts had relied upon the report of the Local Commissioner, who had found no encroachment on the suit land – however, the demarcation was not conducted in accordance with law – appeal allowed and suit of the plaintiff decreed.

Title: Gian Chand (since deceased) through his legal heirs Vs. Janki Devi & others

Page-462

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit seeking permanent prohibitory injunction for restraining the defendant from interfering in the suit – it was pleaded that plaintiff

had purchased 41/97th Share in the suit land –he had constructed a septic tank and two latrines over the land by spending Rs.30,000/- - the defendant has no right over the suit land but is interfering with the same- he demolished the septic tank and two latrine sheets – the defendant pleaded that construction was started without getting the suit land demarcated – the latrine and septic tank were constructed over the passage- the suit was dismissed by the Trial Court- an appeal was preferred, which was also dismissed- held in second appeal that plaintiff and defendant had purchased the share from the original vendor – plaintiff had not purchased any specific portion of the suit land- the plaintiff was found to be encroacher in the demarcation – plaintiff had purchased 4 biswas of land but was found in possession of 4.10 biswa of the land – plaintiff was not present at the time of the incident and the testimony of his witness is not satisfactory – the Courts had dealt with the evidence properly- appeal dismissed.

Title: Salig Ram Vs. Ved Parkash Page-455

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit for permanent prohibitory injunction for restraining the defendant from taking away timber or any other part of the deodar tree felled from his land – the suit was dismissed by the Trial Court- an appeal was preferred, which was allowed and the suit was decreed – held in second appeal that the trees were found to be standing on the land owned by the plaintiff in demarcation- plaintiff had filed an application for permission to fell the trees apprehending danger to his life and property- trees were felled by the defendant - however, this would not give ownership to the defendants - a notification was issued for handing over the trees to the Forest Corporation- however, this notification will apply to the trees owned by the defendant and not to the trees standing on the private land- the Appellate Court had rightly passed the judgment- appeal dismissed.

Title: M.C. Shimla Vs. Mathu Ram and Another Page-821

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.

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 storeyed house 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.

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.

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.

Title: Nand Lal Vs. Sanjana Sood and others Page-192

Specific Relief Act, 1963- Section 38- Plaintiff pleaded that he alongwith his brother is in settled possession of the suit land, which was given to them by S- defendant No.1 is stated to have purchased part of the suit land from S but the same is paper transaction – possession was not delivered to the purchaser – the defendants started interfering in the suit land – hence, the suit was filed – the suit was dismissed by the Trial Court – an appeal was filed, which was allowed- held in second appeal thatS had filed a civil suit against the plaintiff and his brother in which plaintiff and his brother were held to be in possession of the suit land - the sale deed was executed before the final judgment was delivered in the suit – S had no authority to execute the sale deed – the Appellate Court had rightly held that the plaintiff was in possession and was entitled to protect his possession – appeal dismissed.

Title: Balia & Others Vs. Ganga Ram Page-470

Specific Relief Act, 1963-Section 38- Plaintiffs claimed right of passage through the edges (mainds) by way of custom – they further pleaded that the passage was blocked by the defendants without any right to do so- the defendants denied the existence of passage – held that wazib-ul-arj shows the existence of custom of using the passage through the edges – oral evidence also proved the existence of the passage – courts had rightly appreciated the evidence - appeal dismissed.

Title: Brestua & ors.Vs. Rajinder Singh & ors. Page-637

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.

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 by the parties– 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.

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.

Title: Het Ram & others Vs. Partap Singh & others Page-133

'W'

Workmen Compensation Act, 1923- Section 4- H was employed by B – he died as a result of accident during the course of employment- the Commissioner awarded compensation of Rs.4,50,000/- along with interest @ 12 % per annum – solatium was awarded @ 30% - held in appeal that Insurance Company is liable to pay the compensation even if the driving licence is not valid- the Act does not provide for the grant of solatium @ 30% but only provides for the payment of penalty and interest – appeal allowed – the award passed by Commissioner modified.

Title: National Insurance Company Ltd. Vs. Vidya Devi & another Page-499

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Sunderbhai Ambalal Desai v. State of Gujarat, AIR 2003 SC 638
Supdt. & Remembrancer of Legal Affairs, West Bengal v. Anil Kumar Bhunja and Ors, AIR 1980, SCC 52, 1979 CRI. L. J. 1390
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T. Subramanian vs. State of Tamil Nadu (2006) 1 SCC 401
The New India Assurance Company Ltd. versus Chura Mani and others, ILR 2016 (II) HP 1021
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Transport Corporation of India Vs. Employees' State Insurance Corpn. and another, (2000) 1 SCC 332
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U.P. Pollution Control Board and others Vs. Kanoria Industrial Ltd. and another, (2001) 2 Supreme Court Cases 549
Uddar Gagan Properties Ltd. vs. Sant Singh and Ors. 2016 (5) JT 389
Umakant and another Vs. State of Chhattisgarh (2014) 7 SCC 405
Union of India & others versus Paras Ram, I L R 2015 (III) HP 1397 (D.B.)
Union of India and another Vs. Surendra Pandey (2015) 13 SCC 625
Union of India v. Ibrahim Uddin and Anr", (2012) 8 Supreme Court Cases 148
Union of India v. M/s Ambica Construction, AIR 2016 SC 1441
Union of India versus Nek Ram Sharma, 2004 (1) JKJ 280
United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others, (2002) 6 SCC 281
Uttar Pradesh and others vs. Arvind Kumar Srivastava and others, 2014 AIR SCW 6519

'V'

V. Bhagat versus D. Bhagat, (1994) 1 Supreme Court Cases, 337
V. K. Mishra and another v. State of Uttarakhand and another, (2015) 9 SCC 588
Ved Prakash Garg vs. Premi Devi & others, (1997) 8 SCC 1
Vinay Tyagi. v. Irshad Ali alias Deepak and Ors., (2013) 5 SCC 762
Vinobabai and others versus K.S.R.T.C. and another, 1979 ACJ 282
Vinod Bhandari v. State of Madhya Pradesh, (2015) 11 SCC 502
Vipin Jaiswal Versus State of Andhra Pradesh, (2013) 3 SCC 684

'Y'

Yomeshbhai Pranshankar Bhatt vs. State of Gujarat, (2011) 6 SCC 312

'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 version 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 Courts 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 has 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 Rashtriya Military School, Chail – they were on probation of two years – they were issued warnings for unauthorized absence –their services 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.
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> 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.
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> 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.
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> 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:-
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> > "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."
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> 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.

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.*
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> *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.*
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> *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 abused the accusedunder the influence of liquor - 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 his non-examination – 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:*
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> > *"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."*
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> *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:*
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> > *"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.*
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> *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.*
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> *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. 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. 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 practitioners - 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 case ***"State of Kerala Vs. Puttumana Illath Jathavedan Namboodiri"*** (1999) 2 Supreme Court Cases 452, wherein it has been held as under:-

> ***"In its revisional jurisdiction, the High Court can call for and examine the record of any proceedings for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order. In other words, the jurisdiction is one of supervisory jurisdiction exercised by the High Court for correcting miscarriage of justice. But the said revisional power cannot be equated with the power of an appellate court nor can it be treated even as a second appellate jurisdiction. Ordinarily, therefore, it would not be appropriate for the High Court to re-appreciate the evidence and come to its own conclusion on the same when the evidence has already been appreciated by the Magistrate as well as Sessions Judge in appeal, unless any glaring feature is brought to the notice of the High Court which would otherwise tantamount to gross miscarriage of justice."***

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 an 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.
>
> 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 proprietary 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 State – 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 whereto 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 had 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.

****

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.*
>
> *...........*
>
> *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 defendants started raising construction near the house of the plaintiff during the course of hearing 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 $1/6^{th}$ 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 $2/7^{th}$ 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.

<u>Substantial Question of Law No. 1:</u>

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:

<u>Sureshwar Thakur, Judge (Oral)</u>

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.

****

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

कमांक 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 ष्क्तियों 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 Vitrak Yojna 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- Section148, 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 complainant's car 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.*
>
> 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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>> * * *
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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."

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)

"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 by the parties– 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)

"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

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)

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 had stated that he had lost gold chain and money, but 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.

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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:

<u>Sureshwar Thakur, Judge.</u>

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)
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> > > "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.*
>
> *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.*
>
> *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.

****

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 efflux 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 had 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.

****

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

Prem Singh ....Petitioner

Versus

H.P. State Forest Development Corporation ....Respondent

CWP No.2826 of 2011.
Judgment Reserved on: 03.03.2017
Date of decision: 07.03.2017

Constitution of India, 1950- Article 226- **Industrial Disputes Act, 1947-** Section 25- The workman was engaged as field man in the year 1989 on daily wage basis- he was posted as conductor in a truck- he made a representation against his postings and his services were terminated – a reference was made and the Industrial Tribunal dismissed the claim of the workman- aggrieved from the order, present writ petition was filed- held thatthe workman had failed to prove that he had completed 240 days in the preceding 12 months period- it was proved by the respondents that workman was habitual absentee and did not respond to the notices issued by the Corporation to join his duties and his services were rightly terminated – the Writ Court has limited jurisdiction while deciding the writ petition and it cannot re-appreciate the evidence – the Industrial Tribunal had rightly dismissed the reference- writ petition dismissed.(Para-14 to 24)

Cases referred:

Mool Raj Upadhyaya vs. State of H.P. and Others, 1994 Supp(2) SCC 316
Bhuvnesh Kumar Dwivedi vs. M/s.Hindalco Industries Ltd. 2014 AIR SCW 3157

For the Petitioner: Mr.P.P. Chauhan, Advocate.
For the Respondent: Mr.P.P. Singh, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

By way of instant Civil Writ Petition filed under Article 226 of the Constitution of India, petitioner has laid challenge to the award dated 17.1.2011 (Annexure P-1) passed by learned Industrial Tribunal-cum-Labour Court, Shimla, H.P. *(for short 'Tribunal')* in Reference No.52 of 2008, whereby reference has been answered against the petitioner.

2. Briefly stated facts, as emerged from the record, are that the petitioner-workman was engaged by respondent-Forest Corporation as Field-man in the year 1989 on daily wage basis and was initially posted at Nankhari Sub Division of Forest Corporation. As per averments contained in this petition as well as in the impugned award dated 17.1.2011, petitioner continuously worked for more than 240 days in each calendar year till 2003, whereafter, he was transferred from Forest Division Nankhari to Forest Division Rampur. As per petitioner-workman, his service conditions were changed arbitrarily and illegally and he was posted as conductor in Truck of Forest Corporation. He informed the Divisional Manager, Forest Corporation that it was not possible for him to travel with the Truck to distant places and thereafter his services were terminated by Forest Corporation on 15.1.2015 in violation of the provisions of Section 25-F of the Industrial Disputes Act *(for short `Act')*. Petitioner-workman claimed before the Tribunal below that during his service of 14 years, he had completed 240 days in each calendar year and he had good service record, but his services were terminated in illegal manner by the Forest Corporation that too in violation of provisions of Section 25-F of the Act.

3. In the aforesaid background, petitioner-workman sent demand notice to Forest Corporation seeking his re-engagement with consequential benefits, but in vain. Accordingly, he approached Conciliation Officer, Rampur to seek redressal of his grievance. Since conciliation efforts failed, appropriate Government sent reference under Section 10 of the Act for adjudication to the Tribunal below in the following terms:-

> *"Whether the termination of services of Shri Prem Singh S/o Shri Mohan Lal, daily wages Field man w.e.f. 15.1.2005 by the Divisional Manager, HP State Forest Corporation, Rampur, District Shimla without complying the provisions of section 25-F & G of the Industrial Disputes Act, 1947 is legal and justified? If not, what relief of service benefits, amount of compensation, back wages and seniority the aggrieved workman is entitled to?"*

4. Respondent-Corporation by way of detailed written statement refuted the aforesaid claim of the petitioner on various grounds including maintainability. Respondent, while admitting that the petitioner was initially engaged as Field-man in Nankhari Unit of the Forest Corporation on daily wage basis on 18.7.1989 to perform watch and ward duty, stated that he was habitual absentee from duty and was to remain absent from duty. Respondent further claimed before the Tribunal below that services of the petitioner-workman were terminated due to willful absent from duty and he was also negligent in performing his duties. As per respondent, petitioner-workman remained willfully absent from duty continuously for a period of 5/6 months before termination of his services. Respondent specifically denied that petitioner-workman was in continuous service for a period of 240 days preceding twelve months period. In the aforesaid background, respondent sought dismissal of the statement of claim of the petitioner-workman filed before the Tribunal below.

5. The petitioner-workman by way of rejoinder reasserted his claim made in the statement of claim and denied the averments of written statement filed by respondent-Corporation.

6. On the pleadings of the parties learned Tribunal below has framed the following issues for determination:-

> "1. Whether the retrenchment of services of petitioner by the respondent w.e.f. 15.1.2015 without complying with the provisions of section 25F & G of the Industrial Disputes Act, 1947 is illegal and unjustified as alleged? … …OPP.
>
> 2. If issue no.1 is proved, to what relief of service benefits, amount of compensation, back wages and seniority, the petitioner is entitled to?… …OPP.
>
> 3. Relief."

7. Learned Tribunal below on the basis of pleadings as well as evidence led on record by respective parties answered reference in negative and dismissed the claim of the petitioner-workman.

8. Mr.P.P. Chauhan, learned counsel representing the petitioner, vehemently argued that impugned award passed by learned Tribunal below is not sustainable in the eye of law as the same is not based upon correct appreciation of evidence led on record as well as law on the point. While referring to the impugned award passed by Tribunal below, Mr.Chauhan forcefully contended that learned Tribunal below miserably failed to appreciate that services of the petitioner-workman were terminated without complying with the provisions of law contained in the Act and as such impugned award being against well established principle of law deserves to be quashed and set aside.

9. Mr.Chauhan strenuously argued that since absenteeism of the petitioner was made basis by the respondent to dispense with his service, it was incumbent upon the respondent to have conducted a domestic enquiry after following due procedure of law.

Mr.Chauhan further contended that absenteeism, if any, of the petitioner, at best could be termed to be misconduct on his part and disciplinary action, if any, could be taken by conducting domestic inquiry against him. Since no domestic inquiry was conducted before alleged termination of petitioner, action of respondent in terminating the services of petitioner-workman, which was further upheld by the impugned award, is required to be rectified in accordance with law.

10. While concluding his arguments, Mr.Chauhan further contended that since petitioner had completed more than 10 years of service with more than 240 days in each calendar year as on 1.9.1997, as such, it was incumbent upon the respondent to have granted work charge status to the petitioner-workman on completion of 10 years of service in terms of the directions issued by the Hon'ble Apex Court in ***Mool Raj Upadhyaya vs. State of H.P. and Others, 1994 Supp(2) SCC 316*** and in that eventuality, the services of the petitioner-workman could not have been dispensed with in such cursory manner by the respondent. In the aforesaid background, Mr.Chauhan, prayed that the petitioner-workman may be reinstated in service with consequential benefits after setting aside the impugned award having been passed by the learned Tribunal below.

11. Mr.P.P. Singh, learned counsel representing the respondent-Corporation, supported the impugned award. As per Mr.Singh, there is no illegality and infirmity in the impugned award passed by the learned Tribunal below and the same is based upon correct appreciation of evidence adduced on record by the respective parties. While referring to the impugned award, Mr.Singh argued that evidence led on record by respective parties has been dealt with in its right perspective and there is no scope of interference, whatsoever, of this Court, especially, while exercising writ jurisdiction. While refuting the aforesaid submissions having been made by learned counsel representing the petitioner-workman, Mr.Singh argued that points raised before this Court by Mr.Chauhan were never raised before the learned Tribunal below and as such present petition deserves to be dismissed on this ground only.

12. While concluding his arguments, Mr.Singh invited the attention of this Court to the terms of the reference made by appropriate Government to the learned Tribunal below to demonstrate that cogent and convincing evidence was led on record by the respondent-Corporation to prove its case within the ambit of question passed to the Tribunal and as such there is no force in the contention of learned counsel representing the petitioner-workman. In the aforesaid background, Mr.P.P. Singh, learned counsel representing the respondent-Corporation, prayed for dismissal of the writ petition.

13. During proceedings of the case, this Court had an occasion to peruse the pleadings as well as complete record of Tribunal below (annexed with the petition), perusal whereof clearly suggests that learned Tribunal below, while exploring the answer to specific term of reference sent to it by appropriate Government, dealt with each and every aspect of the matter and as such this Court sees no force in the contention put forth on behalf of the petitioner-workman that evidence adduced on record by respective parties have not been dealt with in its right perspective.

14. In nutshell, case of the petitioner-workman was that since he had completed 240 days in the preceding twelve months, his services could not be terminated in illegal manner by respondent-Corporation without resorting to provisions of Section 25-F of the Act, whereas respondent-Corporation claimed that the petitioner-workman left the job voluntarily and he had not completed continuous service of 240 days preceding his termination.

15. Petitioner-workman, while appearing as PW-1 before learned Tribunal below, stated that he was engaged as Field-man in the year 1989 on daily wage basis and he continued to work as such till the year 2003 for more than 240 days in each calendar year. He also stated that in the year 2003, he was transferred from Nankhari to Forest Division, Rampur in an illegal manner and was detailed for duty as conductor in the Truck. It has also come in his statement that since he was deputed for duties to places like, Nahan, Baddi, Nalagarh and Kumarhatti, he

requested Divisional Manager, Forest Corporation that it was not possible for him to travel with the Truck to distant places, accordingly his services were terminated on 15.1.2005 without complying with the provisions of Section 25-F of the Act. Though petitioner-workman claimed that he rendered continuous service of more than 240 days in each calendar year during the span of his fourteen years of service, but he was unable to prove on record aforesaid factum by leading cogent and convincing evidence in the shape of ocular or documentary evidence. In his cross-examination he admitted that he had worked for 224 days during the calendar year 2003 and for 29 days during the calendar year 2004. He also admitted that he had not worked w.e.f. 18.5.2004 to 31.12.2004. Perusal of Ex.PB i.e. mandays chart led in evidence by him also does not prove that he had completed 240 days during a period of twelve calendar months preceding the date of his termination. There is no illegality in the findings returned by Tribunal below that onus was upon workman to prove that he infact had completed 240 days in the preceding twelve months period.

16. Whereas, respondent examined RW-1 Shri Yogesh Parsad Gupta, Divisional Manager, Forest Corporation, who appeared before the Tribunal as RW-1 and deposed that petitioner-workman was not performing his duty properly and was habitual absentee. While placing reliance upon the documents, RW-1 stated that since he remained absent from duty from 1.5.2004, his explanation in writing was called by Assistant Manager and thereafter he joined duty on 19.5.2004, but failed to submit any reply. RW-1 further stated that petitioner-workman again remained absent from duty w.e.f. 27.5.2004, whereafter he was also asked to join his duties vide notice Ex.P-2 dated 16.6.2004, but in vain. Perusal of notices Ex.R-4 and Ex.PD clearly prove on record that repeatedly petitioner-workman was asked to join his duties but petitioner-workman failed to join, as a result of which his services came to be terminated on 15.1.2005. Cross-examination conducted on RW-1 nowhere suggests that the petitioner-workman was able to extract anything contrary to what he stated in his examination-in–chief, rather, this Court, after carefully perusing the record, has no hesitation to conclude that there is no illegality or infirmity in the findings returned by the learned Tribunal below that petitioner-workman was habitual absentee from duties and since he did not respond to the notices issued by Corporation to join his duties, his services were rightly terminated by the Corporation.

17. Similarly, this Court sees no illegality or infirmity in the findings returned by Tribunal below that there is no evidence on record to show that the petitioner-workman had actually completed 240 days in preceding 12 months period and as such there was no occasion for Forest Corporation to issue notice under Section 25-F of the Act. Since petitioner-workman had claimed that he had worked for more than 240 days in a calendar year, onus was upon him to prove the same by leading cogent and convincing evidence.

18. In the present case, as has been discussed above, no evidence was led on record to prove factum of his completion of 240 days in preceding 12 months, rather, respondent-Corporation, by placing on record ample evidence, proved to the hilt that despite repeated communications, petitioner-workman failed to join his duties as a result of which his services came to be terminated.

19. Consequently, this Court sees no illegality and infirmity in the impugned award passed by the Tribunal below, which appears to be based upon correct appreciation of evidence as well as law and hence calls for no interference of this Court.

20. Another contention of Mr.P.P. Chauhan, learned counsel representing the petitioner-workman, that since absenteeism of the petitioner was made basis by the respondent to dispense with his services, it was incumbent upon the respondent to have conducted a domestic enquiry before taking disciplinary action, deserves out right rejection. Perusal of pleadings as well as impugned award nowhere suggests that aforesaid point was ever raised before Tribunal and as such same cannot be allowed to be raised at this stage in writ proceedings, where legality of impugned award is under challenge. Moreover, Tribunal in reference petition was only bound to answer specific term of reference as referred to it by the appropriate Government for adjudication. "Term of reference" nowhere suggests that Tribunal

was required to decide whether services of the petitioner-workman could be terminated without conducting disciplinary proceedings, especially, when charge was of absenteeism.

21. This Court also sees no force in another arguments having been made by Mr.Chauhan that since petitioner-workman had completed more than 10 years of service with more than 240 days in each calendar year as on 1.9.1997, as such, it was incumbent upon the respondent to have granted work charge status to the petitioner on completion of 10 years of service in terms of the directions issued by the Hon'ble Apex Court in ***Mool Raj Upadhyaya's*** case *supra* because this was not the issue before learned Tribunal below, who, well within four corners of reference specifically referred to it, returned its findings.

22. This Court is conscious of the fact that it has very limited jurisdiction to re-appreciate the findings of fact returned by learned Tribunal below, while exercising its jurisdiction under Article 226 of the Constitution of India and it has very limited scope to re-appreciate the findings of fact. In this regard reliance is placed upon the judgment passed by the Hon'ble Apex Court in ***Bhuvnesh Kumar Dwivedi vs. M/s.Hindalco Industries Ltd. 2014 AIR SCW 3157,*** wherein the Court held as under:-

> *"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. nA 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.*
>
> *17. The judgments mentioned above can be read with the judgment of this Court in Harjinder Singh's case (supra), the relevant paragraph of which reads as under:*
>
> > *21. Before concluding, we consider it necessary to observe that while exercising jurisdiction under Articles 226 and / or 227 of the Constitution in matters like the present one, the High Courts are duty bound to keep in mind that the Industrial Disputes Act and other similar legislative instruments are social welfare*

legislations and the same are required to be interpreted keeping in view the goals set out in the Preamble of the Constitution and the provisions contained in Part IV thereof in general and Articles 38, 39(a) to (e), 43 and 43-A in particular, which mandate that the State should secure a social order for the promotion of welfare of the people, ensure equality between men and women and equitable distribution of material resources of the community to subserve the common good and also ensure that the workers get their dues. More than 41 years ago, Gajendragadkar, J. opined that:

> *10.... The concept of social and economic justice is a living concept of revolutionary import; it gives sustenance to the rule of law and meaning and significance to the ideal of welfare State.*

18. A careful reading of the judgments reveals that the High Court can interfere with an order of the Tribunal only on the procedural level and in cases, where the decision of the lower Courts has been arrived at in gross violation of the legal principles. The High Court shall interfere with factual aspect placed before the Labour Courts only when it is convinced that the Labour Court has made patent mistakes in admitting evidence illegally or have made grave errors in law in coming to the conclusion on facts. The High Court granting contrary relief under Articles 226 and 227 of the Constitution amounts to exceeding its jurisdiction conferred upon it. Therefore, we accordingly answer the point No. 1 in favour of the appellant." [Emphasis added]

23. Learned counsel representing the petitioner was unable to point out any particular mistake, if any, committed by learned Tribunal below in admitting the evidence illegally or error in law, while dismissing the claim of petitioner-workman and as such, this Court sees no occasion to interfere in the findings of the learned Tribunal below which otherwise appear to be based on proper appreciation of evidence.

24. Consequently, in view of the detailed discussion made hereinabove, this Court sees no illegality and infirmity in the impugned award dated 17.1.2011 passed by learned Presiding Judge, Industrial Tribunal-cum-Labour Court, Shimla and as such the same is up-held and present petition is dismissed being devoid of any merit.

25. All the interim orders are vacated. All miscellaneous applications are disposed of.

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

Sh. Shyam Lal & Others ....Petitioners

Versus

Shri Praveen Verma & Others ....Respondents-Contemnors

COPC No.430 of 2016
Judgment Reserved on: 02.03.2017
Date of decision: 08.03.2017

Contempt of Courts Act, 1971- Section 12- A consent order was passed by the Writ Court directing the respondents to convene a general house in the presence of Assistant Registrar of the Co-operative Societies after following due process of law- a contempt petition was filed pleading that the respondents have not obeyed the order passed by the Writ Court – held that the respondent had taken all possible steps for convening of general house – the petitioners

frustrated the managing committee meeting so that general house meeting could not be held – the respondents have not violated the order passed by writ court- Contempt petition dismissed. (Para-7 to 15)

For the Petitioners:	Mr.Ankush Dass Sood, Senior Advocate with Mr.Rakesh Kumar, Advocate.
For Respondent No.1:	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.2 to 8:	Mr.Ashwani Pathak, Senior Advocate with Mr.Rajiv Rai, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

By way of instant Contempt Petition preferred under Section 12 of the Contempt of Courts Act, 1971 read with Article 215 of the Constitution of India, petitioners have prayed for initiation of contempt proceedings against the respondents for willful non-compliance of the judgment dated 08.09.2016 passed by this Court in *CWP No.1958 of 2016, titled: Shyam Lal and Others vs. Addl.CS-cum-Secretary (Cooperation) to the Government of Himachal Pradesh and Others,* with further prayer to issue directions to the respondents to comply with the aforesaid judgment. Apart from above, petitioners have also prayed for restraining the respondents from convening a General House fixed on 8th October, 2016.

2. 'Key' facts, as emerged from the record are that the petitioners filed writ petition bearing CWP No.1958 of 2016 seeking therein following reliefs:-

"a) Quash, set aside and clarify the observation made in para 8,9,10,11 as detailed in the review petition filed by the petitioner in order dated 15.03.2016 passed by the respondent no.1 Annexure P-7 and also set aside the order dated 15.06.2016 Annexure P-13 in so far as it dismisses the review petition filed by the present petitioner pertaining to the case;

b) Direct respondent no.3 and 4 authorities to convene the meeting of the Managing Committee of the respondent no.5 Society as per rules 45 and 48 of the H.P. Co-Operative Societies Rules, 1971 for discussing the no confidence motion passed by the petitioners against the office bearers of the Society in terms of the operative part of the order dated 15.03.2016 passed by the respondent no.1 by ignoring the observation made in para 8,9,10,11.

c) Respondent no.6 to 12 may kindly be restrained from carrying out functions of the Managing Committee of the Non-applicant/respondent no.5 Society or in the alternative from taking any major or financial decision without associating the petitions and justice may be done;

d) The unilateral major or financial decisions taken by the minority respondents no.6 to 12 may be directed to be reviewed by the entire Managing Committee in the presence of the concerned Inspector of the co-operative Societies;

e) The books of the respondents no.5 Society may be directed to be audited by respondent authorities."

3. Writ Court, after considering the pleadings made available on record by the respective parties, passed consent order directing the respondents to convene a General House in

the presence of Assistant Registrar of the Cooperative Societies after following due procedure within a period of four weeks from the date of passing of the aforesaid judgment.

4. Shri Ankush Dass Sood, learned Senior counsel representing the petitioners, vehemently argued that the respondents willfully and intentionally disobeyed the aforesaid judgment and have made all out efforts to defeat the mandate issued by this Court and as such they are liable to be punished for Contempt of Court. Mr.Sood further contended that despite there being specific direction to the respondents to convene a General House in the presence of the Assistant Registrar of Cooperative Societies, no steps, whatsoever, have been taken till date by concerned person for convening General House, rather respondents in flagrant violation of directions issued by this Court convened meeting of Management to pass an agenda for discussion in the General House meeting, which was not the direction of the Court.

5. As per Mr.Sood, there was no occasion for the respondents to pass an agenda in issue for discussion about termination of membership of two members of Society i.e. S/Shri Shyam Lal and Lal Singh, who were allegedly terminated on 9.11.2015. Mr.Sood further contended that issue with regard to termination of the membership of the petitioners was subject matter of the Civil Writ Petition, wherein this Court, after hearing rival submissions of both the parties, had ordered for convening of General House meeting in the presence of Assistant Registrar of Cooperative Societies after following due procedure. Mr.Sood further contended that there was no occasion for the Assistant Registrar i.e. respondent No.1 to approve the agenda made available to him by the Management Committee and as such he is guilty of disobeying the directions contained in the judgment dated 8.9.2016, whereby General House was to be convened in his presence. Lastly, Mr.Sood contended that agenda, if any, was to be discussed in General House and by no stretch of imagination same could be approved by the Assistant Registrar of the Cooperative Societies.

6. Respondents, by way of separate replies, have submitted that they have highest regard for the orders passed by this Court and by no stretch of imagination they can think of disobeying or flouting the Court's directions. Respondents further averred that they have neither willfully nor deliberately disobeyed or flouted the orders passed by this Court but still, if any inconvenience caused to the Court on account of their actions or inactions, they tender unconditional apology for the same at the very outset.

7. Perusal of reply filed by respondent No.1 i.e. Assistant Registrar, clearly suggests that he had no prior intimation with regard to meeting of Managing Committee of Society, wherein as per provisions of Rule 50 (i) and (j) of the H.P. Co-operative Societies Rules, 1971, meeting was convened to discuss and for fixing the date, agenda and venue of the proposed General Body meeting of the Society. As per respondent No.1, on 15.9.2016, he, in terms of directions issued by Registrar, Co-operative Societies Himachal Pradesh, directed the Secretary/President of the Bilaspur J.P. Cement Industries Transport Society *(hereinafter referred to as the 'Society')* to immediately convene a General Body meeting by following due procedure for ensuring compliance of the judgment dated 8.9.2016 passed by this Court.

8. Perusal of documents placed on record in shape of Annexure R-1 certainly suggest that respondent No.1 called upon President/Secretary of the Society to decide about the date of General Body meeting of the Society in terms of judgment dated 8.9.2016. Similarly, reply having been filed by respondent No.1 also suggests that pursuant to request having been made by the petitioners, he issued a letter to respondent No.3, President/Secretary of Society, to inform him the date of holding Management Committee meeting so that Inspector is authorized to attend the said meeting.

9. After carefully perusing the reply filed by respondent No.1 and documents annexed therewith, this Court is convinced and satisfied that all possible steps, as required by him, were taken to ensure the convening of General House meeting. Otherwise also perusal of judgment dated 8.9.2016 nowhere suggests that action, if any, for convening the General House

meeting of the concerned Co-operative Society was required to be taken by respondent No.1, rather meeting, as referred above, was to be convened by the Society in the presence of Assistant Registrar of Co-operative Societies after following due procedure within a period as prescribed in the order. Hence, this Court sees no reason to initiate proceedings, if any, against respondent No.1 for non-compliance of judgment dated 8.9.2016.

10. Reply preferred on behalf of respondents No.2 to 8 also suggests that immediately after passing of judgment dated 8.9.2016, steps were taken by the Co-operative Society concerned for convening General House. As per respondents No.2 to 8, since Writ Court, while passing judgment dated 8.9.2016, had not fixed any agenda to be discussed in the General House, Society called the meeting of Managing Committee for deciding the agenda, but petitioners instead of participating in the meeting and proposing agenda in the Managing Committee made all out efforts to frustrate the Managing Committee meeting so that General House meeting as directed by this Court is not held. As per respondents No.2 to 8, petitioners No.1 and 2, who seized to be members of Managing Committee, were also present in the meeting of Managing Committee, wherein agenda for General House was being discussed, but they refused to sign the attendance register. After carefully examining the explanation having been rendered by respondents No.2 to 8, this Court sees no substantial force in the arguments having been advanced by learned Senior Counsel representing the petitioner, that no steps whatsoever, were taken by respondent-Society to ensure the compliance of judgment passed by this Court and efforts were made to defeat the mandate issued by this Court.

11. After bestowing our thoughtful consideration, this Court is of the view that respondents have not willfully disobeyed the judgment passed by this Court, rather they misinterpreted and misread the directions contained in the judgment dated 8.9.2016. Petitioners herein by way of Writ Petition bearing No.1958/2016 had sought directions to convene the meeting of Managing Committee of respondent No.5 Society in terms of Rules 45 and 48 of the H.P. Co-operative Societies Rules, 1971 for discussing the no confidence motion passed by the petitioners against the office bearers of the Society in terms of order dated 15.3.2016 passed by respondent No.1 ignoring the observations made in paras 8, 9, 10, and 11 of review petition.

12. Apart from above, petitioners No.1 & 2, who stood terminated from the membership of Society also laid challenge to their termination on the ground that decision, if any, with regard to termination of the member of Society could only be taken by the General House. Since issue in question in the writ petition was with regard to termination of members of Society by the Managing Committee of respondent-Society as well as discussion of no confidence motion by petitioners against all the office bearers of the Society, this Court deemed it fit to dispose of writ petition with the consent of parties to decide the aforesaid issue in the General House meeting to be conducted in the presence of Assistant Registrar of Cooperative Societies after following due procedure.

13. Though we see force in the aforesaid contention made by respondents No.2 to 8 that since there was no agenda fixed by this Court for the discussion of General House, meeting of Managing Committee was required to be convened for fixing the agenda in terms of Rules 50 (i) and (j) of H.P. Cooperative Societies Rules, 1971, whereby Society is under obligation to discuss and fix the agenda at first instance before fixing the date of General House meeting of the Society, but after carefully perusing the minutes of meeting of Managing Committee held on 25.9.2016 (Annexure C-2), we are in agreement with the submissions having been made by Shri Ankush Dass Sood, learned Senior Counsel, that there was no occasion for the Society to discuss issue with regard to termination of members of Society in the meeting of Management Committee because same was required to be discussed and decided in the general meeting of Society as directed by this Court vide judgment dated 8.9.2016.

14. Leaving everything aside, it clearly emerge from the pleadings available on record as well as submissions having been made on behalf of the counsel representing the parties that both the parties are keen to have the meeting of General House and as such this Court without

complicating the matter further deems it fit to dispose of the Contempt Petition with the direction to respondent No.1 i.e. Assistant Registrar, Cooperative Societies to ensure convening of meeting of General House strictly in terms of judgment dated 8.9.2016 passed by this Court within a period of 30 days from the date of passing of this order.

15. Needless to say that all the issues as raised in the CWP shall be discussed and decided in the General House meeting as agreed by both the parties at the time of passing of the judgment dated 8.9.2016 strictly following the procedure as laid in bye-laws of the Society. Respondents No.2 to 8 shall render all necessary assistance to respondent No.1 for smooth convening of General House. However, it is made clear that intimation with regard to date on which Assistant Registrar of Co-operative Society convenes General House shall be conveyed to all the members of Society by the respondent-Society by written communication. Shri Ankush Dass Sood, learned Senior counsel, undertakes that petitioner herein shall make themselves available in the General House meeting on the date to be fixed by the Assistant Registrar of Cooperative Societies.

16. Consequently, in view of the aforesaid discussion, we do not see any reason to interfere in this Contempt Petition and accordingly same is disposed of.

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

Girdhari Lal & Another ….Appellants-Plaintiffs

Versus

Amin Chand ….Respondent-Defendant

Regular Second Appeal No.616 of 2007
Judgment Reserved on: 06.03.2017
Date of decision: 16.03.2017

Specific Relief Act, 1963- Section 34- Plaintiff pleaded that half share of the suit land was owned by K and remaining half share was owned by D- plaintiff was recorded as tenant without the payment of rent with the consent of the owners – original owner D died and his daughter 'C' gifted her 1/4th share in favour of the plaintiff – plaintiff remained in possession as tenant over the remaining share- defendant purchased half share and became co-owner- after the death of the plaintiff, his legal heirs succeeded to him- defendant is threatening to interfere with the suit land on the basis of revenue entries- suit was dismissed by the Trial Court- an appeal was filed, which was also dismissed- held in second appeal that the original owner was survived by four co-sharers including the plaintiff- one co-sharer had gifted 1/4th share to the plaintiff- plaintiff became owner of half share- entries were made during settlement after proper verification – original plaintiff was not recorded as a tenant after 1958-59 and the name of the legal representatives to the extent of half share is wholly misconceived – no bilateral agreement was proved- Courts had dealt with evidence in a proper manner- appeal dismissed. (Para-10 to 29)

Cases referred:

Kaushalya Devi & Ors vs. Sito Devi and Others, 2014(2) Him.L.R. 768
Ashok Kumar vs. Satya Devi, 2013(2) Him.L.R. 1164
Sant Ram Nagina Ram vs. Daya Ram Nagina Ram and Others, AIR 1961 (Pb) 220.
Laxmidevamma and Others vs. Ranganath and Others, (2015)4 SCC 264

For the Appellants: Mr.Rajnish K.Lall, Advocate.
For the Respondent Mr.Pawan Gautam, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

This appeal has been filed by the appellants-plaintiffs against the judgment and decree dated 22.09.2007, passed by the learned District Judge, Kangra at Dharamshala, H.P., affirming the judgment and decree dated 07.06.2005, passed by learned Civil Judge(Senior Division), Dehra, District Kangra, H.P., whereby the suit filed by the appellants-plaintiffs has been dismissed.

2. Brief facts of the case, as emerged from the record, are that the appellants-plaintiffs *(herein after referred to as the `plaintiff'),* filed a suit for declaration to the effect that he be declared in exclusive possession of the land comprised in Khata No.29, Khatauni No.65, Khasra No.479, measuring 0-01-11 hectares, as per jamabandi for the year 1993-94, situated in Mohal Dohag, Mauza Gumber, Tehsil Dehra, District Kangra, *(hereinafter referred to as `suit land')* as co-sharer and he is entitled to remain in exclusive possession, the entries to the contrary be declared as null and void and not binding upon the plaintiff. Plaintiff also claimed a decree for permanent prohibitory injunction restraining the defendant from interfering in his exclusive possession over the suit land or from raising construction. Plaintiff also claimed a decree for mandatory injunction to remove the foundation from the suit land.

3. It is averred by the plaintiff in the plaint that ½ of land comprised in Khasra No.479, measuring 6 marlas, was owned by Kishanu and others and remaining ½ share was owned by Dilu, but total land of said Khasra No.479 was recorded in possession of original plaintiff, Sant Ram, as a tenant without payment of rent with the consent of aforesaid owners. It is further averred by the plaintiff that during the consolidation operation, the land comprised in Khasra No.479 (old Khasra No.255) was put in the share of Dilu and the same was recorded in the ownership of Dilu, but the possession of the same remained to be recorded in exclusive possession of original plaintiff Sant Ram. It is alleged by the plaintiff that on the death of Dilu, his sons and one daughter succeeded him in equal shares to the said land, but Sant Ram remained in possession of the same as a co-sharer to the extent of 1/4th share and as a tenant to the extent of 3/4th share. It is further alleged by the plaintiff that Smt.Chinti Devi daughter of Dilu gifted her 1/4th share in favour of Sant Ram, as a result of which Sant Ram became a co-sharer to the extent of ½ share over the said land comprised in Khasra No.255, but he remained in possession as a tenant over the remaining ½ share of the suit land. It is further averred that the suit land was a part of old Khasra No.255, which is recorded in possession of Sant Ram as a co-sharer. It is averred by the plaintiff that the defendant purchased ½ share of the suit land from Piar Chand son of Bhagat Ram and Jagdish, as a result of which the defendant became co-sharer with the plaintiff to the extent of ½ share in the suit land, but defendant never came in possession over any portion of the suit land. To the contrary, Sant Ram, original plaintiff, continued to be in exclusive possession over whole of the suit land as a co-sharer to the extent of ½ share and as a tenant to the extent of remaining ½ share. It is further claimed that on the death of original plaintiff Sant Ram, his sons and widow, who were substituted as legal representatives of Sant Ram, succeeded to the share of Sant Ram in the suit land as well as to his tenancy rights and, as such, they are entitled to remain in exclusive possession and the entries showing the suit land in joint possession of all the co-sharers are wrong, null and void and not binding upon the plaintiff. It is further alleged by the plaintiff that under the garb of said wrong entries, the defendant dug out and laid foundation of a shop in the suit land and in his absence collected construction material and completed the construction during the pendency of the suit. In the alternative, it is also claimed by the plaintiff that, if he fails to prove his exclusive possession over the suit land, even then a co-sharer has no right to raise any new construction till the suit land is partitioned by metes and bounds. In the aforesaid background the plaintiff filed a Civil Suit before the learned trial Court.

4. Defendant, by way of filing written statement, refuted the claim of the plaintiff on the ground of cause of action and estoppel. On merits, it is averred by the defendant that Dilu, father of the plaintiff Sant Ram, and others were owners in possession of the suit land. Dilu had three sons, namely, original plaintiff Sant Ram, Jagdish Chand and Bhagat Ram and one daughter Smt.Chinti Devi. It is alleged by the defendant that Smt.Chinti Devi gifted her 1/4th share in favour of plaintiff Sant Ram and, thus, he became a co-sharer in the suit land to the extent of ½ share. It is further alleged by the defendant that after the death of Bhagat Ram, his son Piar Chand succeeded to his share in the suit land and said Piar Chand sold his share to Chingo, who further sold the same to the defendant. Thus, the defendant became a co-sharer in the suit land to the extent of 1/4th share and Jagdish Chand remained a co-sharer to the extent of 1/4th share. It is further pleaded that there was one shop covering about two and half marlas of land, which was given by the plaintiff to the defendant on rent. It is alleged by the defendant that in the month of November, 1994, Sant Ram, plaintiff requested the defendant to vacate the shop and build his own shop in vacant portion of the suit land. Since defendant was owner to the extent of 1/4th share i.e. an area of one and half marlas and the vacant portion of the land was in possession of Jagdish Chand, an another co-sharer, the defendant approached Jagdish Chand, who sold his 1/4th share to the defendant on 09.01.1995 and handed over the possession of entire remaining portion of the suit land. In this way, the defendant became owner in possession of the suit land to the extent of ½ share. It is alleged by the defendant that the plaintiff was pressurizing him for vacation of his shop, hence, the defendant laid the foundation of a shop and a room behind it in the month of February, 1995 on persuasion of the plaintiff himself and in his presence he constructed the shop and, after construction of the same, vacated the shop of the plaintiff and handed over the possession of ½ portion of the shop on 07.07.1995 by raising separation wall. On the basis of said averments, defendant claimed that the original plaintiff Sant Ram never remained in exclusive possession of the suit land as a tenant. In the aforesaid background the defendant prayed for dismissal of the suit.

5. On the pleadings of the parties, the learned trial Court framed the following issues:-

> *"1. Whether the plaintiff is in exclusive possession of the suit land and the entries to the congtrary in the revenue record are wrong and incorrect, as alleged? OPP.*
>
> *2. Whether the plaintiff has no cause of action? OPD.*
>
> *3. Whether the plaintiff is estopped by his act and conduct? OPD.*
>
> *4. Whether the plaintiff is estopped by his act and conduct? OPD.*
>
> *5. Relief."*

6. Learned trial Court vide judgment and decree dated 07.06.2005 dismissed the suit of the plaintiffs.

7. Feeling aggrieved and dissatisfied with the aforesaid judgment and decree passed by the learned trial Court, whereby suit filed by the plaintiffs was dismissed, appellants-plaintiffs filed an appeal under Section 96 of the Code of Civil Procedure *(for short `CPC')* read with Section 21 of the H.P. Courts Act assailing therein judgment and decree dated 07.06.2005 passed by learned Civil Judge(Senior Division), in the Court of learned District Judge, Kangra at Dharamshala, who, vide impugned judgment and decree dated 22.09.2007, dismissed the appeal preferred by the plaintiff by affirming the judgment and decree passed by the learned trial Court. In the aforesaid background, the present appellants-plaintiffs filed this Regular Second Appeal before this Court, details whereof have already been given above.

8. This second appeal was admitted on the following substantial question of law:

> *"(1) Whether the findings of the court below are perverse, based on misreading of oral and documentary evidence as also pleadings of the parties particularly the revenue records P12, P13 and P11 and the report of the Local Commissioner D1 to D3.*

> 2. *Whether on the material on record, the presumption of truth attached to the revenue records P12 P13 and P11 was rebtted more particularly in view of the provisions of Section 104 of the H.P. Tenancy and land Reforms Act and also the presumption of continuity of the tenancy had been rebutted.*
>
> 3. *Whether in the facts and circumstances of the case, the plaintiff was entitled to a decree for permanent and prohibitory injunction when the construction was sought to be carried out during the pendency of the case and the appellant could be denied the discretionary relief of injunction."*

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

10. This Court, with a view to explore answer to the substantial questions of law, as referred hereinabove, as well as to ascertain the genuineness and correctness of submissions/arguments having been advanced by learned counsel representing the parties, carefully perused the oral as well as documentary evidence led on record by the respective parties, perusal whereof clearly suggests that there is no force in the arguments having been made by Shri Rajnish K.Lall, learned counsel representing the appellants-plaintiffs, that Courts below, while dismissing the suit of the plaintiff, misread and mis-appreciated the evidence. This Court, after close scrutiny of evidence, is convinced and satisfied that both the Courts below have meticulously dealt with each and every aspect of the matter. Documentary evidence in the shape of Ex.P-1 to Ex.P-13 placed on record by the plaintiff would go to show that original plaintiff; namely; Sant Ram, was recorded in the suit land as non-occupancy tenant without payment of rent and he continued to be recorded as such in the suit land, as emerged from the entries reflected in copies of Jamabandies for the years 1958-59 and 1972-73 (Exts.P-12 & P-13). However, perusal of Misalhaquiat for the year 1976-77 (Ex.P-2) clearly suggests that settlement took place in the year 1976-77, wherein during settlement operation, Khasra No.255 was given new Khasra No.479, i.e. suit land, which came to be recorded in joint ownership and possession of Sant Ram i.e. original plaintiff and his brothers Jagdish Chand, Bhagat Ram and sister; namely; Smt.Chinti Devi in equal shares.

11. Mr.Lall vehemently argued that plaintiff was recorded as tenant over the suit land since the year 1954-55 till settlement i.e. year 1976-77 and as such he was entitled to be recorded thereafter in the same capacity and entry showing him not as a tenant in possession is wrong and incorrect. But aforesaid arguments of Shri Lall deserve outright rejection because if Jamabandies for the years 1954-55, 1958-59 (Ex.P-12 and Ex.P-11) are perused carefully, it clearly emerge that nature of land is shown to be an *Abadi deh* whereupon original plaintiff Sant Ram was recorded as non-occupancy tenant without payment of rent with the consent of the land owners. Similarly, perusal of pleadings adduced on record by the respective parties clearly suggests that there is no dispute that Dilu, who happened to be father of the original plaintiff Sant Ram, was actually inducted as tenant over the suit land. There is no other evidence led on record, be it ocular or documentary, by the plaintiff suggestive of the fact that plaintiff himself was ever inducted as a tenant over the suit land and as such this Court sees no force in the contention of Shri Lall that since plaintiff was shown as a non-occupancy tenant in the earlier entries i.e. prior to Jamabandi for the year 1993-94, he was entitled to be recorded as such during consolidation operation as well as in future also.

12. If pleadings available on record as well as testimonies of PW-1 Girdhari Lal and PW-4 Parmod Singh, who happened to be legal representatives of original plaintiff Sant Ram, are perused juxtaposing revenue record, Ex.P-1 to Ex.P-13, it clearly emerge that suit land was originally owned and possessed by Krishanu and Others to the extent of half share and Dilu to the extent of remaining half share. It is also undisputed between the parties that during consolidation operation, the suit land was partitioned and allotted to Dilu, who died leaving behind Sant Ram i.e. original plaintiff, Jagdish Chand, Bhagat Ram and Smt.Chinti Devi. There is no dispute that all aforesaid legal representatives of Dilu inherited the suit land to the extent of

1/4th share each. Smt.Chinti Devi gifted her 1/4th share to the original plaintiff Sant Ram, on the basis of which mutation No.379 came to be attested and sanctioned, as a result of which Sant Ram i.e. original plaintiff became owner to the extent of ½ share of the suit land. It is also admitted case of the parties that Jagdish Chand and Bhagat Ram remained owners to the extent of 1/4th share each. Bhagat Ram died leaving behind Piar Chand as his only legal heir, to whom his 1/4th share on the suit land was shifted. Similarly, this Court sees no rebuttal, if any, to the positive assertion of the defendant that Piar Chand son of Bhagat Ram sold his 1/4th share in the suit land in favour of Chingo, who further sold the same to the defendant herein. It is own case of the plaintiff, as projected in the plaint, that Jagdish Chand, who happened to be son of late Dilu, also sold his 1/4th share in the suit land to the defendant, as a result of which defendant herein became owner to the extent of ½ share in the suit land.

13. True, it is that original plaintiff Sant Ram stood recorded in possession of the suit land as non-occupancy tenant without payment of rent with the consent of land owners, as reflected in Jamabandi for the year 1954-55 (Ex.P-13) and he continued to be recorded as such till 1958-59 and thereafter in the Jamabandi for the year 1972-73. But, in settlement, which took place in the year 1976-77, old Khasra No.255 was given new Khasra number 479 and it came to be recorded in joint ownership and possession of Sant Ram i.e. original plaintiff and his brothers Jagdish Chand and Bhagat Ram in equal shares. Perusal of Ex.P-6 i.e. Jamabandi for the year 1993-94 suggests that Sant Ram and Jagdish Chand were recorded as co-owners of the other joint land but in exclusive possession of different Khasra numbers of the joint land as co-sharers. However, as per entries incorporated in the copy of Jamabandi for the year 1993-94 (Ex.P-1), the suit land stood recorded in joint ownership and possession of Sant Ram and after his death in the name of his legal representatives to the extent of ½ share and rest of ½ share of the suit land stood recorded in the ownership of defendant.

14. This Court sees no force in the contention of Mr.Lall that changes in the revenue entries were made without there being any basis. At first instance Settlement Authorities during settlement operation themselves verified the factual possession on the spot and on the basis of actual possession on the spot recorded the land in the joint ownership of co-owners, who were admittedly legal representatives of Dilu. Similarly, there is no dispute with regard to purchase of shares of Bhagat Ram and Jagdish Chand i.e. legal representatives of deceased Dilu, by the defendant, as a result of which he became co-owner to the extent of ½ share of suit land. There is no evidence on record suggestive of the fact that steps, if any, were ever taken by either legal representatives of plaintiff or by plaintiff himself, laying therein challenge to change made in the revenue entries in Misalhaquiat for the year 1976-77 (Ex.P-10), wherein joint ownership and possession of Jagdish Chand and Bhagat Ram, legal representatives of Dilu, were recorded in equal shares alongwith original plaintiff Sant Ram; meaning thereby entries as referred above attained finality.

15. As per own case of the plaintiff, Smt.Chinti Devi i.e. legal representative of Dilu gifted her share in favour of original plaintiff Sant Ram, as a result of which he became owner of the suit land to the extent of ½ share. Aforesaid factum of gift having been made in favour of plaintiff by Smt.Chinti Devi, clearly suggests that plaintiff was not aggrieved with the revenue entries made in the year 1976-77 after settlement operation and as such suit land continued to be in joint ownership and possession of parties. It was in the year 1993-94, when change in revenue entries was made, whereby name of defendant came to be recorded as joint owner in possession of the suit land alongwith the plaintiff. Careful perusal of Ex.P-6 clearly suggests that Jagdish Chand sold his share in favour of defendant and accordingly mutation was attested and sanctioned in his favour and as such there is no force in the arguments of Sh.Rajnish K. Lall that change in revenue entries, as reflected in Jambandi for the year 1993-94, is without any basis.

16. Similarly, this Court sees no document placed on record by the plaintiff suggestive of the fact that change, if any, in revenue entries was made by authorities concerned between year 1976-77 till 1993-94 and since there was no dispute between the plaintiff and other

legal representatives of Dilu i.e. Jagidsh Chand and Bhagat Ram and legal representatives of Bhagat Ram, entries made after settlement in the year 1976-77 continued till 1993-94. Since Jagdish Chand sold his share to plaintiff in the year 1993-94, his name came to be recorded as joint owner in possession of the suit land alongwith original plaintiff in the revenue record. Most importantly, nature of the suit land, as emerged from the record, is *Gair Mumkin Dukan* and as such perusal of documentary evidence, as discussed above, clearly establish on record that original plaintiff Sant Ram is not recorded as a tenant after the year 1958-59 and hence claim of his legal representatives that they are tenants qua the suit land to the extent of ½ share is wholly misconceived.

17. Perusal of depositions, having been made by PW-4 Promod Singh and PW-5 Babu Ram, is very material, who in their statements have categorically stated that they are aware of the settlement operation in the village, which took place in the year 1975-76. They also stated that possession of persons is recorded properly. Hence, this Court is of the view that since there is a long standing revenue entries showing original plaintiff Sant Ram as well as Jagdish Chand and Bhagat Ram as co-owners and in possession of ½ share each, it cannot be said that deceased plaintiff had been cultivating the suit land as *Gair Maurusi Tenant*. Needless to say that to prove the tenancy, there must be some agreement between the landlord and tenant, but in the instant case no agreement, if any, entered into between the deceased plaintiff and original owner of the land is available on record.

18. PW-4 Promod Singh son of deceased plaintiff though claimed the cultivating possession of his father over the suit land as a tenant without payment of any *galla, but* denied his relationship, if any, with landlord. But, as observed above, there must be certain terms and conditions to constitute tenancy. Hence learned Courts below rightly came to the conclusion that the deceased plaintiff never remained tenant over the suit land to the effect of ½ share after the year 1958-59. Similarly, there is no evidence that after 1958-59, deceased plaintiff remained tenant over the suit land to the extent of $3/4^{th}$ share as claimed in the plaint because admittedly there is no revenue record for intervening period between the year 1958-59 to the year 1975-76.

19. Shri Lall was unable to point out any material available on record suggestive of the fact that deceased plaintiff continued to remain in possession of the suit land as tenant till his death in the month of October, 1995, whereas, entries, as recorded in the revenue record, clearly proves on record that Jagdish Chand, who happened to be brother of deceased plaintiff continued to be in joint possession of the suit land alongwith other co-sharers including the deceased plaintiff and defendant. Similarly, Bhagat Ram was also in possession of the suit land as a co-owner alongwith the deceased plaintiff and other co-sharers. Hence, the learned Courts below rightly came to conclusion that there is no reason to discard long standing revenue entries right from the year 1972-73 till 1993-94. Moreover, in para-3 of the plaint, PW-1 Girdhari Lal son of deceased plaintiff has himself admitted the possession of the defendant over ½ share of the suit land. He also admitted the ownership of the defendant and stated that defendant constructed the shop over the suit land forcibly. PW-4 Promod Singh brother of PW-1 Girdhari Lal though deposed that defendant started interfering in the suit land in the month of July, 1995, whereas, PW-1 Girdhari Lal during his cross-examination has admitted that defendant laid foundation of the shop over the disputed portion of the suit land in the moth of February, 1995.

20. PW-1 Girdhari Lal though claimed that, during the pendency of the suit, defendant constructed the shop over a part of the suit land, but he in his cross-examination admitted that there was one *"Kharpel posh"* shop which was removed and slates were put in the said shop. PW-3 Dharam Chand in his cross-examination admitted that deceased was a tailor by profession and doing the tailoring work in the shop of the plaintiff. While claiming relief of injunction, PW-1 Girdhari Lal, PW-2 Jagat Ram and PW-3 Dharam Singh deposed before the Court that defendant raised construction on the other vacant portion of the land during the pendency of the suit, whereas PW-4 Promod Singh son of original plaintiff as well as PW-5 Babu Ram stated that over half share of the suit land there is a double storyed house of the plaintiff

and rest of the suit land was vacant on spot. Though plaintiff as well as witnesses adduced by him claimed that no shop of the defendant is in existence over the suit land, but it is not understood that why plaint was amended and relief of demolition of shop constructed by the defendant in the suit land was sought and prayed for. Even perusal of report of the Local Commissioner Ex.D-3 suggests that during his visit foundation of the shop was already there. As per report, one old shop was also in existence and other shop was being raised by the defendant.

21. Similarly, there is nothing in the plaint that defendant raised shop, if any, on any more valuable portion of the suit land, rather, documents available on record suggests that suit land is one filed. Plaintiff has nowhere proved on record that defendant or his predecessor-in-interest were enjoying the possession of the suit land, rather with own admission of plaintiff as made in the plaint as well as in his deposition before the Court, it appears that original plaintiff Sant Ram was in possession of old shop adjacent to which defendant proposed to raise construction. Similarly, there is no averment, if any, in the plaint made by the plaintiff that defendant had no right, title or interest on the suit land.

22. This Court also carefully perused the following case law pressed into service by Shri Lall in support of his contention:-

1. *Kaushalya Devi & Ors vs. Sito Devi and Others, 2014(2) Him.L.R. 768.*
2. *Ashok Kumar vs. Satya Devi, 2013(2) Him.L.R. 1164*
3. *Sant Ram Nagina Ram vs. Daya Ram Nagina Ram and Others, AIR 1961 (Pb) 220.*

23. 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.

24. But, in the instant case, as has been discussed hereinabove, settlement took place in the year 1976-77 and during settlement operation Khasra No.255 was given new Khasra No.479 and suit land came to be recorded in joint ownership and possession of original plaintiff and his brothers Jagdish Chand and Bhagat Ram in equal shares and since then it continued to be in their joint ownership and possession till the year 1993-94, when Jagdish Chand and Bhagat Ram sold their respective shares to the extent of $1/4^{th}$ each to defendant, who lateron became owner to the extent of ½ share alongwith original plaintiff as reflected in the year Jamabandi for the year 1993-94. At the cost of repetition, it may be stated that entry as reflected in the Jamabandi for the year 1993-94 is not a stray entry without there being any basis, rather it clearly emerge from the Jamabandi for the year 1993-94 that mutation was attested and sanctioned in favour of defendant after sale of share of Jagdish Chand and Bhagat Ram in his favour. Hence, it cannot be accepted that change is reflected in the year 1993-94 was without any basis.

25. Similarly, it is well settled that till the land is partitioned amongst the cosharers, all the cosharers are entitled to use every inch of the land and they are owners in possession of entire land. But, in the instant case, there is nothing in the pleadings of the plaintiff that defendant has raised shop, if any, on the more valuable portion to the detriment of the plaintiff. Rather, as per own admission of the plaintiff, it clearly emerged that defendant proposed the construction on the land adjacent to shop of plaintiff which was already on the spot. Perusal of report filed by the Local Commissioner suggests that the suit land is one field and plaintiff is in possession of bigger share than that of defendant. Hence, this Court sees no application of aforesaid law cited by learned counsel for the appellants-plaintiffs in the instant case.

26. Interestingly, in the instant suit, plaintiff, while claiming himself to be in exclusive possession of the suit land as a co-sharer, prayed that entries, as reflected in Jambandi

for the year 1994-94 showing defendant as a co-owner to the extent of ½ share, be declared null and void, but nowhere laid any challenge to the entries, as reflected in Misalhaquiat for the year 1976-77 (Ex.P-2), wherein suit land came to be recorded in joint ownership and possession of original plaintiff Sant Ram and his brothers Jagdish Chand, Bhagat Ram and sister Chinti Devi in equal shares. Rather, as per own case of the plaintiff, Chinti Devi, legal representative of Dilu, gifted her share to him raising his share from 1/4th to ½ in the suit land. Since there was no dispute, if any, between original plaintiff Sant Ram and his brothers Jagdish Chand and Bhagat Ram and their legal representatives, entries, as reflected in Misalhaquiat for the year 1976-77 (Ex.P-2), continued till year 1993-94, when admittedly, name of defendant came to be recorded as co-owner in possession to the extent of ½ share on the basis of sale admittedly made by Jagdish Chand and Bhagat Ram of their respective shares to the defendant. Since plaintiff failed to lay any challenge to sale made by Jagdish Chand and Bhagat Ram, he cannot be allowed to say that entries, as reflected in Jamabandi for the year 1993-94, were abrupt and without any basis.

27. This Court is fully satisfied that both the Courts below have very meticulously dealt with each and every aspect of the matter and there is no scope of interference, whatsoever, in the present matter. Since both the Courts below have returned concurrent findings, which otherwise appears to be based upon proper appreciation of evidence, this Court has very limited jurisdiction/scope to interfere in the matter. In this regard, it would be apt to reproduce the relevant contents of judgment rendered by Hon'ble Apex Court in ***Laxmidevamma and Others vs. Ranganath and Others,*** **(2015)4 SCC 264,** to case supra, wherein the Court has held as under:

> *"16. Based on oral and documentary evidence, both the courts below have recorded concurrent findings of fact that the plaintiffs have established their right in A schedule property. In the light of the concurrent findings of fact, no substantial questions of law arose in the High Court and there was no substantial ground for reappreciation of evidence. While so, the High Court proceeded to observe that the first plaintiff has earmarked the A schedule property for road and that she could not have full-fledged right and on that premise proceeded to hold that declaration to the plaintiffs' right cannot be granted. In exercise of jurisdiction under Section 100 CPC, concurrent findings of fact cannot be upset by the High Court unless the findings so recorded are shown to be perverse. In our considered view, the High Court did not keep in view that the concurrent findings recorded by the courts below, are based on oral and documentary evidence and the judgment of the High Court cannot be sustained." (p.269)*

28. Consequently, in view of detailed discussion made hereinabove, this Court is of the view that there is no illegality and infirmity in the judgment and decree passed by the Courts below, which are based upon proper appreciation of evidence, be it ocular or documentary, adduced on record. Similarly, this Court sees no reason to differ with the findings returned by the Court below that the plaintiff has miserably failed to prove on record by leading cogent and convincing evidence that he was inducted as tenant over the suit land by original owner.

29. No relief of permanent prohibitory injunction could be granted in favour of plaintiff in view of his own admission that defendant had laid foundation of shop in February, 1995 i.e. prior to institution of suit, with his consent, whereas, defendant, while filing written statement to the plaint, specifically admitted that he has already laid foundation in February, 1995 with the consent of plaintiff. Hence, all the substantial questions of law are answered accordingly.

30. Interim order, if any, is vacated. All the miscellaneous applications are disposed of.

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

State of Himachal Pradesh .....Petitioner
Versus
Manohar Lal .....Respondent.

Cr. Appeal No. 452 of 2007
Decided on : 20/03/2017

Indian Penal Code, 1860- Section 279, 337, 338, 304-A and 201-Accused was driving a truck in a rash and negligent manner – the truck hit S, who sustained injuries below the abdomen – the accused was tried and acquitted by the Trial Court- held in appeal that the testimonies of the prosecution witnesses did not establish that accused had an opportunity to see the deceased and despite that he had hit the deceased– the author of the FIR was not examined- no blood stain was found on the tyre of the truck – the prosecution case became suspect due to all these infirmities – the Trial Court had properly appreciated the evidence- appeal dismissed.(Para- 9 to 14)

For the petitioner: Mr. Vivek Singh Attri, Dy. A.G.
For the Respondent: Ms. Shikha Chauhan, 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, Kasauli, District Solan, H.P. whereby he pronounced an order of acquittal upon the accused qua the offences allegedly committed by him.

2. The brief facts of the case are that on 23.10.2001 at about 5.45 p.m on receipt of a telephonic message qua the accident, SI Brij Mohan Sharma, alongwith Constable Neter Singh had gone to ESI Hospital, Parwanoo. ASI Bheem Singh and constable Ram Lal met them in the bazaar at Parwanoo, who had at that time were on patrol duty. They both were also taken to ESI Hospital by S.I. Brij Mohan Sharma. There they came to know that Suneel Kumar had met with an accident near Truck Union, with truck No. HP-07-1112 due to which he had sustained injuries on his body below the abdomen. Suneel Kumar from ESI Hospital Parwanoo had been referred for further treatment to the Government Medical College and Hospital, Sector-32, Chandigarh. On preliminary enquiry conducted by SI Brij Mohan Sharma, alongwith other police officials, he came to know that a truck after loading material from Cosmo Factory was coming towards the Truck Union being driven by the accused Manohar Lal. When the truck reached near the Truck Union gate, Suneel Kumar at that time was going towards the bus stand. Accused Manohar Lal by driving the truck at high speed and in a negligent manner while trying to take the truck inside the gate, struck it against Suneel Kumar, who sustained injuries below the abdomen. The accident is said to have taken place due to the rash and negligent driving on the part of the accused. The accused had fled alongwith the truck from the spot. On the written report made by SI Brij Mohan Sharma, an F.I.R. under Sections 279, 337, 338 and 304-A and 201 of the Indian Penal Code was recorded in Police Station, Parwanoo 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 notice of accusation stood put to the accused by the learned trial Court for his committing offences punishable under Sections 279, 337, 304-A and 201 of the IPC to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 5 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 defence evidence.

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. As unraveled by site plan embodied in Ext.PW-5/A, the site whereat the truck driven by the accused/respondent, struck deceased Sunil Kumar, stands depicted therein to be point 'C' in sequel whereto, the body of the latter stood pulverized thereunder, whereupon as divulged by post mortem report held in Ext.PW-5/B, the deceased suffered on his person the injuries as stand delineated therein, whereupon he suffered his demise. The learned Deputy Advocate General has contended with much vigour and force qua with PW-1, an ocular witness to the occurrence, emphatically rendering a truthful account qua the occurrence wherewithin he ascribes penally inculpable negligence vis.a.vis the respondent, thereupon his testimony was sufficient for constraining the learned trial Court, to record findings of conviction upon the accused also he submits qua the mere factum of dis-concurrence if any, in the ocular account qua the occurrence rendered by PW-1 vis.a.vis. the injuries borne on post mortem report comprised in Ext.PW-5/B would not be amenable to any inference, conspicuously, even when the injuries reflected in post mortem report borne on Ext.PW-5/B do not hold synonymity with the testification of PW-1, qua hence the body of deceased Sunil Kumar standing not pulverized under the tyres of the offending vehicle driven by accused/respondent qua nor perse thereupon this Court standing constrained to revere the findings returned upon the accused/respondent.

10. The latter submission addressed before this Court by the learned Deputy Advocate General, though would hold tremendous vigour unless evidence stood adduced by the defence qua the fragility or strength of the ribcage of the victim/deceased whereover the offending truck driven by the accused drove upon also with vivid pronouncements occurring therein qua the fragility or strength of the ribcage of the victim/deceased whereover the offending truck driven by the accused, drove upon, thereupon its suffering or not hence suffering a complete fracture thereof, whereas absence of the aforesaid apposite evidence, does constrain this Court to conclude qua the visible non-alignment inter se the version qua the aforesaid factum testified by PW-1 vis.a.vis the minimal injuries in sequel thereto standing reflected in the post mortem report borne on Ext.PW-5/B, does contrarily constrain this Court to conclude qua it being construable to be unworthy of any relevance, for hence disimputing credence vis.a.vis the prosecution case.

11. PW-3 the other eye witness to the occurrence has in his cross-examination disclosed qua his not glimpsing the precise moment whereat the body of deceased Sunil Kumar stood driven upon/over by the offending truck, truck whereof stood thereat driven by the accused/respondent, thereupon his testification borne in his examination in chief wherein he attributes penal negligence qua the occurrence upon the accused, does obviously loose its vigour, its holding an account thereof, at a stage whereat he had not eye witnessed the trite factum of the

manner of the accused/respondent purportedly driving over/upon the body of deceased Sunil Kumar.

12. Dehors the above, the aforesaid ocular witnesses to the occurrence omitted, to, in their respective examinations in chief make any disclosure therein qua the factum probandum qua the accused/respondent despite his holding an opportunity to sight the arrival of the deceased before the truck driven by him, his yet proceeding to manoeuvre, it for its standing driven over the body of the deceased. The omission of the aforesaid disclosures in the examinations in chief of the aforesaid purported eye witnesses to the occurrence, fillips a derivative qua the relevant tenet, for establishing the charge against the accused, comprised in the prosecution proving qua the accused/respondent despite sighting the arrival of the accused before the truck driven by him, his hence abandoning adherence to the standards of due care and caution, deviation wherefrom standing constituted in his penal act of driving the offending truck upon the body of the deceased. Consequently, reticence qua the aforesaid facet(s) by both the ocular witnesses to the occurrence, coaxes an inference qua evidence qua the accused not adhering to the standards of due care and caution, being wholly amiss, whereupon this Court cannot proceed to sustain the charge.

13. Be that as it may, PW-4 has made a disclosure in his statement qua one Brij Mohan Sharma, on receiving a Rukka from one Ram Lal, in Rukka whereof details occur qua the manner of the occurrence, his thereupon proceeding to register an F.I.R. qua the occurrence. The aforesaid Rukka in sequel whereof the apposite F.I.R stood registered against the accused hence constituted the best evidence qua the manner of besides the genesis of the relevant occurrence. However, it came to be withheld besides obviously suppressed also both Ram Lal and Brij Mohan Sharma remained un-examined by the prosecution. The effect of withholding of 'Rukka' in sequel whereof one Brij Mohan Sharma registered the apposite F.I.R., whereas the endeavour of the prosecution to succor the charge, on anvil of purported eye witness thereto would achieve success, only on their names finding occurrence therewithin, contrarily with the 'Rukka' standing withheld nor Brij Mohan Sharma and Ram Lal standing examined constrains an inference qua both the purported ocular witnesses to the occurrence standing unnamed by Ram Lal in the 'Rukka', whereupon it is befitting to conclude qua the Investigating Officer contriving the factum of their presence at the relevant site of occurrence thereat thereupon their testimonies lose their credibility. The further effect of both Ram Lal, who purportedly prepared Rukka and of Brij Mohan Sharma who thereupon prepared the apposite F.I.R hence remaining unexamined is qua hence an inference standing aroused qua the prosecution hence smothering the true genesis of the occurrence which otherwise may stand unfolded by Ram Lal and Brij Mohan Sharma whereupon the emergence of a smothered besides invented version qua the occurrence warrants dis-imputation of credence thereto.

14. Be that as it may, the inevitable sequel of the body of deceased standing crushed under the tyres of the offending vehicle, vehicle whereof stood driven thereon by the accused, warranted the tyres of the offending truck to acquire blood stains, yet photographs unravelling the aforesaid fact remained unadduced whereupon also the aforesaid submission(s) apart from the hereinbefore ascribed reasons warrant, theirs standing discountenanced.

15. 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.

16. 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.

Suchita Bhaik …….Petitioner.
Versus
Rajesh Kumar Bhaik …….Respondent.

FAO (HMA) No. 163 of 2009.
Decided on: 20th March, 2017

Hindu Marriage Act, 1955- Section 13- Wife filed a petition on the ground that her husband is a known patient of Schizophrenia and had treated her with cruelty – the husband pleaded that he was suffering from depression, which is curable – the petition was dismissed – aggrieved from the order, the present appeal has been preferred- held that wife has to prove that the disease with which the spouse is suffering is not curable and it is not possible to live with the ailing spouse – the Doctor was not examined to prove the nature of ailment – it was not proved that the disease was not curable – the respondent suffered first attack after 4½ years of marriage, which reveals that respondent was not suffering from the attacks regularly – the husband is prepared to live with the petitioner in a matrimonial home- the divorce petition was rightly dismissed- appeal dismissed.(Para-9 to 15)

Cases referred:

V.Bhagat versus D. Bhagat, (1994) 1 Supreme Court Cases, 337
K. Srinivas Rao versus D.A. Deepa, (2013) 5 Supreme Court Cases 226

For the appellant Mr. Prashant Kumar Sharma, Advocate vice Mr. Manish Sharma, Advocate
For the Respondent Mr. Satyen Vaidya, Senior Advocate with Mr. Varun Chauhan, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. (oral).

Appellant herein was the petitioner in a petition filed under Section 13 of the Hindu Marriage Act, 1955 for dissolution of her marriage with the respondent. Learned District Judge, Shimla, after holding full trial and affording the parties on both sides due opportunity of being heard, has dismissed the petition vide judgment and decree dated 31.12.2008, which is under challenge in this appeal.

2. The grounds on which the decree for dissolution of marriage was sought to be passed in a nut shell read as follows:

i) The respondent-husband is a known/ diagnosed patient of schizophrenia since 1988 and during the initial stay about three years of their marriage; he had been picking up quarrels and fights with her on trivials. On 11.3.2002 when the respondent came from the shop, which was opened by him in New Shimla having not in good mood started behaving with her in a awkward manner and when she offered food to him and indifferently such as that he wanted to kill someone. The incident was conveyed to his mother in the village and he was taken to IGMC by her with the help of neighbours in ambulance.

ii) On this occasions when her mother-in-law came to Shimla, she disclosed, for the first time, that the respondent was suffering with such decease since 1988.

iii) The respondent regularly got himself checked up in IGMC Shimla to Dr. Ravi and during such visit was used to stay outside.

iv) He suffered another attack of schizophrenia in the month of October 2002, due to which they had to close the shop and leave Shimla.

v) Later on, in July 2003, she got a job in DAV School Kumarsain. They started living there in rented accommodation. There the respondent allegedly beaten up one Balwant in the neighbourhood and also quarreled with landlord in the year 2005.

3. The respondent-husband has, however, denied the allegations of cruelty so levelled by the petitioner against him being wrong. However, according to him, it is also denied that he is a diagnosed patient of schizophrenia. It is admitted that he is suffering from depression since 1991, which is a disease completely curable. It is denied that this fact was concealed from the petitioner at the time of marriage and rather the marriage, which could be settled with the intervention of one Govind Shyam related to both families, the petitioner and her parents were duly apprised about the disease from which he was suffering.

4. Rejoinder was also filed. The contentions to the contrary in the reply were denied being wrong and the case set-up in the petition reiterated.

5. On such pleadings of the parties, the following issues were framed:

1. Whether the respondent has treated the petitioner with cruelty, as alleged? ..OPP
2. Whether the petition is not maintainable? ....OPR
3. Whether the petitioner is estopped from filing the petition by her own act and conduct? .....OPR
4. Whether the petitioner has no cause of action? .....OPR
5. Whether the petition is not according to H.M. Act?.....OPR
6. Whether this Court has no jurisdiction to try the petition? .....OPR
7. Relief.

6. Learned trial Court, on appreciation of the evidence available on record, has dismissed the petition vide judgment and decree under challenge before this Court in the present appeal.

7. The legality and validity of the impugned judgment and decree has been questioned on the grounds *inter alia* that the evidence qua the cruelty mental as well as physical committed by the respondent upon his wife, has not been appreciated in its right perspective. The allegations in the petition allegedly were not the wear and tear of normal married life and rather the true instances of cruelty he committed upon her. The Court below allegedly has erred in not taking view of the matter that the petitioner-wife came to know about the respondent suffering from schizophrenia after about 4½ years of her marriage with him. There is no appreciation of the specific instances of cruelty given by her in the petition. The wife allegedly cannot be compelled to remain in the company of the respondent when it is established that he being the patient of schizophrenia may take her life and the life of her son including causing bodily injuries to both of them. Therefore, she had made out a case for the grant of decree of divorce, which relief allegedly has been withheld from her on untenable grounds.

8. On hearing learned counsel representing the parties and also going through the evidence available on record, the only question which needs adjudication in the present lis is that though the appellant-petitioner has made out a case for dissolution of her marriage with the respondent on the ground of he is suffering from an incurable disease, however, learned trial Court on account of misappreciation, misconstruction and misreading of the facts of the case as well as the evidence available on record has wrongly dismissed the petition.

9. Before coming to the facts of case and also the evidence available on record, it is desirable to take note of the provisions contained under Section 13(1)(iii) of the Act, which reads as follows:

> "13. **Divorce:-** Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party-
>
> (i) xxx xxx xxx
>
> (ia) xxx xxx xxx
>
> (ib) xxx xxx xxx
>
> (ii) xxx xxx xxx
>
> (iii) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.
>
> Explanation – In this clause-
>
> (a) The expression "mental disorder" means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia
>
> (b) The expression "psychopathic disorder" means a persistent disorder or disability of mind (whether or not including sub-normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party, and whether or not it requires or is susceptible to medical treatment; or
>
> xxx xxx xxx

10. A bare reading of the above provisions leave no manner of doubt that in order to succeed on such grounds the party seeking decree of divorce should plead and prove that the disease, with which the other spouse is suffering, is not curable or he/she is suffering from mental disorder either continuous or intermittently of such a nature that it is not possible to the party seeking the decree of divorce to live with the ailing spouse. The explanation 'a' and 'b' defines the 'mental disorder' and 'psychopathic disorder'.

11. True it is that the instances of cruelty detailed supra in this judgment and quoted in the petition by the petitioner have been pressed into service for seeking the decree of divorce. However, if coming to the proof thereof she is satisfied with her own testimony and also that of one Madan Singh Chauhan, PW-1, who has proved the record qua admission of the respondent in psychiatric department of the IGMC Shimla during the period 8.11.2003 to 11.11.2003. He has also proved the copy of discharge slip Ex.PW-1/A, however, it was not for PW-1 to have said something about the nature of the ailment from which the respondent was suffering. The onus to prove issue No.1 was on the petitioner. She failed to discharge the same because the testimony of PW-1 and discharge slip Ex.PW-1/A is not sufficient to discharge the onus upon her. Nothing has come on record qua the nature of the ailment with which the respondent was suffering in the statement of PW-1. Although in Ex.PW-1/A the primary disease, from which the respondent was suffering, finds mentioned, however, whether it was schizophrenia or depression, it remained unexplained. Learned Trial Judge, therefore, has not committed any illegality or irregularity while holding that for want of the expert opinion viz. the opinion given by the doctor concerned, it cannot be said that the respondent is suffering from schizophrenia or that while under the attack thereof used to be violent and thereby the petitioner-wife really apprehends danger not only to her own life but also to that of her minor son.

12. Interestingly enough the marriage was solemnized on 25.10.1997. No evidence has also come on record to show that the respondent is suffering from a disease, which is not curable. The first attack of the disease as per the allegations in the petition was suffered by the respondent on 11.3.2002 i.e. after about 4 ½ years of marriage, which itself reveals that he is not suffering from a disease nor suffering the attacks regularly. At the most and as per his own admission he is suffering from depression, however, there is nothing to believe that such disease is not curable. Above all the petitioner and respondent had lived as husband and wife in the company of each other till June 2005, which amply demonstrates that the respondent is not suffering from a disease of such a nature that it has become difficult for the petitioner to live in his company.

13. Interestingly enough, she did B.Ed. from Himachal Pradesh University and it is he who, as per her own evidence, used to attend to the business in the shop he had opened in New Shimla. The respondent as such is not suffering from any incurable disease and rather the story has been fabricated and engineered by the petitioner merely to get rid of him as admittedly he is suffering from a disease i.e. depression. The present as such is the case where the petitioner is backing out from her responsibilities and moral obligations towards her ailing husband, who at this juncture need her company.

14. It is not the petitioner's case that the respondent has turned her out from matrimonial home. No doubt, she claims that she apprehends danger to her life; however, for the reasons hereinabove the same is not correct. The respondent-husband is still prepared to live with her in the matrimonial home as stated by learned counsel at bar during the course of arguments. Being so, it is difficult to believe that the petitioner has made out a case for dissolution of her marriage with the respondent by a decree of divorce on the ground as discussed hereinabove. The legal principles settled by the apex Court in ***V.Bhagat*** versus ***D. Bhagat, (1994) 1 Supreme Court Cases, 337*** and ***K. Srinivas Rao*** versus ***D.A. Deepa, (2013) 5 Supreme Court Cases 226,*** are not attracted in this case being distinguishable on facts.

15. In view of what has been said hereinabove, this appeal fails and the same is accordingly dismissed. Consequently, the judgment and decree passed by the trial Court is affirmed. No order so as to costs.

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

Salig Ram ….Appellant-Plaintiff

Versus

Ved Parkash ….Respondent-Defendant

Regular Second Appeal No.388 of 2005
Date of decision: 21.03.2017

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit seeking permanent prohibitory injunction for restraining the defendant from interfering in the suit – it was pleaded that plaintiff had purchased 41/97th Share in the suit land –he had constructed a septic tank and two latrines over the land by spending Rs.30,000/- - the defendant has no right over the suit land but is interfering with the same- he demolished the septic tank and two latrine sheets – the defendant pleaded that construction was started without getting the suit land demarcated – the latrine and septic tank were constructed over the passage- the suit was dismissed by the Trial Court- an appeal was preferred, which was also dismissed- held in second appeal that plaintiff and defendant had purchased the share from the original vendor – plaintiff had not purchased any specific portion of the suit land- the plaintiff was found to be encroacher in the demarcation – plaintiff had purchased 4 biswas of land but was found in possession of 4.10 biswa of the land –

plaintiff was not present at the time of the incident and the testimony of his witness is not satisfactory – the Courts had dealt with the evidence properly- appeal dismissed.(Para-12 to 27)

Case referred:

Laxmidevamma and Others vs. Ranganath and Others, (2015)4 SCC 264

For the Appellants: Mr.G.D. Verma, Senior Advocate with Mr.B.C. Verma, Advocate.
For the Respondent Mrs.Ritu Raj Sharma, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

This appeal has been filed by the appellant-plaintiff against the judgment and decree dated 28.4.2005, passed by the learned District Judge, Shimla, H.P., affirming the judgment and decree dated 27.3.2004, passed by learned Civil Judge(Junior Division), Shimla, H.P., whereby the suit filed by the appellant-plaintiff seeking the relief of prohibitory injunction and damages has been dismissed.

2. Brief facts of the case, as emerged from the record, are that the appellant-plaintiff *(herein after referred to as the 'plaintiff'),* filed a suit for permanent prohibitory injunction restraining the defendant from interfering in his suit land comprised in Khata No.41, Khatauni No.52, Khasra No.638/33/1, measuring 4.10 biswas, situated at Mauja Chakrail, Pargana Majhola, Tehsil and District Shimla *(hereinafter referred to as the 'suit land')* and also sought damages to the tune of Rs.40,000/- from the defendant. It is averred by the plaintiff that he had purchased 41/97th shares in the suit land from Prabhu Ram and Nazroo Devi vide sale deed dated 21.5.1994. It is further averred by the plaintiff that he occupied this land and had constructed a house, septic tank and two latrines over this land. It is further averred by the plaintiff that he has spent a sum of Rs.30,000/- on the construction of septic tank and two laterines. It is alleged by the plaintiff that the defendant has no right or interest, whatsoever, over the suit land, however, he has unlawfully and illegally destroyed the septic tank of the plaintiff on 5.3.2000 and also demolished latrine seats with a hammer, thereby causing wrongful loss to him to the tune of Rs.40,000/- in all. In the aforesaid background the plaintiff filed a Civil Suit before the learned trial Court.

3. Defendant, by way of filing written statement, refuted the claim of the plaintiff on the ground of maintainability, cause of action and estoppel. On merits, it is averred by the defendant that the plaintiff started raising construction over the land without getting it demarcated and in this process had covered more area of land under his construction than was purchased by him. It is further averred by the defendant that the plaintiff constructed septic tank and latrines on a portion of land, which is being used as common passage by the owners and vendees. It has further been averred by the defendant that the plaintiff constructed latrines and septic tank on this common passage, which is in the shape of stair-case and has blocked it. Defendant, while denying all other allegations regarding demolition of latrines and septic tank and of plaintiff suffering loss to the tune of Rs.40,000/-, prayed for the dismissal of the suit.

4. On the pleadings of the parties, the learned trial Court framed the following issues:-

> *"1. Whether the plaintiff is entitled to relief of permanent prohibitory injunction as prayed? OPP*
>
> *2. Whether the plaintiff is entitled to relief of damages as prayed? OPP.*
>
> *3. Whether the suit is not maintainable? OPD*
>
> *4. Whether the plaintiff has no cause of action? OPD.*

5. *Whether the plaintiff is estopped from filing the suit? OPD*
6. *Relief".*

5. Learned trial Court vide judgment and decree dated 27.03.2004 dismissed the suit of the plaintiff for relief of permanent prohibitory injunction restraining the defendant from interfering in the suit land and also for damages to the extent of Rs.40,000/-.

6. Feeling aggrieved and dissatisfied with the aforesaid judgment and decree passed by the learned trial Court, whereby suit filed by the plaintiff was dismissed, appellant-plaintiff filed an appeal under Section 96 of the Code of Civil Procedure *(for short `CPC')* in the Court of learned District Judge, Shimla, who, vide impugned judgment and decree dated 28.04.2005, dismissed the appeal preferred by the plaintiff by affirming the judgment and decree passed by the learned trial Court. In the aforesaid background, the present appellant-plaintiff filed this Regular Second Appeal before this Court, details whereof have already been given above.

7. This second appeal was admitted on the following substantial question of law:

> *"(1) Whether approach on the part of both the courts below in considering the subject matter of dispute has been erroneous and illegal and instead of considering the claim of plaintiff for grant of decree for permanent prohibitory injunction, the claim was taken for removal of encroachment over the suit land?*
>
> *2. Whether the appellant is entitled for recovery of suit amount on account of damages as caused by the defendant to the septic tank and latrines of the plaintiff and in this regards the claims stands proved by damage report Ex.PW-4/A prepared by Sh.H,.S. Bisht a retired Executive Engineer?*
>
> *3. Whether Ex.Dx alleged compromise set up by the respondent is irrelevant for the purpose of determination of the dispute because this document is not relating to the dispute in the present suit?*
>
> *4. Whether tatima Ex.PW-1/B report of expert Ex.PW-4/A and Ex.DX have been misread and misconstrued?*
>
> *5. Whether the courts below were required to appoint a Local Commissioner in order to ascertain the location and dismantling of the septic tank?"*

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

9. Mr.G.D. Verma, learned Senior Counsel representing the appellant-plaintiff, vehemently argued that approach of both the Courts below, while considering the dispute at hand, has been erroneous and illegal, as a result of which, erroneous/contrary findings have come on record to the detriment of plaintiff, who successfully proved on record, by leading cogent and convincing evidence, that defendant is interfering in the exclusive ownership and possession of the plaintiff. As per Mr.Verma, it was none of the case of the plaintiff that defendant encroached upon the land of the plaintiff, rather, plaintiff filed Civil Suit for injunction restraining the defendant from interfering in the ownership and possession of the plaintiff. With a view to substantiate his aforesaid argument, Mr.Verma, invited the attention of this Court to the evidence led on record by respective parties, be it ocular or documentary, to demonstrate that Courts below not only misread and misinterpreted the real point of controversy, but failed to appreciate the evidence in its right perspective.

10. On the other hand, Mrs.Ritu Raj Sharma, learned counsel appearing for the respondent-defendant, supported the judgments passed by both the Courts below and vehemently argued that no interference, whatsoever, is warranted in the present facts and circumstances of the case, especially in view of the fact that both the Courts below have meticulously dealt with each and every aspect of the matter. She also urged that scope of interference by this Court is very limited, especially when two Courts have recorded concurrent

findings on the facts as well as law. In this regard, to substantiate her aforesaid plea, she placed reliance upon the judgment passed by Hon'ble Apex Court in ***Laxmidevamma and Others vs. Ranganath and Others,* (2015)4 SCC 264.**

<u>Substantial Question No.1</u>:

11. This Court, with a view to ascertain the genuineness and correctness of the aforesaid submissions having been made by Mr.Verma vis-à-vis substantial question of law No.1, carefully perused the pleadings as well as evidence adduced on record by the respective parties, perusal whereof nowhere suggests that learned Courts below misread and mis-appreciated the material on record. Rather, close scrutiny of the impugned judgments passed by both the Courts below suggests that both the Courts below have carefully dealt with each and every aspect of the matter and by no stretch of imagination it can be said that the Courts below, while deciding the case at hand, mis-directed themselves. Admittedly, plaintiff filed suit for permanent prohibitory injunction restraining the defendant from interfering in any manner with the ownership and possession of the plaintiff over the suit land, as described hereinabove, and also for recovery of an amount of Rs.40,000/- on account of damages.

12. In order to succeed, onus was on plaintiff to prove on record by leading cogent and convincing evidence that he had constructed septic tank and latrines on the suit land comprising in Khasra No.638/33/1, measuring 4.10 biswas and the same was demolished by the defendant without any justification. It is admitted case of the plaintiff that he as well as defendant purchased shares, as described above, out of land of Khasra Nos.637/33 and 638/33 from original vendors Prabhu Ram and Nazaroo Devi. Though plaintiff claimed that land purchased by him is comprised of Khasra No.638/33/1, measuring 4 biswas and 10 biswansis, but admittedly, there is nothing on record suggestive of the fact that he had purchased specific portion of joint land from the previous owners.

13. Similarly, there is no evidence, be it ocular or documentary, available on record suggestive of the fact that land was partitioned between joint owners. Hence, plaintiff cannot be allowed to state that he is exclusive owner in possession of the suit land. Similarly, in view of aforesaid, plaintiff cannot be allowed to contend that any portion of his land is encroached by the defendant unless specific portion of the land was identified or demarcated on the spot. Plaintiff by placing on record Tatima Ex.PW-1/B made an attempt to prove that he purchased land bearing Khasra No.638/33/1, on which he constructed a house, septic tank and two latrines and, as such, defendant had no right, whatsoever, to interfere in the same. But perusal of Ex.PW-2/B, i.e. demarcation report submitted by the Assistant Collector, clearly suggests that plaintiff himself was found to have encroached upon common passage used by the parties. Aforesaid report, having been given by Assistant Collector, nowhere suggests that land of plaintiff was encroached by the defendant, as alleged by the plaintiff. Similarly, there is no evidence available on record suggestive of the fact that plaintiff being dis-satisfied with the aforesaid demarcation, having been carried out by Assistant Collector, ever laid any challenge to the same, meaning thereby that the same was accepted by the plaintiff without any demur. It may also be noticed that Tatima Ex.PW-1/B was prepared by Patwari Dalip Singh, who, while appearing as PW-1, stated that he had prepared Tatima Ex.PW-1/B on the spot on 10.3.2000 i.e. just five days after the alleged incident, but it nowhere suggests that any septic tank or latrines constructed over the land in Khasra No.638/33/1 were found in demolished condition. Aforesaid PW-1 Dalip Singh Patwari also admitted that plaintiff was found to be in possession of 4 biswas and 10 biswansis of land, whereas, as per plaintiff, he had only purchased 4 biswas of land. PW-2 Ludermani Kanungo, who had conducted demarcation of land of the plaintiff on 20.4.2001, nowhere stated that some septic tank was found demolished on the spot.

14. Similarly, there is no Tatima annexed with the report Ex.PW-2/B reflecting exact possession of the plaintiff over the join land. Rather, report, as referred above, clearly suggests that the plaintiff has purchased only 4 biswas of land, whereas he was found to be in possession of land measuring 4.10 biswas of land. Similarly, this Court also carefully perused demarcation

report Ex.DW-1/A obtained by the plaintiff in Civil Suit having been filed by him against one Devi Ram, which also suggests that plaintiff himself encroached upon the land left for the path for constructing septic tank etc. Since no cogent or convincing evidence was led on record by the plaintiff suggestive of the fact that he is/was exclusive owner in possession of the land over which septic tank and latrines were constructed by him, Courts below rightly held him not entitled to the relief of prohibitory injunction.

15. Careful perusal of impugned judgments passed by both the Courts below nowhere suggests that Courts below misdirected themselves while adjudicating the subject matter of the dispute and erroneously and illegally considering the case of the plaintiff for removal of the encroachment of the suit land instead of grant of decree for permanent prohibitory injunction. Substantial question of law is answered accordingly.

Substantial Question No.2:

16. Mr.Verma, while making submissions, as referred above, also strenuously argued that Courts below miserably failed to appreciate overwhelming evidence adduced on record by the plaintiff that damage to the septic tank as well as latrine seats was caused by the defendant and as such he was entitled to be compensated. Mr.Verma, with a view to substantiate his aforesaid arguments, invited the attention of this Court to the damage report Ex.PW-4/A, prepared by Shri H.S. Bisht, a retired Executive Engineer. However, aforesaid arguments having been made by Shri Verma also appear to be without any merit because admittedly this Curt was unable to lay its hand to any evidence, be it ocular or documentary, suggestive of the fact that defendant damaged or dismantled septic tank and latrines of the plaintiff constructed on the common passage. Plaintiff himself stated before the Courts below that at the time of incident he was not present on the spot. It has come in his statement that septic tank and latrines were damaged by the defendant on 5.3.2000 in the presence of his wife, but strangely she was not brought to the witness box to prove aforesaid factum. Since plaintiff was not present on the spot, as admitted by him, no reliance, if any, could be placed upon his version without there being any corroboration from person, who was actually present on the site.

17. PW-3 Plaintiff Salig Ram though claimed in his statement that septic tank and latrines were demolished by the defendant causing loss to him to the tune of Rs.40,000/-, but careful perusal of admission having been made by him in his cross-examination as well as photographs mark A-1 to A-7 clearly suggests that plaintiff had constructed part of his septic tank beneath the stairs which admittedly are not over the land of the plaintiff nor he has constructed the same. Rather, these stairs were got prepared by previous owners as common passage.

18. Statement of PW-4 H.S. Bisht, retired Executive Engineer, who prepared damage report Ex.PW-4/A, suggests that plaintiff had constructed part of his septic tank beneath the stairs. Moreover, perusal of Ex.PW-4/A also suggests that Shri H.S. Bisht visited the spot at the behest of plaintiff namely, Shri Salig Ram, who requested him to inspect his house and prepare estimate on the basis of present market value qua the damage caused by defendant Ved Parkash to septic tank and two WC seats of his house. Report, as referred above, clearly suggests that version put forth on behalf of Salig Ram plaintiff was incorporated in the report, wherein he stated that defendant namely Ved Parkash damaged septic tank and two WC seats of his house.

19. This Court, after carefully perusing the aforesaid report, has no hesitation to conclude that same was procured by the plaintiff on 16.3.2000 solely with a view to claim damages from the defendant. But, as has been observed above, there is no direct evidence adduced on record by the plaintiff suggestive of the fact that defendant caused damage to septic tank as well as two WC seats and as such no help/benefit, if any, could be taken by the plaintiff on the basis of report furnished by PW-4 H.S.Bisht, who admittedly prepared report on the basis of version put forth by the plaintiff himself after visiting site on 11.3.2000 i.e. after one week of the alleged incident. Hence, this Court sees no illegality and infirmity in the findings returned by

the Courts below qua the claim of damages of the plaintiff, which was based upon the damage report Ex.PW-4/A prepared by Mr.H.S. Bisht. Hence, substantial question of law is answered accordingly.

Substantial Questions No.3 & 4:

20. Mr.Verma, while inviting the attention of this Court to Ex.DX, strenuously argued that Courts below placed undue reliance upon the compromise deed dated 21.10.2001, wherein he allegedly compromised the matter with defendant subsequent to aforesaid incident. As per Mr.Verma, bare perusal of compromise deed would reveal that nothing with regard to septic tank or latrines were agreed upon between the parties, rather, it pertains to boundary dispute between the parties and parties had agreed to withdraw the respective cases pertaining to boundaries. Careful perusal of compromise i.e. Ex.DX clearly suggests that plaintiff entered into a compromise with Shri Devi Ram as well as defendant, wherein parties agreed to withdraw their cases against each other. Parties also agreed that there shall be a vacant space of 3 feet between the two houses, meaning thereby that the parties agreed not to raise any kind of construction on the land measuring 3 feet existing between the house of plaintiff as well as defendant.

21. True, it is that compromise deed, as referred above, nowhere suggests that there is mention, if any, with regard to septic tank and two latrines but, if compromise is read in its entirety, especially the background in which it came into existence, it can be safely concluded that after institution of present lis by the plaintiff against the defendant as well as another suit having been filed by Shri Devi Ram against the plaintiff, parties agreed to resolve the matter amicably. Plaintiff himself in his cross-examination admitted that earlier suit was instituted by him against his neighbour Devi Ram, wherein he had obtained demarcation report Ex.DW-1/A, perusal whereof suggests that plaintiff was found to have encroached upon the land left for path by constructing septic tank etc.

22. This Court, after specifically seeing the background of compromise, sees no force much less substantial in the arguments having been made by Shri Verma, learned Senior Counsel representing the appellant, that compromise Ex.DX has no relevance for the purpose of determination of dispute between the parties and as such sees no illegality and infirmity in the findings returned by the Courts on the basis of document Ex.DX. Similarly, this Court sees no merit in the contention of Shri Verma that Courts below misread and mis-construed Tatima Ex.PW-1/B and report of expert Ex.PW-4/A, effect of which has already been dealt with by this Court while answering aforesaid substantial questions of law. Hence, both the aforesaid substantial questions of law are answered accordingly.

Substantial question No.5:

23. While exploring answer to substantial question of law No.5, this Court could lay its hand to relevant portion of ground-(xi) of the appeal, which is reproduced hereinbelow:-

> *"(xi)… … … … … …As a matter of fact, there was no dispute about the identity and boundaries of the respective plots of the parties. The fact of the matter is that since Respondent caused damage to the properties of the plaintiff as detailed in the suit, therefore, claim has been set up for recovery of amount of damages and also a prayer was made that the Respondent should be restrained from committing acts of interference and damages."*

24. It is own case of the plaintiff that there was no dispute about the identity and boundaries of the respective plots of the parties, rather case of the plaintiff is/was that since respondent caused damage to the property of the plaintiff, he is entitled for the recovery of amount of damages, as claimed in the plaint by the plaintiff. Moreover, plaintiff, with a view to prove his claim, placed on record demarcation report conducted on spot by Assistant Collector i.e. Ex.PW-2/B, wherein no land of plaintiff was found under the encroachment of the defendant. Rather, plaintiff's own witness Patwari Dalip Singh admitted that the plaintiff was in possession of 4.10 biswas of land, whereas, as per own case of plaintiff, he has purchased only 4 biswas of land, meaning thereby that he himself covered more area of land under construction than was

actually purchased by him. Similarly, this Court finds that apart from above, there was another demarcation report Ex.DW-1/A available on record suggestive of the fact that the plaintiff himself encroached upon the land left for the path for constructing septic tank etc. Hence, in view of above, this Court is not in agreement with the contention of Shri G.D. Verma, learned Senior Counsel representing the plaintiff, that the Courts below ought to have appointed Local Commissioner in order to ascertain the location and dismantling of the septic tank. Since there was no boundary dispute, if any, between the parties, as admitted by the plaintiff, there was no occasion for the Courts below to appoint Local Commissioner, more particularly when two demarcation reports in the shape of Ex.PW-4/A and Ex.DW-1/A were available on record suggestive of the fact that the plaintiff himself encroached upon the land left for path by constructing septic tank and latrines etc. It may also be observed that there is no evidence available on record that the plaintiff, being aggrieved, if any, with the aforesaid demarcation report, ever laid any challenge to the same in appropriate proceedings under law. Hence, substantial question is answered accordingly.

25. This Court is fully satisfied that both the Courts below have very meticulously dealt with each and every aspect of the matter and there is no scope of interference, whatsoever, in the present matter. Since both the Courts below have returned concurrent findings, which otherwise appear to be based upon proper appreciation of evidence, this Court has very limited jurisdiction/scope to interfere in the matter. In this regard, it would be apt to reproduce the relevant contents of judgment rendered by Hon'ble Apex Court in ***Laxmidevamma and Others vs. Ranganath and Others,*** **(2015)4 SCC 264,** to case supra, wherein the Court has held as under:

> *"16. Based on oral and documentary evidence, both the courts below have recorded concurrent findings of fact that the plaintiffs have established their right in A schedule property. In the light of the concurrent findings of fact, no substantial questions of law arose in the High Court and there was no substantial ground for reappreciation of evidence. While so, the High Court proceeded to observe that the first plaintiff has earmarked the A schedule property for road and that she could not have full-fledged right and on that premise proceeded to hold that declaration to the plaintiffs' right cannot be granted. In exercise of jurisdiction under Section 100 CPC, concurrent findings of fact cannot be upset by the High Court unless the findings so recorded are shown to be perverse. In our considered view, the High Court did not keep in view that the concurrent findings recorded by the courts below, are based on oral and documentary evidence and the judgment of the High Court cannot be sustained."* ***(p.269)***

26. In the instant case, learned Senior Counsel representing the appellant-plaintiff was unable to point out any perversity, which could persuade this Court to interfere in the concurrent findings of fact and law recorded by the Courts below.

27. Consequently, in view of detailed discussion made hereinabove, this Court is of the view that there is no illegality and infirmity in the judgment and decree passed by the Courts below, which are based upon proper appreciation of evidence, be it ocular or documentary, adduced on record. Hence, the present appeal fails and is dismissed accordingly. There shall be no order as to costs.

28. Interim order, if any, is vacated. All the miscellaneous applications are disposed of.

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

Gian Chand (since deceased) through his legal heirs .....Appellants/Plaintiffs.

Versus

Janki Devi & others .....Respondents/defendants.

RSA No. 351 of 2006.
Reserved on: 10th March, 2017.
Decided on : 24th March, 2017.

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit pleading that he is owner in possession of the suit land and defendant is interfering with the same without any right to do so- the suit was dismissed by the Trial Court- an appeal was filed, which was also dismissed- held in second appeal that Courts had relied upon the report of the Local Commissioner, who had found no encroachment on the suit land – however, the demarcation was not conducted in accordance with law – appeal allowed and suit of the plaintiff decreed. (Para-7 to 12)

For the Appellants: Mr. K.D. Sood, Senior Advocate with Mr. Ankit Aggarwal, Advocate.
For the Respondents: Mr. Parneet Gupta, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal stands directed by the appellants/plaintiffs against the concurrently recorded verdicts of the learned Courts below, whereby, they dismissed the suit of the plaintiff wherein he claimed relief of permanent prohibitory injunction restraining the defendants from interfering in his possession over the suit land as also for demarcation and in alternative for possession.

2. Briefly stated the facts of the case are that the original plaintiff Gian Chand had filed a suit against the defendant for permanent prohibitory injunction restraining the defendants from interfering in the land comprised in Khata No.44, Khatauni No. 44 min, khasra Nos. 3, 80, 82, kita 3, measuring 3 kanals 15 marlas situated in Tiko Kharoh, Tappa Matti Morian, Tehsil and District Hamirpur, H.P. and also for demarcation of the same. It is averred that the plaintiff is owner in possession of the suit land and the defendants have no concern with it. It was alleged that the defendant being head strong and quarrelsome person, started interference over the suit land without any right, title or interest and also threatened to dispossess the plaintiff from the suit land. Hence the suit.

3. The defendants contested the suit and filed written statement wherein they have pleaded that the land of the defendants adjoining to the suit land and it stands already demarcated by the revenue authorities and parties were found in possession of their respective land as per the demarcation report. It is further pleaded that the defendants neither raised any construction nor interfered with the suit land. It is further pleaded that in case the defendants were found to be in possession of any part of the suit land, in that case, the defendants had become the owner of the same by way of adverse possession.

4. 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. Relief.

5. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court DISMISSED the suit of the plaintiffs/appellants herein. In an appeal, preferred

therefrom by the plaintiffs/appellants herein before the learned First Appellate Court, the first Appellate Court also dismissed the appeal and affirmed the findings recorded by the learned trial Court.

6. Now the plaintiffs/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 21.11.2006 this Court, admitted the appeal instituted by the plaintiffs/appellants against the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

c) Whether the report of the Local Commissioner, appointed vide order dated 10.03.1995 is beyond the scope of reference made to him and it ought not to have been relied upon for deciding the matter?

Substantial question of Law No.1.

7. Both the learned Courts below had declined the apposite relief to the plaintiff by placing reliance upon the report of the Local Commissioner embodied in Ex. LX, whereto copy of aks musabi embodied in Ex. L-1 stood appended. Both the learned Courts below had imputed implicit reliance to the report of the Local Commissioner, also they dispelled the vigour of the objections purveyed thereto by the plaintiff. The impugned verdicts recorded by both the learned Courts below apparently spur from theirs grossly mis-appraising, the import of the apposite pleadings constituted in the plaint besides in the written statement. Short shrift, by both the learned Courts below to the apposite averments constituted in the plaint by the plaintiff, qua his holding possessory title qua the suit land besides visible gross overlooking(s) by both the learned Courts below vis-a-vis the written statement furnished thereto by the defendants, wherein they acquiesce qua both the litigating parties in consonance with a previous demarcation, hence holding possession qua tracts of land(s) demarcated thereunder, has palpably engendered erroneous findings standing returned, on the apposite issue.

8. The import of the acquiescence of the defendants in their written statement furnished to the plaint qua the contentious boundaries standing previously demarcated by the Revenue Agency concerned, in sequel, whereto each holding possession of tracts of land, is qua theirs bespeaking with candour qua the plaintiff not encroaching upon the land of the defendants abutting his land also the effect of the aforesaid acquiescence is qua the defendants not holding any grievance qua the plaintiff nor theirs espousing qua encroachment, if any, carried by the plaintiff upon theirs land, standing ordered by the Court for its apt determination by a Local Commissioner. Moreover, the defendants omitted, for succoring their espousal even if veiledly ventilated in their written statement qua theirs holding only portion of the suit land in pursuance to a previous demarcation carried by the Revenue Authorities concerned to adduce evidence in consonance thereto, comprised in their placing on record the report of the demarcating officer concerned. Omission of the defendants to place on record the report of the demarcating officer prepared by the latter previous to the report of the demarcating officer, hereat comprised in Ex.LX nor their concerting to seek appointment of a Local Commissioner for re-demarcating the suit land, is a stark display qua the defendants acquiescing qua the plaintiff not encroaching upon any portion of their land abutting the land of the plaintiff also thereupon an inference stands engendered qua theirs accepting the claim of the plaintiff.

9. In the backdrop of the aforesaid pleadings constituted respectively in the plaint besides in the written statement, the effect of the report of the Local Commissioner embodied in Ex. LX whereon implicit reliance stand placed upon by the learned Courts below stands enjoined to be tested besides the effect of the learned trial Court recording an order on 10.03.1995, for appointment of a Local Commissioner for visiting the relevant site, for determining qua whether the defendants carrying out encroachment(s) upon the land of the plaintiff whereas the demarcating Officer concerned in transgression thereto preparing his report embodied in Ex.LX making unfoldments therein qua the plaintiff encroaching upon the land of the defendants, legality of transgression whereof also stands enjoined to be tested.

10. The reference made to the Local Commissioner under the apposite orders recorded on 10.03.1995, was to determine qua the defendants encroaching upon the land of the plaintiff, thereupon, he stood enjoined to revere the mandate held therewithin. However, the Local Commissioner proceeded to irrevere the scope of the apposite reference, comprised in his unfolding in his report qua the plaintiff encroaching upon the land of the defendant whereupon, hence, with the Local Commissioner, travelling beyond the scope of the reference, stains his report with a vice of his holding leanings towards the defendants, evident display whereof stands unearthed in his report Ex. Lx wherein he proposed action against both the plaintiff besides his counsel, for their refusal to append their signagtures on their statements wherewithin they purveyed their objections qua the demarcation conducted by him. The evident bias of the Local Commissioner concerned also benumbs the efficacy of his report embodied in Ex. LX. The objections purveyed by the deceased plaintiff before the learned trial Court whereon he assailed the report of the Local Commissioner comprised in Ex. LX, make loud echoings qua the demarcating officer not holding the demarcation of the suit land in consonance with the apposite rules and regulations. The aforesaid objections warranted determination under a speaking order standing pronounced thereon. However, both the learned Courts below proceeded to impute implicit reliance or credibility to the report of the Local Commissioner comprised in Ex. LX, despite his proceeding to demarcate the suit land in gross detraction of the scope of the apposite reference whereon he was directed to ascertain the encroachment made by the defendants upon the suit land. Also the belittling by both the learned Courts below of the aforesaid acquiescence (s) of the defendants qua the plaintiff not encroaching upon their land assumes significance comprised in its conveying qua both the learned Courts below despite the defendants not hence instituting any counterclaim to the apposite plaint of the plaintiffs, theirs proceedings to impute leverage to the report of the local Commissioner, imputation of sanctity whereof tantamounts to their leveraging an unespoused claim of the defendant also theirs discreetly pronouncing a decree qua them despite its standing never claimed whereupon a gross injustice has ensued to the plaintiff besides travesty to the pleadings has occurred.

11. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court as also by the learned trial Court are 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 has excluded germane and apposite material from consideration. Accordingly, the substantial question of law is answered in favour of the plaintiffs/appellants and against the defendants/respondents.

12. In view of above discussion, the present Regular Second Appeal is allowed and the judgements and decrees rendered by both the learned Courts below are set aside. Consequently, the suit of the plaintiff is decreed and the defendants are restrained from interfering in th suit land comprised in Khata No.44, min, Khataoni NO.44 min, Khasra No.3, 80, 82 measuring 3 kanals 15 marlas situated in Tika Kharoh, Tappa Matti Morian, Tehsil and District Hamirpur, H.P., in any manner whatsoever through themselves or through their authorized agents, servants and family members etc. Decree sheet be drawn accordingly. All pending applications also stand disposed of. No order as to costs.

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

Sanjay Kumar ….Petitioner.

Versus

Sumna Kumari & others ….Respondents.

Civil Revision No. 113 of 2014.

Date of Decision: 24th March, 2017.

Hindu Adoption and Maintenance Act, 1956- Section 18 and 23- Trial Court granted interim maintenance of Rs.1,000/- per month to each of the plaintiffs/applicants- aggrieved from the order, the present petition was filed- held thatTrial Court had relied upon the pleadings to grant interim relief- although issues have been framed, parties were not called upon to produce the evidence – the reliance placed upon the pleadings is improper as in case of dismissal of main suit, recovery proceedings would have to be initiated – petition allowed- order of the Trial Court set aside. (Para-3 and 4)

For the Petitioner: Mr. Amandeep Sharma, Advocate.
For the Respondents : Mr. Ramakant Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral)

The Instant petition stands directed against the impugned order recorded by the learned trial Court, on 21.05.2014, upon an application standing preferred therebefore under Sections 18, 23 of Hindu Adoption and Maintenance Act, whereby, he granted relief of interim maintenance quantified in a sum of Rs.1000/- per mensem qua plaintiff/applicant No.1 besides also quantified interim maintenance of Rs.1000/- per mensem qua plaintiff No.2/applicant No.2.

2. A perusal of the plaint constituted before the learned trial Court underscores qua in the plaintiffs/applicants espousing therein, the apposite relief, theirs drawing leverage from the provisions engrafted in Section 18 of the Hindu Adoption and Maintenance Act.

3. Per se, the plaint constituted against the defendant in the apposite civil suit, holds an apparent synonimity vis-a-vis the statutory provisions whereunder the applicants/plaintiffs, anvilled their apposite application qua award of interim maintenance vis-a-vis them. The statutory provisions whereunder, both the plaint as also the apposite application stood constituted also whereupon, the impugned rendition stood recorded by the learned trial Court, do not hold any mandate qua the learned trial Court holding any jurisdiction to grant any sum of money, as interim maintenance qua the plaintiffs/applicants, thereupon, it was unbefitting for the learned trial Court, to proceed to accord the relief of interim maintenance upon an application constituted therebefore under statutory provisions holding alikeness with the statutory provisions whereunder the plaintiffs instituted a suit against the defendant. The underlying object of the legislature, in omitting to, engraft in the relevant statutory provisions, any apt provision for grant of interim maintenance, appears to stand engendered by the Civil Court standing thereupon forestalled to render a decision upon the plaint, ultimate decision whereon, may, with the defendant adducing evidence of vigorous sinew, be adversarial vis-a-vis the plaintiff, whereupon, the plaintiffs would prematurely besides at an inchoate stage hence stand unjustly enriched also would lead to the obviable fate of the defendant(s) standing driven to seek refund of amount(s) awarded to the plaintiff(s) as interim maintenance, besides any decision upon an application for interim maintenance may also present a *fait accompli* to the Civil Court significantly when on completion of trial of the suit, it proceeds to render an adjudication thereupon.

4. Dehors the above, a perusal of the impugned order recorded by the learned trial Court unveils qua the imminent reason prevailing upon it, standing anchored upon the pleadings respectively constituted in the plaint besides in the written statement, each by the plaintiffs and the defendant, also it stands gauged from the relevant record qua the learned trial Court proceeding to impute validation to the pleadings in the plaint despite the apposite issue(s) thereupon standing struck subsequent to its proceeding to record the impugned order, thereupon in the learned trial Court proceeding to analyze the worth of the contentious respective pleadings of the respective contestants also its imputing sanctity to the pleadings constituted in the plaint, whereas, it dispelling the sanctity of the pleadings constituted in the written

statement, despite no evidence standing adduced therebefore thereon, at the relevant stage, by either of the contesting parties, is a per se deprecatory exercise resorted to, by the learned trial Court. Even otherwise, with the application aforesaid, for the reasons aforestated being misconstituted therebefore also with the relief asked therein being analogous to the relief claimed by the plaintiff in the main suit, thereupon, also the impugned order stands ingrained with an inherent vice, emanating from the learned trial Court committing a gross illegality and impropriety comprised in its untenably deciding the claim in the suit, without asking for adduction of relevant evidence thereupon by the defendant, evidence whereof may ultimately constrain it to dismiss the suit, thereupon, the plaintiff would stand untenably/inchoately enriched also the defendant would be driven to launch obviable restitutory recovery proceedings for the recovery of the amount awarded as interim maintenance besides thereupon the aforesaid underlying object of the legislature in not clothing the Civil Court with jurisdiction to grant any ad interim maintenance amount would suffer frustration. Consequently, the instant petition is allowed and the impugned order is quashed and set aside. The learned trial Court is directed to conclude the trial of the suit within one year from today. However, it is made clear that any observations made hereinabove shall have no bearings on the merits of the case. Records be sent back forthwith. All pending applications also stand disposed of.

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

Fanki Ram …..Appellant.

Versus

State of H.P. …..Respondent.

Cr. Appeal No. 163 of 2007.
Date of Decision: 27th March, 2017.

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 450 grams charas – the accused was tried and convicted by the Trial Court- held in appeal that the testimonies of prosecution witnesses are credible and confidence inspiring – independent witnesses have not supported the prosecution version- however, they admitted their signatures on the seizure memos and are estopped from denying the contents of the same – samples were connected to the contraband recovered – option was given to the accused to get his premises searched by Executive Magistrate or Gazetted Officer – however, the accused consented for search by the police- the prosecution case was proved and the accused was rightly convicted- appeal dismissed.(Para-9 to 13)

For the Appellant: Mr. Yashveer Singh Rathore, Advocate.
For the Respondent: Mr. R.S. Thakur, Addl. A.G.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral).

The instant appeal stands directed against the judgment rendered on 07.05.2007 by the learned Sessions Judge, Solan, H.P. in Sessions trial No.2-S/7 of 2007, whereby, the learned trial Court convicted the accused/appellant herein for his committing an offence punishable under Section 20-B of the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as NDPS Act) and sentenced him to undergo rigorous imprisonment for two years and to pay a fine of Rs.10,000 and in default of payment of fine amount to further undergo rigorous imprisonment for a period of six months.

2. The facts relevant to decide the instant case are that on 4.9.2006, ASI Deva Nand along with other police officials of the C.I.A. staff had left Solan at about 2.30 p.m. and had gone to Kunihar on routine checking and detection of crime. When they reached at Kunihar bus stand, a secret information was received by ASI Deva Nand that Fanki Ram son Shri Balak Ram, resident of Village Jabal Jhamrot, Post Office, Koti, Tehsil Kasauli, keeps and sells charas in his house and if his house is checked charas in large quantity can be recovered. Finding the information reliable ASI Deva Nand recorded the reasons of belief and sent it to S.P. Solan through C. Ajay Kumar, which were received by S.P. Solan on the same day at 5.30 p.m.. Thereafter they proceeded towards the house of the accused and on the way two independent witnesses Pritam Singh, Up Pardhan and Om Parkash were associated and police party reached the house of accused where he was found present in his court yard. No person was present with him at that time. He was apprised of the reasons for search. Asi Deva Nand told him about the information and had asked him if he wanted his personal search to be effected before a Magistrate or a Gazetted Officer but he agreed to be searched by the police. His search was then effected by the police party after giving their personal search to the accused but nothing incriminating was found on his personal search and thereafter the search of the house was effected and during the search of the house, a plastic container on which word "mint" was written was found under the bed box which was kept in the main gallery. The container was taken out and opened. It was found containing charas in the forms of wicks. It was tested by smell by ASI Deva Nand and found it giving smell of charas and identification memo was prepared in this regard in the presence of both the witnesses. The weighing scale and weights were procured from the shop of one Sant Ram and the charas was weighed in presence of the witnesses and on weighment, it was found 450 grams. Two samples of 25 grams each were drawn and then were put into two separate empty cigarettes packets and sealed in cloth parcels separately and the remaining charas was also sealed in separate cloth parcel with same seal "K". ASI Deva Nand also took sample impressions of the seal used, filled NCRB forms in triplicate and the case property was taken into possession in presence of the witnesses through recover memo. Consequently, an FIR was registered in the concerned police station. Thereafter, the Investigating Officer concerned completed the codel formalities.

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

4. The accused stood charged by the learned trial Court for his committing offence punishable under Section 20-B of the NDPS Act. In proof of the prosecution case, the prosecution examined 11 witnesses. On conclusion of recording of the prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure was recorded by the learned trial Court in which the accused claimed innocence and pleaded false implication in the case.

5. On an appraisal of the evidence on record, the learned trial Court, recorded findings of conviction against the accused/appellant herein.

6. The appellant/convict stands aggrieved by the judgment of conviction recorded against him by the learned trial Court. The learned counsel appearing for the appellant/convict has concertedly and vigorously contended qua the findings of conviction recorded by the learned trial Court standing not based on a proper appreciation of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation of the material on record. Hence, 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. On the other hand, the learned Additional Advocate General has with considerable force and vigour, contended qua the findings of conviction recorded by the learned trial Court standing based on a mature and balanced appreciation by it of the evidence on record and theirs not necessitating any interference, rather theirs meriting vindication.

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

9. The testimonies of the official witnesses are bereft of any vice of any inter se contradictions in their respective depositions qua the prosecution version comprised in their respective examinations-in-chief vis-a-vis their respective testimonies embodied in their respective cross-examinations. Also when their testimonies are shorn off any vice of any intra se contradictions vis-a-vis their respective depositions on oath, hence, constrains this Court to conclude qua their respective testimonies being both credible as well as inspiring.

10. Furthermore, even if, PW-1 one Om Prakash and PW-6 one Pritam Singh, both independent witnesses to the apposite proceedings which stood initiated and concluded at the relevant site, reneged from their respective previous statements recorded in writing, nonetheless the factum of theirs respectively reneging from their previous statements recorded in writing would not undermine the efficacy of the prosecution case qua its propagation qua recovery of contraband standing effectuated from the conscious and exclusive possession of the accused in the manner as enunciated in the apposite FIR borne on Ex. PW8/A. The reason for this Court omitting to belittle their creditworthiness rests upon the fact of both PW-1 and PW-6 admitting their signatures borne on memos Ex.PW1/A, Ex.PW1/B, Ex.PW1/C, Ex.PW1/D, Ex.PW1/E, Ex. PW1/F, and Ex.PW1/G. Both also admit their signatures occurring on bulk parcel, Ex. P-2. The effect of both PW-2 and PW-6 respectively admitting their signatures borne on Ex.PA, Ex.PB and Ex.PC besides respectively borne on sample parcel as well as bulk parcel, comprised respectively in Ex.P-1 and P2, is qua their depositions manifestative of theirs repelling besides ousting their previous statements recorded in writing, holding no worth, given the embodiment of the apt legal principle in Sections 91 and 92 of the Indian Evidence Act, qua theirs hence standing estopped to digress from the contents of the afore referred exhibits, preeminently when their respective signatures occurring thereon, stand admitted by both besides with a mandate standing foisted in the afore referred provisions of the Indian Evidence Act qua with proof emanating qua signatures of both existing thereon hence ex facie ipso facto constituting conclusive evidence in proof of the recitals recorded in the apposite memos, whereupon, this Court stands constrained to conclude qua dehors theirs reneging from their previous statements recorded in writing, yet for reasons aforesaid the recitals recorded therein standing rendered to stand conclusively proved by the prosecution. In sequel, with the depositions of the official witnesses acquiring corroborative vigour from hence the conclusively proven recitals of the apposite exhibits whereon both PW-1 and PW-6 admit theirs carrying their signatures, besides with the principle engrafted in Sections 91 and 92 of the Indian Evidence Act against the receipt of oral evidence contrary to the signatured recitals occurring in any document preponderantly when signatures of both PW-1 and PW-6 stand undenied by them, rendered them hence incapacitated to depose at variance or in digression to the recitals occurring in the apposite memos. Consequently, the effect of theirs reneging from their previous statements recorded in writing would not preclude this Court to undermine the efficacy of proof adduced by the prosecution qua the apposite recitals depicted in the apposite memos. In aftermath, this Court concludes with aplomb qua the prosecution succeeding in proving the factum of the genesis of the occurrence embodied in the apposite FIR borne on Ex.PW8/A.

11. Be that as it may, the prosecution was also under a solemn legal obligation to firmly connect the contraband as stood recovered from the purported exclusive and conscious possession of the accused at the site of occurrence under memo Ex.PW1/D with the sample parcel thereof as stood sent for analysis to the FSL concerned, whereon the latter on receiving the apposite sample(s) recorded its affirmative opinion, qua its contents, opinion whereof stands borne on Ex.PW7/D also the prosecution was enjoined to connect the opinion manifested in Ex.PW7/D vis-a-vis the sample parcels at the stage contemporaneous to their production in Court. Firm connectivity inter se, the case property recovered from the purported exclusive and conscious possession of the accused at the site of occurrence vis-a-vis the opinion recorded by the FSL concerned comprised in Ex.PW7/D stood comprised in the apposite road certificate

comprised in Ex.PW8/C, connectivity whereof for reasons ascribed hereinafter, hence, stands proven.

12. The investigating officer, had obtained reliable and credible information with visible upsurgings therein qua the accused/respondent holding in his premises some item of contraband. In sequel thereto, the Investigating Officer concerned formed a raiding party, whereupon, he proceeded to arrive at the house of the accused/convict. The Investigating Officer prepared consent memo comprised in Ex.PW1/A holding echoings therein qua the accused/convict holding a statutory right qua his premises standing searched by a Executive Magistrate or a Gazetted Officer also the recitals borne therein holding echoings qua in the event of the accused waiving his statutory right for his premises standing searched by a Executive Magistrate or a Gazetted Officer, thereupon, the accused communicating his consent to the Investigating Officer qua his premises standing searched by him in the presence of the relevant witnesses, whereupon, as unfolded therein the accused communicated his apposite consent qua his premises standing searched by the Investigating Officer, in sequel whereto, the relevant search of the premises stood conducted by the Investigating Officer leading to effectuation of recovery therefrom of 'charas' under the apposite recovery memo borne on Ex.PW1/D. The consent memo holding the aforesaid unfoldments stands signatured by the relevant witnesses thereto. Ex.PW1/D holds the signatures of the witnesses to the relevant recitals occurring therein predominantly qua the one displaying effectuation of recovery of charas weighing 450 grams by the Investigating Officer also his at the relevant site of its recovery preparing two sample parcels of 25 grams each besides his enclosing in a separate parcel the remaining bulk holding a weight of 400 grams. Also he proceeded to as unraveled by the apposite NCB form comprised in Ex.PW7/B, emboss thereon three seal impression(s) of english alphabet 'K', whereafter the afore referred exhibit unfolds qua the SHO resealing it with seal 'A'. Prior to the aforesaid effectuation of recovery of charas in the manner delineated in recovery memo Ex.PW1/D, the Investigating Officer concerned under memo Ex.PW1/B and Ex.PW1/C respectively permitted the accused/convict to hold personal search of the members of the raiding party in the presence of witnesses thereto also the Investigating Officer had under memo Ex.PW1/C held a *jama talashi* of the accused/convict.

13. Be that as it may, the relevant case property stood dispatched under road certificate borne on Ex.PW8/C to the FSL concerned, whereupon, the FSL concerned in its opinion comprised in Ex.PW7/D concluded qua the contents of the relevant parcel(s) sent to it for analysis, holding therewithin ingredients of charas also their exists intra se congruity inter se seal impression(s) borne on the relevant parcels, Ex. P-1 and P-2 vis-a-vis the seal impressions recited in the NCB form to stand embossed thereon, at the time contemporaneous to the Investigating Officer concerned effectuating recovery of charas. The description of seal impression(s) as stood embossed thereon at the earliest stage as unraveled in the apposite NCB form comprised in Ex.PW7/B, holds synonimity vis-a-vis the description of the seal impression(s) borne on the relevant parcels of charas, seal impression whereof depicted in specimen of seal impression(s) drawn on cloths Ex.PW11/A and Ex.PW7/A, ultimately, the report of the FSL concerned comprised in Ex.PW7/D , makes a disclosure qua the imperative congruity qua the description of seal impressions embossed on the relevant case property/parcels received at the laboratory concerned holding synonimity with the seal impression(s) reflected to be borne thereon prior thereto in recovery memo(s) comprised in Ex.PW1/D, NCB form comprised in Ex.PW7/B as also, on the road certificate, wherefrom it is befitting to conclude qua the prosecution succeeding in establishing the factum probandum of intra se connectivity qua the description(s) of seal impressions occurring on the relevant parcels at the stage whereat they stood received in the laboratory concerned. However, the aforesaid connectivity would not per se enhance any conclusion qua thereupon, the prosecution succeeding in establishing qua the relevant parcel, whereupon the FSL concerned recorded an opinion qua the contents held therewithin holding ingredients of charas holding connectivity with the one which stood recovered under the apposite recovery memo, unless at the material stage, qua the relevant case property standing produced before the learned trial Court, also, displaying an evident apt connectivity qua the relevant prima

dona factum. A thorough perusal of the testimony of PW-2, wheretowhom the case property stood shown by the learned PP unravels qua his making a marked explicit enunciation therein qua parcels Ex.P-1 and P-2 holding analogity with the relevant memo comprised in Ex.PW1/D, whereunder the recovery of the relevant item of contraband stood effectuated, thereupon the prosecution has succeeded in proving on all fronts its case to the fullest.

14. The learned counsel appearing for the accused/convict has contended with vigour qua the testimony of IO qua his receiving a secret information qua the accused holding charas in his premises standing contradicted by PW-2 and PW-3, whereupon, he concerts to draw leverage. However, the aforesaid contradictions would not unsettle the entire genesis of the prosecution case, anvilled upon the relevant connectivity for the reasons aforesaid standing unflichingly proven at all the relevant stages commencing from the storage of the case property in the malkhana concerned, its dispatch under the apposite R.C. to the FSL concerned also its retrieval from the latter place upto the police station concerned and ultimately at the stage of its production in Court, whereupon, reiteratedly, the charge against the accused stands proved..

15. 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.

16. 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 SANDEEP SHARMA, J.

Balia & Others ….Appellants-Defendants
Versus
Ganga Ram ….Respondent-Plaintiff

Regular Second Appeal No.54 of 2007.
Date of decision:28.03.2017

Specific Relief Act, 1963- Section 38- Plaintiff pleaded that he alongwith his brother is in settled possession of the suit land, which was given to them by S- defendant No.1 is stated to have purchased part of the suit land from S but the same is paper transaction – possession was not delivered to the purchaser – the defendants started interfering in the suit land – hence, the suit was filed – the suit was dismissed by the Trial Court – an appeal was filed, which was allowed- held in second appeal thatS had filed a civil suit against the plaintiff and his brother in which plaintiff and his brother were held to be in possession of the suit land - the sale deed was executed before the final judgment was delivered in the suit – S had no authority to execute the sale deed – the Appellate Court had rightly held that the plaintiff was in possession and was entitled to protect his possession – appeal dismissed.(Para-16 to 29)

Case referred:
Maria Margarida Sequeira Fernandes and Others vs. Erasmo Jack De Sequeira (Dead) through LRs., (2012)5 SCC 370

For the Appellants: Mr.Neeraj Gupta, Advocate.
For Respondent: Mr.J.S. Chandel, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

This Regular Second Appeal filed under Section 100 of the Code of Civil Procedure is directed against the judgment and decree dated 02.11.2006, passed by learned District Judge, Shimla in Civil Appeal No.50-S/13 of 2006, reversing the judgment and decree dated 03.05.2006 passed by learned Civil Judge(Senior Division), Theog, District Shimla, H.P., whereby suit for permanent prohibitory injunction having been filed by the plaintiff-respondent *(hereinafter referred to as the `plaintiff')* was dismissed, however, it was ordered that the plaintiff and his brother be not evicted therefrom except in due course of law.

2. Briefly stated facts, as emerged from the record, are that plaintiff filed a suit for permanent prohibitory injunction praying therein to restrain the appellants-defendants *(hereinafter referred to as `defendants')* from dispossessing him as well as raising any construction upon the land comprised in Khasra No.52, measuring 0-07-60 hectares, situated in Chak Sainj, Pargana Jais, Tehsil Theog, District Shimla, H.P. *(hereinafter referred to as the `suit land').* It is alleged by the plaintiff that he alongwith his brother Budhi Ram is in settled possession of the suit land for the last 22 years, which was given to them in family arrangement by their mother; namely; Smt.Shobni. Plaintiff further claimed that land in question was given to them by Smt.Shobni since she was being maintained by them. Plaintiff further stated that Smt.Shobni had filed a Civil Suit bearing RBT No.54-1 of 2004/2003 for injunction against him as well as his brother, which was dismissed by Civil Judge (Junior Division), Chopal Camp at Theog on 14.10.2004. As per plaintiff, he alongwith his brother was found to be in possession of the suit land in the aforesaid Civil Suit having been filed by Smt.Shobni. Plaintiff further averred that defendant No.1 is alleged to have purchased a part of the suit land from Smt.Shobni and mutation was also attested on 16.09.2004 vide mutation No.98, but, said sale was a paper transaction as no possession was ever handed over to defendant No.1 because plaintiff and his brother were in settled possession of the suit land. Plaintiff further claimed that since defendant No.1 through defendants No.2 and 3 started interfering in the suit land, he was compelled to file suit, as described hereinabove, seeking therein relief of permanent prohibitory as well as mandatory injunction.

3. Defendants, by way of detailed written statement, refuted the aforesaid claim having been put forth by the plaintiff and stated that plaintiff as well as his brother had no right, title or interest over the suit land and they are also not in possession of the suit land. Defendants further averred that Smt.Shobni was owner of the suit land and she had sold the entire land to different persons including defendant No.1, who had also purchased suit land vide registered sale deed dated 25.08.2004 for a consideration of Rs.15,000/-. Defendants further claimed that on the basis of aforesaid sale deed, mutation was attested in favour of defendant No.1 and he was also given possession. In nutshell, defendant No.1 claimed himself to be bonafide purchaser for consideration. Defendants further averred that construction was started in the month of April, 2005 and thereafter pillars were constructed and huge material was collected by defendant No.1 for raising construction and at no point of time objection, if any, was raised to the construction by the plaintiff and as such he has every right to raise construction over the suit land. Accordingly, he prayed for dismissal of the suit.

4. Learned trial Court on the basis of pleadings of the parties framed the following issues:-

"1. Whether plaintiff is entitled for relief of permanent injunction? OPP.

2. Whether plaintiff is entitled for relief of mandatory injunction? OPP.

3. Whether defendant No.1 is bonafide purchaser for consideration? OPD."

5. Subsequently, learned trial Court, on the basis of pleadings as well as evidence adduced on record by respective parties, dismissed the suit of the plaintiff, however, ordered that the plaintiff as well as his brother be not evicted from the suit land except in accordance with law.

6. Plaintiff Ganga Ram, being aggrieved and dis-satisfied with the dismissal of his suit, preferred an appeal under Section 96 of the Code of Civil Procedure in the Court of learned District Judge, Shimla, which came to be registered as Civil Appeal No.50-S/13 of 2006. Learned District Judge accepted the appeal having been filed by the plaintiff and held him entitled to relief of permanent injunction restraining the defendants from interfering in possession of the plaintiff over the suit land till they are lawfully evicted.

7. In the aforesaid background, defendants approached this Court in the instant proceedings praying therein for setting aside the judgment and decree passed by the learned first appellate Court.

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

> *"1. When the Defendant-Appellant acquired title to the suit property from rightful title holder through registered sale deed, which document recited the delivery of possession of the land sold, was the lower appellate court justified in granting the relief of injunction to the plaintiff, who had not legal right over the property, especially when the plaintiff himself was deriving the right of possession from the same owner?*
>
> *2. Was not it necessary for the plaintiff to challenge the sale deed in favour of defendant in the suit for prohibitory and mandatory injunction when the title was lawfully vested in defendant? Have not the entries in revenue record lost their presumption of truth on account of recital in the deed of sale, disentitling the plaintiff to seek injunction against the true owner, especially when there was no cogent evidence justifying the claim of the plaintiff to be in settled possession?*
>
> *3. When the plaintiff has not arrayed his brother namely Shri Budhi Ram as party to the suit have not the courts below acted in erroneous and perverse manner recorded findings in favour of plaintiff and his brother to be in possession by wrongly placing reliance on the entries in the revenue record, which were not proved to be recorded in accordance with law and also relying on Ex.P-1 which had no effect of the controversy in question?"*

9. Mr.Neeraj Gupta, learned counsel appearing for the appellants-defendants, vehemently argued that impugned judgment and decree passed by learned first appellate Court are highly unjust, illegal, arbitrary, against law and facts and as such are liable to be set aside. While referring to the aforesaid impugned judgment having been passed by learned first appellate Court, Mr.Gupta contended that learned lower appellate Court committed grave illegality and irregularity while reversing the well reasoned findings of the learned trial Court, whereby suit having been filed by the plaintiff-respondent was dismissed in toto. Mr.Gupta, further contended that entries existing in the revenue record were assailed by the defendants-appellants because same were without any basis.

10. Mr.Gupta further stated that findings of learned lower appellate Court below that the suit land was in possession of the plaintiff-respondent are apparently erroneous and perverse, rather, contrary to the recital made in the sale deed as well as in the mutation entered and attested in favour of defendant No.1. Mr.Gupta contended that title of the property vested in defendant No.1 by virtue of sale deed and as such suit filed by the plaintiff-respondent without there being any challenge to sale made by Smt.Shobni was not competent and as such same was rightly dismissed by learned trial Court below.

11. While concluding his arguments, Mr.Gupta, strenuously argued that bare perusal of pleadings as well as evidence, be it ocular or documentary available on record, suggests that both the Courts below misread and misconstrued the same and wrongly arrived at conclusion that possession of disputed property denoted by Khasra No.52/2/3, admittedly, purchased by defendant No.1 is also with the plaintiff. Mr.Gupta further contended that learned trial Court rightly refused injunction to the plaintiff-respondent because he was not having any

title to the suit property, but Court below wrongly placed reliance upon the judgment and decree Ex.P-1, while concluding that plaintiff-respondent is in possession of the suit land. Mr.Gupta, contended that since defendant successfully proved by way of documentary evidence on record that he is in possession of the suit land, there was no occasion for Courts below to have recorded arbitrary, illegal, erroneous and perverse findings that the plaintiff and his brother Budhi Ram are in possession of the suit land. In the aforesaid background, Mr.Gupta prayed for dismissal of the suit.

12. Mr.J.S. Chandel, learned counsel appearing for the respondent-plaintiff, while supporting the impugned judgment and decree passed by learned first appellate Court, vehemently argued that there is no illegality and infirmity in the same, rather, the same is based upon correct appreciation of evidence adduced on record by the respective parties. With a view to refute aforesaid contentions having been made by Mr.Neeraj Gupta, learned counsel representing the appellants, Mr.Chandel made this Court to travel through findings returned by the learned trial Court, wherein learned trial Court, while dismissing the suit of the plaintiff, has categorically held that plaintiff and his brother are in possession of the suit land.

13. Mr.Chandel further contended that it is an admitted fact that decision of Civil Suit RBT No.54-1/2004/2003 came to be passed on 14.10.2004, whereas sale deed Ex.DA was executed in favour of defendant No.1 on 25.08.2004. He further contended that in the aforesaid litigation, plaintiff and his brother were found to be in possession of the suit land. Accordingly, learned trial Court, though dismissed the suit of the plaintiff, but categorically observed that it was bounden duty of defendant No.1 to prove as to when and how Smt.Shobni came in possession and delivered possession to him on execution of sale deed Ex.DA.

14. Mr.Chandel further invited the attention of this Court to Ex.P-1, copy of *Misalhaquiat* for the year 1998-99, to demonstrate that name of plaintiff and his brother appeared in column of possession and there is no documentary evidence led on record by the defendants suggestive of the fact that the aforesaid entry, validly showing the plaintiff to be owner in possession of the suit land, was ever rectified or changed in accordance with law at the behest of defendants. Mr.Chandel further contended that though there is a mention of delivery of possession by Mrs.Shobni in favour of vendee in the sale deed Ex.DA, but mere recital in the sale deed was not sufficient to prove the possession on the spot because plaintiff by placing on record Ex.P-2 successfully proved on record that possession of the suit land was with him prior to sale made by Mrs.Shobni in favour of defendants. Mr.Chandel, while referring to the impugned judgment passed by learned first appellate Court, forcefully contended that since plaintiff successfully proved on record his possession over the suit land, learned trial Court ought to have granted decree for permanent prohibitory injunction against the defendants.

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

16. During proceedings of the case, this Court had an occasion to peruse the pleadings, evidence on record as well as submissions having been made by the learned counsel representing the parties, perusal whereof clearly suggests that Smt.Shobni had appointed DW-2 Sh.Het Ram as her Power of Attorney, who allegedly sold the suit land vide sale deed Ex.DA in favour of defendants. But perusal of copy of judgment Ex.P-2 clearly suggests that Smt.Shobni had filed Civil Suit bearing RBT No.54-1 of 2004/2003 against the plaintiff as well as his brother, claiming herself to be exclusive owner in possession of the land denoted by Khata No.108, Khatauni Nos. 142 and 143, Khasra Nos.52 (subject matter of instant suit) 56, 81, 158, 159, 160, 191, 607, 609 and 165, Kitta 10, measuring 1-35-13 hectares, situated in Chak Sainhj, Tehsil Theog, District Shimla, which came to be dismissed on 14.10.2004. In the aforesaid suit, she claimed herself to be exclusive owner in possession of the suit land for the last 20 years.

17. Most importantly, in the suit, as referred hereinabove, Smt.Shobni also stated that during settlement operation defendants *(present plaintiff and his brother Budhi Ram)* changed the entry in the column of possession without the consent and permission of the plaintiff because she never parted with legal possession at any time nor gave suit land to the defendants

exclusively for cultivation. Civil Court, while hearing Civil Suit bearing RBT No.54-1 of 2004/2003, framed following issues on the basis of pleadings of the parties:-

"1. Whether the plaintiff is the owner in possession of the suit land? OPP.

2. Whether the defendants are interfering with the suit land without any right, title or interest? OPP.

3. Relief."

18. However, fact remains that aforesaid issues were decided against Smt.Shobni (plaintiff therein) and she was not held to be owner in possession of the suit land, which is also the subject matter of the present case. In the aforesaid suit, defendants therein (plaintiff and his brother herein) were held to be in possession of the suit land. It is also undisputed that sale deed Ex.DA, allegedly made in favour of defendants at the behest of Smt. Shobni, was executed on 25.8.2004 i.e. before final judgment in Civil Suit RBT No.54-1 of 2004/2003. This Court sees substantial force in the arguments having been made by Shri J.S. Chandel, learned counsel representing the respondent-plaintiff, that once vide judgment dated 14.10.2004, Ex.P-2, plaintiff and his brother were held to be in possession of the suit land, how possession, if any, qua the suit land, could be delivered to defendants as recited in sale deed Ex.DA.

19. Needless to say that it was incumbent upon defendant No.1 to prove on record by leading cogent and convincing evidence that at the time of execution of sale deed dated 25.8.2004, Smt.Shobni was owner in possession of the suit land and she had delivered the same to him at the time of execution of sale deed Ex.DA. Though defendant No.1, with a view to prove his possession over the suit land, examined DW-1 Balia and DW-2 Het Ram, but, careful perusal of their statements made before the Court nowhere suggests that defendant was able to prove on record that at the time of execution of sale deed dated 25.8.2004 Smt.Shobni was owner in possession of the suit land. There is no evidence led on record by defendants to establish that at the time of execution of sale deed Ex.DA, Smt.Shobni was lawful owner of the land and as such recital made in the sale deed that defendant was put to possession is of no consequence. DW-1 Balia simply stated that defendant purchased land from Smt.Shobni and he had seen the revenue record that he purchased the land, but he further stated that possession was that of Het Ram, which is contrary to record. Similarly, Het Ram, DW-2 son of Smt.Shobni and brother of plaintiff also stated that he had sold suit land vide sale deed Ex.DA to defendant No.1. He also admitted that suit was earlier filed for injunction against Budhi Ram and his brother and same was dismissed. Most importantly, aforesaid witness stated that when he sold the land, he did not see the possession, as recorded in revenue record. True it is that DW-3 Budhi Ram and DW-4 Rama Nand, marginal witnesses, proved sale deed Ex.DA and similarly there is a reference of delivery of possession in favour of the vendor, but recital in sale deed may not be sufficient to prove actual possession over the land.

20. Mere recital in the sale deed that possession was delivered at the time of execution of sale deed was not sufficient to conclude that vendor was in possession of the suit land at the time of executing sale deed, especially, in view of specific findings returned by learned trial Court in Civil Suit No.RBT 54-1 of 2004/2003, whereby, admittedly, plaintiff there (Smt.Shobni Devi) was not held to be owner in possession vide judgment dated 14.10.2004. To the contrary, defendants therein (plaintiff herein and his brother) were held to be in possession of the suit land and as such it is not understood how learned trial Court on the basis of sale deed Ex.DA dated 25.8.2004 could conclude that defendant was put into possession pursuant to aforesaid sale deed.

21. At the cost of repetition, it may be observed that though by way of placing reliance on sale deed Ex.DA defendant No.1 made an attempt to prove on record that he acquired title of the property from Smt.Shobni, but as has been discussed above, there is no evidence led on record by defendant suggestive of the fact that at the time of execution of sale deed dated 25.8.2004 Smt.Shobni had authority to execute sale deed being lawful owner of the property. Apart from above, there is no evidence, as has been discussed above, suggestive of the fact that

pursuant to sale deed Ex.DA defendant No.1 put into possession by Smt.Shobni because admittedly at the time of execution of the aforesaid sale deed, Civil Suit RBT No.54-1 of 2004/2003 was pending before the Court having been filed by Smt.Shobni, wherein admittedly she was not held to be owner in possession of the suit land vide judgment dated 14.10.2004.

22. True, it is that ordinarily no injunction can be granted against true owner, but in the instant case defendant admittedly failed to prove on record that he became true owner pursuant to sale deed Ex.DA dated 25.08.2004 because, as per own case of defendant, he purchased suit land from Smt.Shobni Devi vide aforesaid sale deed, who failed to prove her title before the competent Court of law in Civil Suit RBT No.54-1 of 2004/2003. Once the title of original vendor; namely; Smt.Shobni was under clout in aforesaid Civil Suit, there was no occasion for her to make sale of the suit land in favour of defendant No.1 and moreover she was not held to be owner in possession of the suit land in those proceedings. Hence, this Court sees substantial force in the arguments of Shri J.S. Chandel, learned counsel appearing for the respondent, that once Smt.Shobni was not held to be owner in possession of the land how defendant No.1 can claim to have title qua the suit land on the basis of sale deed Ex.DA.

23. Similarly, this Court sees no force in the contention of Shri Neeraj Gupta that while seeking relief for prohibitory and mandatory injunction against defendant qua the suit land, it was incumbent upon the plaintiff to lay challenge to the sale deed made in favour of defendant because it is none of the case of the plaintiffs that they are owners in possession of the suit land, rather their simplicitor case is that they are in possession over the suit land for so many years and they cannot be evicted forcibly, save and except, in accordance with law.

24. Moreover, there is nothing in pleadings or in evidence led on record by plaintiff, suggestive of the fact that plaintiff disputed the title of the defendant over the suit property. Plaintiff, while setting up a case before the trial Court, stated that defendant alleged to have purchased part of the suit land from Smt.Shobni and to that effect mutation has been attested vide mutation No.98 dated 20.8.2004, but, such transaction is merely paper transaction because no possession was ever transferred and since then the same is with the plaintiff and his brother. Undoubtedly, there is recital in the sale deed with regard to delivery of possession of the suit land, but, as has been observed above, same could not be termed sufficient for holding that defendant was in actual physical possession of the suit land. Ex.P-1, copy of Jamabandi for the year 1998-99, clearly suggests that names of plaintiff and his brother are recorded in column of possession and as such entry could not be changed merely on the basis of sale deed Ex.DA, rather, defendants ought to have filed appropriate proceedings in appropriate Court of law seeking possession of the suit land on the basis of sale deed Ex.DA.

25. True it is, that plaintiff has not arrayed his brother, namely, Budhi Ram, as party in the suit but perusal of Ex.P-1 clearly proves on record that name of Budhi Ram is also recorded alongwith his brother, who happens to be plaintiff in the present case, in the column of possession. Similarly, perusal of Ex.P-2 i.e. judgment dated 14.10.2004 passed by Civil Court in suit having been filed by Smt.Shobni also proves on record that Shri Buidhi Ram was in possession of the suit land alongwith his brother i.e. plaintiff and as such this Court sees no illegality and infirmity in the findings of Courts below, whereby Shri Budhi Ram has also been held to be in possession of the suit land along with his brother; namely; Ganga Ram.

26. Leaving everything aside, it also emerge from the judgment passed by learned trial Court in instant suit having been filed by the plaintiff that the learned Court below while declining the decree of permanent prohibitory injunction in favour of plaintiff held him to be in possession of the suit land. But, interestingly no challenge, whatsoever, was ever laid to the aforesaid findings recorded by the learned trial Court by the defendants, rather, aforesaid judgment dated 03.05.2006 passed by trial Court was accepted by the defendant without any demur and as such findings with regard to possession of the plaintiff over the suit land attained finality. Substantial questions are answered accordingly.

27. After carefully examining the pleadings as well as record, this Court has no hesitation to conclude that learned first appellate Court appreciated the evidence in its right perspective and has rightly come to the conclusion that once plaintiff has successfully proved on record that he is in possession of the suit land, relief of injunction ought to have been granted against the defendant, especially, when defendant who claimed himself to be true owner, failed to prove on record that at the time of execution of sale deed Ex.DA, original vendor; namely; Smt.Shobni Devi was the owner in possession of the suit land. Otherwise also it is well settled that nobody ought to be condemned unheard and a person in settled possession will not be dispossessed except by due process of law.

28. In this regard reliance is placed upon ***Maria Margarida Sequeira Fernandes and Others vs. Erasmo Jack De Sequeira (Dead) through LRs., (2012)5 SCC 370,*** wherein the Hon'ble Apex Court has held as under:-

> *"61. In civil cases, pleadings are extremely important for ascertaining the title and possession of the property in question.*
>
> *62. Possession is an incidence of ownership and can be transferred by the owner of an immovable property to another such as in a mortgage or lease. A licensee holds possession on behalf of the owner.*
>
> *63. Possession is important when there are no title documents and other relevant records before the Court, but, once the documents and records of title come before the Court, it is the title which has to be looked at first and due weightage be given to it. Possession cannot be considered in vacuum.*
>
> *64. There is a presumption that possession of a person, other than the owner, if at all it is to be called possession, is permissive on behalf of the title-holder. Further, possession of the past is one thing, and the right to remain or continue in future is another thing. It is the latter which is usually more in controversy than the former, and it is the latter which has seen much abuse and misuse before the Courts.*
>
> *65. A suit can be filed by the title holder for recovery of possession or it can be one for ejectment of an ex-lessee or for mandatory injunction requiring a person to remove himself or it can be a suit under Section 6 of the Specific Relief Act to recover possession.*
>
> *Due process of Law*
>
> *79. Due process of law means that nobody ought to be condemned unheard. The due process of law means a person in settled possession will not be dispossessed except by due process of law. Due process means an opportunity to the defendant to file pleadings including written statement and documents before the Court of law. It does not mean the whole trial. Due process of law is satisfied the moment rights of the parties are adjudicated upon by a competent Court."*

29. Exposition of law, as referred hereinabove, suggests that due process of law is satisfied the moment rights of the parties are adjudicated by a competent Court. It further suggests that ejectment from settled possession can only be ordered by recourse to a Court of law and person in settled possession cannot be ejected without a Court of law having adjudicated upon his rights qua the true owner. But, in the instant case, where the plaintiff, who had filed suit for prohibitory injunction, though was denied decree of injunction by trial Court below but was held to be in possession of suit land. Court below, while holding plaintiff to be in possession of suit land, further directed that he be evicted in accordance with law. Aforesaid findings qua possession as well as directions with regard to eviction in accordance with law were never challenged by the appellants-defendants in any of the proceedings. Hence, this Court sees no illegality and infirmity in the findings of learned Court below.

30. In view of the detailed discussion made hereinabove, this appeal fails and is dismissed accordingly. The judgment passed by the learned first appellate Court below is upheld

and that of the learned trial Court is quashed and set aside. There shall be no order as to costs. Interim order, if any, stands vacated. All miscellaneous applications are disposed of.

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

Ashok Kumar ....Petitioner.

Versus

Social Mutual Benefits Company Ltd. ....Respondent.

Civil Revision No. 123 of 2010.
Decided on: 29th March, 2017

Code of Civil Procedure, 1908- Order 21 Rule 37- Petitioner/judgment debtor was ordered to be detained in civil imprisonment for a period of two months- aggrieved from the order, the present revision petition has been filed – held that the judgment debtor can be ordered to be detained in civil imprisonment on service of show cause notice to him and after giving an opportunity of being heard- judgment debtor pleaded that he is a man of no means and is not in a position to satisfy the decree – there is no evidence that judgment debtor had disposed of his property after institution of the suit or had neglected to pay the decretal amount intentionally and deliberately – merely because judgment debtor does not have any movable and immovable property is not sufficient to detain him – order set aside. (Para- 7 to 12)

For the petitioners : Mr. Vishal Bindra, Advocate.
For the Respondent : Mr. Karan Singh, Advocate

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. (oral).

Challenge herein is to the order Annexure P-2, passed in an application registered as CMA No. 209/6 of 2010 filed in Execution Petition No.22/10 of 2009/08 by learned Civil Judge (Senior Division) Court No.1, Paonta Sahib whereby the application has been allowed and the petitioner, hereinafter referred to as the judgment debtor has been ordered to be detained in civil imprisonment for two months.

2. The legality and validity of the impugned order has been questioned in this petition on several grounds, however, mainly that the same is contrary to the provisions contained under Order 21 Rule 37 and also Section 51 of the Code of Civil Procedure.

3. Mr. Vishal Bindra, Advocate learned counsel representing the petitioner has urged that no doubt the order qua detention of the judgment debtor, if he fails to satisfy the decree, can always be passed under Order 21 Rule 37 of the Code of Civil Procedure, however, such power is controlled by the proviso to Section 51 of the Code of Civil Procedure and on finding that the petitioner despite having sufficient movable or immovable property and even was a man of means, failed to satisfy the decree.

4. Mr. Karan Singh Advocate, learned counsel representing the respondent, hereinafter referred to as the decree holder submits that in view of the own admission of the judgment debtor in reply to the application that by way of his earning he is arranging for his both ends meet and also the expenses required for his medical treatment itself demonstrates that he has source of income and as such could have discharged his liability under the decree sought to be executed. Also that prayer for adjournment of the execution petition for payment of the decretal amount can be taken to arrive at a conclusion that he was in a position to satisfy the

decree, however, to the reasons best known to him failed to do so. It has, therefore, been urged that learned trial Court has rightly ordered his detention in Civil Imprisonment.

5. Before coming to the claims and counter claims as aforesaid, it is desirable to take note of the provisions contained under Order 21 Rule 37 of the Cove of Civil Procedure, which read as follows:

> **"37. Discretionary power to permit judgment-debtor to show cause against detention in prison**.- (1) Notwithstanding anything in these rules, where an application is for the execution of a decree for the payment of money by the arrest and detention in the civil prison of a judgment debtor who is liable to be arrested in pursuance of the application, the Court shall, instead of issuing a warrant for his arrest, issue a notice calling upon on him to appear before the Court on a day to be specified in the notice and show cause why he should not be committed to the civil prison:
>
> Provided that such notice shall not be necessary if the Court is satisfied, by affidavit, or otherwise, that, with the object or effect of delaying the execution of the decree, the judgment debtor is likely to abscond or leave the local limits of the jurisdiction of the Court.
>
> (2) Where appearance is not made in obedience to the notice, the Court shall, if the decree holder so requires, issue a warrant for the arrest of the judgment debtor."

6. The other provision relevant in the present controversy finds mentioned in Section 51 of the Code of Civil Procedure, the same also reads as follows:

> **"51. Powers of Court to enforce execution.-** Subject to such conditions and limitations as may be prescribed, the Court may, on the application of the decree holder, order execution of the decree—
>
> (a) by delivery of any property specifically decreed;
>
> (b) by attachment and sale or by sale without attachment of any property;
>
> (c) by arrest and detention in prison for such period not exceeding the period specified in section 58, where arrest and detention is permissible under that section;
>
> (d) by appointing a receiver; or
>
> (e) in such other manner as the nature of the relief granted may require:
>
> Provided that, where the decree is for the payment of money, execution by detention in prison shall not be ordered unless, after giving the judgment debtor an opportunity of showing cause why he should not be committed to prison, the Court, for reasons recorded in writing, is satisfied—
>
> (a) that the judgment debtor, with the object or effect of obstructing or delaying the execution of the decree,—
>
> (i) is likely to abscond or leave the local limits of the jurisdiction of the Court, or
>
> (ii) has, after the institution of the suit in which the decree was passed, dishonestly transferred, concealed, or removed any part of his property, or committed any other act of bad faith in relation to his property, or
>
> (b) that the judgment debtor has, or has had since the date of the decree, the means to pay the amount of the decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same, or
>
> (c) that the decree is for a sum for which the judgment debtor was bound in a fiduciary capacity to account.
>
> Explanation : In the calculation of the means of the judgment debtor for the purposes of clause (b), there shall be left out of account any property which, by

> or under any law or custom having the force of law for the time being in force, is exempt from attachment in execution of the decree."

7. In terms of the provisions contained under Order 21 Rule 37 CPC supra the judgment debtor can be ordered to be detained in civil imprisonment in connection with the execution of decree on service of show cause notice to him and also affording him opportunity of being heard, if in the given facts and circumstances it is deemed fit and proper to do so. In a case of money decree, in terms of the proviso to Section 51 CPC, the detention of judgment debtor during execution proceedings can be ordered if the Court is satisfied that the judgment debtor with a view to obstruct or delay the execution of the decree is likely to abscond or leave the local limits of the jurisdiction of the Court or had concealed and removed any part of his property after institution of the suit or committed other act of bad faith in relation to his property or irrespective of having means to pay the decretal amount or substantial part thereof, he refused or neglected to pay the same.

8. Now coming to the case in hand, the application filed with a prayer to detain the judgment debtor in civil imprisonment in relation to the execution of the decree is consisting of one para, which reads as follows:-

> " That the JD No.1 is delaying the payments since then at one or the other pretext and is not making the payments of decretal amount and it has become very difficult to realize the decretal amount as he does not possess movable and immovable property because the DH has made tireless affords to get the details of his property but all in vain, hence this application. An affidavit is attached."

9. In reply thereto the stand of the judgment debtor is that he is a man having no means nor any movable or immovable property hence on account of his poor financial condition not in a position to satisfy the decree. The reply to this application has weighed heavily with learned trial Court while arriving at a conclusion that the judgment debtor as per his own admission has no movable or immovable property, hence in its opinion he deliberately and intentionally failed to satisfy the decree. Learned Trial Judge has also noticed from the record that the stand of the judgment debtor right from the very beginning is that he had not raised loan from the decree holder nor executed any document hence not liable to pay the suit amount. The defence of the defendant in the written statement as such has also been used against him while passing the impugned order. As a matter of fact, what was the defence of the defendant in the written statement should have not been taken into consideration during the execution proceedings and the application as such was required to be decided in view of the pleadings and also the provisions contained under order 21 Rule 37 and Section 51 of the Code of Civil Procedure. When according to Decree Holder itself the judgment debtor does not possess movable and immovable property, it is not possible to realize the decretal amount from him. Therefore, the present is not a case where the judgment debtor either disposed of his property after institution of the suit or neglected to pay the decretal amount intentionally and deliberately.

10. As a matter of fact in order to seek the detention of the judgment debtor in imprisonment, the plaintiff was required to plead and prove its case in terms of the provisions contained under Order 21 Rule 37 read with Section 51 CPC. Merely that the judgment debtor does not have any movable and immovable property he could have not been ordered to be detained in imprisonment.

11. True it is that on behalf of the judgment debtor time was sought for payment of decretal amount on the very first day i.e. 29.9.2009 and in reply to the application, his defence was that he anyhow or other is earning his livelihood and arranging the expense required for his medical treatment by way of working as labourer. However, on the basis thereof also it cannot be said that he is a man of means or that he has neglected to pay the decretal amount intentionally and deliberately.

12. In view of the above, the impugned order is not legally and factually sustainable and the same as such is quashed and set aside. The decree holder, however, is at liberty to take

appropriate steps including filing of an application for detention of the judgment debtor in civil imprisonment to ensure that the decree is satisfied, however, in the light of the observations hereinabove and in accordance with law. The petition is accordingly allowed and stands disposed of.

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

Dharam Chand .....Petitioner.
Versus
State of H.P ....Respondent.

Cr. Revision No. 139 of 2010
Decided on : 29.3.2017

Indian Penal Code, 1860- Section 326 and 506- Complainant and accused are residing in the same building – the room of the accused is above the room of the complainant - complainant noticed that water was dripping from the room of the accused , which was falling on her bed – the complainant went to the room of the accused to complain about this fact- the accused started abusing her – her husband came on the spot – the accused took out a knife and stabbed the husband of the complainant – the accused was tried and convicted for the commission of the offence punishable under Section 326 of IPC – an appeal was preferred, which was dismissed – held in revision that medical evidence proved the injuries – the statement of accused was not recorded prior to recovery and the recovery is not admissible – there are contradictions in the statements of PW-2 and PW-6- report of the FSL did not say that the blood found on the knife belonged to the accused – the possibility of sustaining injury by falling upon nails cannot be ruled out – the Courts had wrongly convicted the accused – appeal allowed – judgments of the Courts set aside- accused acquitted of the offences charged. (Para-9 to 18)

For the Petitioner: Mr. Atul Jhingan, Advocate.
For the Respondent: Mr. R.K Sharma, Deputy Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The instant revision petition stands directed against the impugned judgment of 28.4.2010 rendered by the learned Additional Sessions Judge, FTC, Kullu in Criminal Appeal No. 07/2010, whereby he affirmed the judgment of 20.1.2010 rendered by the learned Judicial Magistrate, 1st Class, Manali, District Kullu, H.P. in Criminal Case No. 48-1/09: 46-II/09 whereupon the petitioner herein (hereinafter referred to as "accused") stood convicted besides sentenced for his committing an offence punishable under Section 326 of IPC.

2. Brief facts of the case are that on 5.11.2008 at 8 a.m. complainant Pawna Devi, her husband Chunni Lal and nephew Kuldeep were present in the room of the house. In the upper story of the room of the house of the complainant, her brother-in-law (Jeth)/accused also resides alongwith his family. On the draining of water from the upper story of the room in which the accused alongwith his family resides, the complainant went upside and informed the accused with regard to the falling of water on her bed. On this accused started abusing her. The complainant came out to the verandah of the house. The husband of the complainant also arrived there. Accused in presence of Kuldip hit Chunni Lal with knife in his stomach and also threatened him to do away with his life and fled away. The injured thereafter was shifted to Mission Hospital, Manali for medical treatment. On the same day at 8.30 a.m. the complainant

reported the matter to the police of Police Station, Manali through telephone. Rapat No. 15(a) was registered. After completing all codal formalities and on conclusion of the investigation into the offence by the investigating Officer, allegedly committed by the accused challan was prepared and filed in the Court

3. The accused stood charged by the learned trial Court for his committing offence punishable under Sections 326 and 506 IPC to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 9 witnesses. On closure of prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure was recorded wherein he pleaded innocence and claimed false implication. In defence he did not choose to lead any evidence.

6. On an appraisal of the evidence on record, the learned trial Court returned findings of acquittal qua the accused for his committing an offence punishable under Section 506 of I.P.C however it returned findings of conviction qua the accused for his committing an offence punishable under Section 326 of IPC.

6. The learned counsel appearing for the accused 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 the relevant material on record by both the Courts below. Hence he contends qua the concurrently recorded 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 concurrently recorded by both the learned Courts 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. In the alleged occurrence, wherein the prosecution ascribes a penal ascription qua the accused committing an offence punishable under Section 326 of I.P.C, the victim sustained injuries borne on Ex. PW-1/A proven by PW-1.

10. With PW-1 (Dr. Philip Alexander) making underscorings in his testification qua the injuries embodied in Ex. PW-1/A being sequel-able by user of a shape edged weapon also with proven efficacious recovery of knife (Ex.P-1) under memo Ex.PW-2/B, ultimately with the injured/victim and the complainant both with intra-se corroboration testifying in consonance with the recitals borne in the apposite FIR, thereupon the verdict(s) concurrently recorded upon the accused are not amenable to a conclusion qua theirs warranting any reversal.

11. Be that, as it may, the prosecution was enjoined to prove the factum of the injuries borne on Ex.PW-1/A standing, as deposed with utmost unison by both PWs 4 (Chunni Lal) and 6 (Smt. Pawna Devi), caused by user by the accused, of knife (Ex.P-1), upon the abdomen of the victim, recovery whereof stood effectuated under memo Ex.PW-2/B besides also the prosecution was enjoined to prove qua the aforesaid recovery memo qua the purported weapon of offence holding the paramount statutory virtue of admissibility besides relevancy. In determining the aforesaid facet, the Investigating Officer concerned stood enjoined with a dire legal necessity, to, prior to his 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 remains unrecorded, thereupon any bald recovery of any weapon of offence at the instance of the accused by the investigating Officer 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 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 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 "knife" with purported user whereof injuries stood sustained by the victim standing used thereon by the accused.

13. Also complainant(PW-6) and Kuldeep (PW-2) in their previous statements recorded in writing make echoings qua the effectuation of the relevant recovery of weapon of offence standing begotten by the Investigating Officer at the instance of the accused from a jungle, thereupon their testifications in variance thereto stand ingrained with a vice of theirs perse being in rife contradiction with the recitals borne in the apposite recovery memo, hence theirs constituting embellishments therefrom, whereupon the purported efficacious recovery of the alleged weapon of offence under an apposite memo, looses its apposite tenacity.

14. Injured PW-4 (Chunni Lal) in his testification recorded before the learned trial Court thereat omitted to, with utmost categoricality, identify the relevant weapon of offence (Ex.P-1) when it thereat stood shown to him in Court qua its comprising the weapon of offence with user whereof, the accused inflicted injuries on his person, whereupon a firm conclusion spurs qua hence the testifications of ocular witnesses to the occurrence wherein they with specificity assign an incriminatory role to the accused qua his with user of knife stabbing the victim, in sequel whereto he gained injuries on his person, thereupon loosing in their entirety their respective evidentiary sinew also it appears qua hence theirs inventing a false ascription vis-à-vis the accused qua his, with purported user of weapon of offence thereupon stabbing the victim.

15. The injuries borne in Ex.PW-1/A are in stark contradiction(s) with the ocular version(s) qua the occurrence testified with intra-se harmony by both PW-4 besides by PW-6 wherein they ascribe qua the accused, a penal ascription qua his while purportedly wielding "knife", his delivering its singular blow on the abdomen of PW-4, whereas the injuries enunciated in Ex.PW-1/A unfold qua the victim apart from his receiving stab injuries, his body also holding injuries reflected in Sr. No. 2 to 5 in Ex.PW-1/A, whereupon also the testifications of ocular witnesses to the occurrence loose their respective creditworthiness rendering open a conclusion qua the complainant in collusion with the victim rearing a false case against the accused moreso when the other ocular witness to the occurrence has not lent any succor to the charge.

16. The FSL concerned to which the knife as well as the clothes of the victim stood dispatched for eliciting an opinion therefrom qua the blood stains existing therein belonging to the victim also omitted to pronounce in its apposite opinion borne on Ex. PX (report of FSL) qua the purported stains of blood held in T-shirt also in knife, belonging to the victim, in sequel thereto it appears qua the prosecution contriving the factum qua the accused stabbing the victim on his stomach with a "knife" in sequel, whereto the "knife" gathered blood stains thereon also its contriving the factum qua the T-Shirt of the accused also during the course of the occurrence, standing stained with blood.

17. Apparently the relevant site of occurrence is the "verandah" of the upper storey of the house apparently in close proximity whereof exists a "staircase", as unveiled in the testification of the complainant embodied in her cross-examination wherewithin she also echoes qua nails standing embedded thereon, thereupon the effect of existence thereon of "nails" when stands coagulated with the aforesaid dis-concurrence inter-se the ocular version qua the occurrence vis-à-vis the pronouncements made in Ex.PW-1/A besides also with PW-1 during the course of his standing subjected to cross-examination, his making a communication therein qua the injuries borne on Ex.PW-1/A being sequel-able by the victim falling upon nails, hence boosts an inference qua the injuries borne on Ex.PW-1/A being a sequel to the victim falling on "nails" embedded in the staircase.

18. In view of above discussion, the petition is allowed and the impugned judgment is quashed and set aside. The accused is acquitted of the offence 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 AJAY MOHAN GOEL, J.

Smt. Manju Sharma … Petitioner

Versus

State of Himachal Pradesh and others … Respondents

CWP No. 870 of 2011

Reserved on: 24.03.2017

Date of decision: 29.03.2017

Constitution of India, 1950- Article 226- Petitioner worked as Balwari teacher in Balwari Centre, Bathmana- respondent No.3 sanctioned an Anganwadi Centre – applications were invited from the eligible candidates- petitioner submitted her candidature but the respondent No.3 refused to entertain her application- respondent No.6 was appointed by way of transfer- notification was issued to fill up the post, which had fallen vacant due to the transfer- she filed an appeal, which was rejected as time barred- a further appeal was filed, which was also dismissed as time barred- aggrieved from the orders, present writ petition has been filed- held that clause 4 of the terms and conditions reads that under the ICDS programme there is no provision of transfer of Anganwadi Workers/ Helpers as these are honorary workers- it has been stated that in case of marriage of Anganwadi workers or helpers, if any vacancy exists, she would be transferred or adjusted in that Anganwadi Centre - only a female who is resident of the Village/Ward, where Anganwadi Centre is located or who belongs to feeder area is eligible for appointment- adjustment of respondent No.6 by way of transfer is arbitrary and colourable exercise of power- once the discretionary power had been exercised by adjustment, it was not incumbent to adjust her again- application for second adjustment is contrary to guidelines – petition allowed- direction issued to initiate the process to fill up the post of Anganwadi worker.

(Para-7 to 20)

For the petitioner: Ms. Anu Tuli Azta, Advocate.

For the respondents: Mr. V.S. Chauhan, Additional Advocate General with Mr. Vikram Thakur and Ms. Parul Negi, Deputy Advocate Generals, for respondents No. 1 to 5 and 7.

Mr. Sanjeev Bhushan, Senior Advocate, with Ms. Abhilasha Kaundal, Advocate, for respondent No. 6

Mr. Suresh Kumar Sharma, Director, Directorate of Women and Child Development, present in person.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J. (Oral):

By way of this writ petition, the petitioner has prayed for the following reliefs:-

"1. the impugned orders/notification dated 5-11-2006, 10-6-2008 and 9-7-2010 may kindly be quashed and set aside.

2. the respondents no. 1 to 5 be directed to entertain and consider the application of the petitioner for the post of AWW at village Bathmana on the basis of old guidelines of Anganwadi workers and helpers prevailing at the time of first eligibility of the petitioner and fresh post be advertised against the vacancy of AWW at AWC, Bathmana inviting applications from all the eligible candidates of village Bathmana on the criteria of old rules under the ICDS Scheme so that the rights of all others who did not approach the court may also be not affected adversely.

3. the respondents be directed to produce the entire record of the case in the Honorable High Court.

4. the respondent no. 6 Smt. Geeta devi be directed to join back at AWC, Jabri in the facts and circumstances of the case.

5. any other relief which this learned court deems fit and proper in the facts of the case may also be granted in favour of the petitioner and the petition may kindly be accepted alongwith costs.

2. Case of the petitioner is that she is a resident of village Bathmana, Tehsil and District Shimla. She is matriculate and has worked as Balwari teacher in Balwari Centre, Bathmana from 01.05.2005 to 25.02.2006. Respondent No. 3 sanctioned an Anganwadi Centre in village Bathmana vide notification dated 25.10.2006 and applications were accordingly invited from the eligible candidates for filling up the said post. As per the petitioner, as she was eligible to apply for the said post of Anganwadi Worker at Anganwadi Centre, Bathmana, she submitted her candidature complete in all respects. However, respondent No. 3 refused to entertain her application and verbally informed that the said post was likely to be filled by way of transfer. It is further the case of the petitioner that with an ulterior motive to give unreasonable benefit to respondent No. 6, respondent No. 3 issued another notification dated 05.11.2006 vide which respondent No. 6 was appointed by way of transfer as Anganwadi Worker at Anganwadi Centre, Bathmana, thus, denying the petitioner and other similarly situated persons opportunity of being appointed to the said post. Further, as per the petitioner, vide notification dated 05.11.2006 addressed to Pradhan, Gram Panchyat, Jabri, the Pradhan was called upon to invite applications for filling up the post of Anganwari Worker at Anganwari Centre, Jabri, which had thereafter fallen vacant on account of respondent No. 6 having been transferred from Jabri to Bathmana, which act of the respondents according to the petitioner was arbitrary and discriminatory. As per the petitioner, she filed Original Application No. 3384/2006 before learned H.P. Administrative Tribunal but the same was dismissed for want of jurisdiction of the Tribunal. It is further the case of the petitioner that she thereafter preferred an appeal under Section 12 of the ICDS Scheme before learned Deputy Commissioner,

Shimla. However, the said appeal was rejected by the authority concerned as being time barred. Thereafter, she filed an appeal before learned Divisional Commissioner, Shimla, which was also dismissed on 09.07.2010 on the ground that the authorities were not having any power to condone any delay in filing appeals in Anganwadi matters. It is further the case of the petitioner that respondent No. 6 was earlier also transferred from Anganwadi Centre Bhawana in village Ghanatti to Anganwadi Centre, Jabri, in the year 2001 on account of her marriage and since then respondent No. 6 was working at Jabri till she was arbitrarily transferred to Anganwadi Centre, Bathmana from Jabri vide impugned communication dated 05.11.2006 again on the ground of marriage. As per petitioner, distance between Bathmana and Jabri is just 2 KMs.

3. On above pleadings, the petitioner has filed the present petition challenging the impugned act of respondents of filling up the vacancy of Anganwadi Worker at Anganwadi Centre, Bathmana by transferring respondent No. 6 to the said place from Anganwadi Centre, Jabri.

4. Respondent State has filed reply to the petition, whereas respondent No. 6 has adopted the reply filed by the State. Respondent State vide its reply has justified its act on the ground that the adjustment of respondent No. 6 at Bathmana from Jabri is not an arbitrary act or an act of colourable exercise of powers but she was adjusted from Jabri to Bathmana, where a new Anganwadi Centre stood sanctioned in the year 2006-07 on account of her marriage and the said adjustment was made by the respondents in exercise of powers which are in consonance with the provisions contained in Para-4 of the Terms and Conditions of Services Part-II of guidelines notified by the State on 29.05.2006. On this reasoning, the respondent State has justified its act. Private resident has supported this stand of the State.

5. On 28.12.2016, this Court had directed respondent No. 2 to file his personal affidavit within a period of ten days as to whether Anganwadi Worker can be adjusted at more than one place in lieu of marriage or not as per the guidelines.

6. In the affidavit which has been filed by respondent No. 2, pursuant to the directions issued by this Court on 28.12.2016, the following stand has been taken:-

> "The Guidelines/Scheme as notified on 29-05-2006, and which is applicable in the present case, do not restrict the number of times which the Anganwadi Workers may be transferred to the concerned Anganwadi Centre on ground of marriage provided matrimonial home of the Anganwadi Worker is the feeding village of the Anganwadi Centre where the Anganwadi Worker is transferred."

7. Therefore, in this background, now the moot issue which has to be adjudicated upon by this Court is whether clause (4) of the guidelines for the engagement of Anganwadi Workers/Helpers under the ICDS scheme confers upon the respondents power to adjust by way of transfer an Anganwari Worker on her request more than once?

8. Before proceeding further, it is relevant to take note of Clause (4) of the Terms and Conditions of Services of the guidelines, which is reproduced herein below:-

> "**4. Transfer/Adjustment of the Anganwadi Workers/Helpers**
>
> a) Under ICDS programme there is no provision of transfer of Anganwadi Workers/ Helpers as these are honorary workers. However, in the case of marriage of an Anganwadi Worker or Helper, if at the place of her marriage, vacancy of an Anganwadi Workers or Helper exists she would be transferred or adjusted in that Anganwadi Centre.
>
> b) Request for adjustment/transfer can be made to the Child Development Project Officer on plain papers with certificate of marriage.
>
> c) Child Development Project Officer will be the competent authority to order transfer/ adjustments of Anganwadi Workers/Helpers within the project and

> outside project but within the District, the District Programme Officer will be the competent authority to do so. Outside district transfers/adjustments will be done with the approval of Director on the recommendation of the Distt. Programme officers of the both distts."

9. A perusal of Clause (4) of the Terms and Conditions of Services of the guidelines supra, demonstrates that this clause envisages that under the ICDS programme there is no provision of transfer of Anganwadi Workers/ Helpers as these are honorary workers. However, it is mentioned therein that in case of marriage of an Anganwadi Workers or Helpers, if at the place of her marriage, vacancy of an Anganwadi Workers or Helpers exists she would be transferred or adjusted in that Anganwadi Centre.

10. Before proceeding further, it is necessary to take note of the fact that as per the eligibility criteria laid down in the Guidelines supra, only such female candidates are eligible to apply for the post of Anganwadi Worker or Helper who either are resident of the village/ward where Anganwadi Centre is located or belong to the feedings villages/wards of the Anganwadi area. Meaning thereby that no female candidate who is not resident of the village/ward where Anganwadi Centre is located or does not belong to the feeding village/ward of the Anganwadi area, is eligible to be considered for engagement as Anganwadi Workers/ Helpers. Because engagement of Worker/Helper is contingent upon the person so engaged being resident of the village/ward concerned or feeding villages/wards of the Anganwadi area, for this reason in its wisdom it has been provided in the policy by the State that under the ICDS programme there is no provision of transfer of Anganwadi Workers/Helpers. The only exception is that in case of marriage of an Anganwadi Worker or Helper, if at the place of her marriage, vacancy of an Anganwadi Workers or Helpers exists, they would be adjusted or transferred in that Anganwadi Centre.

11. When we come to the facts of the present case, it is obvious that respondent No. 6 was initially engaged as per the said guidelines as Anganwadi Worker at Anganwadi Centre, Bhawana in village Ghanatti. Thereafter, on account of her marriage, in exercise of the powers conferred upon the authority under Clause (4) of the guidelines supra, respondent No. 6 was transferred to Anganwadi Centre, Jabri in the year 2001. When a separate Anganwadi Centre stood sanctioned in the year 2006-07 at Bathmana, respondent No.6 again applied for her adjustment in this Anganwadi Centre and the same was considered and exceeded to by the State.

12. The respondents have justified their act of adjusting respondent No. 6 twice on account of her marriage firstly at Anganwadi Centre, Jabri and thereafter at Anganwadi Centre, Bhatmana, on the ground that initially she was adjusted at Anganwadi Centre, Jabri, on account of her marriage as village Bathmana was feeding village of Anganwari Centre, Jabri and thereafter, she was adjusted at Bathmana itself as a new Anganwadi Centre was sanctioned for the said place itself in the year 2006-07.

13. In my considered view, this act of the respondent authority of adjusting respondent No. 6 by invoking Clause (4) of the guidelines from Jabri to Bathmana is both arbitrary as well as an act of colourable exercise of powers. No doubt, Cause (4) confers upon the authority power to adjustment of the Anganwadi Workers on account of her marriage but this clause does not confer arbitrary powers on the authority to invoke the said clause more than once or again and again in order to adjust/accommodate Anganwadi Worker on account of her marital status. Once the discretionary power of adjustment stood exercised by transferring respondent No. 6 from Bhawana in village Ghanatti to Jabri as per clause (4) on account of marriage of respondent No. 6, it was not open to the respondent authority to have had readjusted her at_Bathmana on the pretext that the said adjustment was also as per clause (4) as a new Anganwadi Centre stood open at Bathmana itself. This issue can be looked into from another aspect also, if Bathmana was the place where in fact respondent No. 6 had the right to be adjusted on account of her marriage as per clause (4) of the policy then the only conclusion which can be drawn is this that her initial adjustment at Jabri by the respondent by invoking clause(4) of the guidelines supra, was wrong and not inconformity with the clause of the

guidelines. However, without further dwelling on this aspect of the matter, in my considered view, the second adjustment of respondent No. 6 from Jabri to Bathmana is not sustainable in the eyes of law as when the authority had once exercised the discretionary power for adjusting of respondent No. 6 on account of her marriage from Bhawana to Jabri it was not open to invoke Clause (4) again and re-adjust respondent No. 6 from Jabri to another Centre as has been done in the present case. In fact if this is permitted, then it will defeat the very purpose for which this concession was given to a married lady and it will confer unfettered power upon the authority concerned.

14. Accordingly, the impugned act of the respondent authority of transferring/ adjusting respondent No. 6 from Anganwadi Centre, Bathmana, is held to be an arbitrary act and an act of colourable exercise of power.

15. During the course of arguments, it was urged by learned counsel for the respondents that this Court need not to go into the merits of the case as the petitioner had the right to file appeal if she was aggrieved by the policy of respondent No. 6 and she failed to avail this remedy within the period of limitation. In my considered view, this contention of the respondents also deserves to be rejected. This is for the reason that the appeals which are envisaged in the guidelines are on account of party being aggrieved by the engagement of Anganwadi Worker after a process for engagement of such Anganwadi Worker has been initiated by the authority and pursuant to the said process, an engagement has been made. Therefore, right to file an appeal is conferred upon an aggrieved party who is dissatisfied with the engagement of a person engaged as Anganwadi Worker. In my considered view, in the present case, the petitioner in fact was misguided to file appeal both before the Deputy Commissioner as well as Divisional Commissioner under the provisions of the guidelines. This is for the reason that the grievance of the petitioner was not qua engagement of an Anganwadi Worker appointed pursuant to a process undertaken in this regard by the authorities concerned, but her grievance was that a process initiated for engagement of Anganwadi Worker at Bathmana was throttled on account of arbitrary act of the respondent authority i.e. of filling up the vacancy in issue by wrongly transferring respondent No.6 from Anganwadi Centre, Jabri to Anganwadi Centre Bathmana. Therefore, as there is no merit in the contention of the respondents, the same is accordingly rejected.

16. Another objection of the respondent authority is that as the petitioner had not applied for the post, therefore, she had no locus to file and maintain this petition. This objection also has no merit and same thus deserves to be rejected. It is not the case of the respondents that pursuant to the advertisement issued for the engagement of Anganwadi Worker at Anganwadi Centre, Bathmana, the petitioner was not fulfilling the criteria which was contemplated in the guidelines in force at the relevant time. Besides, in the present case, applications were invited for engagement of Anganwadi Worker at Anganwadi Centre, Bathmana, vide communication dated 25.10.2006 as per which applications could be submitted by 15.11.2006. It is a matter of record that before 15.11.2006 vide impugned communication dated 05.11.2006 (Annexure P-3) the communication vide which applications were invited for Anganwadi Centre, Bathmana, was withdrawn on the ground that respondent No. 6 stood adjusted at the said Centre and the applications were thereafter invited for Anganwadi Centre, Jabri. Meaning thereby that the petitioner was having her right to have had applied for the said Centre upto 15.11.2006 but the communication inviting applications stood rescind before the last date by which the applications were to be received. In this view of the matter, the contention of the respondents that the petitioner does not has a locus to file and maintain the petition, also stands rejected.

17. During the course of hearing on 24.03.2017, Director, Directorate of Women and Child Development, had made a statement in the Court that as vacancy of Anganwadi Worker at Anganwadi Centre, Jabri, was still available, the Department had no difficulty in re-appointing the private respondent at the said place and Mr. Sanjeev Bhushan, learned Senior Counsel appearing for respondent No. 6, had on instructions submitted that private respondent was not

averse to be reverted back to Anganwadi Centre, Jabri but then the respondent authority must ensure that she should not be disturbed from Jabri on account of the pressure of the villagers.

18. Be that as it may, in view of the fact that this Court has come to the conclusion that the act of adjustment of respondent No. 6 from Jabri to Bathmana was an act of arbitrary exercise of power by the respondent authority, communication dated 05.11.2006 (Annexure P-3) vide which earlier communication dated 25.10.2006 was rescinded, is quashed and set aside and the adjustment of respondent No. 6 from Jabri to Bathmana is held to be bad. Respondent No. 6 shall rejoin her duties at Anganwadi Centre, Jabri forthwith and respondent authority shall ensure that respondent No. 6 is permitted to perform her duties in accordance with law at Anganwadi Centre, Jabri.

19. Writ is accordingly allowed. Communication dated 05.11.2006 (Annexure P-3) is quashed and set aside. Orders dated 10.06.2008 (Annexure P-6) and 09.07.2010 (Annexure P-7) are also quashed and set aside having been passed by authorities without jurisdiction. Respondents No. 2 and 3 are directed to forthwith commence the process to fill up the post of Anganwadi Worker in Anganwadi Centre, Bathmana, under the ICDS Project in Mashobra Development Block, District Shimla. It is further directed that the process to fill up the said post shall be initiated by respondents No. 2 and 3 as per the guidelines for the engagement of Anganwadi Workers on honorary basis under the ICDS Scheme run by Social Justice and Empowerment Department as were in force at the time when communication dated 25.10.2006 (Annexure P-1) was issued, by inviting applications from eligible candidates. Keeping in view the fact that the impugned communication was issued on 05.11.2006 rescinding communication dated 25.10.2006 vide which applications were invited for engagement as Anganwadi Worker in Anganwadi Centre, Bathmana. This direction is being passed to do substantive justice to the petitioner because the process which was initiated on 25.10.2006 was rescinded vide communication dated 05.11.2006 and thereafter, guidelines for engagement for Anganwadi Workers have undergone changes. It is further clarified that in case no person is found eligible to be offered the said post under the process so initiated under the old guidelines then the respondents shall be at liberty to fill up the said post by inviting afresh applications as per the existing guidelines.

20. Writ petition is disposed of in the above terms with cost assessed at Rs.5,000/-, which shall be paid to the petitioner by the respondent State with liberty to the State to recover the same from the erring officer(s)/ official(s). Miscellaneous Applications pending, if any, also stand disposed of.

****

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

Mr. Parma Nand .....Petitioner/JD.
Versus
Kasturi Lal & others .....Respondents.

Civil Revision No. 91 of 2016.
Reserved on: 16th March, 2017.
Date of Decision: 29th March, 2017.

Code of Civil Procedure, 1908- Order 21 Rule 30- An execution for recovery of money was filed- the notice was served upon the daughter of J.D.- however, the process server did not record that J.D. could not be found at the residence within a reasonable time – hence, the service was not proper- however, the ex-parte order was not sought to be set aside by the J.D. - further, the property was ordered to be sold and the notice required under Order 21 Rule 66 (2) was not

served – however, the compliance of Order 21 Rule 54(1A) was made- hence, no prejudice was caused to the J.D. – petition dismissed. (Para- 2 to 6)

Case referred:
Desh Bandu Gupta versus N.L. Anand and Rajinder Singh, (1994)1 SCC 131

For the Petitioner: Mr. Nishant Kumar, Advocate.
For Respondents No.1 to 3 : Mr. K.D. Sood, Senior Advocate with Mr. Mukul Sood and Sanjeev Sood, Advocates.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The petitioner herein suffered a conclusive binding decree for recovery of money, decree whereof stood rendered by the learned Sub Judge 1st Class, Dehra, District Kangra, H.P., in Civil Suit/RBT No. 27/99/91, verdict whereof stood pronounced on 27.12.2000. On rendition of the aforesaid conclusive decree, the plaintiffs/decree holders instituted an application under Order 21, Rule 30 of the Code of Civil Procedure before the learned Executing Court wherein they sought realization of the decretal amount from the Jds, in the manner hereinafter extracted:-

> "(1) That in C.S. titled Kasturi vs. Hari Chand and others C.S. No. RBT 27/99/91 the Hon'ble Court S.J.I. Dehra on 27.12.2000 have passed the order decree against the respondents to the tune of Rs.3020/- being LRS of late Sh. Santu to the extent their shares inherited from late Sh. Santu.
>
> (2) That the respondents have not paid the amount recoverable by applicant despite the decree and order passed by the Hon'ble Court.
>
> (3) That JD's No.1 to 3 have inherited share of khilwatta, who have succeeded to Late Sh. Santu to the extent of ¼ share. Respondent No.(4) ABCD have inherited the share of late Sh. Gian Chand, who have succeeded to late Sh. Santu to the extent of ¼ share. Respondent No.4 also have succeeded to late Sh. Santu to the extent of ¼ shares. Respondent No.5 also have succeeded to late Sh. Santu to the extent of ¼ shares. Similarly respondent NO.6 have succeeded to late Smt. JOK to late Santu to the extent of ¼ shares.
>
> 4. That as per share respondents No.1 to 3 had to pay Rs.755/- in equal share, respondent No.4 ABCD had to pay Rs.755 in equal share. Respondent 5 to the extent of Rs.755/- and respondent No.6 to the extent of Rs.755/- to the applicant.
>
> 5. That respondents have inherited the other land of late Sh. Santu which is comprised khata 104, khatauni 174, khasra Nos. 97,99, 136, measuring 0-03-45 hectares and in khata No. 106, khatoni No.176, khasra N.98, 106, 107 area 0-09-58 hectares situated in Mohal Katoi Mauza Chakath, Tehsil Dehra, District Kangra, H.P. entered, (H.P.) entered jamabandi 1999-2000.
>
> 6. That no appeal against the order and decree is pending or has been filed as per knowledge of the applicant.
>
> (7).."

2. Notice upon execution petition No. 19 of 2003 stood ordered by the learned Executing Court to be issued upon the JDs. The process server concerned, concerted to personally serve JD Parmanand through ordinary mode. The endorsement made by the process server concerned on the reverse of the apposite summons, discloses qua on his visiting the abode of Parmanand, on 5.9.2003 also his concerting to locate him thereat, whereas his apposite concert(s) proving abortive, thereupon, his delivering a copy of the summons(es) to his daughter

Vijeta Kumari, also he echoes therein qua the latter willingly accepting them. He also makes a disclosure in the apposite summons qua Vijeta Kumari, the daughter of Parmanand residing along with the latter. JD Parmanand despite standing served through his daughter Vijeta Kumari omitted to on the relevant date, record his presence before the learned executing Court, whereupon the latter proceeded to order qua his being proceeded against ex-parte.

3. The execution petition, in the absence of JD Pramanand recording his presence therebefore progressed uptil the stage of the decree holder(s) on 15.2.2005 under an application constituted therebefore under Order 21, Rule 64 of the CPC, motioning it, for sale of the attached property/assets of the Jds, whereon, the learned Executing Court proceeded to record an order for issuance of notice(s) under Order 21, Rule 54 (1-A) of the CPC upon the JDs for hence the terms of sale standing settled, It on 24.3.2005 imputed credence to the sworn affidavit furnished before it by the process server concerned holding, echoings qua his effectuating service of notice(s) aforesaid upon JD Nos. 1,2, 3, 4(d) and 5, whereupon the learned Executing Court, on JD Parmanand besides other JDs omitting to on the date aforesaid record their respective appearance(s) therebefore hence recorded a direction qua theirs standing proceeded against ex-parte. Both the orders of the learned Executing Court respectively recorded on 27.01.2004 and on 24.03.2005 wherein it directed qua JD Parmanand standing proceeded against ex-parte, stood not concerted by him to be set aside nor obviously he thereafter proceeded to participate in the apposite execution petition.

4. The initial effectuation of service of summons by the process server concerned upon JD Parmanand through his daughter Vijeta Kumari, effectuation whereof occurred prior to the order recorded on 24.03.2005 by the learned Executing Court does attract qua him an apposite prohibition engrafted under Order 5, Rule 15 of the CPC, significantly, against the assay process server concerned concerting to serve a copy of summons upon his daughter Vijeta Kumari, importantly, when for reasons ascribed hereinafter the mandate held therewithin stood evidently infringed, at the stage contemporaneous qua the initial effectuation of service upon JD Parmanand through his daughter whereupon the aforesaid manner of JD Parmanand standing served suffers from a vice of invalidity also the order(s) pronounced by the learned Executing Court qua his for want of his appearance therebefore, his being hence proceeded against ex-parte, concomitantly stand stained with jurisdictional fallibility. Provisions of Order 4, Rule 15 stand extracted hereinafter:-

> **"15. Where service may be on an adult member of defendant's family**.- Where in any suit the defendant is absent from his residence at the time when the service of summons is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time and he has no cogent empowered to accept service of summons on his behalf service may be made on any adult member of the family, whether male or female, who is residing with him.

The aforesaid provisions hold a palpable mandate upon the process server concerned, to prior to his proceeding to effectuate a copy of the relevant summons upon any adult member residing along with the addressee, his making echoings in his report qua prior thereto, his concerted efforts in discovering the (a) addressee at his homestead/abode, not bearing any fruition; (b) there being no likelihood qua his being found at his abode within a reasonable time. However, the aforesaid echoings do not find occurrence in the relevant summons, whereupon, the tendering of a copy thereof besides acceptance thereof by Vijeta Kumari, the daughter of JD Parmanand hence would not tantamount to any valid effectuation of service upon him.

5. Be that as it may, the effect, if any, of an invalid effectuation of service upon JD Parmanand on 5.9.2003, in sequel, whereto the learned Executing Court proceeded to on 17.01.2004 record an order qua his being proceeded against ex-parte is reinteratedly qua the order aforesaid hence also acquiring a vice of nullity. Nonetheless vices aforestated staining the aforesaid order would stand subsumed, on evident upsurgings occurring in the relevant record, in portrayal qua prior to the learned Executing Court proceeding to order for issuance of

proclamation of sale of the attached assets of the JDS, through a public auction, it revering the mandate of Order 21, Rule 66 of the CPC, provisions whereof stand extracted herein after:-

> "**Rule 66. Proclamation of sales by public auction.-** (1) Where any property is ordered to be sold by public auction in execution of a decree, the Court shall cause proclamation of the intended sale to be made in the language of such Court.
>
> (2) Such proclamation shall be drawn up after notice to the decree holder and the judgment debtor and shall state the time and place of sale and specify as fairly and accurately as possible-
>
> (a) the property to be sold [or, where a part of the property would be sufficient to satisfy the decree, such part];
>
> (b) the revenue assessed upon the estate or part of the state, where the property to be sold is an interest in an estate or in part of an estate paying revenue to the Government.
>
> (c) any incumbrance to which the property is liable;
>
> (d) the amount for the recovery of which the sale is ordered; and
>
> (e) every other thing which the Court considers material for a purchaser to know in order to judge of the nature and value of the property;
>
> [Provided that where notice of the date for settling the terms of the proclamation has been given to the judgment-debtor by means of an order under rule 54, it shall not be necessary to give notice under this rule to the judgment debtor unless the Court otherwise directs;
>
> Provided further that nothing in this rule shall be construed as requiring the Court to enter in the proclamation of sale its own estimate of the value of the property, but the proclamation shall include the estimate, if any, given by either or both of the parties.]
>
> (3) Ever application for an order for sale under this rule shall be accompanied by a statement signed and verified in the manner hereinbefore prescribed for the signing and verification of pleadings and containing, so far as they are known to or can be ascertained by the person making the verification, the matters required by sub-rule (2) to be specified in the proclamation.
>
> (4) For the purpose of ascertaining the matters to be specified in the proclamation, the Court may summon any person whom it thinks necessary to summon and may examine him in respect to any such matters and require him to produce any document in his possession or power relating thereto."

Sub-rule (2) to Rule 66 of Order 21of the CPC, casts a peremptory legal obligation upon the Executing Court, to, preceding its drawing a proclamation of sale of the assets/immovable property of the JD(s), wherefrom the decretal amount is intended to be satisfied, its ordering for issuance of notice upon the JDs concerned, notice whereof indicating therewithin the time and place of sale, of the attached assets of the JD, through a public auction, besides its ensuring qua the apposite notice(s) standing validly served upon the JDs. On anvil of the aforesaid mandate embodied in the afore extracted relevant provisions of the CPC, judgment debtor Parmanand in his application constituted under the provisions of Order 21, Rule 89 of the CPC, before the learned executing Court had thereupon, vigorously canvassed qua prior to the learned Executing Court drawing up the apposite proclamation of sale, of his attached assets, through a public auction, its irrevering the mandate of sub-rule (2) to Rule 66 of Order 21 of the CPC, comprised in its, in digression therefrom neither ordering for issuance of notice of sale, of his assets, through a public auction nor obviously his standing served, consequently, he contended qua a visible infraction of the peremptory mandate of sub-rule (2) to Rule 66 of Order 2, bolstering his espousal qua the relief canvassed in his application hence being affordable to him. He also places reliance upon a decision of the Hon'ble Apex Court in ***Desh Bandu Gupta versus N.L. Anand***

and Rajinder Singh, reported in (1994)1 SCC 131, the relevant paragraphs NO.9 and 10 whereof are extracted hereinafter:-

> "[9] However, there is considerable force in the contention of the appellant that the procedure prescribed under Order 21 Rule 66 was flagrantly violated by the Executing court. We have already noted the order of the court to conduct the sale. For judging its legality and validity, it would be desirable to have a bird's eye view of the procedure for sale of immovable property in execution. On an application for execution filed under Order 21 Rule 5 the court shall ascertain the compliance of the prerequisites contemplated under Rule 17 and on finding the application in order, it should be admitted and so to make an order, thereon to issue notice under Rule 22, subject to the conditions specified therein. If a notice was served on the judgment-debtor as enjoined under Order 5 but he did not appear or had not shown cause to the satisfaction of the court, under Rule 23 the court "shall order the decree to be executed". If an objection is raised to the execution of the decree, by operation of sub-rule (2) thereof, "the court shall consider such objections and make such order as it thinks fit". Thereafter in the case of a decree for execution against immovable property an attachment under Rule 54 should be made by an order prohibiting the judgment-debtor from transferring or creating encumbrances on the property. Under Rule 64 the court may order sale of the said property. Under Rule 66 (2 proclamation of sale by public auction shall be drawn up in the language of the court and it should be done after notice to the decree-holder and the judgment-debtor and should state "the time and place of sale" and "specify as fairly and accurately as possible" the details specified in clauses (a) to (d) of sub-rule (2) thereof. The Civil Rules of Practice in Part L in the Ch. 12 framed by the High court of Delhi 'sale of Property and Delivery to the Purchaser' Rule 2 provides that whenever a court makes an order for the sale of any attached property under Order 21, Rule 64, it shall fix a convenient date not being distant more than 15 days, for ascertaining the particulars specified in Order 21 Rule 66 (2) and settling the proclamation of sale. Notice of the date so fixed shall be given to the parties or their pleaders. In Rule 4 captioned 'settlement of Proclamation of Sale, Estimate of Value' it is stated that on the day so fixed, the court shall, after perusing the documents, if any, and the report referred to in the preceding paragraph, after examining the decree-holder and judgment-debtor, if present, and after making such further enquiry as it may consider necessary, settle the proclamation of sale specifying as clearly and accurately as possible the matters required by Order 21 Rule 66 (2) of the Code. The specifications have been enumerated in the rule itself. The proclamation for sale is an important part of the proceedings and the details should be ascertained and noted with care. This will remove the basis for many a belated objections to the sale at a later date. It is not necessary to give at proclamation of sale the estimate of the value of the property. The proclamation when settled shall be signed by the Judge and got published in the manner prescribed by Rule 67. The court should authorise its officers to conduct the sale. Under Rule 68 the sale should be conducted at "the place and time" specified or the time may be modified with the consent in writing of the judgment-debtor. The proclamation should include the estimate, if any, given by either judgment-debtor or decree-holder or both the parties. Service of notice on judgment-debtor under Order 21 Rule 66 (2), unless waived by appearance or remained ex parte, is a fundamental step in the procedure of the court in execution. Judgment-debtor should have an opportunity to give his estimate of the property. The estimate of the value of the property is a material fact to enable the purchaser to know its value. It must be verified as accurately and fairly as possible so that the intending bidders are not misled or to prevent them from offering inadequate price or to enable them to make a decision in offering adequate price. In Gajadhar Prasad v. Babu Bhakta Ratari this court, after noticing the conflict of judicial opinion among the High courts, held that a review of

the authorities as well as the amendments to Rule 66 (2) (c) make it abundantly clear that the court, when staling the estimated value of the property to be sold, must not accept merely the ipse dixit of one side. It is certainly not necessary for it to state its own estimate. If this was required, it may, to be fair, necessitate insertion of something like a summary of a judicially considered order, giving its grounds, in the sale proclamation, which may confuse bidders. It may also be quite misleading if the court's estimate is erroneous. Moreover, Rule 66 (2) (e) requires the court to state only nature of the property so that the purchaser should be left to judge the value for himself. But, the essential facts which have a bearing on the very material question of value of the property and which could assist the purchaser in forming his own opinion must be stated, i. e. the value of the property, that is, after all, the whole object of Order 21, Rule 66 (2) (e) , Civil Procedure Code. The court has only to decide what are all these material particulars in each case. We think that this is an obligation imposed by Rule 66 (2) (c). In discharging it, the court should normally state the valuation given by both the decree-holder as well as the judgment-debtor where they both have valued the property, and it does not appear fantastic. It may usefully state other material facts, such as the area of land, nature of rights in it, municipal assessment, actual rents realised, which could reasonably and usefully be stated succinctly in a sale proclamation has to be determined on the facts of each particular case. Inflexible rules are not desirable on such a question. It could also be angulated from an The proclamation should include the estimate, if any, given by either judgment-debtor or decree-holder or both the parties. Service of notice on judgment-debtor under Order 21 Rule 66 (2), unless waived by appearance or remained ex parte, is a fundamental step in the procedure of the court in execution. Judgment-debtor should have an opportunity to give his estimate of the property. The estimate of the value of the property is a material fact to enable the purchaser to know its value. It must be verified as accurately and fairly as possible so that the intending bidders are not misled or to prevent them from offering inadequate price or to enable them to make a decision in offering adequate price. In Gajadhar Prasad v. Babu Bhakta Ratari this court, after noticing the conflict of judicial opinion among the High courts, held that a review of the authorities as well as the amendments to Rule 66 (2 (c) make it abundantly clear that the court, when staling the estimated value of the property to be sold, must not accept merely the ipse dixit of one side. It is certainly not necessary for it to state its own estimate. If this was required, it may, to be fair, necessitate insertion of something like a summary of a judicially considered order, giving its grounds, in the sale proclamation, which may confuse bidders. It may also be quite misleading if the court's estimate is erroneous. Moreover, Rule 66 (2) (e) requires the court to state only nature of the property so that the purchaser should be left to judge the value for himself. But, the essential facts which have a bearing on the very material question of value of the property and which could assist the purchaser in forming his own opinion must be stated, i. e. the value of the property, that is, after all, the whole object of Order 21, Rule 66 (2) (e) , Civil Procedure Code. The court has only to decide what are all these material particulars in each case. We think that this is an obligation imposed by Rule 66 (2) (c). In discharging it, the court should normally state the valuation given by both the decree-holder as well as the judgment-debtor where they both have valued the property, and it does not appear fantastic. It may usefully state other material facts, such as the area of land, nature of rights in it, municipal assessment, actual rents realised, which could reasonably and usefully be stated succinctly in a sale proclamation has to be determined on the facts of each particular case. Inflexible rules are not desirable on such a question. It could also be angulated from another perspective. Sub-rule (1) of Rule 66 enjoins the court that the details enumerated in sub-rule (2) shall be specified as fairly and accurately as possible. The duty to comply with it arises only after service of the

notice on the judgment-debtor unless he voluntarily appears and is given opportunity in the settlement of the value of the property. The absence of notice causes irremediable injury to the judgment-debtor. Equally publication of the proclamation of sale under Rule 67 and specifying the date and place of sale of the property under Rule 66 (2) are intended that the prospective bidders would know the value so as to make up their mind to offer the price and to attend at sale of the property and to secure competitive bidders and fair price to the property sold. Absence of notice to the judgment-debtor disables him to offer his estimate of the value who better knows its value and to publicise on his part, canvassing and bringing the intending bidders at the time of sale. Absence of notice prevents him to do the above and also disables him to know fraud committed in the publication and conduct of sale or other material irregularities in the conduct of sale. It would be broached from yet another angle. The compulsory sale of immovable property under Order 21 divests right, title and interest of the judgment-debtor and confers those rights, in favour of the purchaser. It thereby deals with the rights and disabilities either of the judgment-debtor or the decree-holder. A sale made, therefore, without notice to the judgment-debtor is a nullity since it divests the judgment-debtor of his right, title and interest in his property without an opportunity. The jurisdiction to sell the property would arise in a court only where the owner is given notice of the execution for attachment and sale of his property. It is very salutory that a person's property cannot be sold without his being told that it is being so sold and given an opportunity to offer his estimate as he is the person who intimately knew the value of his property and prevailing in the locality, exaggeration may at time be possible. In Rajagopala Ayyar v. Ramachandra Ayyar the full bench held that a sale without notice under Order 21 Rule 22 is a nullity and is void and that it has not got to be set aside. If an application to set aside such a void sale is made it would fall under Section 47.

[10] Above discussion indicates a discernible rule that service of notice on the judgment-debtor is a fundamental part of the procedure touching upon the jurisdiction of the Execution court to take further steps to sell his immovable property. Therefore, notice under Order 21 Rule 66 (2), unless proviso is applied (if not already issued under Order 21 Rule 22, and service is mandatory. It is made manifest by Order 21 rule 54 (1-A) brought on statute by 1976 Amendment Act with peremptory language that before settling the terms of the proclamation the judgment-debtor shall be served with a notice before settling the terms of the proclamation of sale. The omission thereof renders the further action and the sale in pursuance thereof void unless the judgment-debtor appears without notice and thereby waives the service of notice."

Evidently, the relevant records omit to make any underscorings qua the learned Executing Court, prior to its ordering for issuance of proclamation of sale, of the attached assets/immovable property of the JDs through a public auction, its ordering for issuance of notice(s) under sub-rule (2) to Rule 66 of Order 21 of the CPC upon the JDS nor obviously it ensured qua the apposite notice(s) standing served upon JD Parmanand. Significantly, hence, an apparent infraction of the mandate of sub-rule (2) to Rule 66 of Order 21 of the CPC has visibly occurred. However, no benefit can stand derived therefrom by JD Permanand, negation of relief qua him on anvill aforesaid stands encapsulated in the evident factum qua though the aforesaid mandate encapsulated under sub-rule (2) to Rule 66 of Order 21 of the CPC standing visibly infringed by the learned Executing Court yet his not adducing the enjoined evidence, in display qua upon the apposite application constituted under Order 21, Rule 54 of the CPC by the decree holder before the learned Executing Court, the latter neither ordering for issuance of notice(s) upon them nor ensuring qua theirs standing served. In the event of, on an incisive perusal of the record, forthright evidence emanating, holding revelations qua upon an application standing constituted under Order 21, Rule 64 of the CPC by the decree holders before the executing Court, the latter

ordering qua issuance of summons(es) upon the JDs also obviously, its ensuring qua theirs standing personally validly served, thereupon the proviso engrafted in sub rule (2) of Rule to Rule 66 of Order 21 of the CPC would hold command besides clout also would dilute the effect of infringement(s), if any, made by the learned Executing Court vis-a-vis the mandate of sub rule (2) of Rule 66 to Order 21 of the CPC, significantly when the apposite proviso, to sub rule (2) to Rule 66 of Order 21 of the CPC, holds vivid echoings qua where the learned Executing Court has proceeded to within the ambit of Order 21, Rule 54 (1-A) of the CPC, hence order for issuance of notice(s) upon the Jds, thereupon no subsisting statutory obligation standing cast upon the learned Executing Court, to also obey the mandate of sub rule (2) of Rule 66 of Order 21 of the CPC unless it records a direction for compliance therewithin yet standing warranted. Provisions of Order 21, Rule 54 stand extracted hereinafter:

> "**54 attachment of immovable property.-** (1) Where the property is immovable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such charge.
>
> [(1A) The order shall also require judgment debtor to attend Court on a specified date to take notice of the date to be fixed for settling the terms of the proclamation of sale.]
>
> (2) The order shall be proclaimed at some place on or adjacent of such property by beat of drum or other customary mode, and a copy of the order shall be affixed on a conspicuous part of the property and then upon a conspicuous part of the Court-house, and also, where the property is land paying revenue to the Government, in the office of the Collector of the district in which the land is situate [and, where the property is land situate in a village, also in the office of the Gram Panchayat, if any, having jurisdiction over that village.]"

Reiteratedly, thereupon, it stands not enjoined to within the domain of sub rule (2) of Rule 66 to Order 21 of the CPC hence order for issuance of notice(s) upon the JDS concerned. For making the relevant unearthings from the record which exists hereat, an allusion to the trite factum of the learned executing Court recording an order on 15.02.2015 for issuance of notice(s) upon JDS concerned, for hence eliciting their participation before it for settling the terms of proclamation of sale, of the relevant attached property, through a public auction, brings-forth an apt conclusion from this Court qua the learned Executing Court hence begetting compliance with the mandate of sub rule (1A) to Rule 54 of Order 21 of the CPC, whereupon, it stood relieved of the statutory obligation of revering the mandate of sub rule (2) to Rule 66 of Order 21 of the CPC. Conspicuously, also when in pursuance to the learned Executing Court, hence, begetting compliance with sub rule (1A) to Rule 54 of Order 21 of the CPC, the process server concerned making endorsement(s) on the reverse of the apposite notices qua JD Parmanand standing personally served, factum whereof attains vigorous evidentiary worth arising from the factum of Parmanand endorsing his signature(s) on the reverse of the apposite notice(s), also with JD Parmanand not disputing the authenticity of his signatures existing on the reverse of notice served upon him under sub rule (1A) to Rule 54 of Order 21 of the CPC, thereupon, with JD Parmanand hence standing personally served within the ambit of the proviso of sub rule (2) to Rule 66 of Order 21 of the CPC also with the aforesaid proviso operating as an exception to the peremptory mandate constituted in sub rule (2) of Rule 66 of Order 66 of the CPC besides obviously thereupon, infraction, if any, by the learned Executing Court of the mandate of the aforesaid substantive provisions, would not stain the sale by public auction of the attached assets of the JDs , whereupon, even if the learned Executing Court hence prior to its ultimately drawing up the apposite proclamation of sale of the attached property(ies) of the JDS, omitted to under the aforesaid provisions order for issuance of notice(s) upon the JDS, yet its impugned order does not , hence, for reasons aforestated fall within the domain of judicial fallibility. Even though, the coinage "unless the Court otherwise directs" occurring at the end of the relevant proviso, does confer power upon the learned Executing Court to undermine the vigour of the mandate of the apposite proviso also hence give a discretion to it, to yet, comply with the mandate of sub rule (2)

of Rule 66 to Order 21 of the CPC, nonetheless the petitioner has been unable to espouse with efficacy qua the relevant material laid therebefore making relevant bespeakings, for entailing the learned Executing Court to proceed to comply with the mandate of sub rule (2) to Rule 66 of Order 21 of the CPC, material whereof pronouncing upon the likelihood of fraud or irregularity occurring at the sale by public auction of the assets of JD, thereupon, on anvill thereof also the petition cannot succeed.

6. For the foregoing reasons, there is no merit in the instant petition, consequently, the instant petition stands dismissed and the orders impugned hereat are affirmed and maintained. All pending applications also stand disposed of.

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

Shri Umesh Chand Thakur & others ..Appellants.
Versus
Land Acquisition Collector and others .....Respondents.

RFA No. 345 of 2008.
Reserved on: 28th February, 2017.
Date of Decision: 29th March, 2017.

Land Acquisition Act, 1894- Section 30- The land was acquired and a reference was made under Section 30 – Reference Court declared respondent No.3 to be the person entitled for compensation on the basis of entries in the jamabandi and missal hakiat – held in appeal that a reference was made under Section 28-A of the Act – petition under Section 30 was not forwarded to the reference Court – hence reference court had no jurisdiction to adjudicate the entitlement of respondent No.3 – it was wrongly held that respondent No.3 was gair maurusi over the acquired land – appeal allowed and the award of the reference Court modified. (Para-3 to 6)

For the Appellants: Mr. Bhupender Gupta, Senior Advocate with Mr. Ajeet Jaswal, Advocate.
For Respondents No.1 & 2: Mr. Vivek Singh Attri, Dy. A.G.
For Respondent No.3: Mr. G.D. Verma, Senior Advocate with Mr. B.C. Verma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

Under the impugned award, pronounced by the learned Reference Court in Petition No. 58-S/4 of 2007/94, it, proceeded to order qua respondent No.3, namely, Chattar Singh alone holding the entitlement qua compensation amount assessed thereunder. The aggrieved appellants hence for assailing the award pronounced by the learned Reference Court, have instituted the instant appeal herebefore.

2. The paramount reason which prevailed upon the learned reference Court, to declare respondent No.3 to hold the sole entitlement qua the determination of compensation amount pronounced under the impugned award, rested upon the factum of reflections occurring in the jamabandi apposite to the suit land pertaining to the year 1980-81 comprised in Ex. RX also upon the entires embodied in Ex.AW1/C, copy of missal hakiyat qua the suit land pertaining to the year 1985-86, reflections whereof unfold qua one Devi Ram (the petitioner in land reference petition No. 58-S/4 of 2007/94 whereupon the impugned rendition stood pronounced) standing in the apposite column of ownership pronounced to be its owner whereas respondent

No.3, Chattar Singh, standing therein reflected to hold a tenancy under the aforesaid Devi Ram to the extent of 135 share in the undevided holdings. Moreover, in coagulation with the aforestated reflections borne on the aforesaid exhibits, the learned Reference Court also imputed credence to an admission held in the statement of one Suresh comprised in Ex. R-2, holding echoings qua his father inducting respondent No.3, Chattar Singh, as a "gair maurusi" upon the suit land, whereupon, it recorded a conclusive finding qua respondent No.3 holding the status of a "gair maurusi" upon the acquired land, whereupon it stood constrained to render a further finding qua the aforesaid status of respondent No.3 upon the suit land clothing him with automatic statutory bestowment of proprietary rights thereon, significantly, at the time apposite to the issuance of the apposite notification under Section 4 of the Land Acquisition Act, whereby, the respondent concerned initiated proceedings for bringing the relevant land, under acquisition, thereupon, foisting a leverage in him to, to the ouster of the appellants herein, claim the entire amount of compensation determined under the impugned rendition.

3. The sinew of the aforesaid reasoning, has to be tested not in isolation rather stands enjoined to be tested by making an allusion to the recitals unraveled in Ex. RW2/B, exhibit whereof constitutes an application preferred by respondent No.3, Chattar Singh, under Section 28-A of the Land Acquisition Act, 1984 before the Land Acquisition Collector, whereunder he claimed the benefit of the award recorded on 27.05.1994, by the Reference Court, in land reference petition No. 2NS/4 of 1990/89. Though, the patwari in the office of the Collector concerned, whose statement stands embodied in Ex. R-3, has been unable to forthrightly testify therein qua the aforesaid petition constituted by respondent No.3 under Section 28-A of the Land Acquisition Act, standing transmitted by the Collector concerned to the learned Reference Court, for enabling the latter to pronounce an adjudication thereupon, whereas, in Ex.RW2/B a recital occurs qua the respondents therein holding no objection qua the amount claimed by respondent No.3, Chattar Singh, in the latter's petition constituted under Section 28-A of the Land Acquisition Act, 1894 standing disbursed in his favour. It also holds echoings qua the respondents in Ex.RW2/A standing directed by the Collector to make the deposit of Rs.81,925/-. However, no apposite record exists hereat manifesting qua the amount assessed under Ex.RW2/B qua respondent No.3 standing released in his favour, yet therefrom, it is not apt to conclude qua his not receiving its benefit, especially, when no apposite record making the aforesaid bespeakings exists hereat. Nonetheless, articulations occur in Ex. R-3 constituting the statement of the patwari concerned, qua on 4.10.1985, respondent No.3 under protest receiving the amount of compensation determined under the apposite Award No. 9/83 of 12.6.1983, as pronounced by the Collector concerned, also therein echoings occur qua his prior thereto prefering a petition under Sections 30 and 31 of the Land Acquisition Act before the Collector concerned. However, he continues to depose qua the aforesaid petitions preferred by Chartar Singh standing ordered to be filed, wherefrom, it is befitting to conclude qua the aforesaid petitions preferred by respondent Chattar Singh never standing transmitted to the learned Reference Court for enabling the latter to pronounce an adjudication thereupon. However, the effect of the aforesaid omission, of the Collector concerned or of respondent No.3 to ensure the further apt transmission of his apposite petition aforesaid preferred prior to his receiving the amount of compensation determined under the award No.9 of 1983 would stand dwelt upon hereinafter. At this stage, it is deemed fit, to thereupon construct, an inference qua respondent No.3 Chattar Singh acquiescing to the payment of compensation determined in his favour by the Collector concerned, under the apposite award No.9 of 1983 also his acquiescing to the relevant pronouncement made under Ex.RW2/B, whereupon, he stood estopped, to, in land reference petition No. 58-S/4 of 2007/94, whereupon the impugned rendition stood pronounced, to hence contest qua his solitarily to the complete ouster of the landowners, standing entitled to receive the entire compensation amount determined thereunder. Furthermore, with respondent No.3 herein, not ensuring the transmission, by the Collector concerned of his petitions aforesaid constituted under Section 30 and 31 of the Act, onwards to the learned Reference Court, whereupon, hence with his contest raised therein standing terminated, thereupon, also the learned Reference Court held no jurisdiction to, when it stood seized only of a composite petition constituted therebefore by the landowners, wherein they sought enhancement of compensation

besides canvassed qua the award of compensation amount vis-a-vis respondent No.3 Chattar Singh standing set aside, significantly when the composite petition aforesaid alone warranted pronouncement of an adjudication thereon, to pronounce a verdict qua respondent No.3 more so when for the aforestated reasons he stood estopped to re-agitate a terminated claim.

4. Even though, Chattar Singh stood impleaded as respondent No.3 in reference petition No. 58-S/4 of 2007/94, whereupon he stood entitled to contest the claim canvassed therein by the landowners, thereupon, the learned Reference Court though held jurisdictional capacity to reject his prayers urged thereunder, nonetheless, it did not hold any jurisdictional vigour, to oust the landowner from his/their entitlement, to receive compensation amount adjudged in his/their favour by the authority concerned. Ensuingly, also the according of relief qua the entire compensation amount, adjudged upon the apposite land reference petition aforesaid constituted therebefore by the landowners, hence standing disbursed exclusively qua respondent No.3, Chattar Singh, whereas, the latter had omitted to ensure the onward apt transmission, of his petition preferred before the quarter concerned under Section 30 and 31 of the Act, though, it stood preferred prior to his receiving compensation under protest on 4.10.1985, in sequel to pronouncement of award No. 9 of 1983, whereupon he stood estopped to seek any ouster of the landowner(s) from theirs seeking enhancement of compensation amount from the learned Reference Court upon his/their land Reference Petition No. 58-S/4 of 2007/94. The effect of the aforesaid estopple, is qua its baulking not only respondent No.3 Chattar Singh from exclusively claiming the adjudicated compensation amount besides his also standing forestalled to preempt the landowners from receiving the compensation amount awarded under the impugned award also its foisting an embargo upon the learned Reference Court against its totally excluding the landowner(s) from receiving the compensation amount determined by it under the impugned rendition pronounced upon their petition. Consequently, the findings of the learned reference Court qua the aforesaid factum probandum suffers from an inherent jurisdictional vice.

5. Be that as it may, it appears that the learned Reference Court had depended upon the aforesaid exhibits besides upon the apposite acquiescence(s) occurring in the statement of Suesh, comprised in Ex. R-2 to hence hold qua respondent No.3, Chattar Singh holding the status of “gair maurusi” upon the entire land of the landowners. The aforesaid inference stands erected upon a wholly fallacious besides misfounded appreciation of the aforesaid exhibits, especially, when therewithin echoings occur qua respondent No.3 Chattar Singh standing recorded as “gair maurusi” upon 135th share of the landowner(s), wherefrom it is befitting to conclude qua only upon the afore referred share, respondent No.3, Chattar Singh holding rights as a “gair maurusi” under the landowner(s), unless evidence stood adduced holding stark postures qua the earmarked share in exhibits aforesaid constituting the entire share of one Devi Ram in the relevant undivided holdings, brought to acquisition. However, the aforesaid evidence is amiss. In aftermath, it was judicially insagacious for the learned Reference Court to, hence, conclude qua vis-a-vis the entire tract of joint holdings of the landowner(s), respondent No.3 Chattar Singh holding status of a “gair maurusi” nor it was apt for it to conclude qua his alone to the exclusion of the landowner(s) holding entitlement qua the entire compensation amount determined under the impugned award. Likewise, the oral admission occurring in the cross-examination of Suresh embodied in Ex.R-2 qua Devi Ram inducting, respondent No.3 as a “gair maurusi”, is not amenable to a construction qua its affording any leverage to respondent No.3 to espouse qua vis-a-vis the entire share of Devi Ram in the undivided holding, his standing inducted as a tenant thereon by him, obviously when the aforesaid trite precise evidence in respect thereto stood enjoined to be adduced by respondent No.3, whereas, he omitted to adduce it. Contrarily, his abandoning to pursue his petition under Sections 30 and 31 of the Act also his accepting the mandate of Ex.RW2/B ensures the ensual of a clinching conclusion qua his hence portraying his acquiescence qua vis-a-vis only a part of the share of one Devi Ram in the relevant undivided holding, his holding the status of a “gair maurusi” under him, whereupon also he stands estopped to canvass qua the entire amount of compensation determined qua the acquired

land(s), hence, standing disbursed in its entirety in his favour and to the complete ouster of other landowner(s).

6. For the foregoing reasons, the impugned award is modified to the extent, it has declared respondent No.3 to stand entitled to the entire amount of compensation determined under the impugned award. However, the disbursement of amount of compensation, if any, earlier made vis-a-vis Chattar Singh (respondent No.3), under the relevant pronouncement(s) do not warrant any direction qua his standing dis-entitled to their benefit(s). The benefit of the impugned rendition shall also accrue to the appellants besides to respondent No.3 in the manner as concluded/drawn in the previous rendition(s), rendered with respect to the acquired land(s). Accordingly, the instant appeal stands disposed of. All other pending applications also stand disposed of.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

National Insurance Company Ltd. … Appellant.

Versus

Vidya Devi & another … Respondents

FAO (WCA) No. 330 of 2010
Date of Decision : March 30, 2017

Workmen Compensation Act, 1923- Section 4- H was employed by B – he died as a result of accident during the course of employment- the Commissioner awarded compensation of Rs.4,50,000/- along with interest @ 12 % per annum – solatium was awarded @ 30% - held in appeal that Insurance Company is liable to pay the compensation even if the driving licence is not valid- the Act does not provide for the grant of solatium @ 30% but only provides for the payment of penalty and interest – appeal allowed – the award passed by Commissioner modified.

(Para- 2 to 10)

Cases referred:

Oriental Insurance Company vs. Bhagat Singh, 2012 (2) Him. L. R. 969
Ved Prakash Garg vs. Premi Devi & others, (1997) 8 SCC 1

For the appellant : Mr. Jagdish Thakur, Advocate, for the appellant.
For the respondent : Mr. Vijay Chaudhary, Advocate, for respondent No. 1.
Mr. Vikrant Chandel, Advocate, vice Mr. Dinesh Sharma, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Sanjay Karol, J. (Oral)

The appeal stands admitted on the following substantial questions of law:

"1. Whether the Insurance Company is liable to pay the compensation, if the driver is not having valid and effective driving license?

2. Whether the ld. Commissioner below is justified in awarding 30% solatium on the award amount under the provisions of Workmen Compensation Act, 1923?

3. Whether the Insurance Company is liable to pay penal interest under the provisions of workmen Compensation Act?

4. Whether the ld. Commissioner below has erred in interpreting Section 4-A(3)(a)(i) of the Workmen Compensation Act?"

2. Insofar as question No. (1) is concerned, the issue is no longer *res integra* in view of law laid down by the apex Court in *Kulwant Singh & others vs. Oriental Insurance Company Ltd.,* (2015) 2 SCC 186, wherein it is held as under:

"6. The learned counsel for the appellants submitted that the High Court erred in holding that licence for driving light motor vehicle disentitled the driver to drive 'light goods vehicle'. Reliance has been placed on the Judgments of this Court in *S. Iyyapan vs. United India Insurance Company Limited and another*, (2013) 7 SCC 62 and *National Insurance Company Ltd. vs. Annappa Irappa Nesaria alias Nesearagi and others*, (2008) 3 SCC 464. Thus, there was no breach of policy entitling the Insurance Company to recovery rights against the owner. The learned counsel for the Insurance Company supported the view taken by the High Court.

(7) We have considered the rival submissions and perused the judgments relied upon.

(8) We find the judgments relied upon cover the issue in favour of the appellants. In *Annappa Irappa Nesaria (supra)*, this Court referred to the provisions of Sections 2(21) and (23) of the Motor Vehicles Act, 1988, which are definitions of 'light motor vehicle' and 'medium goods vehicle' respectively and the rules prescribing the forms for the licence, i.e. Rule 14 and Form No.4. It was concluded:

"20. 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."

(9) In *S. Iyyapan (supra)*, the question was whether the driver who had a licence to drive 'light motor vehicle' could drive 'light motor vehicle' used as a commercial vehicle, without obtaining endorsement to drive a commercial vehicle. It was held that in such a case, the Insurance Company could not disown its liability. It was observed :

"18. In the instant case, admittedly the driver was holding a valid driving licence to drive light motor vehicle. There is no dispute that the motor vehicle in question, by which accident took place, was Mahindra Maxi Cab. Merely because the driver did not get any endorsement in the driving licence to drive Mahindra Maxi Cab, which is a light motor vehicle, the High Court has committed grave error of law in holding that the insurer is not liable to pay compensation because the driver was not holding the licence to drive the commercial vehicle. The impugned judgment [Civil Misc. Appeal No.1016 of 2002, order dated 31.10.2008 (Mad)] is, therefore, liable to be set aside."

(10) No contrary view has been brought to our notice.

(11) Accordingly, we are of the view that there was no breach of any condition of insurance policy, in the present case, entitling the Insurance Company to recovery rights.

(12) Accordingly, we allow these appeals, set aside the impugned order of the High Court and restore that of the Tribunal. There will be no order as to costs."

3. Insofar as question No. (4) is concerned, this issue also stands settled in view of law laid down by a Coordinate Bench of this Court in *Oriental Insurance Company vs. Bhagat Singh,* 2012 (2) Him. L. R. 969. Wages have been correctly accounted for while determining the amount of compensation payable to the workman.

4. It is not in dispute that Hem Chand who was employed by Bhagat Ram, died during the course of his employment. He died as a result of an accident on 10.11.2006. It is not in dispute that at the time of his death, Hem Chand was of 19 years of age. It is also not in dispute that claimant Vidya Devi is mother of the deceased and that she is entitled to the claim. Salary payable to the deceased is also not in dispute.

5. In terms of the impugned Award, claim petition stands allowed to the following effect:

> "The amount of compensation is due to the petitioner but not the whole amount as prayed for by the petitioner. The workman compensation Act WC Act lays down the method to calculate the compensation amount. The age of the deceased at the time of the death was 19 years as per record available which is Ex. AW2/A. Further respondent No. 1 has admitted in his w/reply and statement on oath that the deceased was getting 4000/- pm. Therefore on the application of factor formula given in schedule i.e. half of the wages (subject to the maximum of Rs. 2000/-) is multiplied by the relevant factor which is 225.22 at the age of 19 years, the amount of compensation comes to Rs. 4,50,000/- which amount will be payable to the petitioner from the date of accident till the final payment of compensation as assessed supra. The assessed amount alongwith interest @ 12% per annum from the date of accident. I further do consider here, the loss of future aspects of parents as the deceased was the only son and earner in old age and coming to this non pecuniary damage. It would be appropriate to console the poor harijan parents who lost their 19 years unmarried son forever. They lost their future aspects of hereditary growth thereby deprived of from last Hindu rituals (rites) even there will be none to perform/lit fire to their pyre at the time of death. This permanent pain, sufferings and unbearable mental agony through out their life cannot be compensated in terms of money but by little relief. I find this case fit to award solatium @30% on awarded amount of Rs. 4,50,000/- The aforesaid amount of Rs. 7,69,500/- shall be deposited by respondent No. 2 within 30 days from the date of this order failing which 18% penal interest over and above on Prime Landing Rate @ 12% above as penalty shall be paid till the final date of deposit. The file be consigned to G.R.R.Arki after due completion."

6. It is a settled principle of law that claimants are entitled for compensation only in terms of the Workmen's Compensation Act, 1923 (hereinafter referred to as the 'Act'). The 'Act' does not provide for grant of "solatium @30%", on the awarded amount, which stands awarded by the Commissioner, Workman Compensation, in terms of the impugned award.

7. Compensation, due and payable to the workman/claimant is payable under Section 4(1)(a) which provides as under:

> "4. Amount of compensation. – (1) Subject to the provisions of this Act, the amount of compensation shall be as follows, namely:-
>
> > (a) Where death results from the injury an amount equal to fifty per cent of the monthly wages of the deceased workman multiplied bythe relevant factor; or an amount of eighty thousand rupees, whichever is more;" …

8. Additionally claimant would have been entitled for interest and penalty in terms of Section 4-A of the Act, which in the instant case is not the position. As such, substantial question of law No. (2) is answered accordingly.

9. Insofar as substantial question of law No. (3) is concerned, again one has to only peruse the provisions of Section 4-A of the Act which does not provide for payment of penal interest. The authority is empowered to award interest, simple in nature @12% per annum, only where the employer is in default in paying the amount of compensation due, under the Act, which would be one month from the date it fell due. The apex Court in *Ved Prakash Garg vs. Premi Devi & others,* (1997) 8 SCC 1, has clarified what is the meaning of expression "date it fell due" to mean, one month after the date of incident/accident. As such the question is answered accordingly.

10. Under these circumstances, the impugned Award dated 30.4.2010 passed by Commissioner, Under Workman's Compensation Act, Arki in Case No. 9 of 2007, titled as *Vidya Devi vs. Bhagat Ram & another,* is modified to the following effect:

> Claimant shall be entitled to compensation of Rs. 4,50,000/- alongwith interest @12% from 11.12.2006 that is one month after the date of accident which took place on 10.11.2006 up to 28.8.2010, the date of deposit, which comes to Rs. 2,00,466/-. As such total compensation payable comes to Rs. 6,50,466/- instead of Rs. 7,69,500/-.

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

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

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

Cr. Appeal No. 145 of 2009.
Date of Decision: 30th March, 2017.

Indian Penal Code, 1860- Section 279, 337 and 338- Accused was driving a bus – he took it to the wrong side and the bus fell down – the complainant sustained injuries – the accused was tried and acquitted by the Trial Court- held in appeal that according to mechanical expert the steering and braking system of the vehicle had suffered break down– he was not cross-examined at all- hence, the defence version is probable – Trial Court had rightly acquitted the accused- appeal dismissed. (Para-9 to 11)

For the Appellant: Mr. R.K. Sharma, Deputy Advocate General.
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 by the State of Himachal Pradesh against the judgment rendered on 16.10.2008 by the learned Sub Divisional Judicial Magistrate, Chachiot at Gohar, District Mandi, H.P. in Police Challan No. 76-I/2001 (2000), whereby, he acquitted the accused for his allegedly committing offences punishable under Sections 279, 337 and 338 of the IPC.

2. The facts relevant to decide the instant case are that complainant Nargis Thakur, Hindi Teacher at Senior Secondary School Thunag recorded her statement before the Police to the effect that today on 28.9.1999 at about 3.35 P.M., she was travelling in a HRTC bus which was

going from Janjehli to Sundernagar and was sitting on seat No.3. There were about 35 passengers in the bus. AT about 4.00 p.m., when the bus passed through Kandhi mod then about 70 ft. ahead, the driver of the bus bearing No. HP-31-1509 due to his rashness and negligence took the bus to the wrong side and the bus tumbled down 50 ft. below the road. She came out from the window of the bus. She stated that she along with other passengers of the bus received injuries in the alleged accident. The accident stated to have taken place due to the rash and negligent driving of the bus by its driver. On the aforesaid statement of the complainant, FIR was registered in the police station concerned. 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 279, 337 and 338 of the IPC. In proof of the prosecution case, the prosecution examined 23 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 penal act of the accused/respondent stands comprised in his purportedly negligently driving his vehicle/bus bearing No. HP-31-1509, constituted by his driving it at an excessive and brazen pace, whereupon, it rolled down at Kandi Mod into a depth of 50 feet below the road. The prosecution witnesses unanimously deposed qua in sequel to the negligent manner of driving of the bus by the accused/respondent, thereupon, it rolling into a depth of 50 feet below the road, also they in tandem depose qua the passengers occupying the bus driven by the accused/respondent sustaining injuries on their person(s), factum whereof stands borne on the apposite MLCs embodied in Ex. PW19/A to Ex.PW19/K and Ex.PA to Ex.PV. All the prosecution witnesses are the occupants of the bus driven by the accused/respondent, each in their respective testifications, testify with unanimity bereft of any vice of any intra se contradictions qua the accused/respondent driving the aforesaid bus, at an excessive speed, whereupon, hence, swerved it astray from the road, whereafter it tumbled into a depth of 50 feet from the edge of the road whereon it stood plied.

10. Be that as it may, their consistently deposed version qua the charge, whereto the accused stood tried, would constrain an inference of the accused/respondent while driving the

aforesaid HRTC bus bearing No. HP-31-1509, his driving it negligently at a brazen pace, sequel whereto, being qua its rolling down into a depth of 50 feet from the edge of the road whereon it stood plied. However, before imputing tenacious credence to the testifications of the ocular witnesses qua the relevant incident, an allusion to the strength of the espousal made by the accused in his defence qua the tumbling of the bus from the edge of the road whereon it stood plied, into a depth of 50 feet therefrom, emanating from eruption of sudden mechanical defect therein, on anvil whereof, he obviously seeks to exculpate his incriminatory role embodied in the relevant charge, besides as a necessary corollary thereto also warrants an advertence to the report of the mechanical expert borne on Ex.PW21/A holding disclosures therein qua sequels of the the Mechanical Expert carrying its inspection, on the day subsequent to the ill-fated mishap involving the vehicle driven by the accused/respondent. The mechanical report Ex.PW21/A, which stands proven by PW-21, pronounces therein qua on his holding the inspection of the relevant vehicle, his detecting its steering system suffering a break down also he vioces therein qua the tyre rod also the leaf spring also standing noticed by him stand dismantled, whereupon, he stood incapacitated to hold inspection of the steering wheel of the relevant vehicle. Furthermore, he has also voiced in Ex.PW21/A qua his inability to ascertain the efficacy of the braking system of the vehicle, inability whereof arose from the brake pipe suffering a breakdown. However, in his report, he has not with firmness voiced the aforesaid defects noticed by him to be occurring in the relevant vehicle on his holding its inspection either erupting prior to the occurrence or subsequent to the occurrence of the accident. However, when PW-9, PW-11 and PW-14, all ocular witnesses to the occurrence in their respective testifications occurring in their relevant cross-examination(s) make vivid articulations qua at the time contemporaneous to the bus driven by the accused swerving away from its appropriate path, whereupon, it tumbled upto a depth of 50 feet from the edge of the road, whereon, it stood plied, theirs hearing a sound of some breakage occurring in the relevant vehicle. The aforesaid testimonies of PWs aforesaid stood not concerted to be shred of their efficacy by the learned APP concerned comprised in his seeking the permission of the learned trial Magistrate to either cross-examine them or to re-examine them qua the fact aforesaid, whereupon, the effect of the aforesaid pronouncements made by the aforesaid PWs is qua theirs being credible besides their apposite effect stands when construed in coalescence with PW-21 omitting to with firmness voice in Ex.PW21/A qua the relevant defects noticed by him to be occurring in the vehicle concerned occurring thereon either prior to the accident or subsequent thereto, whereupon, hence with lack of conclusivity of imputation by him qua the relevant defects noticed by him in the relevant vehicle hence occurring therewithinn prior to or subsequent to the accident, is qua hence an inference standing engendered qua the espousal of the accused qua his inability to keep the vehicle on the appropriate side of the road standing sequelled by the failure or of break down of its steering wheel besides break down of its braking system, whereupon, obviously the speed at which it stood driven being hence volitionally uncontrollable did not hence render him penally inculpable.

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

12. 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 DHARAM CHAND CHAUDHARY, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

State of H.P. ……Appellant.
Versus
Madan Lal & ors. ……Respondents.

Cr. Appeal No. 49 of 2014.
Decided on: 30.3.2017.

Indian Penal Code, 1860- Section 498-A and 306 read with Section 34- Deceased S was married to accused M – the accused treated her with cruelty – she consumed poison and committed suicide – the accused was tried and acquitted by the Trial Court- held in appeal that parties were married for 9 years – according to prosecution cruelty started after 5-6 months of the marriage- the cause of cruelty was not given – the deceased was asked to return to her matrimonial home, which shows that that the situation was not grave otherwise Panchayat would not have asked her to return to her matrimonial home – the children of the deceased were not associated to prove the cruelty – the Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed.(Para-6 to 17)

For the appellant Mr. D.S.Nainta and Mr. Virender Verma, Addl. AGs.
For the respondents Appeal stands abated against respondent No. 1.
Mr. Gaurav Gautam, Advocate, for respondents No. 2 & 3.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J.

The respondents (hereinafter referred to as the accused persons), one of them i.e. respondent No. 1 Madan Lal has expired during the pendency of the appeal in this Court, have been acquitted of the charge under Sections 498-A and 306 read with Section 34 IPC by learned Sessions Judge, Kangra, Sessions Division at Dharamshala vide impugned judgment dated 30.3.2013, passed in sessions Case No. 67-K/VII/2010/08.

2. This appeal has been filed with a prayer to quash the impugned judgment and after recording the findings of conviction against the accused persons to convict them for the commission of the offence they allegedly committed.

3. The charges against all the accused persons were that they all started treating deceased Sweety Bala, wife of accused Madan Lal (since dead) with cruelty, mental as well as physical, after 5-6 years of her marriage. As a result thereof, she consumed *'phosphide'*, a poisonous substance at 8:00 AM on 18.10.2007, at the place of her in-laws i.e. village Baidi, Tehsil Kangra under the jurisdiction of Police Station Kangra, H.P. Therefore, all the co-accused in furtherance of their common intention have allegedly tortured the deceased and abetted the commission of suicide by her.

4. The prosecution, in order to prove charges so framed against the accused persons, has examined 16 witnesses in all. However, the material prosecution witnesses are the mother of the deceased PW-1 Radha Rani, her brother PW-4 Sanjeev Kumar, Uncle PW-5 Pawan Kumar, PW-7 Ghandharv Singh and maternal Uncle PW-10 Des Raj. Learned trial Court, on appreciation of the evidence as has come on record by way of their testimony and also by that of the official witnesses, has arrived at a conclusion that the prosecution has failed to prove its case against the accused beyond all reasonable doubt. They all have therefore been acquitted of the charges which were framed against each of them.

5. The grouse of the appellant-State herein is that learned trial Judge has brushed aside the cogent and reliable evidence produced by the prosecution without assigning any reason. The findings of acquittal as recorded, therefore, are stated to be not legally and factually sustainable. On hearing learned Addl. Advocate General at length and also going through the entire evidence as well as taking into consideration the arguments addressed on behalf of the appearing accused-respondents No. 2 & 3, the questions which have engaged our attention and need adjudication are that the findings of acquittal recorded by learned trial Court are not in consonance vis-à-vis oral as well as documentary evidence produced by the prosecution during the course of trial.

6. Interestingly enough, the deceased was married to accused Madan Lal nine years ago of her suicidal death. As per the first version which find recorded in the statement Ext. PW-1/A of Smt. Radha Rani, the mother of the deceased, accused started torturing her daughter immediately after 5-6 months of her marriage. The cause as to why she was being tortured or being turned out from the matrimonial home, however, is missing in Ext. PW-1/A and also in the statement of the material prosecution witnesses, named hereinabove. As per their version, it is deceased Madan Lal, the husband of deceased Sweety Bala who had apprised on 18.10.2007 around 2:00 PM over telephone that Sweety Bala had consumed poison and that PW-1 Radha Rani should reach in Dharamshala hospital at once. PW-1 Radha Rani tells us in her examination-in-chief that her statement Ext. PW-1/A was recorded by the police, however, at what stage, the same is silent. Now, if coming to her cross-examination, she tells us about recording of her statements by the police twice i.e. first at the time when her deceased daughter was admitted for treatment in the hospital and secondly in the mortuary when her post mortem was being conducted. We could lay our hands only on her statement i.e. Ext. PW-1/A recorded under Section 154 Cr.P.C. i.e. after the death of Sweety Bala. Where is her first statement which as per her version was recorded at the time when the deceased was admitted in hospital, the record is silent, meaning thereby that the allegations leveled by the complainant party against the accused persons are not proved beyond all reasonable doubt. The possibility of the present case foisted against the accused persons under some political pressure cannot be ruled out because admittedly, Chaudhary Ashok Kumar, Advocate, nephew of Sh. Chander Kumar, Former Member of Parliament and Cabinet Minister of Himachal Pradesh was related to complainant party, being son-in-law (Chacha Sasur) of PW-1 Radha Rani. Though, it is denied that the case against the accused was engineered and manipulated under political pressure, however, when specific instances of cruelty thereof remained unexplained, therefore, in view of the recent trend of implicating the in-laws of a married women having committed suicide, the false implication of the accused persons cannot be ruled out.

7. The Panchayat was there in the village of the complainant party. The Pradhan/Up-Pradhan of the Gram Panchayat was none else but PW-10 Des Raj, maternal Uncle of the deceased. As per the own admission of PW-1 Radha Rani, Police Post Gaggal was at a distance of 3 kms. from her house. As admitted by all the material prosecution witnesses, they never reported the matter qua the alleged torturing and harassment of the deceased in the matrimonial home either to the Gram Panchayat or to the police. They rather had been consoling the deceased as and when she comes to them with a complaint of her maltreatment and torturing against accused and make her to understand to return to the matrimonial home. Had the degree of alleged cruelty been to such an extent that the deceased decided to put an end of her life by committing suicide, the complainant party instead of pacifying or consoling the deceased or persuading her to return to the matrimonial home was expected to have reported the matter either to the Panchayat, police or have filed complaint in the Court of law against her in-laws. As a matter of fact, while in the witness-box, they had no explanation to offer to justify their conduct in not reporting the matter to the authorities that the accused started treating the deceased with cruelty.

8. It is significant to note that two issues were born to the deceased out of her wed-lock with accused Madan Lal (since dead). As per the testimony of PW-1 Radha Rani, the complainant and PW-4 Sanjeev Kumar, the daughter of the deceased was studying in 7th

standard whereas son in 4th standard. This fact was not disclosed to the Investigating Agency as has come in the statement of complainant PW-1 Radha Rani while in the witness-box. The Investigating Agency has also not made any effort to associate the daughter and son of the deceased during the course of investigation. As a matter of fact, a child studying in 7th standard is mature enough and can be said to be a material witness in a case of this nature having witnessed the harassment and torturing of his/her mother at the hands of his/her father or any relative(s) of father. Therefore, the daughter of deceased would have deposed something tangible to lend support to the prosecution case had there been any ill-treatment or harassment of her mother at the hands of accused Madan Lal or her grand parents, accused Munshi Ram and Geeta Devi. Since she has not been associated during the course of investigation, therefore, an adverse inference has to be drawn against the prosecution. Above all, the only independent witness PW-7 Ghandharv Singh examined by the prosecution has not supported its case and rather he has turned hostile. His testimony, therefore, belies the prosecution case that the accused persons started treating the deceased with cruelty after 5-6 months of her marriage and that this fact was disclosed by the deceased herself to this witness. The rest of the prosecution case that the accused used to turn out the deceased from the matrimonial home and that he tried to settle the matter between the complainant party and the accused on several occasions is without any result having also been denied being wrong. According to him, the accused never compelled the deceased to commit suicide. There is nothing to disbelieve the testimony of PW-7 Ghandharv Singh because he is Rajput by caste whereas accused belongs to Ghirth community. It has come in his examination-in-chief that accused was his relative, however, clarified in his cross-examination that he was not related with them in any manner, whatsoever, and rather he had friendly relations with the parents of the deceased. He had settled the marriage of the deceased with accused Madan Lal in the capacity of a mediator, however, neither party approached him for getting the dispute, if any, amongst them to be sorted out by him.

9. Therefore, the evidence discussed hereinabove is not suggestive of that the deceased was being tortured by the accused persons and the degree thereof was to such an extent that the deceased deemed it appropriate to put an end to her life and that too when she was mother of two minor children.

10. 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***.

11. 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.

12. 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.

13. Interestingly enough, even for the arguments sake if it is believed that in the case in hand, 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 Madan Lal or his parents accused Munshi Ram and Geeta Devi. There is not even a whisper 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 by her in-laws.

14. In view of the contradictions, inconsistencies and improvements, as noticed hereinabove, the allegations of cruelty as has come on record in the statements of PW-1 Radha Rani, PW-4 Sanjeev Kumar, PW-5 Pawan Kumar, PW-7 Gandharv Singh and PW-10 Desh Raj are nothing else but merely an after thought and leveled with an idea to implicate the accused persons in this case falsely.

15. We, therefore, are not in agreement with learned Addl. Advocate General representing the State i.e. 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.

16. The remaining prosecution witnesses PW-2 Const. Vijay Kumar, PW-3 Dr. Vivek Sood, PW-6 Shiv Kumar, PW-8 HHC Kuldeep Singh, PW-9 HHC Ajeet Singh, PW-11 HC Vijay Singh, PW-12 HC Gopal Sain, PW-13 HC Rahul Rishi, PW-14 ASI Nirmal Dass, PW-15 Insp. Ranjit Singh and PW-16 Dr. Ashok Kumar 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.

17. 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 and 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.

18. 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.

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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

Bimla Devi. ….Respondent

Criminal Appeal No. 38 of 2014
Reserved on: 24.3.2017
Date of Decision: 31.3.2017

Indian Penal Code, 1860- Section 498-A and 306- Deceased was married to the son of the respondent – respondent used to taunt the deceased for not delivering a male child and for not giving gifts- respondent used to quarrel with the deceased on insignificant issues- the deceased

got burnt – the accused was tried and acquitted by the Trial Court –aggrieved from the order, the present appeal has been filed – held that witnesses except PW-16 turned hostile – there are discrepancies in the testimony of PW-16 – the deceased had also made contradictory statements in the dying declaration due to which the dying declaration cannot be relied upon – an inference can be drawn that the deceased may have put herself on fire on account of daily quarrel but a suspicion cannot take the place of proof – the abetment or cruelty has not been established – the prosecution had failed to prove its case beyond reasonable doubt and the Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed.(Para- 8 to 35)

Cases referred:

Raja and others Vs. State of Karnataka (2016) 10 SCC 506
Umakant and another Vs. State of Chhattisgarh (2014) 7 SCC 405
Samadhan Dhudaka Koli vs. State of Maharashtra (2008) 16 SCC 705,
Bhadragiri Venkata Ravi Vs. Public Prosecutor, High Court of Andhra Pradesh, Hyderabad (2013) 14 SCC 145
Gurcharan Singh Vs. State of Punjab (2017) 1 SCC 433

For the Appellant: Mr.M.A. Khan and Mr. Virender Verma, Additional Advocate Generals.
For the respondent: Mr. Virender Singh Rathour, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge

State has assailed acquittal of respondent vide judgment dated 25.7.2013 passed in Sessions Trial No. 72-J/VII-2010/2009 by Sessions Judge, Kangra at Dharamshala in case FIR No. 136 of 2008 under Sections 498-A and 306 IPC registered in Police Station Indora.

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

3. On 18.6.2008 at about 11.30 A.M. a telephonic message was received in Police Post Fatehpur, calling police for action, as a lady having burn injuries was brought for treatment in CHC, Fatehpur. On reducing the said information into writing as report No. 7, dated 18.6.2008, PW-2 ASI Mohinder Singh along with Head Constable Rajesh Kumar departed for CHC Fatehpur, on whose application Ex. PW-2/B, Medical Officer opined that injured was fit to give statement whereupon statement of injured Ex. PW-2/D was recorded in presence of PW-11 Janak Raj Pradhan Gram Panchayat, Up-Pradhan Karnail Singh and Medical Officer duly attested by Medical Officer wherein injured (deceased Asha Devi) stated that she caught fire accidently when she was lighting kerosene stove and on crying her mother-in-law who was outside with cattle, came and extinguished fire and in the incident there was no negligence or fault of any body. The said statement was also reproduced in rapat No. 9, dated 18.6.2008 Ex. PW-2/E in Police Post, Fatehpur by PW-2 ASI Mohinder Singh. On finding that case pertained to jurisdiction of Police Station Indora, at about 1:00 P.M., telephonic information was sent to Police Station Indora through Head Constable Rajesh Kumar on behalf of Incharge of Police Post Fatehpur for taking action in the matter with further information that statement of injured has been recorded whereupon, from Police Station Indora, PW-9 H.C. Anubhav Krishan was sent to CHC Fatehpur where he found that injured had been taken to Pathankot for treatment. From Pathankot deceased was shifted to Dr. Rajendra Prasad Government Medical College (RPGMC), Tanda. On 19.6.2008, PW-9 H.C. Anubhav Krishan, on receiving telephonic information about return of father of injured (deceased), who was accompanying her in hospitals, to his village, went to parental village of deceased, where he found that PW-15 ASI Geeta Parkash had already arrived there who recorded statement Ex. PW-10/A of PW-12 Subash Singh, father of deceased under Section 154 Cr.P.C.

4. In his statement Ex. PW-10/A recorded under Section 154 Cr.P.C, PW-12 stated that his daughter Asha Devi (deceased), married to son of respondent, whenever came to meet him, had been telling him that respondent used to taunt her for not delivering to male child and for not giving gifts by her parents to them and also used to quarrel on insignificant issues whereupon he used to propose his daughter to advise respondent, but his daughter always refrained him from doing so because of some pressure. Thereupon he asked his son-in-law to advise his mother not to harass deceased. He further stated that on 18.6.2008 on receiving information about burning of his daughter, he reached hospital, where on asking, his daughter did not tell anything and he took her to a private hospital at Pathankot, wherefrom she was referred to Chandigarh/Ludhiana whereupon he brought his daughter in the same vehicle to RPGMC Tanda for treatment. Thereafter he stated that he believed that his daughter burn herself by pouring kerosene oil upon her on 18.6.2008 because of harassment by respondent. The aforesaid statement was sent to Police Station Indora as rucka, in pursuance to which FIR Ex. PW-10/B was recorded by PW-10, Inspector Shakti Parsad.

5. On the basis of FIR Ex. PW-10/B, investigation was started, statements of witnesses were recorded, burnt cloths alngwith bottle of kerosene oil and match box were taken into possession vide seizure memo Ex. PW-11/A and were sent to chemical examination to forensic lab and on 22.6.2008 at about 11:35 A.M. another statement Ex. PW-15/G of deceased Asha Devi was recorded by PW-15 Geeta Prakash in Medical College, Tanda in presence of her mother PW-3 Kamla Devi and one Baldev Singh and Medical Officer made endorsement Ex. PW-17/A on it, certifying making of the statement in his presence. PW-17 Dr. Sanjay Sood was examined to prove the signatures of Dr. Kuldeep Singh (deceased) in endorsement Ex. PW-17/A made on the statement of deceased Asha Devi Ex. PW-15/G. In this statement, deceased alleged that on 18.6.2008 respondent Bimla Devi, her mother-in-law, started quarreling on issue of cattle and poultry and thereafter she started taunting for not giving birth to male child and teasing by uttering hopeless words and she did not stop despite requests of deceased whereupon deceased felt angry and poured kerosene oil upon herself and put herself on fire by lighting matchstick and on feeling pain she ran out of the room and started crying and her mother-in-law also cried for help and tried to extinguish fire of her clothes. She fell down on the ground and respondent threw water upon her. Thereafter villagers took her to hospital and she had put on fire herself because of harassment by Bimla Devi. She further stated that she did not want to say anything about statement given in CHC Fatehpur.

6. On 25.6.2008, Asha Devi succumbed to her injuries at about 6:15 P.M. Her post mortem was conducted by PW-14 Dr. Atul Gupta on 26.6.2008, who issued her post mortem report Ex. PW-14/C with opinion that she died due to asphyxia and septic shock due to antimortem burns approximately 70%. In chemical examination report, traces of kerosene oil were detected in burnt clothes with skin of deceased and match box. On completion of investigation, prima facie findings complicity of respondent, challan was put in the Court against her and she was charged under Sections 498-A and 306 IPC.

7. Prosecution has examination 17 witnesses to prove its case. After recording statement of respondent under Section 313 Cr.P.C., she had chosen not to lead any evidence in defence. On conclusion of trial, respondent stands acquitted.

8. Receiving burn injuries on 18.6.2008 by deceased at her in-laws house and her death on 25.6.2008 succumbing to her injuries is not disputed. Respondent Bimla Devi had also received burn injuries, for which she was also treated in CHC Fatehpur and remained admitted in the hospital from 20.6.2008 to 29.6.2008 is also an admitted fact as prosecution examined PW-1 Dr.Randhir Thakur, who medically examined and treated her, to prove her MLC Ex. PW-1/B and discharge card Ex. PW-1/C. In cross-examination, he admitted injuries mentioned in MLC Ex. PW-1/B were possible, if person tried to extinguish fire of other person and probable time of receiving these injuries might be morning and day time of 18.6.2008.

9. The moot question to be decided in this appeal is that whether prosecution has established beyond reasonable doubt that deceased Asha Devi had burn herself by putting kerosene oil upon her, because of harassment subjected to her by respondent.

10. PW-6 Shiv Kumar photographed the dead body of deceased. PW-7 H.C. Santokh Singh had received message from Police Post Fatehpur and recorded report on the basis of said message. PW-8 H.C. Sushil Kumar, being Malkhana incharge, had received articles taken in possession during investigation and sent them for chemical examination. PW-9 H.C. Anubhav Krishan had visited the parental village of deceased and hospital in pursuance to information received PW-10 Inspector Shakti Parsad had registered FIR after receiving statement Ex. PW-10/A made by PW-12. PW-14 Dr.Atul Gupta conducted post mortem of dead body of deceased. PW-17 Dr.Sanjay Sood identified signatures of Dr.Kuldeep Singh (deceased) on statement of deceased Ex. PW-15/G. PW-4 Surinder Kumar had taken deceased Asha Devi to CHC, Fatehpur in his Jeep. PW-5 Hoshiar Singh on hearing cries of deceased went to the house of her in-laws and found deceased in burnt condition and helped to take her to CHC Fatehpur. All these witnesses are not aware about the cause of incident.

11. Prosecution has examined PW-3 Smt. Kamla Devi, PW-12 Subash (parents of deceased), PW-13 Tilak Raj and PW-16 Ram Pal (paternal and maternal uncles of deceased) and PW-11 Sh. Janak Raj, Pradhan of Gram Panchayat to prove that deceased has committed suicide as a result of harassment faced by her in the hands of respondent.

12. Except PW-16, all these witnesses were declared hostile for resiling their earlier statements recorded by police under Section 161 Cr.P.C. PW-16 also, though in examination-in-chief stated that mother-in-law of deceased i.e. respodnent Bimla Devi maltreated and tortured the deceased, resulting into commission of suicide by deceased. But in cross-examination, he admitted that deceased in her statement recorded by police in CHC Fatehpur, stated that she had caught fire accidently. He further stated that deceased never complained to him or his family members about any maltreatment or any instance of torture by respondent. He had shown his ignorance about relations between respondent and deceased. He also expressed his ignorance about the fact that respondent remained admitted in the hospital for nine days for her treatment, due to burn injuries sustained by her. The version of this witness is self-contradictory.

13. Conviction can be based on statements of hostile witness as statement of hostile witness is not to be brushed aside in toto and Court can consider evidence of hostile witness to corroborate other evidence on record. It is also clearly well settled that mere fact that a witness is declared hostile does not make him unreliable witness so as to exclude his evidence from consideration altogether but the said evidence remains admissible in the trial and there is no legal bar to base conviction or acquittal upon testimony of hostile witness if corroborated by other reliable evidence. Hon'ble Supreme Court in case ***Raja and others Vs. State of Karnataka (2016) 10 SCC 506*** has held as under:-

> "32. *That the evidence of a hostile witness in all eventualities ought not stand effaced altogether and that the same can be accepted to the extent found dependable on a careful scrutiny was reiterated by this Court in Himanshu @ Chintu (supra) by drawing sustenance of the proposition amongst others from Khujii vs. State of M.P. (1991) 3 SCC 627 and Koli Lakhman Bhai Chanabhai vs. State of Gujarat (1999) 8 SCC 624. It was enounced that the evidence of a hostile witness remains admissible and is open for a Court to rely on the dependable part thereof as found acceptable and duly corroborated by other reliable evidence available on record."*

14. In the light of aforesaid settled position, we have to examine statements of hostile witnesses PW-3, PW-11, PW-12 and PW-13.

15. PW-3 Smt. Kamla Devi in her cross-examination by learned Public Prosecutor also desisted from supporting case of prosecution and has denied to have made statement portion A to A recorded under Section 161 Cr.P.C. Though she admitted that her son-in-law used to keep

her daughter nicely and only respondent maltreated and tortured her, but she further stated that she could not say that due to torture of respondent, her daughter committed suicide. She admitted that they had good relation with respondent and she want to save old lady from punishment for daughters of deceased and her son-in-law and for that reason she was not deposing against her as per police case. In cross-examination by defence counsel, she denied that her daughter never complained to her that respondent had been torturing and maltreating her for not giving birth to a male child, but so far as cause of burning of deceased is concerned, she categorically stated that she could not say that deceased had stated to police that she had caught fire accidently. At the same time, she also remained silent about the incident, by not saying that deceased had committed suicide because of maltreatment of respondent. What can be gathered from her entire statement is that respondent was taunting deceased for not delivering male child. About cause of burning this witness is not sure.

16. PW-12 Subash is father of deceased and on the basis of his statement Ex. PW-10/A recorded under Section 154 Cr.P.C. case was registered against the respondent, has also not lent support to the prosecution case. He was declared hostile and was subjected to cross-examination by learned Public Prosecutor. He denied the entire case of prosecution and also statement Ex.PW-10/A, except his signatures on the same. He stated that he was an illiterate person and was not conversant with Hindi language and he could not say what was written by police in Ex. PW-10/A. He admitted that he did not want to pursue the present case against the respondent. He stated that Ex. PW-10/A was not read over to him and nor he himself read it. He also expressed his ignorance about recording of statement of deceased in CHC, Fatehpur, wherein she stated that she had caught fire accidently. However, he admitted that deceased never made any complaint regarding maltreatment or any kind of mental torture to him against respondent and it was told by him to the police at the time of recording his statement that he did not know anything about the case. Despite lengthy cross-examination by learned Public Prosecutor, nothing favourable could be extracted in favor of prosecution.

17. PW-13 Tilak Raj, uncle of deceased, was also declared hostile for not supporting the prosecution case. In cross-examination by learned Public Prosecutor, he admitted that deceased Asha Devi used to visit his parental house and tell him that respondent harassed and maltreated her. He also stated that because of that harassment and maltreatment, she set herself on fire. In cross-examination by defence counsel, he stated that he was not present at the time of incident on the spot and he could not say how and why deceased sustained burn injuries. He admitted that on 18.6.2008 in CHC Fatehpur, statement of deceased was recorded by PW-2 ASI Mohinder Singh in presence of PW-11 Janak Raj and Karnail Singh Pradhan and Up-Pradhan of Gram Panchyat, wherein she stated that she had caught fire accidently when she was trying to pump oil in kerosene stove. He further stated that deceased was living very nicely prior to death with respondent Bimla Devi and deceased was not having any dispute of any nature with respondent or her husband and in his presence respondent never tortured deceased for giving birth to daughters. However, he denied suggestion that deceased had never complained to him against respondent for being maltreated by her for not giving birth to son. This witness also indicates harassment of deceased by respondent for not delivering male child.

18. PW-11 Janak Raj Pradhan Gram Panchyat, went to CHC Fatehpur on coming to know about burn injuries received by deceased along with Up-Pradhan Karnail Singh. He stated that in his presence and also that of Medical Officer, deceased made a statement to police stating therein that at about 9:00 A.M. she caught fire accidently when she was trying to pump oil in kerosene store. He was also declared hostile for resiling his earlier statement recorded under Section 161 Cr.P.C. and was subject to cross-examination by learned Public Prosecutor. He admitted recording of his statement, but stated that he did not remember whether small girl child named Shibu was present on spot and he denied that small girl child Shibu told in his presence that her mother poured kerosene oil and set her on fire. He denied to have made such statement to the police. A suggestion was put to him by prosecution itself that respondent had tried to extinguish fire on the person of deceased and during that process, respondent had also sustained burn injuries on her person, which he admitted. In cross-examination by defence counsel, he

again admitted making of statement by deceased, recorded by ASI PW-2 Mohinder Singh, in his presence and that of Karnail Singh, stating therein that she caught fire accidently and the said fact was also told by him to police at the time of recording his statement. Small girl child namely Shibu was never examined despite being claimed to be eye witness in cross-examination of PW-11 by learned Public Prosecutor. Prosecution did not explain why the said Shibu was not brought before the Court. Prosecution must also be fair to the accused. Fairness on the part of investigating agency in investigation as well as trial is a human right of an accused. The State cannot suppress vital evidence from the Court only because the same would support the case of accused. (See *Samadhan Dhudaka Koli Vs. State of Maharashtra (2008) 16 SCC 705*).

19. PW-15 recorded statement Ex. PW-15/G made by deceased in RPGMC, Tanda in presence of her mother PW-3 Kamla Devi and one Baldev Singh which was endorsed by Dr. Kuldeep Singh (now deceased). Signatures of Dr. Kuldeep Singh were proved by PW-17 Dr.Sanjeev Sood. However, PW-17 is not witness to statement. PW-3 Kamla, mother of deceased is silent about this statement. Interestingly the statement was not put to her even during cross-examination by learned Public Prosecutor. Another witness to this statement PW Baldev Singh was not examined.

20. In statement Ex. PW-15/G, deceased had accused respondent for abetting her to commit suicide by maltreating and taunting her. However there is another statement Ex. PW-2/D made by deceased to PW-2 Mohinder Singh, which is also on record, wherein she had attributed the incident of her burning to an accident. Therefore, there are two inconsistent statements of deceased on record. The circumstances and timing of these statements are so proximate to the death of deceased and to each other that both of these statements can be considered to be her dying declaration. The statement of deceased cannot be discarded only on the ground that there is more than one dying declaration. Conviction can also be based upon only on dying declaration of deceased in case the said dying declaration is trustworthy, credible and confidence inspiring. However, when there is material variance and inconsistency in two statements of deceased, definitely either of those statements cannot be made basis for convicting accused.

21. In case ***Umakant and another Vs. State of Chhattisgarh (2014) 7 SCC 405***, Hon'ble Apex Court has held as under:-

> *"22. The legal position about the admissibility of a dying declaration is settled by this Court in several judgments. This Court in Atbir v. Government of NCT of Delhi - 2010 (9) SCC 1, taking into consideration the earlier judgments of this Court in Paniben v. State of Gujarat - 1992 (2) SCC 474 and another judgment of this Court in Panneerselvam v. State of Tamilnadu 2008 (17) SCC 190 has given certain guidelines while considering a dying declaration:*
>
> *"(i) Dying declaration can be the sole basis of conviction if it inspires full confidence of the Court.*
>
> *(ii) The Court should be satisfied that the deceased was in a fit state of mind at the time of making the statement and that it was not the result of tutoring, prompting or imagination.*
>
> *(iii) Where the Court is satisfied that the declaration is true and voluntary, it can base its conviction without any further corroboration.*
>
> *(iv) It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborative. The rule requiring corroboration is merely a rule of prudence.*
>
> *(v) Where the dying declaration is suspicious, it should not be acted upon without corroborative evidence.*
>
> *(vi) A dying declaration which suffers from infirmities, such as the deceased was unconscious and could never make any statement cannot form the basis of conviction.*

(vii) Merely because a dying declaration does not contain all the details as to the occurrence, it is not to be rejected.

(viii) Even if it is a brief statement, it is not to be discarded.

(iv) When the eye-witness affirms that the deceased was not in a fit and conscious state to make the dying declaration, medical opinion cannot prevail.

(x) If after careful scrutiny the Court is satisfied that it is free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it basis of conviction, even if there is no corroboration."

22. Law on multiple dying declarations is well settlement. In ***Samadhan Dhudaka Koli vs. State of Maharashtra (2008) 16 SCC 705***, Hon'ble Apex Court has held as under:-

"18. Consistency in the dying declaration, therefore, is a very relevant factor. Such a relevant factor cannot be ignored. When a contradictory and inconsistent stand is taken by the deceased herself in different dying declarations, they should not be accepted on their face value. IN any event, a rule of prudence, corroboration must be sought from other evidence brought on record. ...."

23. However, after considering plethora of judgments, Hon'ble Supreme Court in case ***Bhadragiri Venkata Ravi Vs. Public Prosecutor, High Court of Andhra Pradesh, Hyderabad (2013) 14 SCC 145*** has held as under:-

"22. It is a settled legal proposition that in case there are apparent discrepancies in two dying declarations, it would be unsafe to convict the accused. In such a fact-situation, the accused gets the benefit of doubt. (Vide: Sanjay v. State of Maharashtra, (2007) 9 SCC 148; and Heeralal v. State of Madhya Pradesh, (2009) 12 SCC 671).

23. In case of plural/multiple dying declarations, the court has to scrutinise the evidence cautiously and must find out whether there is consistency particularly in material particulars therein. In case there are inter-se discrepancies in the depositions of the witnesses given in support of one of the dying declarations, it would not be safe to rely upon the same. In fact it is not the plurality of the dying declarations but the reliability thereof that adds weigh to the prosecution case. If the dying declaration is found to be voluntary, reliable and made in a fit mental condition, it can be relied upon without any corroboration. But the statements should be consistent throughout.

24. In case of inconsistencies, the court has to examine the nature of the same, i.e. whether they are material or not and while scrutinising the contents of various dying declarations, the court has to examine the same in the light of the various surrounding facts and circumstances. In case of dying declaration, as the accused does not have right to cross-examine the maker and not able to elicit the truth as happens in the case of other witnesses, it would not be safe to rely if the dying declaration does not inspire full confidence of the court about its correctness, as it may be result of tutoring, prompting or product of imagination. The court has to be satisfied that the maker was in a fit state of mind and had a clear opportunity to observe and identify the assailant (s). (Vide: Smt. Kamla v. State of Punjab, AIR 1993 SC 374; Kishan Lal v. State of Rajasthan, AIR 1999 SC 3062; Lella Srinivasa Rao v. State of A.P., AIR 2004 SC 1720; Amol Singh v. State of Madhya Pradesh, (2008) 5 SCC 468; State of Andhra Pradesh v. P. Khaja Hussain, (2009) 15 SCC 120; and Sharda v. State of Rajasthan, AIR 2010 SC 408)."

24. Discrepancy in two statements Ex. PW-2/D and Ex. PW-15/G made by deceased is not trivial in nature, but both the statements are in contrast to each other and such contradictory statements renders the version of deceased unreliable. In case first statement Ex. PW-2/D is not considered to be dying declaration and only statement Ex. PW-15/G is considered

to be dying declaration, then also it is admitted case of prosecution that deceased had made statement Ex. PW-2/D recorded by Pw-2 Mohinder Singh and said fact stands also admitted by deceased in her statement Ex. PW-15/D, wherein she stated that she had no explanation about statement Ex. PW-2/D made by her in CHC Fathepur. Though PW-2 Mohinder Singh has tried to improve by stating that it appeared at that time that deceased was trying to save her mother-in-law and deceased seemed to be under some pressure, but his version does not find corroboration from his subsequent conduct. After going back to Police Post Fathepur he entered daily diary report Ex. PW-2/E and reproduced entire statement of deceased along with his comments in the said report. Perusal of contents of report Ex. PW-2/E reveals that he had no where recorded his observation that it was noticed by him that deceased was under pressure and was trying to save her mother-in-law. After finding the case fallen in jurisdiction of Police Station Indora, information was sent to the said Police Station and it was conveyed in the information that statement of injured had been recorded. Again there was no reference of observation of PW-2 about saving of her mother-in-law by deceased under some pressure or otherwise. Therefore, improvement made by PW-2 Mohinder Singh is also of no help to the prosecution.

25. There are contradictory statements of deceased as well as relatives of deceased from parental side. Scrutiny of evidence on record, at the most can lead an inference that deceased may have put herself on fire on account of day to day quarrels with respondent and such inference can lead to conclusion only that cause of committing suicide by deceased may have been maltreatment by respondent. But suspicion however strong may not take place of conclusive proof. It is settled law that in absence of conclusive proof, conviction cannot be based merely on suspicion. There are self contradictory statements of prosecution witnesses and two divergent statements of deceased but for unexplained reasons, which leads to only conclusion that it cannot be said beyond all reasonable doubt that deceased had committed suicide on account of maltreatment and harassment by respondent. It is another aspect of the case that whether such taunting will amount a sufficient reason driving deceased to take drastic step to end her life by committing suicide. However, statements of deceased and prosecution witnesses are not sufficient to prove beyond reasonable doubt that deceased committed suicide due to taunting by respondent for not giving birth to a male child or otherwise respondent abetted deceased to commit suicide.

26. Section 107 of Indian Penal Code defines abetment 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."*

27. Legislature has also inserted Section 113-A in the Evidence Act, 1872 permitting Court to have presumption as to abetment of suicide by a married women by her husband or any his relative if suicide is committed within seven years of marriage and her husband or his relative had subjected her to cruelty. Cruelty in this Section has same meaning as expressed in Section 498-A IPC.

28. Section 498-A IPC 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 pun-ished 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 willful 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."

29. For raising presumption under Section 113-A of the Evidence Act cruelty on the part of in-laws is sine qua non. In absence of cruelty as defined in Section 498-A IPC there cannot be any presumption of abatement of suicide.

30. In ***Gurcharan Singh Vs. State of Punjab (2017) 1 SCC 433,*** Hon'ble Supreme Court 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. (SCC p. 134, paras 12-13)

> *"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."*

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."

31. In present case unnatural death of deceased has taken place within seven years of marriage and even if it is considered to be suicide, then also it is not a case of harassment for dowry but for alleged cruelty as explained in explanation (a) in Section 498-A IPC. For evidence on record, it cannot be said with certainty that there was willful conduct of respondent causing grave injury or danger to life, limb or health (mental or physical) of the deceased.

32. There is no other allegation against respondent, except that she was cursing deceased for not giving birth to male child and even the incident quoted in statement Ex. PW-15/G is considered to be true, quarrel within family on insignificant day to day matters cannot be treated sufficient for driving deceased to take a decision for committing suicide. It is stated in Ex. PW-15/G by deceased that she put kerosene upon her out of anger as respondent did not pay heed to her requests to keep mum. For committing suicide by deceased in heat of anger of spur of moment, respondent cannot be held guilty for abetting deceased to commit suicide. There is nothing on record establishing that respondent either instigated or intentionally aided deceased to commit suicide or engaged with someone else in a conspiracy so as driving deceased to commit suicide. Ingredients necessary for abetting as defined in Section 107 IPC are missing in present case. On the contrary it has come on record in statements, Ex. PW-2/D as well as Ex. PW-15/G, that respondent tried to save deceased and in this process she herself also suffered burn injuries and remained admitted in hospital for 9 days.

33. In view of aforesaid discussion, prosecution has failed to establish beyond reasonable doubt that respondent is responsible for driving deceased to commit suicide on account of her maltreatment and harassment. There is no trustworthy, cogent and reliable evidence to prove the said allegation. The evidence on record does not inspire confidence to accept version of prosecution story and therefore, the view taken by trial Court is a plausible one, which cannot be termed to be perverse and the trial Court has appreciated the evidence correctly and completely.

34. Respondent has advantage of being acquitted by the trial Court which strengthens presumption of her innocence. Onus to rebut such presumption heavily lies upon prosecution, to which prosecution has miserably failed. After considering arguments of respective counsel for the parties and minutely examining the testimonies of witnesses and other documentary evidence placed on record, we are of the considered view that no case for interference is made out.

35 Thus, present appeal, devoid of any merit, is dismissed and also pending applications, if any. Bail bonds, if any, furnished by or on behalf of respondent are discharged. Records of the Court below be immediately sent back.

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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
Mahesh Verma. ....Respondent

Criminal Appeal No. 215 of 2011
Reserved on: 24.3.2017
Date of Decision: 31.3.2017

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 1.5 kg. charas – the accused was tried and acquitted by the Trial Court- held in appeal thatthere are cuttings and over writings in record, which have not been properly explained – the witnesses had not given the detail of material particulars – PW-5 supported the prosecution version – the defence version was probablized by defence witnesses- the prosecution evidence creates doubts about the fairness of investigation – the Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed. (Para-7 to 21)

Cases referred:

Raja and others Vs. State of Karnataka (2016) 10 SCC 506

P. Satyanarayana Murthy Vs. District Inspector of Police State of Andhra Pradesh and another (2015) 10 SCC 152

Jose alias Pappachan Vs. Sub-Inspector of Police, Koyilandy and another (2016) 10 SCC 519

For the Appellant: Mr.D.S. Nainta and Mr.Virender Verma, Additional Advocate Generals.
For the respondent: Mr. Ajay Chandel, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge

Judgment dated 30.3.2011 passed by learned Special Judge, Fast Track Court Kullu in Sessions Trial No. 27 of 2009 in case FIR No. 114 of 2008 registered in Police Station, Banjar under Section 20 of Narcotic Drugs and Psychotropic Substances Act, 1985, acquitting respondent, has been assailed by State of Himachal Pradesh by way of present appeal.

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

3. Prosecution case is that on 6.10.2008, police party headed by PW-9 ASI Man Singh consisting of PW-6 Constable Puran Chand, PW-7 Constable Ramesh Kumar was on patrolling in Taxi No. HP-01K-1491 being driven by PW-5 Sunder Singh from Banjar to Sai Ropa side. On the way near village Dogri Ropa, on noticing respondent coming from Gushaini side with backpack on his right shoulder, police party questioned him, who on inquiry disclosed his name as Maheshwar son of Kehar Singh, R/o Khadragi. PW-9 ASI Maan Singh suspected possession of some contraband and therefore, associated PW-5 Sunder Singh and PW-6 constable Puran Chand, as witnesses and then gave his personal search vide memo Ex. PW-5/A to respondent in presence of these witnesses, nothing except uniform worn by him was found in his possession. Thereafter on searching backpack of respondent, charas in the form of stick, ball and pancake was found inside a polythene bag, which on weighing was found to be 1 Kg 500 grams. Two samples weighing 20 grams each were extracted and those samples and remaining charas, left in polythene bag, were sealed in different pieces of cloth with six seal impressions of

seal 'D' on each parcel. Parcel of remaining charas was kept in the same bag from which it was recovered and bag was also sealed in a cloth in similar manner. Sample seal was taken separately on separate piece of cloth, NCB form Ex. PW-9/A was prepared in triplicate and after use seal was handed over to PW-5 Sunder Singh. Seizure memo Ex.PW-5/C was prepared, which was signed by witnesses and copy of the same was supplied to respondent after obtaining his signatures on memo. Rucka Ex. PW-9/B was prepared and sent to Police Station Banjar through PW-6 Constable Puran Chand, who came back on the spot after registration of FIR Ex. PW-4/A in pursuance to rucka. Statements of witnesses were recorded and site plan Ex. PW-9/C was prepared and respondent was interrogated and arrested at 5:30 P.M. and arrest memo Ex. PW-5/D was prepared accordingly and intimation of his arrest was given to his brother, as desired by him and memo of personal search Ex. PW-9/E was also prepared after personal search. Thereafter case property was produced before PW-4 SHO SI Lal Singh in Police Station, who re-sealed it with seal impression "H" and handed over the same to PW-1 MHC Uttam Chand. Special report was prepared and copy of same Ex. PW-2/A was delivered to Additional Superintendent of Police, Kullu through PW-8 Constable Laxman Dass on 7.10.2008 at about 4:00 P.M. On 9.10.2008, sample parcels were sent to State Forensic Science Laboratory (FSL), Junga by PW-1 MHC Uttam Singh through PW-7 Constable Ramesh Kumar vide Road Certificate No. 78/08 along with NCB-1 form, seal impression H, seal impression D, copy of FIR and copy of seizure memo which were delivered by PW-7 in State Forensic Science Laboratory, Junga on 13.10.2008, as there were holidays on 10.10.2008, 11.10.2008 and 12.10.2008. Receipt issued by FSL, Junga was deposited by him with PW-1 MHC Uttam Chand.

4. It is further case of prosecution that on 18.12.2009 PW-10 HHC Sobha Ram took parcel of contraband from District Malkhana to State FSL, Junga vide RC No. 8/09 (Ex. PW-10/A) and deposited the case property on the same date in State FSL, Junga and handed over the receipt thereof to MHC on his return.

5. As per prosecution, on verification from Gram Panchyat Chehni, name of respondent was found to be Mahesh Verma @ Happy and since accused deliberately disclosed wrong name, commission of offence under Section 419 IPC was also added against him. Photographs of the spot Ex. PW-7/A to Ex. PW-7/E, snapped by PW-7 Constable Ramesh Kumar were also developed. On completion of investigation, file was handed over to PW-4 SI/SHO Lal Singh. PW-4 after receiving chemical examination report Ex. PW-4/C from FSL Junga, indicating therein that recovered contraband was charas, prepared challan and presented it before the Court.

6. Prosecution has examined ten witnesses to prove its case. After his examination under Section 313 Cr.P.C., respondent also examined DW-1 Rajesh Kumar (conductor of HRTC Bus) in his support. Recovery of charas from bag on 6.10.2008 is not disputed, except that recovered charas was 3 Kgs and not 1.5 Kgms, as indicated in the challan and that bag containing charas did not belong to respondent. Further, recovery of said contraband from respondent has been disputed and it is defence of respondent from very beginning, put to every relevant witness, that on 6.10.2008 respondent was travelling in HRTC bus No. HP-34A-1285 plying on Bathar-Banjar route, on the last seat on driver side and the said bus was intercepted by police party near Amni and one unclaimed bag, lying inside the bus near rear door, was found whereafter police party proclaimed that they had information that bag belonged to a person wearing blue jean pant and respondent for wearing blue jean pant, was apprehended by police in the pretext of the said secret information and was deboarded from bus and bag was also taken out by the police. After covering a distance of about three kilometers, at Dogri Ropa, taxi was stopped and parked on the side of road in jungal and respondent was taken out of taxi along with bag and photographs were snapped after handing over bag to him. On searching bag charas in form of stick, ball and pancake like was found in two polythene bags and on weighing the said charas was found to be, 3 Kgs (1.5 Kgms in each packet) and respondent was framed in present case, though for recovery of 1.5 Kgrms charas from his conscious possession.

7. As per chemical examination report Ex. PW-4/C, recovered contraband was found extract of cannabis and sample of charas. Respondent also disputed safe transportation of samples as well as remaining bulk of seized contraband to State FSL. Samples as well as remaining bulk of contraband were deposited with MHC Uttam Chand, Incharge of Malkhana Police Station, Banjar. There is no evidence on record that remaining bulk of contraband was shifted to District Malkhana, Kullu. Two parcels of samples were sent by PW-1 MHC Uttam Chand through PW-7 Constable Ramesh Kumar to FSL, Junga, but remaining charas was stated to have been sent to State FSL, Junga through PW-10 HHC Sobha Ram on 18.12.2009 after receiving one parcel from District Malkhana Kullu. How and when remaining contraband was shifted from Police Station Banjar to District Malkhana, Kullu is not clear from the evidence on record and there is no documentary or oral evidence, proved on record, indicating the said shifting. Therefore, link evidence connecting the remaining charas in present case with parcel taken by PW-10 on 18.12.2009 to State FSL, Junga from District Malkhana is missing.

8. Samples of contraband were handed over to PW-7 by PW-1 on 9.10.2008 who deposited these parcels in State FSL on 13.10.2008, stating that there were holidays on 10th, 11th and 12th October, 2008. How and when he travelled from Banjar to State Forensic Science Laboratory Junga, where he stayed during these three holidays and how and where he kept parcels of sample during his journey and stay during intervening period from 9.10.2008 to 13.10.2008 is not clear. There are also cuttings and overwriting in record, vide which sample parcels were stated to be transported from Police Station Banjar to State Forensic Science Laboratory, Junga. PW-1 admitted that it was correct that in Road Certificate Ex. PW-1/B figure 78 had been overwritten and the same was without initials. He also admitted that in original Road Certificate, date is visible as 8.10.2008, which was changed to 9.10.2008 on the front as well as back of the said Road Certificate. He also admitted that it was correct that figure 8.10.2008 against column of date was altered to 9.10.2008 in the carbon copy of Road Certificate. He also admitted that in NCB form, date of issuance of Road Certificate 78/08 was mentioned as 8.10.2008 whereas Road Certificate in prosecution evidence was claimed to be issued on 9.10.2008. Though, he explained that it was a clerical mistake, but for the reasons that date 8.10.2008 was changed to 9.10.2008 more than three places in Road Certificate, it cannot be said that it was a clerical mistake, rather it appears that concerned officer forgot to tamer/or manipulate date mentioned on NCB form. Also date of Road Certificate written on NCB Form as 8.10.2008 was attributed to clerical mistake, however, no reason was assigned in the evidence placed on record for firstly writing date on Road Certificate as 8.10.2008 and later on changing the same as 9.10.2008. All these discrepancies cast doubt on fair investigation and lead to an inference that scope of manipulation in investigating the matter cannot be ruled out and truth is something else contrary to prosecution story as portrayed.

9. PW-6 Constable Puran Chand, PW-7 Constable Ramesh Kumar and PW-9 ASI Maan Singh in their examination in chief re-iterated the prosecution case. In cross-examination, all of them denied that police party engaged taxi of PW-5 Sunder Singh for apprehending a person coming in HRTC bus and HRTC bus HP-34A-1285 coming from Gushani to Banjar was stopped by police party and on finding unclaimed bag near rear door of bus, respondent was framed in the case for wearing blue jean pant for information with them that one person wearing blue jean pant was coming with contraband in the said bus. PW-7 described dates, time and other minute details in his examination-in-chief, but in cross-examination stated that he did not remember that where vehicle was stopped, how many parcels were stitched and also that the instrument used in weighing contraband was a traditional or electronic. He further stated that first of all photographs were taken and thereafter other proceedings were conducted. Perusal of photographs Ex. PW-7/B, PW-7/C and Ex. PW-7/E clearly indicates that these photographs were taken after opening bag and keeping its articles on the road. Meaning thereby that prosecution story of giving personal search by PW-9 to respondent and preparation of memo in respect thereof is not true. In special report Ex. PW-2/A as well as rucka Ex. PW-9/B, there was no mention that PW-9 Investigating Officer had given his personal search to respondent, much less preparation of memo Ex. PW-5/A.

10. In photograph Ex. PW-7/B, two polythene bags all clearly visible. However, prosecution witnesses claimed that there was only one polythene bag and in Court also only one poly bag was produced. PW-6 also stated that no parcels were stitched on the spot. Whereas, case of prosecution is that samples parcels and parcel of remaining bulk were stitched and sealed on the spot. PW-6 Constable Ramesh Kumar is an official witness, therefore, his statement casting doubt about prosecution story is material, particularly when only independent witness PW-5 Sunder Singh has also not supported the prosecution case.

11. PW-5 Sunder Singh who was admittedly with police party, not only desisted from lending support to prosecution case, but also admitted the defence version propounded by respondent since very beginning of the trial and re-iterated in statement under Section 313 Cr.P.C which was also fortified by examining DW-1 Rajesh Kumar, Conductor of HRTC Bus HP-34A-1285, who was on duty on 6.10.2008 in the said bus coming from Bathar to Banjar wherefrom respondent was claimed to be de-boarded and detained. PW-5 was declared hostile and was subjected to cross-examination by learned Public Prosecutor. He admitted suggestion of learned Public Prosecutor that when bag was opened and checked, charas in the shape of stick, ball and pancake was found and he also admitted photographs mark C-1 to C-5 (Ex. PW-7/A to Ex. PW-7/E) taken on the spot. However, he denied that weight of charas was found to be 1.5 Kgm and volunteered that it was more than that. But contrary to prosecution story, in examination-in-chief as well as in cross-examination by defence, he stated that his taxi was engaged by police for checking bus on the basis of information received by police that one person was coming in the said bus along with contraband. He also admitted and corroborated the version of respondent propounded in his defence. Therefore, defence plea of false implication cannot be legally discarded.

12. It is also clearly well settled that mere fact that a witness is declared hostile does not make him unreliable witness so as to exclude his evidence from consideration altogether the evidence remains admissible in the trial and there is no legal bar to base conviction or acquittal upon testimony of hostile witness if corroborated by other reliable evidence. Hon'ble Supreme Court in case ***Raja and others Vs. State of Karnataka (2016) 10 SCC 506*** has held as under:-

> "32. *That the evidence of a hostile witness in all eventualities ought not stand effaced altogether and that the same can be accepted to the extent found dependable on a careful scrutiny was reiterated by this Court in Himanshu @ Chintu (supra) by drawing sustenance of the proposition amongst others from Khujii vs. State of M.P. (1991) 3 SCC 627 and Koli Lakhman Bhai Chanabhai vs. State of Gujarat (1999) 8 SCC 624. It was enounced that the evidence of a hostile witness remains admissible and is open for a Court to rely on the dependable part thereof as found acceptable and duly corroborated by other reliable evidence available on record."*

13. From very beginning, respondent had set up a clear, distinct and definite defence with certainty by mentioning registration number of bus, its route and name of conductor on duty in the said bus plying on Bathar-Banjar route on 6.10.2008. Respondent also placed on record certificate Ex. DW-1/A issued by HRTC authorities, which was not disputed by prosecution, certifying that on 6.10.2008 bus No. H.P.-34A-1285 was operating on Bathar-Banjar route with driver Sh.Leela Vilas-II and Conductor DW-1 Rajesh Kumar. DW-1 corroborated story put forth by respondent in his defence and in his cross-examination, nothing material for doubting his veracity could be brought on record.

14. PW-5 Sunder Singh is a prosecution witness who not only denied the prosecution version but also deposed a story different to the said version but similar to defence propounded by respondent in cross-examination of prosecution witnesses and narrated by DW-1 Rajesh Kumar and also strengthened by documentary evidence Ex. DW-1/A a certificate issued by HRTC authorities.

15. From evidence on record, possibility of second view has clearly been established by respondent and on the other hand prosecution has failed to prove its case beyond reasonable doubt by leading cogent, reliable, convincing and confidence inspiring evidence. Presumption of innocence is a recognized human right and it is well settled that benefit of doubt belongs to accused and therefore, whenever possibility of two views arises from evidence on record, the view beneficial to accused is to be preferred by the Court. Hon'ble Apex Court in ***P. Satyanarayana Murthy Vs. District Inspector of Police State of Andhra Pradesh and another (2015) 10 SCC 152*** has held as under:-

> *"26. In reiteration of the golden principle which runs through the web of administration of justice in criminal cases, this Court in criminal cases, this Court in Sujit Biswas V. State of Assam (2013) 12 SCC 406 had held that suspicion, however grave, cannot take the place of proof and the prosecution cannot afford to rest its case in the realm of "may be" true but has to upgrade it in the domain of "must be" true in order to steer clear of any possible surmise or conjecture. It was held, that the court must ensure that miscarriage of justice is avoided and if in the facts and circumstances, two views are plausible, then the benefit of doubt must be given to the accused."*

16. In its recent decision, Hon'ble Apex Court in case ***Jose alias Pappachan Vs. Sub-Inspector of Police, Koyilandy and another (2016) 10 SCC 519*** has held as under:-

> *"56. It is a trite proposition of law, that suspicion however grave, it cannot take the place of proof and that the prosecution in order to succeed on a criminal charge cannot afford to lodge its case in the realm of may be true but has to essentially elevate it to the grade of must be true. In a criminal prosecution, the court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof and in a situation where a reasonable doubt is entertained in the backdrop of the evidence available, to prevent miscarriage of justice, benefit of doubt is to be extended to the accused. Such a doubt essentially has to be reasonable and not imaginary, fanciful, intangible or non-existent but as entertainable by an impartial, prudent and analytical mind, judged on the touch stone of reason and common sense. It is also a primary postulation in criminal jurisprudence that if two views are possible on the evidence available, one pointing to the guilt of the accused and the other to his innocence, the one favourable to the accused ought to be adopted."*

17. Scrutiny of evidence does not inspire confidence in favour of prosecution, rather creates doubt about fairness of investigation. Version of respondent propounded in defence story also appears to be plausible and according to settled law out of two possible views, view favorable to accused will have precedence. Therefore, respondent is entitled for benefit of doubt.

18. Illicit drug trafficking is menace having disastrous effect not only to particular individual, but also on family as well as society at large. Keeping in view dangerous effect of drug abuse at National and International level, the Narcotic Drugs and Psychotropic Substances Act, 1985 has been enacted with stringent provision having deterrent punishment against an offender. The offence committed under the Act is serious and heinous in nature. Therefore, presumption of culpable mental state has also been provided under Section 35 of the Act, which provides that for an offence under this Act, which requires a culpable mental state of accused, the Court shall presume the existence of such mental state. Section 54 of the Act also provides presumption regarding commission of offence by accused under this Act for possession of any material which have undergone any process towards the manufacture of a narcotic drug or psychotropic substance or controlled substance, or any residue left of the materials from which any narcotic drug or psychotropic substance or controlled substance has been manufactured, of which he fails to account satisfactorily. However, the said presumptions are rebuttable on proving contrary by the accused. Presumption of Sections 35 and 54 of the Act will come into play only when prosecution establishes conscious and physical possession of contraband by the accused, beyond

all reasonable doubt, which is sine qua non for recording finding of conviction against the accused.

19. In present case, prosecution has failed to prove recovery of contraband from conscious and physical possession of respondent by leading cogent, reliable, convincing and confidence inspiring evidence. Therefore, provisions of Sections 35 and 54 of the Act are not attracted in present case.

20. Respondent has advantage of being acquitted by the trial Court which strengthens presumption of his innocence. Onus to rebut such presumption heavily lies upon prosecution, to which prosecution has miserably failed. After considering arguments of respective counsel for the parties and minutely examining the testimonies of the witnesses and other documentary evidence placed on record, we are of the considered view that no case for interference is made out.

21. Thus, present appeal, devoid of any merit, is dismissed and also pending applications, if any. Bail bonds, if any, furnished by or on behalf of the respondent are discharged. Records of the Court below be immediately sent back.

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

Smt. Veena Devi ... Petitioner
Versus
State of Himachal Pradesh and others ... Respondents

CWP No. 8439 of 2014
Reserved on: 30.03.2017
Date of decision: 31.03.2017

Himachal Pradesh Panchayati Raj Act, 1994- Section 163- Petitioner was elected as ward panch- election was challenged before authorized officer by filing an election petition- petitioner was held to be disqualified to hold the post- an appeal was filed, which was dismissed- aggrieved from the order, present writ petition has been filed- held that election petition filed before the prescribed authority was beyond the period of limitation as election petition can be filed within thirty days only- authorized officer erred in entertaining the petition after the period of limitation- writ petition allowed and the order of disqualification of the petitioner set aside subject to payment of cost of Rs.10,000/-. (Para- 13 to 25)

For the petitioner: Mr. Dushyant Dadwal, Advocate.
For the respondents: Mr. V.S. Chauhan, Additional Advocate General with Ms. Parul Negi, Deputy Advocate General, for respondents No. 1 to 3.
Mr. Ajay Sharma, Advocate, for respondent No. 4.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J. (Oral):

By way of this writ petition, petitioner has challenged the order passed by Sub Divisional Officer (Civil), Dehra, exercising the powers of authorized officer under Section 161 of the Himachal Pradesh Panchayati Raj Act, 1994, in an Election Petition No. 42/EP/2011 dated 16.02.2012, vide which the said authorized officer while accepting the election petition filed by respondent No. 4 under Section 163 of the Himachal Pradesh Panchayati Raj Act, 1994, set aside the election of the present petitioner as Ward Panch, Ward No. 7, Gram Panchayat Bhadal,

Development Block Pragpur, District Kangra, by holding that her husband was an encroacher of Government land and also the order passed in appeal by learned appellate authority i.e. Deputy Commissioner, Kangra at Dharamshala in Case No. 9/2012 dated 21.10.2013 vide which learned appellate authority dismissed the appeal so filed by the present petitioner against the order of learned authorized officer dated 16.02.2012.

2. Before proceeding further, it is clarified that though the election which is subject matter of the writ petition pertains to the year 2010 and the term of the said election is over and thereafter fresh elections to elect various Ward Panchs of different Gram Panchayats in the State of Himachal Pradesh have taken place, the necessity of deciding this case on merit is that the ground on which the present petitioner was held to be disqualified continuous to be a stigma, as far as petitioner is concerned, to contest Gram Panchayat elections etc.

3. Brief facts necessary for adjudication of the present case as can be carved out from the pleadings of the parties are that the present petitioner was elected as Ward Panch, Ward No. 7, Gram Panchayat Bhadal, Tehsil Dehra, District Kangra, in the Panchayat elections which were held in the month of December, 2010. Her election as such was challenged under Section 163 of the Himachal Pradesh Panchayati Raj Act, 1994, by respondent No. 4 before learned authorized officer by filing an election petition which was instituted on 08.06.2011. Primary ground of assailing the elections of the petitioner was that her husband had encroached upon the Government land which rendered the petitioner disqualified to contest the elections.

4. In her reply filed to the election petition, the petition inter alia took an objection with regard to the maintainability of the election petition on the ground that the same was time barred. There was a specific preliminary objection taken in this regard.

5. Learned authorized officer vide order dated 16.02.2012 held that the husband of the petitioner was an encroacher upon the Government land and on these basis, it held that the petitioner was disqualified to contest the Panchayat elections and learned authorized officer on this account declared the election of the present petitioner as Ward Panch, Ward No. 7, Gram Panchayat Bhadal, as void.

6. A perusal of the order demonstrates that the issue of limitation was not dealt with by learned authorized officer in the said order.

7. Feeling aggrieved, the present petitioner filed a statutory appeal under Section 181 of the Himachal Pradesh Panchayati Raj Act, 1994, wherein also a ground was taken that the order passed by the authorized officer was not sustainable as learned authorized officer had not appreciated that the election petition filed before it was time barred and the election petition in fact was liable to be dismissed on this account alone.

8. Learned appellate authority vide order dated 21.10.2013 while dismissing the appeal so filed by the present petitioner and upholding the order of learned authorized officer held as under on the point of limitation:-

> "On the point of limitation raised by the counsel of appellant I feel this point should have been raised before the lower court during trial. From the case file there is no proof that this point was raised at the lower court. Hence this can be looked at this stage."

9. Said orders passed by learned authorized officer as well as learned appellate authority respectively are under challenge in the present writ petition.

10. Mr. Dushyant Dadwal, learned counsel for the petitioner, has argued that the order passed by learned authorized officer as well as the order passed by learned appellate authority are *non est* and liable to be set aside on this account alone that both learned authorities below erred in not appreciating that as the election petition was filed beyond the limitation as is prescribed under the statutory provisions of the Himachal Pradesh Panchayati Raj Act, 1994, the same could not have been adjudicated upon by learned authorized officer on merit

at all as the said authority was not having any power in law to entertain and adjudicate upon the election petition which was time barred. Mr. Dushyant Dadwal has further argued that the order passed by learned appellate authority was not sustainable in law at all as while dealing with the issue of limitation it erred in not appreciating that the issue of limitation is a legal issue and it can be looked at any stage and further learned appellate authority did not appreciate that in fact the point of limitation was duly taken up in the reply which was filed to the election petition by the present petitioner as well as in the grounds of appeal. On these basis, it has been urged by Mr. Dushyant Dadwal that the orders passed by both the authorities below were liable to be quashed and set aside.

11. Learned counsel for the respondents have justified the impugned orders on the ground that when the husband of the petitioner was an encroacher, she in fact was not eligible to contest the election and her election, therefore, was rightly set aside by both the authorities below and further the petition in fact has become infructuous with the efflux of time.

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

13. As far as the factum of the petition having become infructuous with the efflux of time is concerned, I have already mentioned above that the petition is being adjudicated on merit in view of the fact that the stigma of the petitioner being disqualified for contesting Panchayati Raj elections is writ large as there are findings returned against her by the statutory authority in an election petition under the Himachal Pradesh Panchayati Raj Act, 1994, to this effect and the said findings stood affirmed in the appeal by the appellate authority.

14. It has not been disputed during the course of arguments by the respondents that the petitioner in fact was elected to Gram Panchayat elections which took place in December, 2010 itself. It has also not been disputed by learned counsel for the respondents that the election petition which was filed by respondent No. 4 before the prescribed authority were beyond the period of limitation as is prescribed under Section 163 of the Himachal Pradesh Panchayati Raj Act.

15. Chapter-XI of the Himachal Pradesh Panchayati Raj Act, 1994, deals with the disputes relating to election. Section 163 of the Act contemplates that any elector of a Panchayat may, on furnishing the prescribed security in the prescribed manner, present **within 30 days of the publication of the result**, on one or more of the grounds specified in sub-section (1) of section 175, to the authorized officer an election petition in writing against the election of any person under this Act. Section 165 of the Act contemplates that if an election petition is not furnished in the prescribed manner, or the petition is not presented within the period specified in section 163, the authorized officer shall dismiss the petition provided that the petition shall not be dismissed without giving the petitioner an opportunity of being heard.

16. There is no corresponding provision in the Act whereby learned authorized officer has been conferred the power to condone delay in filing the election petition beyond the period of limitation prescribed in Section 163 of the Act.

17. Himachal Pradesh Panchayati Raj Act is a Special Act and right to appeal is a statutory right. In the absence of any enabling provision being there in the Himachal Pradesh Panchayati Raj Act, conferring upon the authorized officer authority to entertain and adjudicate an election petition beyond the period of limitation prescribed in Section 163 of the same, no election petition can be entertained and adjudicated on merit in case the same is not presented within 30 days of the publication of the result. A co-ordinate Bench of this Court in ***CMPMO No. 27 of 2007*** titled ***Deepender Rohal Vs. Suresh Thakur and others***, decided on 14.12.2007 has held:-

> "The provisions of Section 165 of the Act cast a mandatory duty on the Authorized Officer to dismiss the petition if the election petition is not furnished

in the prescribed manner or the petition is not presented within the period specified under section 163."

18. Admittedly, the elections were held in December, 2010, whereas the petition was presented before respondent No. 3 on 08.06.2011. Though it is not clear from the pleadings as to when did the publication of the result took place, however, it was stated at Bar by learned Additional Advocate General that the publication also took place in December, 2010, as all the elected members were given oath in the month of January, 2011. Besides this, it is not even the case of the private respondent that the election petition was in fact filed by him within 30 days of the publication of the result.

19. In these circumstances, in my considered view, respondent No. 3 erred in entertaining and adjudicating upon the said election petition on merit when admittedly the said election petition was not filed within the statutory period as is envisaged in Section 163 of the Act, and when a specific stand was taken in the reply so filed to the election petition by the present petitioner that the petition was time barred. Even otherwise, issue of limitation being a legal issue, it was incumbent upon the said authority to have had applied its mind as to whether the election petition before it was within limitation or not.

20. Similarly, learned appellate authority while dealing with the point of limitation raised by the counsel of appellant held that the same should have been raised before the lower court during trial and erred in not appreciating that it was the duty of learned appellate forum also to have had adjudicated on the point as to whether the election petition which was decided by respondent No. 3 on merit was in fact filed before the said authority within limitation or not. Learned appellate authority could not have had shirked its responsibility by simply stating that this issue should have been raised before the lower court during trial. This Court deprecates this kind of approach in deciding the matters by quasi judicial authorities.

21. The quasi judicial authorities have to keep in mind while performing their duties as quasi judicial officers that they are deciding rights of the parties and the rights of the parties have to be decided within the parameters of law and legal issues if raised cannot be brushed aside in the manner in which the same has been done by both the authorities in the present case in general and by the appellate authority in particular.

22. Accordingly, in view of the discussion held above, this petition is allowed and impugned order dated 16.02.2012 passed by respondent No. 3 in Election Petition No. 42/EP/2011 and impugned order dated 21.10.2013 passed by respondent No. 2 in Case No. 9/2012 are accordingly quashed and set aside and the findings returned against the petitioner in the impugned orders are held *non est.*

23. It is further clarified that as the term of the office for which the petitioner was elected is since over and fresh elections have also taken place in the Gram Panchayat concerned, this judgment shall not confer any right upon the petitioner to occupy any office on the strength of her having been elected as Ward Panch, Ward No. 7, Gram Panchayat Bhadal, Tehsil Dehra, District Kangra, H.P.

24. It is further clarified that the findings returned by the prescribed authority to the effect that the petitioner was disqualified, are being set aside, as the election petition was not maintainable, having been filed beyond the prescribed period of limitation and this Court has not returned any findings on merit as far as the issue of disqualification of the petitioner is concerned and this issue is left open.

25. Petition accordingly stands disposed of in above terms with cost assessed at Rs.10,000/-. Miscellaneous Applications pending, if any, also stand disposed of.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

Amit Jha ….Petitioner.

versus

State of Himachal Pradesh ….Respondent.

CRMPM No.309 of 2017

Date of Decision: April 1, 2017

Code of Criminal Procedure, 1973- Section 439- Accused has been charged for the commission of offences punishable under Sections 364-A, 420 and 342 read with Section 120-B of I.P.C and Section 66 (d) of I.T. Act, 2000- an FIR was registered on the basis of complaint made by A stating that he was made to travel to Delhi on the pretext of taking him abroad but he was taken to Bagdogra and forced to part with a sum of Rs.22 lakhs- he was kept in confinement and was physically assaulted- petitioner seeks bail on the ground that witnesses examined by the prosecution do not establish the charged offences and he is in custody for more than one year, he is permanent resident of Himachal Pradesh and is a student having bright future- held that the grant or refusal of bail lies in the discretion of the Court- the primary purposes of bail are to relieve the accused in imprisonment, to relieve the State of the burden of keeping him pending trial and to keep the accused constructively in the custody of the Court- accused has wrongly stated that he is permanent resident of Himachal Pradesh- he is actual resident of Orissa – petitioner was traced and brought back from his native place after the lapse of two years- there is nothing on record to establish that petitioner has got roots in the society-hence, he is not entitled to the concession of the bail- petition dismissed. (Para-8 to 13)

Cases referred:

Sanjay Chandra v. Central Bureau of Investigation, (2012) 1 SCC 40

Vinod Bhandari v. State of Madhya Pradesh, (2015) 11 SCC 502

For the petitioner : Mr. Rajesh Mandhotra, Advocate.

For the Respondent : Mr. R.S. Verma and Mr. M.L. Chauhan, Additional Advocates, General.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

In relation to FIR No.41/2015, dated 2.3.2015, registered at Police Station, Dehra, District Kangra, Himachal Pradesh, accused-petitioner stands charged for having committed offences, punishable under Sections 364A, 420, 342, read with Section 120B of the Indian Penal Code, and Section 66-D of the IT Act, 2000. Such FIR came to be registered on the basis of complaint made by Arvind Singh that on the pretext of getting employment in a foreign country, present petitioner Amit Jha alongwith his co-accused Tarsem Singh, made him travel to Delhi, from where he was taken to Bagdogra and forced to part with a sum of `22 lakhs. Not only he stood duped, as the promises turned out to be false, but at Bagdogra, kept in confinement and physically assaulted.

2. Accused-petitioner seeks bail on the grounds – (a) witnesses so far examined by the prosecution do not establish the charged offences; (b) has been in custody for more than a year; (c) stands falsely implicated; (d) investigation is complete and nothing else is required to be recovered; (e) he is a permanent resident of Himachal Pradesh, and that (f) is a student and has a bright career. In support, learned counsel for the petitioner seeks reliance upon the following observations made by the apex Court in *Sanjay Chandra v. Central Bureau of Investigation,* (2012) 1 SCC 40:

> "21. In bail applications, generally, it has been laid down from the earliest times that the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it is required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty.
>
> 22. From the earliest times, it was appreciated that detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some un-convicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, 'necessity' is the operative test. In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances."
>
> "25. The provisions of Cr.P.C. confer discretionary jurisdiction on Criminal Courts to grant bail to accused pending trial or in appeal against convictions; since the jurisdiction is discretionary, it has to be exercised with great care and caution by balancing the valuable right of liberty of an individual and the interest of the society in general. In our view, the reasoning adopted by the learned District Judge, which is affirmed by the High Court, in our opinion, is a denial of the whole basis of our system of law and normal rule of bail system. It transcends respect for the requirement that a man shall be considered innocent until he is found guilty. If such power is recognized, then it may lead to chaotic situation and would jeopardize the personal liberty of an individual."

3. Significantly, in *Sanjay Chandra (supra),* the Court in Paras-39 & 40 itself has clarified that "the grant or refusal to grant bail lies within the discretion of the Court. The grant or denial is regulated, to a large extent, by the facts and circumstances of each particular case. But at the same time, right to bail is not to be denied merely because of the sentiments of the community against the accused. The primary purposes of bail in a criminal case are to relieve the accused of imprisonment, to relieve the State of the burden of keeping him, pending the trial, and at the same time, to keep the accused constructively in the custody of the Court, whether before or after conviction, to assure that he will submit to the jurisdiction of the Court and be in attendance thereon whenever his presence is required." (Emphasis supplied)

4. It further clarified that while granting bail, both, seriousness of the charge and severity of punishment, has to be kept in mind.

5. Further having gone through the said Report, one only finds the following factors, to have weighed with the Court in allowing the application for grant of bail – (a) the extent of sentence of imprisonment, which the accused, if found guilty could have been asked to undergo, (b) possibility of the accused remaining in detention for a period more than the one for which they could have been convicted, (c) large number of accused persons, (d) possibility of procrastinated trial, more so on account of voluminous record, and (e) the investigation being complete.

6. One finds the principle of law, in a case of grant of bail pertaining to non-bailable offence, to be reiterated by the apex Court in a more recent judgment rendered in *Vinod Bhandari v. State of Madhya Pradesh,* (2015) 11 SCC 502, which can be crystallized thus – (a) lawful detention is not violative of Article 21 of Constitution of India, (b) detention is preventive and not punitive, (c) at a pre-conviction stage, there is presumption of innocence, (d) the object of keeping a person in custody is to ensure availability for facing trial and receive sentence, if any, which

may be passed eventually, (e) seriousness of the allegations or availability of material in support thereof, (f) delay in commencement and conclusion of trial, (g) if trial is not likely to be concluded within a reasonable time, then accused is not to be kept in custody for indefinite period, (h) failure on the part of prosecution to prima facie establish the case, (i) even where prosecution has been able to prima facie establish its case, for reasons to be recorded, Court can still grant bail, (j) rejection of an application would not preclude the accused from filing a subsequent application for grant of bail. But however, circumstances prevalent are required to be examined, (k) danger of the accused absconding or fleeing away, after release on bail, (l) character, behavior, means, position and standing of the accused, (m) likelihood of the offence being repeated, (n) reasonable apprehension of the witnesses being tampered with, and, amongst others, (o) danger of justice being thwarted by grant of bail.

7. Record reveals that in the last five months, prosecution has examined 16 witnesses and the next date for examination of the remaining witnesses is fixed for 5.4.2017. In the month of December, 2016, similar application came to be filed, which was withdrawn with liberty to file before the trial Court. Vide order dated 17.2.2017, so annexed with the instant application, such bail application stands rejected.

8. Having perused the record, Court is of the considered view that the instant bail application only merits rejects.

9. Now, in the instant case, it is no doubt true that investigation is complete and most of the prosecution witnesses stand examined. To the credit of learned counsel for the petitioner, one finds statements of witnesses to have been placed on record. Bare perusal of record does not reveal that "ex-facie", no case is made out against the accused. One cannot forget that allegedly, complainant parted with valuable security of huge amount, and that too, on the pretext of being given employment in a foreign country. Allegedly, he was taken to Bagdogra and kept in confinement. He was forced to call his family, asking them to transfer the money. He was beaten up. Nature of allegations is quite severe and serious. The petitioner has wrongly mentioned that he is a permanent resident of Himachal Pradesh (Para-7 of the application). In fact, as is evident from the memo of his earlier bail petition, he is actually a resident of State of Orissa. How and in what manner conspiracy was hatched by the accused persons is a matter of trial.

10. According to Mr. R.S. Verma, learned Additional Advocate General, a bigger racket is being run in the State, which needs to be further investigated. Well, all this is for the trial Court to examine, but however, keeping in view the aforesaid principles of law laid down by the apex Court, this Court certainly does not find the petitioner to have made out a case for grant of bail. To the credit of the trial Court, witnesses are being examined, virtually on day-to-day basis. Maximum sentence, which can be imposed, is imprisonment for life. There is nothing on record to establish that petitioner has got roots in the society, either in this State or in his home State. Well, record does not reveal such fact. It is not that the allegations are vague and unfounded**.** Co-accused has got roots in a foreign country, i.e. Nepal, and according to the prosecution there is every likelihood of the accused fleeing away from the jurisdiction of this Court, which fact stands amplified on record. Though the case came to be registered in the year 2014, but only with great effort, petitioner was traced and brought back from his native place in Orissa, that too after a period of almost two years.

11. In any event, trial is likely to finish in near future and as such his further detention, preventive in nature, is only warranted, in the interest of justice and by no means can be said to be impinging upon his personal liberty, for his detention is purely in accordance with the procedure established by law and in public interest. Allegations are extremely serious.

12. Hence, for all the aforesaid reasons, present application is dismissed.

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

Application stands disposed of, so also pending application, if any.

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

Durga Dass Sharma ....Petitioner
Versus
State of H.P. & Others ....Respondents

CWP No.11054 of 2011
Date of decision: 01.04.2017

Constitution of India, 1950- Article 226- The father of the petitioner was having a shop-cum-residence, which was acquired for the construction of Bhakra Dam Project – compensation of Rs.556/- was paid to him and he fell in the definition of oustee – the petitioner claimed that he was entitled for allotment of plot in new Bilaspur Township but no plot was allotted to him - hence, he filed the writ petition- held that no document was placed on record to show that the petitioner had raised the issue from 1979 till 30th August, 2011, the date of filing of writ petition – the petition is hopelessly barred by time – the relief cannot be granted to a person who does not approach the Court within time- petition dismissed.(Para-6 to 14)

Cases referred:

B.S. Bajwa and another vs.State of Punjab and others, (1998)2 SCC 523
Uttar Pradesh and others vs. Arvind Kumar Srivastava and others, 2014 AIR SCW 6519

For the Petitioner:	Mr.Arvind Sharma, Advocate.
For Respondents No. 1 & 2:	Mr.P.M. Negi, Additional Advocate General with Mr.Ramesh Thakur, Deputy Advocate General.
For Respondent No.3:	None.

The following judgment of the Court was delivered:

Sandeep Sharma,J.

By way of instant petition filed under Article 226 of the Constitution of India, petitioner has prayed for following main reliefs:-

(i) *Writ Of Mandamus may be issued directing the respondent no.2 to Allot a plot to the petitioner as per Rules for The Allotment of Plots in The New Bilaspur Township as petitioner belongs to the family of oustee as defined under Rules for The Allotment of Plots in The New Bilaspur Township.*

(ii) *That the respondent be directed to produce the complete record of oustee before this Hon'ble Court with details of plots allotted till date to similar situated persons.*

(iii) *That the respondents may be directed to implement the rule for the allotment of plots in NEW Bilaspur Town".*

2. In the present petition, petitioner has claimed that his father; namely late Shri Sant Ram was permanent resident of Bilaspur Town and he was having a shop-cum-residence, which was subsequently acquired by the Authorities for the construction of Bhakra Dam Project.

It is admitted case of the petitioner that at the time of acquisition of property of his late father, compensation amounting to Rs.556/- was given to him in the year 1979 as he fell in the definition of oustees as defined under the Rules for Allotment of Plots in the New Bilaspur Township.

3. Learned counsel representing the petitioner, while placing reliance on Annexure P-1, i.e. a list of oustees prepared by respondents-State, contended that father of the petitioner was having 4/62 share in the property acquired by respondents i.e. Khatauni No.319/421 and as such he was also entitled for allotment of plot in New Bilaspur Township as per Rules for Allotment of Plots. Learned counsel further contended that since shop-cum-residence was acquired for the purpose of construction of Bhakra Dam Project, the Authorities concerned, ought to have granted plot in favour of the petitioner in New BIlaspur Township, in addition to compensation already received by him.

4. Learned counsel, while inviting the attention of this Court to Annexures P-2 and P-3, stated that father of the petitioner had applied for residential plot on the prescribed application strictly in terms of Rules for Allotment of Plots in the New Bilaspur Township, but since no action, whatsoever, was taken on the aforesaid request for Allotment of plot having been made by the father of the petitioner, he was compelled to approach this Court by way of instant petition, seeking therein reliefs as reproduced above.

5. Mr.Ramesh Thakur, learned Deputy Advocate General, while inviting the attention of this Court to the reply filed by respondents No.1 and 2, vehemently argued that present petition is not maintainable on account of inordinate and unexplained delay. Mr.Thakur contended that it clearly emerge from the record as well as documents annexed alongwith the petition that petitioner has approached this Court after 54 years and as such present petition deserves to be dismissed on the ground of delay itself. Mr.Thakur further contended that bare perusal of award statement i.e. Annexure P-1 annexed with the petition clearly suggests that shop-cum-residence of petitioner's father was not acquired for construction of the Bhakra Dam Project, rather only land of the petitioner was acquired for the construction of Bhakra Dam Project and accordingly as per Rule 2 of Rules for Allotment of Plots in New Bilaspur Township, father of the petitioner was held not eligible for allotment of plot. Mr.Thakur further contended that since it is an admitted case of the petitioner that due compensation of Rs.556/- was received by late father of the petitioner on account of acquisition of their land, present petition deserves to be dismissed with exemplary costs.

6. During proceedings of this case, this Court had an occasion to peruse various documents annexed with the pleadings by the respective parties, perusal whereof clearly suggests that vide award statement (Annexure P-1) compensation of Rs.556/- was paid to father of the petitioner in the year 1979. Similarly, Annexure P-2 suggests that father of the petitioner vide application dated 30th July, 1979 had made an application for allotment of plot in New Bilaspur Township being Bhakra Dam oustee. However, perusal of Annexure P-4 i.e. communication dated 21.4.1994 clearly suggests that aforesaid request for allotment of plot in lieu of acquisition of land-cum-shop for construction of Bhakra Dam Project was rejected by the Collector, Bilaspur by stating that since name of applicant i.e. father of the petitioner is/was not included in the list of 256 oustees prepared by *Bhakra Dam Oustees Advisory Committee,* prayer for allotment of plot could not be considered.

7. This Court was unable to lay its hand to communication, if any, made by the petitioner and proforma respondent or their late father after issuance of letter dated 21.4.1994 till date, whereby his case was rejected by the Authorities for allotment of plot in New Bilaspur Township. Moreover, perusal of communication dated 21.4.21994 (Annexure P-4) itself suggests that list of 256 oustees was prepared in the meeting of *Bhakra Dam Oustees Advisory Committee* held on 13.7.1983, meaning thereby that prayer for allotment of plot in New Bilaspur Township was made after 11 years i.e. on 17.3.1994 by the petitioner, after the preparation of list of oustees by the aforesaid Committee. Otherwise also last communication, as per petitioner, was sent by the Authorities concerned on 21.4.1994 (Annexure P-4), but even then there is no communication

available on record suggestive of the fact that the petitioner raised issue in terms of original application filed by their father in the year 1979 till the filing of present petition i.e. 30th August, 2011.

8. After carefully examining the documents on record, this Court sees substantial force in the arguments of Shri Ramesh Thakur, learned Deputy Advocate General, that there is inordinate delay of 54 years in maintaining the present petition. First of all, there is no explanation worth the name in the petition for not pursuing the application made by father of the petitioner in 1979 till 21.4.1994 when Authority concerned informed that case of the petitioner could not be considered for allotment of plot in view of non-inclusion of name of their father in the list of oustees prepared by the Committee. There is no document on record to infer that even after 21.4.1994 petitioner took any steps to get the matter revived on the basis of original application filed by his father on 1.8.1979 and as such this Court has no hesitation to conclude that present petition is hopelessly time barred and accordingly deserves to be dismissed on this ground.

9. In the instant case, the petitioner has invoked the jurisdiction of writ Court in the year 2011 claiming residential plot on the basis of application made by his father on Ist August 1979, which claim of the petitioner is hopelessly time barred.

10. Reliance is placed on ***B.S. Bajwa and another vs.State of Punjab and others, (1998)2 SCC 523***, wherein the Hon'ble Apex Court has held as under:-

> *"7. Having heard both sides we are satisfied that the writ petition was wrongly entertained and allowed by the single Judge and, therefore, the Judgments of the single Judge and the Division Bench have both to be set aside. The undisputed facts appearing from the record are alone sufficient to dismiss the writ petition on the ground of laches because the grievance made by B. S. Bajwa and B. D. Kapoor only in 1984, which was long after they had entered the department in 1971-72. During this entire period of more than a decade they were all along treated as junior to the other aforesaid persons and the rights inter se had crystallised which ought not to have been re-opened after the lapse of such a long period. At every stage the others were promoted before B. S. Bajwa and B. D. Kapoor and this position was known to B. S. Bajwa and B. D. Kapoor right from the beginning as found by the Division Bench itself. It is well settled that in service matters the question of seniority should not be re-opened in such situations after the lapse of a reasonable period because that results in disturbing the settled position which is not justifiable. There was inordinate delay in the present case for making such a grievance. This alone was sufficient to decline interference under Article 226 and to reject the writ petition."*

11. The Hon'ble Apex Court in case titled as State of ***Uttar Pradesh and others vs. Arvind Kumar Srivastava and others, 2014 AIR SCW 6519,*** held that relief cannot be extended to the persons who have approached the Court after long delay, that too, who are fence-sitters. It is apt to reproduce para 24 of the judgment herein:

> *"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."*

12. Even Division Bench of this Court, while placing reliance upon the aforesaid judgments passed by Hon'ble Apex Court, has held in ***LPA No.604 of 2011, titled Karan Singh Pathania vs. State of H.P. and Others*** that *"fencer cannot be held entitled to any relief"*.

13. This Court, after carefully examining the material available on record as well as law referred hereinabove, has no hesitation to conclude that the present petition is not maintainable at all, being solely time barred. Moreover, there is no explanation worth the name in the writ petition with regard to undue delay caused in maintaining this petition. Apart from above, as emerged from the record, present petition involves disputed question of fact because respondents have specifically disputed the factum of acquisition of shop alongwith land at the time of construction of Bhakra Dam Project and as such, same cannot be decided in the present proceedings under Article 226/227 of the Constitution of India.

14. Consequently, in view of detailed discussion made hereinabove, this petition is dismissed being devoid of any merit. However, the petitioner is at liberty to approach the appropriate Authority/Forum for redressal of his grievance. Interim direction, if any, is vacated. All miscellaneous applications are disposed of.

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

Kamal Kishore ….Petitioner

Versus

State of H.P. & Others ….Respondents

CWP No.11020 of 2011
Date of decision: 01.04.2017

Constitution of India, 1950- Article 226- Petitioner was selected as a drawing master by PTA – respondent No.5 filed a complaint before Inquiry Committee stating that merit was ignored at the time of selection – the Inquiry Committee concluded that the proper procedure was not adopted by the PTA and held the appointment of the petitioner to be bad- an appeal was filed before Deputy Commissioner, which was dismissed- a writ petition was filed and the matter was remitted to the Inquiry Committee who concluded that petitioner had secured 8th position while the complainant had secured 6th position – the appointment was not proper – aggrieved from the report, present writ petition was filed – held that the appointment of the petitioner is not in accordance with the direction issued by the Government – the Inquiry Committee had rightly concluded that petitioner was not the most meritorious person- writ petition dismissed.

(Para-8 to 12)

For the Petitioner: Mr.Shyam Singh Chauhan, Advocate.

For Respondents No. 1 to 3: Mr.P.M. Negi, Additional Advocate General with Mr.Ramesh Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

Petitioner herein, being aggrieved with the order dated 30.08.2011 (Annexure P-4) passed by Enquiry Committee, whereby his appointment/selection as Drawing Master in

Government Middle School, Dhuma Devi, made by Parents Teacher Association *(for short 'PTA')* on 5.10.2007 was not held to be valid, approached this Court by way of instant petition filed under Article 226 of the Constitution of India seeking therein the following relief(s):-

"(i) That the order dated 30.8.2011, passed by enquiry committee may kindly be quashed with all consequential benefits while issuing the writ of Certiorari.

(ii) That the petitioner may kindly be allowed to work as PTA teacher as per grant in aid rules while issuing the writ in the nature of mandamus and any other order which may deem fit be passed in the interest of justice".

2. Briefly stated facts, as emerged from the record, are that in September, 2007 petitioner was selected by the concerned PTA as Drawing Master at Government Middle School, Dhuma *Devi,* Tehsil Sadar, District Mandi, H.P. *(for short GMS, Dhuma Devi).* However, respondent No.5; namely; Smt.Nirmala Devi, being aggrieved with the selection of petitioner, preferred a complaint before the Enquiry Committee stating therein that merit was ignored at the time of selection by PTA of the School. On the aforesaid complaint having been filed by respondent No.5, enquiry was conducted by the Committee constituted for the disposal of such complaints vide Notification No.EDN-A(Kha)7-3/2006, dated 19th April, 2008, issued by the Secretary (Higher Education) to the Government of Himachal Pradesh. Enquiry Committee conducted inquiry at GMS, Dhuma Devi on 17.9.2008 strictly in terms of the instructions/guidelines issued by Government vide Notification dated 27th May, 2008. Committee, after careful perusal of the record made available by Headmaster of concerned school, came to the conclusion that proper procedure to select the candidate for the post of Drawing Master was not adopted by the PTA and as such alleged appointment of petitioner namely Kamal Kishore, as a Drawing Master in GMS, Dhuma Devi, made by PTA is not in accordance with law and instructions contained in Para-11 of the guidelines of the Notification No.EDN-A(Kha)7-3/2006, dated 27th May, 2008. Petitioner, being aggrieved with the aforesaid findings of Enquiry Committee, preferred an appeal before Deputy Commissioner, Mandi, District Mandi under PTA Rules, which was dismissed.

3. Since petitioner was not satisfied with the rejection of his appeal by the Deputy Commissioner, preferred ***CWP bearing No.1047 of 2009, titled: Kamal Kishore vs. State of H.P. and Others*** before this Court, which came to be decided by Division Bench of this Court vide its judgment dated 18th March, 2010. It would be relevant to reproduce here-in-below the following relevant portion of the judgment:-

> *"The issue raised in these Writ Petitions pertains to the selection and appointment of teachers by the Parents Teacher Association. Learned counsel appearing on both sides point that the Director Higher Education, Himachal Pradesh has issued a communication dated 24th September, 2009, and the cases require fresh consideration in the light of the said communication. The relevant portion of the communication of the Director, Higher Education, Himachal Pradesh reads as follows:-*
>
> > *"Refer to letter No.EDN-kha(7)3706-1, dated 3.9.2009 from the Principal Secretary (Education) to the Govt.of Himachal Pradesh addressed to this directorate and copy endorsed to you and others vide which the government has asked to move an application immediate before the chairman of the concerned enquiry committee in view of the decision of CWP No.525/2009 titled as Ravinder Singh vs. State and CWP No.2632/2009 titled as Koyal Kumar vs. State wherein the Hon'ble High Court of Himachal Pradesh while setting aside the orders of the committee has directed that Committee after giving adequate opportunity of hearing to the petitioner as well as the other respondents can look into the matter and decide whether the appointment of the petitioner was valid or not. The committee while deciding the issue will keep into consideration the observation of the Hon'ble High Court made in CWPs. The copy of the judgment/orders passed by the Hon'ble High Court*

CWP No.2632/2009 titled as Koyal Kumar vs. State is also being sent to all the Deputy Directors.

Therefore, you are directed to comply with the directions of the Government and take action in the matter accordingly."

In view of the above clarification issued by the Director of Higher Education, Himachal Pradesh, the impugned orders are liable to be set aside. Ordered accordingly. However, we make it clear that it will be open to the Enquiry Committee to consider the matters afresh in the light of the instruction referred to above. The needful, if required, shall be done within a period of four months from the date of the production of a copy of this judgment by either side. It is also made clear that in the cases of those teachers who are working in the schools, in case they have not been paid their due wages, the same shall be paid and the State shall ensure that the required grant-in-aid is given to the Schools, as per the Rules forthwith.

The writ petitions are disposed of, so also the pending applications,if any."

4. Subsequent to passing of aforesaid judgment by Division Bench of this Court, matter was inquired into afresh by the Enquiry Committee in the light of observations made by the Division Bench of this Court in the judgment referred hereinabove. Enquiry Committee, while considering the matter afresh, fixed following criteria to assess the merit of nine candidates, who had appeared in the interview for the post of Drawing Master held on 5.10.2007:-

Matric	*10 marks*
Plus two	*10 marks*
BA/Graduation	*10 marks*
Diploma	*10 marks*
Total	***40 marks***

5. Enquiry Committee, applying the aforesaid criteria, prepared comparative merit list, wherein name of petitioner Kamal Kishore figured at Sr.No.8. Enquiry Committee, while passing order dated 30th August, 2011 in terms of aforesaid judgment passed by Division Bench of this Court, specifically concluded that petitioner; namely; Kamal Kishore, has secured 8th position and as such he was not most meritorious candidate for the aforesaid post. Enquiry Committee further concluded that even complainant Smt.Nirmala Devi, who secured 6th position of the merit list, is also not meritorious candidate for the above post. Committee, on the basis of material available on record, concluded that merit was ignored in the selection by the then PTA Committee of the GMS, Dhuma Devi, Tehsil Sadar, Mandi, District Mandi, H.P. accordingly, appointment/ selection of petitioner Kamal Kishore as Drawing Master in GMS Dhuma Devi made by the PTA of the said school on 05.10.2007 was not valid.

6. Mr.Shyam Chauhan, learned counsel representing the petitioner, while referring to impugned order dated 30th August, 2011 (Annexure P-4) strenuously argued that the same is not sustainable in the eye of law as the same is in complete violation of judgment passed by the Division Bench of this Court and as such same deserves to be quashed and set aside. Mr.Chauhan further contended that the petitioner was appointed to the post of Drawing Master, pursuant to interview held on 05.10.2007, whereas new guidelines/criteria, as have been followed by the Committee while passing order dated 30.08.2011, came into force on 27th May, 2008 and as such could not be made applicable in the case of present petitioner. Mr.Chauhan further invited the attention of this Court to the judgment passed by Division Bench of this Court in ***CWP No.525 of 2009, titled : Ravinder Singh vs. State of H.P. and Others, decided on 4.8.2009,*** to demonstrate that criteria laid down in the Notification dated 27.05.2008 could not have been applied retrospectively in the case of the present petitioner.

7. Mr.Ramesh Thakur, learned Deputy Advocate General, while refuting the aforesaid contention of the learned counsel representing the petitioner, specifically invited the

attention of this Court to the judgment dated 18th March, 2010, passed by Division Bench of this Court in ***CWP No.1047 of 2009*** *supra,* to demonstrate that liberty was reserved to Enquiry Committee to consider the matter afresh in the light of instructions contained in communication dated 24th September, 2009 issued by Director, Higher Education to the Government of Himachal Pradesh. Mr.Thakur further contended that bare perusal of criteria fixed by the Enquiry Committee, while considering the matter afresh in the light of judgment passed by this Court, suggests that no injustice was caused to any candidate who had appeared for the interview held on 5.10.2007, rather case of each and every candidate was considered on the basis of uniform criteria.

8. During proceedings of the case, this Court had an occasion to peruse the judgment dated 18th March, 2010 (Annexure P-3), as reproduced hereinabove, perusal whereof clearly suggests that issue with regard to selection and appointment of various teachers by PTA came to be decided by the Division Bench of this Court, wherein learned counsel representing the parties invited the attention of Division Bench to the communication dated 24th September, 2009 issued by Director Higher Education, Himachal Pradesh to demonstrate that certain matters require afresh consideration in the light of aforesaid communication. Perusal of judgment, referred hereinabove, clearly suggests that learned counsel representing the petitioner in that case also consented for fresh consideration of his case in the light of aforesaid communication and as such, at this stage, it does not lie in the mouth of learned counsel for the petitioner to contend that instructions contained in communication dated 24.09.2009 could not be made applicable in the case of petitioner by the Enquiry Committee, while deciding his case afresh. Communication dated 24.09.2009 clearly suggests that Principal Secretary (Education) to the Government of Himachal Pradesh, taking note of judgment passed by Division Bench of this Court in ***CWP No.525 of 2009, titled: Ravinder Singh vs. State of H.P. and CWP No.2632 of 2009, titled Koyal Kumar vs. State*** directed the concerned Authority to look into the matter afresh and decide whether the appointment of the petitioner was valid or not. Vide aforesaid communication, Enquiry Committee was advised to take into consideration the observations of the Hon'ble High Court made in the aforesaid CWPs while deciding the issue.

9. Apart from above, perusal of judgment dated 18th March, 2010 passed by Division Bench of this Court in CWP No.1047 of 2009 clearly suggests that liberty was reserved to the Enquiry Committee to consider the matter afresh in the light of instructions contained in communication dated 24th September, 2009. Perusal of impugned order dated 30.8.2011 (Annexure P-4) clearly suggests that Enquiry Committee, passed impugned order after considering the judgments passed by the Division Bench of this Court in ***CWP No.1047 of 2009, CWP No.525 of 2009*** and ***CWP No.2632 of 2009,*** *supra.*

10. Careful perusal of judgment passed by Division Bench of this Court in *CWP No.525 of 2009* clearly suggests that though Division Bench had held that criteria laid down by Notification dated 27.5.2008 could not have applied retrospectively but also observed that this Court has consistently held that all appointments by the PTA should be made on objective basis and merit should not be ignored.

11. This Court, after carefully examining the aforesaid order made by Enquiry Committee (Annexure P-4), sees no reason to agree with the arguments having been advanced by learned counsel for the petitioner that same is not in accordance with various directions issued by Division Bench of this Court in the cases, as referred above. Rather, close scrutiny of order dated 30.7.2011 clearly suggests that Enquiry Committee solely with a view to arrive at a concrete conclusion that merit has been ignored or not, evolved uniform criteria, which otherwise appears to be fair and just. It is admitted case of the parties that on 5.7.2007, when the interview for the post of Drawing Master held in GMS Dhuma Devi, nine candidates including the petitioner and respondent No.4 appeared. Enquiry Committee, while assessing the matter afresh, considered the cases of all those nine candidates, who originally appeared in the interview on 5.7.2007 and assessed their merit as per criteria fixed by it. Since, name of the petitioner

appeared at Sr.No.8 on the basis of fresh assessment carried out by Enquiry Committee, his appointment to the post of Drawing Master was rightly held not to be valid.

12. Consequently, in view of detailed discussion made hereinabove, this Court sees no illegality and infirmity in the order dated 30.8.2011 passed by the Enquiry Committee, pursuant to judgment dated 18th March, 2010 passed by Division Bench of this Court in CWP No.1047 of 2009 and as such same is upheld. This petition is dismissed. Interim direction, if any, is vacated. All miscellaneous applications are disposed of.

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

Naresh Sharma. .... Petitioner/defendant
Versus
Shiv Ram Sharma .... Respondent/plaintiff.

Civil Revision No.159 of 2015 and
Civil Revision No. 107 of 2016
Date of decision: 01/04/2017

Code of Civil Procedure, 1908- Order 6 Rule 17- Order 8 Rule 6A- A civil suit for recovery of arrears of rent along with interest and also the use and occupation charges was filed – separate applications for pleading a counter-claim and amendment of written statement were filed by the tenant – the applications were dismissed by the Trial Court- aggrieved from the order, present revision has been filed – held that earlier an order of eviction was passed against the tenant on the ground of arrears of rent- he had not filed any counter-claim and had not taken any plea resisting the petition- the order of eviction was successfully executed- the tenant is estopped from raising any counter-claim– further the application for amendment could have been filed after the commencement of trial on establishing sufficient cause for not seeking the amendment earlier - the documents sought to be filed with the counter-claim were also available earlier- the counter-claim is also barred by the provision of Order 2 Rule 2 of C.P.C. – petition dismissed. (Para-2 to 7)

For the petitioner: Mr. S.C.Sharma, Advocate.
For the respondent: Mr. B.C.Verma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral):

These petitions arise from an order pronounced in CMP No. 29-6 of 2015, comprising an application constituted by the defendant, before the learned trial Court, under the provisions of Order 6 Rule 17 CPC and from an order pronounced in CMA No. 30-6 of 2015, comprising an application constituted before the learned trial Court under the provisions of Order 8 Rule 6A CPC. Though both the applications aforesaid stood dismissed by separate order(s) pronounced thereupon by the learned trial Court, yet when facts besides attendant material are common to both thereupon the validity of the orders recorded upon both can stand adjudicated upon, under a common verdict.

2. The impugned order recorded by the learned Civil Judge (Sr. Division), Theog, Himachal Pradesh upon CMA No. 29-6 of 2015, application whereof, comprises an application constituted before the learned trial Court by the defendant by his invoking the provisions of Order 6 Rule 17 read with Section 151 CPC whereupon he concerted to with the leave of the Court add apposite pleadings in his written statement, for succoring his propagation qua his counter claim embodied in CMA No.30-6 of 2015. Before proceeding to dwell upon the efficacy of the

pronouncements impugned hereat, it is imperative to allude to the factum of the suit constituted by the plaintiff before the learned trial Court echoing therein a relief qua a decree of damages, in a sum of Rs. 5,53,312/- comprising both the arrears of rent alongwith interest also the use and occupation charges qua the demised premises, hence standing pronounced upon the defendant. Qua the demised premises, a binding conclusive decree of eviction, of the defendant therefrom, arising from the plaintiff petitioner therein successfully establishing in his apposite rent petition constituted before the learned Rent Controller qua the defendant/petitioner herein falling into arrears of rent vis.a.vis the demised premises stood hence pronounced by the learned Rent Controller. The decree of eviction of the aggrieved defendant/petitioner herein from the demised premise, has come to be satisfactorily executed, comprised in the aggrieved defendant handing over vacant possession of the demised premises, to the plaintiff. The aggrieved defendant petitioner herein during the course of the apposite petition for his eviction from the demised premises, eviction whereof stood anchored upon his falling into arrears of rent, omitted to make any espousal therein qua the amount of arrears of rent claimed from him qua the demised premises, arrears whereof he evidently failed to liquidate qua the landlord, being ordered to be adjusted from the damages encumbered upon him arising from his standing constrained to sell machinery worth Rs.4,34,759/-, sale whereof stood engendered by the plaintiff reneging from his promises, whereas the aforesaid stage comprised the apposite stage for resisting the petition for his eviction from the demised premises anchored upon the statutory ground(s) of his falling into arrears of rent, concomitantly his omission aforesaid to on the aforesaid anchorage hence resist his eviction from the demised premises on the ground of his falling into arrears of rent, thereupon visibly constitutes estoppel against the aggrieved defendant, to with utmost procrastination subsequent to his instituting a written statement to the suit of the plaintiff, hence belatedly seek through the applications constituted before the learned trial Court, its leave for incorporation in the apposite written statement qua apposite amendments, holding communications/pleadings therein qua thereupon his rearing a counter claim against the amounts claimed in the suit instituted by the plaintiff, amounts whereof comprised the arrears of rent, for thereupon his non-suiting the plaintiff, conspicuously when the decree of his eviction from the demised premises stands satisfactorily executed whereupon also he stands forestalled to rear qua the plaintiff any counter claim qua the amounts aforesaid qua the plaintiff. Moreover, no issue on the aforesaid factum stood struck by the learned trial Court. Dehors the aforesaid non-availment earlier by the aggrieved defendant of his remedy to seek adjustment of amount(s) on anchorage aforestated vis.a.vis the quantum of arrears of rent claimed against him by the plaintiff qua the demised premises, he could well have at the earliest also instituted a separate suit holding therewithin the aforesaid relief whereupon he may have constrained the Rent Controller, to not proceed to pronounce any adjudication upon the apposite petition for his eviction, petition whereof stood anchored upon, his falling into arrears of rent in respect thereto, till an adjudication stood pronounced upon his suit for damages instituted against the plaintiff. Significantly, he did not even avail the aforesaid remedy rather permitted the learned Rent Controller to make a pronouncement qua his eviction from the demised premises also he has handed over its vacant possession to the plaintiff respondent herein whereupon with his willfully waiving and abandoning all the available grounds for hence his resisting the apposite petition for his eviction from the demised premises renders his resistance, nowat, to the apposite suit of the plaintiff for arrears of rent besides his monetary claim for use and occupation charges qua the demised premises being hence prima facie construable to be contrived or invented, inference whereof stands supported by the factum of his subsequent to the institution of his written statement to the plaint, his belatedly through an application instituted under the provisions of Order 8 Rule 6A CPC besides constituted before the learned trial Court concerting incorporation therein of his counter claim, incorporation whereof therein also for reasons hereinafter referred, warrants its standing discountenanced.

3. Be that as it may, the generation of the principle of estoppel whereupon the aggrieved defendant stands thwarted to belatedly espouse a counter claim against the suit of the plaintiff upsurges from the factum of the aggrieved defendant, through an application constituted under the provisions of Order 6 Rule 17 CPC, provisions whereof stands extracted hereinafter,

seeking its apposite leave qua its propagation in his written statement wherefrom the workability of the aforesaid provisions of law stands concomitantly aroused:-

> **"17. Amendment of Pleadings.-** the Court may at any stage at the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:
>
> Provided that no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."

The afore extracted provisions of CPC therewithin holding a mandate qua his holding a leverage to with the leave of the Court incorporate propagations for succoring his counter claim, comprised in a sum of Rs.5,53,312/- vis.a.vis. the plaintiff whereupon an allusion is enjoined to be made to the relevant material holding bespeakings qua the aggrieved defendant begetting compliance with its mandate. The trite principle embodied in the provisions engrafted in Order 6 Rule 17 CPC, is though it not prohibiting any party to a lis to at any stage seek appropriate amendment(s) qua his pleadings nonetheless any apposite motion thereunder of any party to the lis, stands enjoined to withstand the test of the rule embodied in proviso thereof, comprised in the factum of the party concerned to the lis establishing the factum of his despite exercising due diligence his yet standing constrained to not earlier rear the apposite factual matrix in his apposite pleadings whereupon satiation thereof standing begotten would constrain this Court to allow even the belatedly made concert of the aggrieved defendant. Bearing in mind the aforesaid principle of law held in Order 6 Rule 17 CPC, it is necessary to allude to the relevant pleadings constituted in the application at hand qua theirs thereupon falling within the ambit or within the domain of the aforesaid provisions. A perusal of the apposite applications, unveil qua the aggrieved defendant petitioner herein not making any underscorings therein qua the cause(s) of action in consonance with the facts concerted to be with the leave of the Court incorporated in his pleadings being earlier unknown to him, unawareness whereof arising from his despite exercising due diligence his yet remaining unacquainted with them, contrarily averments stand constituted in the apposite application(s), averments whereof hold unveilings qua the disability of the aggrieved defendant to earlier incorporate apposite pleadings in his earlier instituted written statement, pleadings whereof nowat stand concerted to be added, ensuing from his omission to collect the documents apposite to his rearing a counter claim in his previous written statement, wherefrom a concomitant deduction stems qua hence despite the aggrieved defendant evidently holding knowledge qua the facts relevant to his rearing an apposite counter claim in his written statement filed earlier to the apposite application constituted under Order 6 Rule 17 CPC, his yet omitting to at the earliest rear a counter claim in his earliest instituted written statement to the plaint whereupon visibly his relevant omission(s) in respect thereto are construable to be both deliberate and intentional. Obviously thereupon the subtle nuance besides the import of the apposite proviso to Order 6 Rule 17 CPC whereupon the aggrieved defendant though stood enjoined to firmly establish qua despite exercise of due diligence, his at a stage earlier to the apposite application(s) standing instituted not thereat holding their knowledge whereupon he would hold the empowerment to constrain the Court concerned, to permit him to incorporate the relevant pleadings in his written statement, has hence visibly remained unsatiated, thereupon with the mandate of the proviso to the provisions of Order 6 Rule 17 CPC begetting non satiation, concomitantly renders his belated apposite endeavour to suffer rejection.

4. Be that as it may, even when the documents relevant to the defendant rearing an apposite counter claim in his written statement instituted prior to his instituting before the learned trial Court an application under Order 6 Rule 17 CPC alongwith a counter claim constituted under the provisions of Order 8 Rule 6A CPC, were thereat unavailable with him yet the aforesaid non-availability thereat of the relevant documents, with the defendant, cannot be construed to be absolutely forestalling his rearing a counter claim in his written statement, written statement whereof stood instituted before the learned trial Court prior to his instituting therebefore the aforesaid CMAs, significantly when dehors their non availability thereat, he yet

wielded the statutory leverage to depict them in the apposite list of documents relied upon him. However, he omitted to avail the aforesaid statutory leverage. Consequently, it appears qua his through the aforesaid applications hence belatedly concerting to seek leave of the Court to propagate his counter claim to the suit of the plaintiff being construable to be both pretextual besides flimsy.

5. Furthermore, the salient principle(s) embodied under the provisions of Order 2 Rule 2 CPC warrant also their application to the concert of the defendant, to nowat rear a counter claim, significantly when it constitutes 'the suit' of the defendant whereupon its clout holds its fullest sway qua even a counter claim, conspicuously when the facts apposite to the, nowat, concert of the defendant, remained alive earlier thereto also stood known to the defendant whereupon the omission of the defendant to incorporate in his earlier instituted written statement, any espousal apposite to his nowat propagated counter claim also spurs an inference qua his intentionally abandoning or relinquishing all claim(s) with respect thereto hence nowat rendering him disempowered to subsequently institute a 'suit' in respect thereof. Even though the provisions incorporated in Order 6 Rule 17 CPC operate as an exception qua the principle of law held within the ambit of Order 2 Rule 2 CPC provisions whereof stand extracted hereinafter

> **2. Suit to include the whole claim.-** (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.
>
> (2) Relinquishment of part of claim—Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.
>
> (3) Omission to sue for one of several reliefs—A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs, but if he omits except with the leave of the court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.
>
> Explanation: For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.

yet with this Court for reasons aforestated excluding qua the factual matrix prevailing hereat, the sway of the mandate of the proviso qua the provisions held in Order 6 Rule 17 CPC thereupon with the workability of the exception to the principle engrafted in the provisions of Order 2 Rule 2 CPC hence standing rendered ousted, thereupon the vigour besides play of the mandate of provisions of Order 2 Rule 2 CPC surfaces with invincible force thereupon with the defendant visibly not in his earlier instituted written statement rearing any counterclaim vis.a.vis the relief reared in the plaint by the plaintiff, hence enjoins this Court to firmly erect an inference qua his intentionally relinquishing his counter claim qua the suit of the plaintiff whereupon he stands statutorily dis-entitled to subsequently raise it.

6. Moreover, the provisions of Order 8 Rule 6A of the CPC foist therewithin a statutory right upon the aggrieved defendant to assert a counter claim to the claim reared by the plaintiff in his apposite plaint, provisions whereof stands extracted hereinafter:

> **"6A. Counter claim by defendant.-** (1) A defendant in a suit may, in addition to his right of pleading a set off under rule 6, set up, by way of counter claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of to suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter claim is in the nature of a claim for damages or not:
>
> Provided that such counter claim shall not exceed the pecuniary limits of the jurisdiction of the court.

> (2) Such counter claim shall have the same effect as a cross suit so as to enable the court to pronounce a final judgment in the same suit, both on the original claim and on the counter claim.
>
> (3) The plaintiff shall be at liberty to file a written statement in answer to the counter claim of the defendant within such period as may be fixed by the court.
>
> (4) The counter claim shall be treated as a plaint and governed by the rules applicable to plaints."

whereupon the defendant stood enjoined to with respect to cause(s) of action accruing to him either before or after filing of the suit but prior to expiry of time qua his delivering his defence or prior to the time for the aforesaid purpose standing granted to him, his standing enjoined to in addition to the plea raised therebefore, also rear a plea of counter claim for thereupon his resisting the claim of the plaintiff. Nowat, with the apposite cause(s) of action accruing vis.a.vis. the aggrieved defendant at the time when a petition for eviction stood instituted before the learned Rent Controller, petition whereof stood squarely anchored upon his falling into arrears of rent with respect thereto also when thereat the aggrieved defendant omitted to make the afore-referred appropriate concerts/motions for thereupon his holding the apposite leverage to oust the endeavour of the respondent to seek his eviction from the demised premises, on score of his falling into arrears of rent also renders open an ensuing corollary qua his abandoning the aforesaid plea whereupon he reiteratedly now stands estopped, to, with the leave of the Court seek its incorporation in his written statement

7. The counsel for the petitioner has placed reliance upon a judgement of the Hon'ble Apex Court rendered in Civil Appeal No. 2308-2309 of 2016 titled Vijay Prakash Jarath vs. Tej Prakash Jarath, hence to canvass qua with the Hon'ble Apex Court therein permitting the aggrieved defendant therein, to even after striking of issues, institute a counter claim, on anvil of the Hon'ble Apex Court therein concluding qua no apparent loss or prejudice standing caused to the defendant therein, whereupon this Court also permit the aggrieved defendant to likewise introduce pleadings in his written statement apposite to his propagation(s) qua his counter claim. However, a close reading of the verdict placed before this Court by the learned counsel for the petitioner does not disclose qua the Hon'ble Apex Court standing seized with an application under Order 6 Rule 17 CPC nor obviously the Hon'ble Apex Court pronounced thereupon qua the visible statutory imperativeness of the aggrieved defendant establishing qua his apposite application constituted under the provisions of Order 6 Rule 17 CPC begetting satiation of the principles held in its proviso whereas with this Court concluding qua the aggrieved defendant petitioner herein visibly not satiating the principles held in the proviso to the provisions of Order 6 Rule 17 CPC, whereupon the benefit of the verdict of the Hon'ble Apex Court relied upon by the learned counsel for the petitioner may not accrue to the defendant also when the Hon'ble Apex Court has confined the benefits of its verdict only on its concluding qua in the factual matrix existing therebefore qua thereupon no serious or irreparable loss accruing upon the aggrieved defendant therein, whereas with the factual matrix prevailing hereat being starkly contra distinct therewith, significantly when the counter claim hereat of the defendant if allowed, it would encumber the plaintiff with immense financial loss comprised in his standing forestalled to recover arrears of rent qua the demised premises wherefrom the aggrieved defendant has suffered a decree of eviction also the plaintiff would stand thwarted to claim the relevant use and occupation charges. Predominantly also with the aggrieved defendant herein for all the reasons aforestated intentionally abandoning all the aforesaid pleas whereupon he hence stands estopped by the principle engrafted in Order 2 Rule 2 of the CPC to hence nowat belatedly raise the plea(s) of counter claim(s). In aftermath the benefit of the verdict of the Hon'ble Apex Court cannot stand bestowed upon the aggrieved defendant. Consequently, there is no merit in the petition(s) which are accordingly dismissed so also the pending applications. Impugned orders are maintained and affirmed. The parties are directed to appear before the learned trial Court on 8.5.2017.

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

Neelam Sharma ....Petitioner
Versus
Baba Balak Nath Temple Trust & Others ....Respondents

CWP No.11017 of 2011
Date of decision:01.04.2017

Constitution of India, 1950- Article 226- Petitioner was appointed as Lecturer – she applied for extraordinary leave for three years and did not turn up to join her services after 15.3.1999 – she claimed the arrears on account of revision of pay till the date of service –held that no representation was made by the petitioner seeking revision of her pay- no explanation was given for the delay on the part of the petitioner – writ petition dismissed.(Para-8 to 15)

Cases referred:
B.S. Bajwa and another vs.State of Punjab and others, (1998)2 SCC 523
Uttar Pradesh and others vs. Arvind Kumar Srivastava and others, 2014 AIR SCW 6519

For the Petitioner: Mr.J.R. Sharma vice Mr.Bhuvnesh Sharma, Advocate.
For the Respondents: Mr.K.D. Sood, Senior Advocate with Mr.Sanjeev Sood, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

Petitioner, being aggrieved with the denial of revised pay scale of Rs.8000-13500/- w.e.f. 01.01.1996, invoked extra ordinary jurisdiction of this Court by way of filing instant petition seeking therein following main relief:

> *"(i) That the Respondents may very kindly be directed to grant the revised pay scale of Rs.8000/- to 13500/- to the Petitioner w.e.f. 01/01/1996 to 15/03/1999 and refix her pay accordingly with all consequential benefits and the arrears accrued there under may very kindly be ordered to be paid with interest, as allowed by this Hon'ble Court vide judgment dated 31/10/2008 in C.W.P. No.274/2008 titled as "Karan Singh Rana & Ors. v. State of H.P. & Ors."*

2. Facts, as emerged from the record, are that the petitioner was appointed as Lecturer in English in Baba Balak Nath Degree College, Chakmoh *(hereinafter referred to as 'College')* by Baba Balak Nath Temple Trust, Deotsidh *(hereinafter referred to as 'Temple Trust')* vide appointment letter dated 10.10.1995 in the pay scale of Rs.2200-4000 + usual allowances (Annexure P-1). Petitioner continued to serve aforesaid College till 15.03.1999, whereafter she applied for extraordinary leave for three years on his selection in the Education Department of Himachal Pradesh as Lecturer in English. It also emerge from the record that petitioner left the job from the aforesaid College w.e.f. 15.03.1999 and thereafter never turned up to join her services in the said College. In nutshell, grievance of the petitioner is that since pay scale of Lecturer was revised from Rs.2200-4000 to Rs.8000-13500 w.e.f. 01.01.1996, she was also entitled for same since she had rendered her services in the College till 15.03.1999.

3. Learned counsel representing the petitioner stated that since, despite repeated communications, respondents-College failed to release benefits of revised pay scale in favour of the petitioner, she was compelled to file instant petition seeking therein relief(s) as referred hereinabove. He also invited the attention of this Court to the judgment dated 31.10.2008, passed by Division Bench of this Court in ***CWP No.274 of 2008, titled: Dr.Karan Singh Rana & Others vs. State of H.P.,*** whereby directions were issued to respondents College/Trust to

release the revised pay scales to the Lecturers working in the College. Learned counsel further stated that since there is no dispute with regard to rendering of services by the petitioner in the respondents-College till 15.03.1999, respondents ought to have granted her benefit of revised pay scale w.e.f. 01.01.1996 to 15.03.1999.

4. Mr.K.D. Sood, learned Senior Counsel duly assisted by Mr.Sanjeev Sood, Advocate, appearing for the respondents, vehemently opposed aforesaid submissions having been made by learned counsel representing the petitioner as well as application of Division Bench judgment *supra* and stated that it will not help to the petitioner because she was not a party in that case, moreover, facts of the case are totally different.

5. Apart from above, Mr.Sood, strenuously argued that the present petition is highly time barred and cannot be entertained, at this belated stage. Mr.Sood, while inviting the attention of this Court to the writ petition filed by the present petitioner, stated that it is an admitted case of the petitioner that she never joined the College after 15.03.1999, whereas she raised demand for release of revised pay scale for the first time by way of instant petition in 2011 i.e. after 12 years. Mr.Sood further stated that there is no document made available on the record by the petitioner suggestive of the fact that in 12 years i.e. from 1999 to 2011, representation, if any, qua the release of revised pay scale was ever made to the respondents and as such present petition deserves to be dismissed on the ground of limitation.

6. Mr.Sood also invited the attention of this Court to the judgment passed by Division Bench of this Court in ***LPA No.604 of 2011, titled Karan Singh Pathania vs. State of H.P. and Others,*** whereby another Lecturer in English; namely Karan Singh had filed an appeal against order/judgment passed by learned Single Judge in ***CWP bearing No.8025 of 2010***, ***titled: Karan Singh Pathania vs. State of H.P.*** whereby his claim for release of revised pay scale was rejected. In the aforesaid background, Mr.Sood prayed that the present petition may be dismissed on the ground of limitation.

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

8. There is no dispute with regard to appointment of petitioner as a Lecturer in the respondents-College. Similarly, there is no dispute with regard to services having been rendered by petitioner in the respondents-College in the capacity of Lecturer w.e.f. 10.10.1995 till 15.03.1999, whereafter she herself applied for extraordinary leave for three years. Though pleadings available on record suggests that the pay scale of Lecturer was revised by the respondents from Rs.2200-4000 w.e.f. 01.01.1996, but this Court was unable to lay its hand to any of the documents made available on record by the petitioner suggestive of the fact that representation, if any, was ever made by her after revision of pay scale, praying therein for release of the same in her favour. Though, perusal of judgment dated 31.10.2008 passed by the Division Bench of this Court in *CWP No.274 of 2001 supra*, suggests that direction was issued to respondents to issue revised pay scale w.e.f. 01.01.1996 to the Lecturers working in the College, but definitely petitioner was not party to that case.

9. Moreover, judgment passed by learned Single Judge of this Court in *CWP No.8025 of 2010*, referred hereinabove, which was further upheld in *LPA No.604 of 2011 supra,* clearly suggests that similarly situate persons as the petitioner had approached this Court for release of revised pay scale after considerable delay and accordingly their prayer was rejected by this Court on account of inordinate delay itself. In the instant case learned counsel representing the petitioner was unable to render explanation, if any, qua the extra ordinary delay caused by the petitioner seeking revised pay scale and as such this Court sees substantial force in the arguments having been made by Mr. Sood that acceptance of prayer having been made by the petitioner at this stage may open pandora's box, otherwise also Division Bench of this Court while upholding the judgment dated 27.08.2011 passed by learned Single Judge in aforementioned *CWP No.8025 of 2011,* has specifically held that fencer cannot be held entitled to any relief.

10. In the instant case also, there is no explanation with regard to delay on the part of petitioner, but, relief has been prayed on the strength of judgment rendered by this Court in *CWP No.274 of 2001 supra,* which itself suggests that the petitioner failed to take recourse to appropriate remedy within reasonable time for release of revised pay scale and as such she can be termed as fencer and cannot be held entitled to any relief.

11. Reliance is placed on ***B.S. Bajwa and another vs.State of Punjab and others, (1998)2 SCC 523***, wherein the Hon'ble Apex Court has held as under:-

> *"7. Having heard both sides we are satisfied that the writ petition was wrongly entertained and allowed by the single Judge and, therefore, the Judgments of the single Judge and the Division Bench have both to be set aside. The undisputed facts appearing from the record are alone sufficient to dismiss the writ petition on the ground of laches because the grievance made by B. S. Bajwa and B. D. Kapoor only in 1984, which was long after they had entered the department in 1971-72. During this entire period of more than a decade they were all along treated as junior to the other aforesaid persons and the rights inter se had crystallised which ought not to have been re-opened after the lapse of such a long period. At every stage the others were promoted before B. S. Bajwa and B. D. Kapoor and this position was known to B. S. Bajwa and B. D. Kapoor right from the beginning as found by the Division Bench itself. It is well settled that in service matters the question of seniority should not be re-opened in such situations after the lapse of a reasonable period because that results in disturbing the settled position which is not justifiable. There was inordinate delay in the present case for making such a grievance. This alone was sufficient to decline interference under Article 226 and to reject the writ petition."*

12. The Hon'ble Apex Court in case titled as State of ***Uttar Pradesh and others vs. Arvind Kumar Srivastava and others, 2014 AIR SCW 6519,*** held that relief cannot be extended to the persons who have approached the Court after long delay, that too, who are fence-sitters. It is apt to reproduce para 24 of the judgment herein:

> *"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."*

13. Even Division Bench of this Court, while placing reliance upon the aforesaid judgments passed by Hon'ble Apex Court, has held in *LPA No.604/2011 supra* that *"fencer cannot be held entitled to any relief"*.

14. In view of judgment rendered hereinabove by the Division Bench of this Court, this Court sees no force in the prayer of the petitioner that respondents ought to have released benefits of revised pay scale to her in the light of judgment rendered by this Court in *CWP No.274 of 2001 supra*, especially, when there is no explanation available on record for inordinate delay caused by the petitioner in maintaining the present petition.

15. Consequently, in view of discussion made hereinabove, this petition is dismissed being devoid of any merits. However, petitioner is at liberty to approach respondents for redressal of her grievances. Interim direction, if any, is vacated. All miscellaneous applications are disposed of.

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

Pradeep Chand Sharma and others ...Appellants/Plaintiffs.
Versus
Budhi Devi and others ...Respondents/Defendants.

R.S.A. No. 565 of 2012
Judgment reserved on: 29.3.2017
Date of decision: 1st April, 2017.

Indian Partition Act, 19- Section 4- Plaintiff filed a civil suit seeking partition of the property pleading that the property is jointly owned by large number of co-sharers and it is difficult to enjoy the same- the suit was decreed by the Trial Court- an appeal was filed, which was allowed – held in second appeal that when a partition is sought, the entire joint property owned by the co-owners must be brought into hotchpot for division amongst the co-sharers –however, partial partition is permissible in certain circumstances provided that no prejudice is caused to the other side – the Appellate Court had made a general observation that the suit was bad for partial partition and no prejudice was pointed out –appeal allowed – judgment of the Appellate Court set aside and that of the Trial Court restored. (Para- 15 to 38)

Cases referred:
Bahadur vs. Bratiya and others, 2016 AIR (HP) 58
Kiran Singh versus Chaman Paswan AIR 1954 SC 340

For the Appellants	Mr. Bhupender Gupta, Senior Advocate, with Ms. Rinki Kashmiri, Advocate.
For the Respondents	Mr. G.R. Palsra, Advocate, for respondents No. 1, 4 and 5. Mr. Debinder Ghosh, Advocate, for respondent No.8.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

This regular second appeal is directed against the judgment and decree passed by learned District Judge, Kullu on 3.7.2012 whereby he reversed the judgment and decree passed by learned Civil Judge (Senior Division), Kullu dated 6.12.2011.

2. The parties are ad idem that the facts of the case have been correctly set out in the impugned judgment passed by learned lower Appellate Court and, therefore, the same are extracted from the said judgment.

3. Brief facts necessary for disposal of the present appeal are that the plaintiff filed suit pleading that following property (hereinafter to be called suit property) is jointly owned and possessed by the parties:

(A) *A two storeyed CGI sheet roofed building with attic bearing municipal No. 371 situated at Nehru Chowk, Manali comprised in Khasra No. 711, 712 measuring 0-4-0 Bigha contained in Khatoni No. 773 of Khata No. 536*

incorporated in jamabandi for the year 1992-93 of Phati Nasogi, Kothi Manali, Tehsil and District Kullu.

(B) A four storeyed CGI shet roofed building with attic situated at Nehru Chowk Manali, Tehsil and District Kullu, comprised in Khasra No. 713 measuring 0-5-0 bigha contained in Khatoni No. 972 of Khata No. 535 incorporated in jamabandi for the year 1992-93 of Phati Nasogi, Kothi Manali, Tehsil and District Kullu.

(C) A single storeyed CGI roofed building comprised in Khasra No. 702 measuring 2-11-0 bigha contained in Khatoni No. 974 of Khata No. 537 incorporated in jamabandi for the year 1992-93 of Phati Nasoi, Kothi Manali, Tehsil and District Kullu,

(D) A single storeyed CGI roofed building comprised in Khasra No. 702, situated at Nehru Chowk Manali measuring 2-11-0 bigha contained in Khatoni No. 537 of Khata No. 974 incorporated in jamabandi for the year 1992-93 of Phati Nasogi, Kothi Manali, Tehsil and District Kullu.

(E) *A three storeyed RCC building situated at Dana Bazaar Manali comprised in Khasra No. 750 measuring 0-1-0 bigha contained in Khatoni No. 829 of Khata No. 427 incorporated in jamabandi for the year 1992-93 of Phati Nasogi, Kothi Manali, Tehsil and District Kullu.*

4. It was pleaded that the suit property was previously owned and possessed jointly by Moti Lal, plaintiff No.1, Shadi Lal, Maya Das, Shiv Singh, Totu Ram, Sher Singh (defendant No.4), Sham Lal, Hira, Hari Khushal, Milap Satish, Dharmi and Surjan defendant No.2 and all these persons are successors of interest of Budh Ram. It was pleaded that after death of Maya Das his estate was inherited by his daughter Hri and Lila, plaintiffs No. 3 and 4 and after death of Shiv Chand, his estate was inherited by plaintiffs No. 5 to 14, after death of Totu Ram, his estate was inherited by Kishan Chand, defendant No.3 and after death of Surat Ram, his estate was inherited by Sher Singh, defendant No.4. It was further pleaded that the suit property is joint and unpartitioned and is presently owned by large number of share holders. The suit property is situated at Manali and fetching handsome rental income but due to large number of share holders it is highly inconvenient to divide income amongst all the co-sharers and prayed that the suit property be partitioned as per shares of the parties.

5. The defendants filed written statements. Defendants No. 1 to 3 i.e. Hira, Surjan and Kishan Chand resisted and contested the suit and took couple of preliminary objections. It was pleaded that the plaintiffs are estopped by their own act and conduct to file the present suit and suit is not properly valued for the purpose of court fee and jurisdiction and also challenged the locus standi of the plaintiffs. It was pleaded that the shares of the persons have not been properly defined. These defendants pleaded that after death of Surat Ram, his share has been inherited by Shiv Chand, Sher Singh and remaining ten real brothers of Surat Ram jointly. They also pleaded that the suit property mentioned in Part E was jointly owned and possessed by the co-sharers mentioned in para No.7 of the plaint and share of Shiv Das was inherited by Jawahar Lal, plaintiff No.15.

6. Defendant No.4 Sher Singh in his written statement took couple of preliminary objections qua limitation, maintainability, estoppel by act and conduct, locus standi and suit not properly valued for the purpose of court fee and jurisdiction. It was pleaded that the value of the suit property is more than one crore ruppes, hence the suit was beyond pecuniary jurisdiction of the trial Court. It was pleaded that the suit was bad for partial partition since other property situated in village Yang Kothi Ranika, District Lahaul Spiti, Akhara Bazar, Kullu, Phati Dhalpur, village 18 Miles Phati Bran, Kothi Baragarh of the parties have not been included in the suit. It was pleaded that the suit was bad for non-joinder of necessary parties since son of defendant No.4 Anil Kumar registered owner of Hotel Woodline Annexe has not been impleaded as party. Defendant No.4 also pleaded that since the plaintiffs are not in possession of the suit property,

hence the suit was not maintainable. Moreover, defendant No.4 claimed absolute ownership and possession over the suit land. It was denied that the suit land was jointly owned and possessed by the parties. It was pleaded that the parties are agriculturist and governed by custom of Kullu Sub Division Riwaj-e-Zamindara, according to which female heirs, in presence of male heirs are not entitled to inherit anything and in case of death of holder of the property without any male heir and the female heir will acquire limited rights and in case of a widow, will acquire right till remarriage or death and in case of daughters they will acquire right till majority or married. It was pleaded that plaintiff No.3 has already married and after her marriage her rights have been automatically reverted to the reversioners male heirs. Defendant No.4 further pleaded that he was younger son out of 15 sons of Budh Ram and after 1950 had settled at Manali. The suit land was purchased by him from various persons from his own funds. He had purchased the property in the joint name of his brothers and no consideration was paid by the rest of the brothers. He also developed the suit land at his own expenses. The building expenses of the hotel were approved in the name of defendant No.4 and electricity and water etc. were also sanctioned in favour of defendant No.4 which prove that the suit property was exclusively owned and possessed by him. Defendant No.4 claimed that the property mentioned in Headnote B was not residential house and it was Hotel building which was registered in the name of defendant No.4. The building plan was proved in the name of defendant No.4 and his son and fee of Rs.1,25,000/- was charged by Nagar Panchayat Manali for sanction of plan. The defendant also claimed ownership by way of adverse possession over the suit property and was pleaded that since his possession was open, continuous and hostile to the other persons, hence he has become owner of the suit property by way of adverse possession. He denied that other parties had any right over the suit property.

7. Defendants No. 5 to 7 pleaded that the plaintiffs were estopped from their act and conduct from filing the suit, the suit was not properly valued and the plaintiffs had no locus standi to file the suit. They admitted that the suit property was jointly owned and possessed by the parties and pleaded that share of Surat Ram after his death was inherited by his brother Shiv Chand, Sher Singh and remaining ten brothers of Surat Ram jointly.

8. In replication, the plaintiffs reasserted their case and controverted the pleadings made by the defendants.

9. The learned trial Court framed the issues on 24.9.2010 and 26.6.2011:

1. Whether the suit property is joint, if so, its effect? OPP
2. If issue No.1 is proved in affirmative, whether the plaintiffs re-entitled to decree of possession of their shares, in the suit property by getting their share partitioned by metes and bounds as prayed? OPP
3. Whether the suit is not properly valued for the purpose of court fee and jurisdiction? OPD-4.
4. Whether the suit is time barred? OPD-4.
5. Whether the plaintiffs are estopped by their acts and conduct from filing the present suit? OPD-4.
6. Whether the suit property stood partitioned in family partition on 18.6.1988 as claimed, if so, its effect? OPD-4.
7. Whether the site plan filed with the plaint is not correct and not according to factual position on the spot? OPD-4.
8. Whether the suit is collusive with defendants No. 1 to 3 and 5 to 7 as alleged? OPD-4.

8A. Whether the suit of the plaintiff is not maintainable? OPD

8B. Whether the parties are governed by the agricultural custom of Kullu Sub Division known as Rewas-Jamindara? OPD

8C. Whether the present suit has been filed for partial. If yes, its effect? OPD

9. Relief.

10. After recording the evidence and evaluating the same, the learned trial Court decreed the suit of the plaintiffs by passing a preliminary decree for partition of the suit property.

11. Aggrieved and dissatisfied with the judgment and decree passed by the learned trial Court, legal representatives of defendant No.4, who died during the pendency of the case before the learned trial Court filed an appeal before the learned first Appellate Court, who allowed the same vide judgment and decree dated 3.7.2012.

12. Aggrieved by the judgment and decree dated 3.7.2012 passed by learned first Appellate Court, the plaintiffs/appellants have filed the instant appeal before this Court.

13. This Court vide its order dated 29.10.2012 admitted the appeal on the following substantial questions of law:

> *"1. When admittedly the proceedings for partition of agricultural land situated in District Lahaul and Spiti were pending before the competent revenue authorities, has not Lower Appellate Court taken erroneous view of facts and rendered erroneous and perverse finding that the suit is not maintainable being for partial partition, ignoring the fact that property in dispute was situated in District Kullu and mainly was hotel and constructed portions alongwith land appurtenant thereto.*
>
> *2. Whether lower Appellate Court has recorded erroneous and perverse findings that the suit pertaining to Khasra No. 702, which is assessed to ladn revenue is not maintainable in the Civil Court and application for partition ought to have been made before the revenue courts, ignoring the fact that such land was appurtenant to the structures for which suit for partition was filed.*
>
> *3. Whether the lower appellate Court has misunderstood the correct legal position regarding the applicability of custom to the parties to the suit and has recorded wrong findings that the suit was not competent as the shares of the parties have not been properly defined? Has not the lower Appellate Court acted in arbitrary, mechanical, erroneous and perverse manner in reversing the preliminary decree passed by trial Court by not defining thee shares of the parties and also failing to notice that Ms. Bimla and Ms. Ram Devi were alive and were parties before the trial Court as well as lower Appellate Court?*

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

<u>Substantial questions of law No. 1 and 2:</u>

15. Since both these substantial questions of law are intrinsically inter-linked and inter-connected the same are being decided by a common reasoning.

16. It is more than settled that normally when a partition is sought through the intervention of the Court the general rule is that the entire joint property owned by the co-owners, whether as joint tenants or tenants-in-common, must be brought into hotchpot for division by the Court.

17. It is equally a well established rule of law that the plaint in a suit for partition must embrace only such property in which the plaintiff has community of interest and unity of possession. Where a purchaser acquires an interest in the coparcenary property, the transfer really effects a severance of joint status in respect of the property transferred and he becomes a tenant-in-common in respect of such property with his vendor, but he does not become a coparcener.

18. Even as a rule of Hindu Law, if the property is not joint family property and the parties are not coparceners but only co-owners or tenants-in-common the rule is not so rigid and partial partition may be allowed if there is not much inconvenience to the other sharers.

19. In addition to that, the partial partition is prohibited for a good reason as the partition has the effect of breaking up a joint Hindu family. If such a family is disrupted, it stands to reason that the family should break up completely and the whole family property should be divided.

20. However, even suits praying for partial partition have also been recognized under some of the following circumstances, namely:

> *(i) where different portions of family property are situated in different districts, separate suits for partition for lands of each district may be brought;*
>
> *(ii) it may be allowed when portion of joint property at the time of the suit for partition is incapable of partition;*
>
> *(iii) where the property left out from its very nature impartible;*
>
> *(iv) where the property is held jointly with strangers who cannot be joined as parties to a general suit for partition the same may be left out; or*
>
> *(v) where the co-owners by mutual agreement decide to make partition of the joint family property leaving some portion in common.(Refer:* ***Harey Harey Singha Chowdhury vs. Hari Chaitanya Singha Chowdhury 40 CWN 1237; Mansharam vs. Ganesh 17 CWN 521; Panchanan Mallick vs. Shiv Chandra ILR 14 Cal 805; Balaram vs. Ramchandra ILR 22 Bom 922; Abdul Karim vs. Badruddin ILR 28 Mad 216).***

Therefore, it is not in all events that partial partition is impermissible.

21. The purpose and object for insisting in a suit for partition that the entire joint property owned by the co-owners whether as joint tenants or tenants-in-common, must be brought into hotchpot in division is to ensure that much inconvenience is not caused to the opposite parties who are also co-heirs, because such suits lead to multiplicity of litigation and consequent harassment, inconvenience and endless litigation.

22. The rule against partial partition is only one of equity and convenience. Therefore, it is better to limit the rule in its application to properties over which the parties have community of interest and unity of possession. If partial partition can be had without inconvenience to the other sharers and if it will not stand in the way of equities being adjusted, it is not necessary to insist that all properties will have to be scheduled. 23. Thus, what can be taken to be settled is that there is no legal inhibition if there are justifying features in allowing a suit for partial partition. However, normally a distinction has to be made between partition of joint family property (joint tenants) and partition among tenants-in-common. The reason for the distinction is that in the former case, unlike in the latter case, there is unity of title, interest and possession over each and every item of property and hence the normal rule is that partition should be of entire properties of the joint family. In the case of partition between co-parceners (in respect of joint family properties) the entire property must be thrown into hotchpot except for certain well recognized exceptions.

24. On the other hand in the matter of partition of property held by tenants-in-common principle regarding partial partition may apply depending on the facts and circumstances of the case. Therefore, the rule regarding partial partition as it applies to the case of joint family properties cannot as such be applied in the case of partition of co-ownership properties in the possession of tenants-in-common.

25. Adverting to the facts, it would be noticed that the learned first Appellate Court by general and sweeping observations held that the suit was for partial partition as would be evident from para 29 of the judgment, which reads thus:

> *"29. The first and foremost question before this Court is "whether the partial partition is permissible in law and plaintiff had not included all the property jointly owned and possessed by the parties in the present suit?". The defendants had specifically pleaded that the plaintiffs have not included all the joint properties in*

the present suit, hence, the suit for partial partition was not maintainable. Issue No.8C was framed qua this plea. The plaintiff when appeared as PW-1 admitted that the parties were having joint and un-partitioned properties at Lahaul Spiti, Akhara Bazaar Kullu and Village Ruaru. Admittedly, these properties have not been included in the present suit. Hence, the suit for partial partition was not maintainable."

26. I really fail to understand as to how the learned first Appellate Court arrived at such a conclusion as it was incumbent upon it to have first clearly spelt out in detail the properties which according to it had been left out, so as to not only enable the parties but also this Court to arrive at a conclusion as to which of the properties had been left out and the same obviously could not have been left to guess work.

Property at Lahaul and Spiti:

27. It has already come on record and even otherwise not disputed by the respondents that the proceedings for partition of agricultural land situated at Lahaul and Spiti was already pending before the competent revenue authorities at the time of filing of the suit and this otherwise is the conclusion that has rightly been drawn by the learned trial Court while deciding issue No. 8C.

Property at Kullu:

28. As regards the property at Kullu, Mr. G.R. Palsra, learned counsel for the respondents had invited my attention to the copy of jamabandi Ext.DW-1/B pertaining to Phati Dhalpur for the year 2001-02 to vehemently canvass that the property reflected in this document has not been included in the suit.

29. I have gone through the aforesaid document and find that in columns No. 4 and 5, which pertain to the ownership and possession, it has specifically been recorded 'Avadi Pati Raghunathpur'. Once that be so, then it cannot be inferred that the properties mentioned in this jamabandi belongs to the parties.

30. However, learned counsel for the respondents would still insist that the property is shown as Abadi and, therefore, should be presumed that there are buildings standing over this land, which in turn belongs to the parties. I am afraid that this argument is totally fallacious and without merit. The respondents in order to establish that there was building(s) standing upon the aforesaid land was required to establish this fact by leading clear, cogent and convincing evidence and thereafter was further required to prove that the same were joint family property and thus was required to be put in the hotchpot.

Property at Ruaru:

31. Learned counsel for the respondents has vehemently argued that the properties in village Ruaru in Mauza Kot Kandi as reflected in jamabandi Exts.DW-1/C, DW-1/D, DW-1/E, DW-1/F, DW-1/G, DW-1/H and Ext.DW-1/J are joint family properties, but have not been included in the suit and, therefore, the suit being one for partial partition ought to be dismissed.

32. I have gone through the aforesaid documents, a perusal whereof reveals that the properties as mentioned therein again do not exclusively belong to either of the parties, but are even owned and possessed by the persons who have no relationship with the parties to the suit.

33. Once that be so, then obviously, the land of Village Ruaru could not have been included in the suit. Further the suit cannot be held to be one for partial partition because even as a Rule of Hindu law, if the property is not joint family property and the parties are not coparceners but are only co-owners or tenants-in-common, the rule of partition is not so rigid and even partial partition can be allowed. It is for the party contesting such partition to prove that much inconvenience shall be caused to them, otherwise in such given cases, it is then only a rule of processual law.

Substantial questions of law No. 1 and 2 are accordingly answered.

Substantial question of law No.3:

34. This question is no longer resintegra in view of the judgment rendered by a co-ordinate Bench (Justice Rajiv Sharma, J.) in ***Bahadur vs. Bratiya and others, 2016 AIR (HP) 58*** wherein it was categorically held that custom providing that the daughters will not inherit the property will be in derogation of the provision of Hindu Succession Act and cannot be recognized. It was further held that such custom would be in violation of Article 15 of the Constitution of India.

35. In view of the authoritative pronouncement on the point in issue, this question is virtually rendered academic and is answered accordingly.

36. Mr. G.R. Palsra, learned counsel for the respondents as last ditch effort would argue that the suit itself was not maintainable before the learned trial Court as the value of the property was worth several of crores, whereas the jurisdiction conferred upon the trial Court at the time of institution of the suit was hardly `5,00,000/- and thereafter subsequently enhanced to `10,00,000/-. I am afraid that even this submission of the learned counsel for the respondents cannot be countenanced firstly for the simple reason that the argument if accepted, would itself render the judgment in favour of the respondents by the first Appellate Court a nullity and that apart, even if it is assumed that the property is beyond the pecuniary jurisdiction of the trial Court, the same will have no bearing on the validity of the judgment and decree passed by it, more particularly when the respondents have failed to question the judgment and decree so passed on the ground that there has been prejudice on the merits (Refer: ***Kiran Singh*** versus ***Chaman Paswan AIR 1954 SC 340).***

37. This issue has already been considered by this Court in ***RSA No.115 of 2014, titled Surinder Singh Sautha*** *versus* ***Raja Yogindra Chandra***, decided on 29.05.2014, wherein it was held as under:-

> "18.The next point raised by learned counsel for the appellant is that the order passed by a Court lacking pecuniary jurisdiction is void, ab initio and, therefore, the judgment passed by the learned trial Court as affirmed by the learned lower Appellate Court is without jurisdiction and deserves to be set-aside. He referred to number of decisions of the various High Courts on the question viz. ***Mamraj Agarwala and others vs. Ahamad Ali Mahamad AIR 1919, Calcutta 984, Mool Chand Moti Lal vs. Ram Kishan and others AIR 1933 Allahabad 249, Shyam Nandan Sahay and others vs. Dhanpati Kuer and others AIR 1960 Patna 244 and Controller of Stores and another vs. M/s Kapoor Textile Agencies, AIR 1975 Punjab 321.***
>
> 19. The judgments relied upon by learned counsel for the appellant would not be of much significance and have lost efficacy in view of the judgment of the Hon'ble Supreme Court in ***Kiran Singh and others vs. Chaman Paswan and others AIR 1954 S.C.340*** wherein the Hon'ble Supreme Court held that when a case had been tried by a court on merits and judgment rendered, it should not be liable to be reversed purely on technical grounds, unless it had resulted in failure of justice, and the policy of the legislature has been to treat objections of jurisdiction both territorial and pecuniary as technical and not open to consideration by an appellate Court, unless there has been a prejudice on the merits. Further it may be observed that there have been a number of subsequent pronouncements of the Hon'ble Apex Court and also by this Court on this issue which otherwise are binding on this Court. The same are referred to and discussed in detail in the later part of the judgment.
>
> 20. The entire law with regard to the decree passed by a Court lacking pecuniary jurisdiction has been discussed in detail by the Hon'ble Supreme Court in ***Subhash Mahadevasa Habib vs. Nemasa Ambasa Dharmadas (dead) by LRs.***

And others (2007) 13 SCC 650 and the position has been summed up as follows:

> *"33. What is relevant in this context is the legal effect of the so-called finding in OS No. 4 of 1972 that the decree in OS No. 61 of 1971 was passed by a court which had no pecuniary jurisdiction to pass that decree. The Code of Civil Procedure has made a distinction between lack of inherent jurisdiction and objection to territorial jurisdiction and pecuniary jurisdiction. Whereas an inherent lack of jurisdiction may make a decree passed by that court one without jurisdiction or void in law, a decree passed by a court lacking territorial jurisdiction or pecuniary jurisdiction does not automatically become void. At best it is voidable in the sense that it could be challenged in appeal therefrom provided the conditions of Section 21 of the Code of Civil Procedure are satisfied.*
>
> *34. It may be noted that Section 21 provided that no objection as to place of the suing can be allowed by even an appellate or revisional court unless such objection was taken in the court of first instance at the earliest possible opportunity and unless there has been a consequent failure of justice. In 1976, the existing section was numbered as sub-section (1) and sub-section (2) was added relating to pecuniary jurisdiction by providing that no objection as to competence of a court with reference to the pecuniary limits of its jurisdiction shall be allowed by any appellate or revisional court unless such objection had been taken in the first instance at the earliest possible opportunity and unless there had been a consequent failure of justice. Section 21-A also was introduced in 1976 with effect from 1.2.1977 creating a bar to the institution of any suit challenging the validity of a decree passed in a former suit between the same parties on any ground based on an objection as to the place of suing. The amendment by Act 104 of 1976 came into force only on 1.2.1977 when OS No. 4 of 1972 was pending. By virtue of Section 97 (2) (c) of the Amendment Act, 1976, the said suit had to be tried and disposed of as if Section 21 of the Code had not been amended by adding sub-section (2) thereto. Of course, by virtue of Section 97 (3) Section 21-A had to be applied, if it has application. But then, Section 21-A on its wording covers only what it calls a defect as to place of suing.*
>
> *35. Though Section 21-A of the Code speaks of a suit not being maintainable for challenging the validity of a prior decree between the same parties on a ground based on an objection as to "the place of suing", there is no reason to restrict its operation only to an objection based on territorial jurisdiction and excluding from its purview a defect based on pecuniary jurisdiction. In the sense in which the expression "place of suing" has been used in the Code it could be understood as taking within it both territorial jurisdiction and pecuniary jurisdiction.*
>
> *36. Section 15 of the Code deals with pecuniary jurisdiction and, Sections 15 to 20 of the Code deal with "place of This Court in Bahrein Petroleum Co. Ltd. v. P.J. Pappu AIR 1966 SC 634 made no distinction between Section 15 on the one hand and Sections 16 to 20 on the other, in the context of Section 21 of the Code. Even otherwise, considering the interpretation placed by this Court on Section 11 of the Suits Valuation Act and treating it as equivalent in effect to Section 21 of the Code of Civil Procedure as it existed prior to the amendment in 1976, it is possible to say, especially in the context of the amendment brought about in Section 21 of the Code by Amendment Act 104 of 1976, that Section 21-A was intended to cover a challenge to a prior decree as regards lack of*

jurisdiction, both territorial and pecuniary, with reference to the place of suing, meaning thereby the court in which the suit was instituted.

37. As can be seen, Amendment Act 104 of 1976 introduced sub-section (2) relating to pecuniary jurisdiction and put it on a par with the objection to territorial jurisdiction and the competence to raise an objection in that regard even in an appeal from the very decree. This was obviously done in the light of the interpretation placed on Section 21 of the Code as it existed and Section11 of the Suits Valuation Act by this Court in Kiran Singh v. Chaman Paswan AIR 1954 SC 340 followed by Hiralal Patni v. Kali Nath AIR 1962 SC 199 and Bahrein Petroleum Co. Ltd. v. P.J.Pappu AIR 1966 SC 634. Therefore, there is no justification in understanding the expression "objection as to place of suing" occurring in Section 21-A as being confined to an objection only in the territorial sense and not in the pecuniary sense. Both could be understood, especially in the context of the amendment to Section 21 brought about by the Amendment Act, as objection to place of suing.

38. It appears that when the Law Commission recommended insertion of Section 21-A into the Code, the specific provision subsequently introduced in sub-section (2) of Section 21 relating to pecuniary jurisdiction was not there. Therefore, when introducing sub-section (2) of Section 21 by Amendment Act 104 of 1976, the wordings of Section 21-A as proposed by the Law Commission were not suitably altered or made comprehensive. Perhaps, it was not necessary in view of the placing of Sections 15 to 20 in the Code and the approach of this Court in Bahrein Petroleum Co. Ltd. AIR 1966 SC 634. But we see that an objection to territorial jurisdiction and to pecuniary jurisdiction, is treated on a par by Section 21. The placing of Sections 15 to 20 under the heading "place of suing" also supports this position. Taking note of the object of the amendment in the light of the law as expounded by this Court, it would be incongruous to hold that Section 21-A takes in only an objection to territorial jurisdiction and not to pecuniary jurisdiction. We are therefore inclined to hold that in the suit OS No. 4 of 1972, the validity of the decree in OS No. 61 of 1971 could not have been questioned based on alleged lack of pecuniary jurisdiction. Of course, the suit itself was not for challenging the validity of the decree in OS No. 61 of 1971 an the question of the effect of the decree in OS No. 61 of 1971 only incidentally arose. In a strict sense, therefore, Section 21-A of the Code may not ipso facto apply to the situation.

39. But the fact that Section 21 (2) or Section 21-A of the Code may not apply would not make any difference in view of the fact that the position was covered by the relevant provision in the Suits Valuation Act, 1887. Section 11 of the Suits Valuation Act provided that notwithstanding anything contained in Section 578 (Section 99 of the present Code covering errors or irregularity) of the Code of Civil Procedure, an objection that a court which had no jurisdiction over a suit had exercised it by reason of undervaluation could not be entertained by an appellate court unless the objection was taken in the court of first instance at or before the hearing at which the issues were first framed or the appellate court is satisfied for reasons to be recorded in writing that the overvaluing or undervaluing of the suit has prejudicially affected the disposal of the suit. There was some confusion about the content of the section.

40. The entire question was considered by this Court in Kiran Singh v. Chaman Paswan, AIR 1954 SC 340. Since in the present case, the objection is based on the valuation of the suit or the pecuniary jurisdiction,

we think it proper to refer to that part of the judgment dealing with Section 11 of the Suits Valuation Act. Their Lordships held: (AIR p. 342, para 7)

"7. ….It provides that objections to the jurisdiction of a court based on overvaluation or undervaluation shall not be entertained by an appellate court except in the manner and to the extent mentioned in the section. It is a self-contained provision complete in itself, and no objection to jurisdiction based on overvaluation or undervaluation can be raised otherwise than in accordance with it.

With reference to objections relating to territorial jurisdiction, Section 21 of the Civil Procedure Code enacts that no objection to the place of suing should be allowed by an appellate or revisional court, unless there was a consequent failure of justice. It is the same principle that has been adopted in Section 11 of the Suits Valuation Act with reference to pecuniary jurisdiction. The policy underlying Sections 21 and 99 of the Civil Procedure Code and Section 11 of the Suits Valuation Act is the same, namely, that when a case had been tried by a court on the merits and judgment rendered, it should not be liable to be reversed purely on technical grounds, unless it had resulted in failure of justice, and the policy of the legislature has been to treat objections to jurisdiction both territorial and pecuniary as technical and not open to consideration by an appellate court, unless there has been a prejudice on the merits."

In Hiralal Patni v. Kali Nath, AIR 1962 SC 199, it was held that: (AIR p.201, para 4)

"4….. It is well settled that the objection as to local jurisdiction of a court does not stand on the same footing as an objection to the competence of a court to try a case. Competence of a court to try a case goes to the very root of the jurisdiction, and where it is lacking, it is a case of inherent lack of jurisdiction. On the other hand an objection as to the local jurisdiction of a court can be waived and this principle has been given a statutory recognition by enactments like Section 21 of the Code of Civil Procedure."

In Bahrein Petroleum Co. Ltd. v. P.J. Pappu AIR 1966 SC 634, it was held Section 21 is a statutory recognition of the principle that the defect as to the place of suing under Sections 15 to 20 of the Code may be waived and that even independently of Section 21, a defendant may waive the objection and may be subsequently precluded from taking it."

21. In fact, a similar proposition came up before this Court (Coram : Deepak Gupta, J, as his Lordship then was) in ***Tikam Ram and others vs. Purshotam Ram and others 2011 (3) Shim. L.C. 251*** wherein again after noticing all the relevant provisions along with law, it was held as under:

"19. To appreciate the rival contentions of the parties, it would be appropriate to refer to Section 21 of the CPC and Section 11 of the Suits Valuation Act which read as follows:

Civil Procedure Code:

"21. Objections to jurisdiction. – [(1) No. objection as to the place of suing shall be allowed by any Appellate or Revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled, at or before such settlement, and unless there has been a consequent failure of justice.

(2) No objection as to the competence of a court with reference to the pecuniary limits of its jurisdiction shall be allowed by any Appellate or

Revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity, and, in all cases where issues are settled, at or before such settlement, and unless there has been a consequent failure of justice.

(3) No objection as to the competence of the executing Court with reference to the local limits of its jurisdiction shall be allowed by any Appellate or Revisional Court unless such objection was taken in the executing Court at the earliest possible opportunity, and unless there has been a consequent failure of justice."

Suits Valuation Act

"11. Procedure where objection is taken on appeal on revision that a suit or appeal was not properly valued for jurisdictional purposes.- (1) Notwithstanding anything in [Section 578 of the Code of Civil Procedure (14 of 1882)] and objection that by reason of the over-valuation or under-valuation of suit or appeal a Court of first instance or lower Appellate Court which had no jurisdiction with respect to the suit or appeal exercise jurisdiction with respect thereto shall not be entertained by an Appellate Court unless.-

> *(a) the objection was taken in the Court of first instance at or before the hearing at which issues were first framed and recorded, or in the lower Appellate Court in memorandum of appeal to that Court, or*
>
> *(b) the Appellate Court is satisfied, for reasons to be recorded by it in writing, that the suit or appeal was over-valued or under-valued, and that the over-valuation or undervaluation thereof has prejudicially affected the disposal of the suit or appeal on its merits.*

(2) If the objection was taken in the manner mentioned in clause (a) of sub-section (1), but the Appellate Court is not satisfied as to both the matters mentioned in clause (b) of that sub-section and has before it the materials necessary for the determination of the other grounds of appeal to itself, it shall dispose of the appeals as if there had been no defect of jurisdiction in the Court of first instance or lower Appellate Court.

(3) If the objection was taken in that manner and the Appellate Court is satisfied as to both those matters and has not those materials before it, it shall proceed to deal with the appeal under the rules applicable to the Court with respect to the hearing of appeals; but if it remands the suits or appeal, or frames and refers issues for trial, or requires additional evidence to be taken, it shall direct its order to a Court competent to entertain the suit or appeal.

(4) The provisions of the Section with respect to an Appellate Court shall, so far as they can be made applicable, apply to a Court exercising revisional jurisdiction under [Section 622 of the Code of Civil Procedure (14 of 1882)] or other enactment for the time being in force.

(5) This Section shall come into force on the first day of July, 1887."

20. The Apex Court in Kiran Singh and others vs. Chaman Paswan and others, AIR 1954 (41), SC 340 was dealing with a case for recovery of possession of more than 12 acres of land. The suit was dismissed. The plaintiff thereafter filed an appeal in the court of District Judge who also dismissed the appeal. In the second appeal, the plaintiffs for the first time raised an objection that the suit itself had not been properly valued for the

purpose of Court fee and jurisdiction and prayed that their appeal should be treated as a first appeal against the order of the learned trial Court. The High Court rejected the plea of the plaintiffs on the ground that the defendants could succeed only when they established prejudice on the merits of the case. An appeal was filed before the Apex Court and it was urged that the decree passed by the District Judge was a nullity because in an original suit having valuation of Rs.9980/-, appeal would lie to the High Court alone and not to the District Judge. The Apex Court held as follows:-

> *"It is a fundamental principle well established that a decree passed by a Court without jurisdiction is a nullity and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject matter of the action, strikes at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties."*

21. Relying upon these observations, Sh. Bhupender Gupta, learned senior counsel for the respondents submits that the decree and judgment of the learned trial Court is a nullity and the learned District Judge was justified in ordering the return of the plaint. This argument cannot be accepted to be correct because it was after making these observations that the Apex Court dealt with Section 11 of the Suits Valuation Act.

22. Dealing with the import of the word prejudice occurring in Section 11, the Apex Court held as follows:-

> *"The language of Section 11 of the Suits Valuation Act is plainly against such a view. It provides that over valuation or undervaluation must have prejudicially affected the disposal of the case on the merits. The prejudice on the merits must be directly attributable to over valuation or under valuation and an error in a finding of fact reached on a consideration of the evidence cannot possibly be said to have been caused by over valuation or undervaluation. Mere errors in the conclusions on the points for determination would therefore be clearly precluded by the language of the Section."*

23. It is also important to note that the aforesaid decision of the Apex Court was rendered much before the amendment of Section 21 of the Code of Civil Procedure. Vide Code of Civil Procedure Amendment Act, 1976, sub-sections 2 and 3 were introduced in Section 21 and sub-section 2 clearly provides that no objection as to the competence of a Court with reference to the pecuniary limits of its jurisdiction shal be allowed by any Appellate Court unless such objection was taken in the court of the first instance at the earliest possible opportunity before settlement of issues and unless there has been a consequent failure of justice. Sub section 2 clearly envisages that not only should the objections have been taken at the first instance but there should have been consequent failure of justice. If there is no failure of justice then the Court would not entertain the objection as to the competence of the Court with reference to its pecuniary limits. This aspect of the matter has not at all been considered by the lower appellate Court.

24. In Sat Paul and another v. Jai Bhan Ananta Saini, AIR 1973 Punjab and Haryana 58 decided prior to the amendment to Section 21 and only taking into consideration Section 11 of the Suits Valuation Act, a learned Single Judge of the Punjab and Haryana High Court held that without showing that any prejudice has been caused, the Appellate Court could not set aside the judgment only on the ground of the suit being improperly valued.

25. In Harshad Chiman Lal Modi v. DLF Universal Ltd. and another 2005 (7) SCC 791 the Apex Court held as follows:

> *"We are unable to uphold the contention. The jurisdiction of a Court may be classified into several categories. The important categories are (i) territorial or local jurisdiction; (ii) pecuniary jurisdiction; and (iii) jurisdiction over the subject matter. So far as territorial and pecuniary jurisdictions are concerned, objection to such jurisdiction has to be taken at the earliest possible opportunity and in any case at or before settlement of issues. The law is well settled on the point that if such objection is not taken at the earliest, it cannot be allowed to be taken at a subsequent stage. Jurisdiction as to subject-matter, however, is totally distinct and stands on a different footing. Where a Court has no jurisdiction over the subject matter of the suit by reason of any limitation imposed by statute, charter or commission, it cannot take up the cause or matter. An order passed by a Court having no jurisdiction is a nullity."*

26. The Apex Court further went on to hold that the Courts at Delhi did not have jurisdiction under Section 16 to decide the issue and, therefore, lacked inherent jurisdiction to decide the matter.

27. The then Hon'ble Chief Justice of this Court in Ajay Singh v. Tikka Brijendra Singh and others, 2006 (2) SLC 394 considered this question in detail and after noting the provisions of Sections 21 and 99 of the Civil Procedure Code and Section11 of the Suits Valuation Act held as follows:

> *"A combined reading of the aforesaid three provisions of law clearly suggests, first and foremost that no objection as to the competence of a Court with reference to its pecuniary limits of jurisdiction shall be allowed unless there has been a consequential failure of justice, and secondly, that no decree shall be reversed or substantially varied etc. on account of any error etc. including an error of jurisdiction which does not affect the merits of the case and thirdly, no objection about the jurisdiction of a Court for over valuation or under valuation of a suit etc. shall be entertained by an Appellate Court unless, apart from the objection having been taken in the Court of first instance etc., the Appeal Court is satisfied for reasons to be recorded in writing that such overvaluation or under valuation has prejudicially affected the disposal of the suit by the trial Court."*

28. In Hasham Abbas Sayyad v. Usman Abbas Sayyad and others, 2007 (2) SCC 355, the Apex Court held as follows:-

> *"24. We may, however, hasten to add that a distinction must be made between a decree passed by a Court which has no territorial or pecuniary jurisdiction in the light of Section 21 of the Code of Civil Procedure, and a decree passed by a Court having no jurisdiction in regard to the subject matter of the suit. Whereas in*

> *the former case, the appellate Court may not interfere with the decree unless prejudice is shown, ordinarily the second category of the cases would be interfered with."*
>
> *29. It would be pertinent to mention that the Apex Court and this Court clearly laid down that so far as objections to the territorial and pecuniary jurisdiction are concerned, the objections must be taken at the earliest possible opportunity and order of the Court not having pecuniary jurisdiction cannot be said to be an nullity. The Court does not lack jurisdiction to decide such a dispute. It only does not have the pecuniary jurisdiction to decide the dispute. Therefore, if it entertains and tries the matter and decides these disputes then the learned Appellate Court cannot set aside its findings unless it comes to the conclusion that prejudice has been caused in terms of Section 11 of the Suits Valuation Act and consequent failure of justice in terms of Section 21 (2) of the Code of Civil Procedure."*

38. In view of the aforesaid discussion, I find merit in this appeal and the same is accordingly allowed and the judgment and decree passed by learned first Appellate Court is set-aside and the judgment and decree of the learned trial Court is restored. However, before parting, it needs to be observed that as the suit was filed about two decades back on 19.5.1997, the same has to be taken to its logical end expeditiously. Accordingly, in the event of the appellants approaching the learned trial Court for passing a final decree, the Court shall make all endeavour to pass a final decree as expeditiously as possible and in no event later than three months of the filing thereof.

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

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

Rekha ……Petitioner.

Versus

The H.P. State Electricity Board & another ……Respondents.

CWP No. 3647 of 2011
Reserved on: 18.03.2017
Decided on: 1.04.2017

Constitution of India, 1950- Article 226- Deceased was standing- he was caught by electric wire, which was hanging very low- deceased was shifted to Hospital but he succumbed to the injuries- a writ petition was filed for seeking compensation- held that where there is prima facie evidence of negligence, the Court cannot grant relief in exercise of writ jurisdiction- deceased was a boy of 13 years whose life was curtailed due to accident- there is violation of right of life- respondent stated that deceased had died due to his own negligence but a person undertaking an activity involving hazardous or risky exposure to human life, is liable to compensate other person for the injury sustained by the other person – contributory negligence is no defence in such situation **-** considering the age of the deceased, respondent directed to pay a compensation of Rs.6 lacs with interest @ 7.5% per annum. (Para-7 to 18)

Cases referred:

Nilabati Behera (Smt) alias Lalita Behera (through the Supreme Court Legal Aid Committee) vs. State of Orissa and others, (1993) 2 Supreme Court Cases 746

Chairman, Railway Board and Others vs. Chandrima Das (Mrs)and others, (2000) 2 Supreme Court Cases 465
Sube Singh vs. State of Haryana and others, (2006) 3 SCC 178
M.P. Electricity Board vs. Shail Kumari and others, (2002) 2 Supreme court Cases 162
Delhi Development Authority vs. Bhagwan and others, 2015 ACJ 324
Paramjit Kaur & others vs. State of Punjab & others, AIR 2009 Punjab and Haryana 27

For the petitioner: Ms. Uma Manta, Advocate.
For the respondents: Mr. Vivek Sharma, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The petitioners, being parents of the deceased, Deepak Kumar (hereinafter referred to as 'the deceased'), maintained the present writ petition under Article 226 of the Constitution of India, seeking compensation from the respondents, i.e. Himachal Pradesh State Electricity Board, (hereinafter referred to as 'respondents-Board') on account of death the deceased due to electrocution, which as per the petitioners, was due to the negligence of the respondents-Board. During the pendency of the petition, petitioner No. 2 (father of the deceased) died and his legal representatives were brought on record.

2. Succinctly, the facts, as per the petitioners, essential for adjudication of this petition, are that on 18.04.2008 the deceased was standing on his lintel. Suddenly, the deceased was caught by the electric wires, which were hanging very low. The deceased, in an unconscious state, was shifted to Indira Gandhi Medical College on the same day, however, during hospitalization he died on 20.04.2008. The occurrence was also reported to the police on 18.04.2008. Postmortem report revealed that the deceased died due to electrocution. As per the petitioners, the deceased died due to the negligence of the respondents, as the respondents-Board did not lay the electric wires as per the prescribed norms under the Indian Electricity Act and Rules. It is further contended that the deceased was thirteen years of age at the time of the incident and was earning Rs. 4500/- per month by working in the locality. The deceased was contributing towards the expenses of the family and due to his death the family not only lost monetary contribution, but also lost his love, affection etc. As per the petitioners, the deceased died due to the negligence of the respondents-Board, as the respondents-Board is wholly responsible for upkeep and supply of electricity. It is further contended that the respondents have failed in supervising and taking necessary precautions while transmitting electricity through high tension electricity line. As per the petitioners, the respondents, by negligently discharging their statutory duties, not only endangered, but have taken away the life of the deceased, by contravening Article 21 of the Constitution of India, thus they are liable to pay compensation to the petitioners. The petitioners have sought compensation to the tune of Rs. 10,00,000/- (rupees ten lac) from the respondents by issuing a legal notice dated 29.09.2010, however, respondents turned deaf ear and neither replied the notice nor released any amount of compensation. Hence the petitioners were virtually forced to resort to the present writ petition.

3. The respondents, by way of filing reply to the petition, resisted the claim of the petitioners. As per the respondents, the petitioners have not approached this Court with clean hands, they have no locus standi and this Court has no jurisdiction to entertain the present petition. The respondents admitted the accident on 18.04.2008. As per the respondents, the accident took place in an under construction and unauthorized building of Shri Vicky and Shri Subhash (father of the deceased and his brother). The respondents on 16.04.2008 issued notice to Shri Subhash to stop the work, however, construction continued and the accident took place only due to the adamancy of Shri Subhash and Shri Vicky. The respondents have further averred that the electric line in question was erected in the year 1989 after taking all obligatory clearances and since then the same has been maintained by them properly. As per the

respondents, the accident took place due to the unauthorized construction being raised by Shri Subhash and Shri Vicky. The respondents have also issued notice for maintaining adequate distance from the 33KV HT line, thus they cannot be held liable for the negligence of the petitioners. The deceased while playing on the lintel with an iron stick. Which got in contact with live wires and due to shock fell down on the road. The owner of the building did not take mandatory clearances, as required under the law, from the respondents-Board and thus the petitioners are themselves liable for the accident.

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

5. The learned counsel for the petitioners has argued that the deceased died due to the negligence of the respondents. She has further argued that life of the deceased was curtailed due to the negligence of the respondents, so there is violation of right to life as provided under Article 21 of the Constitution of India and the respondents are liable to pay compensation to the petitioners. She has relied upon the following judicial pronouncements:

1. *M.P. Electricity Board vs. Shail Kumari and others, (2002) 2 Supreme court Cases 162;*
2. *Paramjit Kaur & others vs. State of Punjab & others, AIR 2009 Punjab and Haryana 27;*
3. *Delhi Development authority vs. Bhagwan and others, 2015 ACJ 324; and*
4. *Naval Kumar alias Rohit Kumar vs. Sate of H.P. & others, CWP No. 475 of 2013* (decided by a learned Single Judge of this Court on 09.01.2015).

6. Conversely, the learned counsel for the respondents-Board has argued that the deceased died due to the negligence of the petitioners, as they have raised unauthorized construction under the high tension electricity wires and despite notice of the respondents, they did not desist from raising construction. Thus, negligence cannot be attributed to the respondents-Board and they are not liable to pay any compensation to the petitioners.

7. The first and foremost question is - whether this Court can grant compensation while exercising jurisdiction under Article 226 of the Constitution of India, as the petitioners have willingly invoked the jurisdiction of this Court under Article 226 of the Constitution of India without taking recourse to other civil remedies available to them under the law?

8. The above question is no longer *res integra* and in number of judgments it has been addressed. In ***Nilabati Behera (Smt) alias Lalita Behera (through the Supreme Court Legal Aid Committee) vs. State of Orissa and others, (1993) 2 Supreme Court Cases 746,*** it has been held by the Hon'ble Supreme Court that compensation can be granted while exercising writ jurisdiction, however, there must be *prima facie* proof that the accident took place due to the negligence of the respondents and the writ Courts cannot shut its doors and relegate the approaching party to avail other efficacious remedies. It would be apt to extract para 17 of the judgment in ***Nilabati Behera's*** case (supra) herein:

> *"It follows that 'a claim in public law for compensation' for contravention of human rights and fundamental freedoms, the protection of which is guaranteed in the Constitution, is an acknowledged remedy for enforcement and protection of such rights, and such a claim based on strict liability made by resorting to a constitutional remedy provided for the enforcement of a fundamental right is 'distinct from, and in addition to the remedy private law for damages for the tort' resulting from the contravention of the fundamental right. The defence of sovereign immunity being inapplicable, and alien to the concept of guarantee of fundamental rights, there can be no question of such a defence being available in the constitutional remedy. It is this principle which justifies award of monetary compensation for contravention of fundamental rights guaranteed by the Constitution, when that is the only practicable mode of redress available for the contravention made by the State or its servants in the purported exercise of their*

powers, and enforcement of the fundamental right is claimed by resort to the remedy in public law under the Constitution by recourse to Arts. 32 and 226 of the Constitution. This is what was indicated in Rudul Sah (AIR 1983 SC 1086) and is the basis of the subsequent decisions in which compensation was awarded under Arts. 32 and 226 of the Constitution, for contravention of fundamental rights."

9. In yet another decision of the Hon'ble Apex Court in ***Chairman, Railway Board and Others vs. Chandrima Das (Mrs)and others, (2000) 2 Supreme Court Cases 465,*** it has been held that a writ petition under Article 226 of the Constitution of India, seeking compensation against the State or its instrumentalities, is maintainable even if there are other alternative remedies available to the petitioner. Relevant paras of the judgment (supra) are reproduced hereinbelow:

"6. We may first dispose of the contention raised on behalf of the appellants that proceedings under Article 226 of the Constitution could not have been legally initiated for claiming damages from the Railways for the offence of rape committed on Smt. Hanuffa Khatoon and that Smt. Hanuffa Khatoon herself should have approached the court in the realm of private law so that all the questions of fact could have been considered on the basis of the ingredients of the commission of "tort" against the person of Smt. Hanuffa Khatoon wee made out, so as to be entitled to the relief of damages. We may also consider the question of locus standi as it is contended on behalf of the appellants that Mrs. Chandrima Das, who is a practicing advocate of the High Court of Calcutta, could not have legally instituted these proceedings.

… … … … … …

11. Having regard to what has been stated above, the contention that Smt. Hanuffa Khatoon should have approached the civil Court for damages and the matter should not have been considered in a petition under Article 226 of the Constitution, cannot be accepted. Where public functionaries are involved and the matter relates to the violation of fundamental rights or the enforcement of public duties, the remedy would still be available under the public law notwithstanding that a suit could be filed for damages under private law."

Therefore, keeping the above settled position of law in mind, the present writ petition is maintainable. The argument of the learned counsel for the respondents-Board that the compensation cannot be granted by this Court while exercising writ jurisdiction and the petitioners may be relegated to appropriate Civil Court seeking compensation, comes a cropper. Therefore, compensation can be granted by the writ Courts while exercising writ jurisdiction, provided there must be *prima facie* proof of negligence of the respondents.

10. The deceased, was a boy of 13 years, was electrocuted and accident has been admitted by the respondents. Moreover, it has also been established, through the postmortem report that the deceased died due to electrocution. The deceased had a right to life enshrined under Article 21 of the Constitution of India, however, his life was curtailed due to the accident. Thus, clearly there is violation of right to life of the deceased and the Hon'ble Apex Court in ***Sube Singh vs. State of Haryana and others, (2006) 3 SCC 178,*** held that grant of compensation against the State or its instrumentalities is an appropriate and effective remedy for redressal of an established infringement of a fundamental right under Article 21 of the Constitution of India. It is gainful to reproduce para 38 of the judgment (supra), which is as under:

"38. It is thus now well settled that award of compensation against the State is an appropriate and effective remedy for redress of an established infringement of a fundamental right under Article 21, by a public servant. The quantum of compensation will, however, depend upon the facts and circumstances of each

case. Award of such compensation (by way of public law remedy) will not come in the way of the aggrieved person claiming additional compensation in a civil court, in enforcement of the private law remedy in tort, nor come in the way of the criminal court ordering compensation under section 357 of Code of Civil Procedure."

11. The next question arises as to whether the respondents were negligent in maintaining their 33KV HT line and due to their negligence the deceased died?

12. The expression 'negligence' is focal point in this case and liability of compensation can only be fastened upon the respondents in case it is found that they were negligent or careless in maintaining their 33KV HT line. Apparently, by way of filing reply to the writ petition, the respondents averred that the deceased died due to the negligence of the petitioners. As per the respondents, the father of the deceased and his brother were raising unauthorized construction under the high tension electricity line and during the construction work the deceased was working with iron stick, which touched the high tension line and he died due to electrocution. Thus, the respondents-Board attributed the negligence of the petitioners and virtually refuted their carelessness in maintaining their high tension line. However, the question of negligence still subsists in this case, as negligence means whether the authorities were vigilant enough **'to take due care'** in maintaining their high tension line and they, in order to obviate any danger to human life, taken all precautionary, protective and preventive measures while performing their duties to safeguard the human life. This point has already been set at right by the Hon'ble Apex Court in ***M.P. Electricity Board vs. Shail Kumari and others, (2002) 2 Supreme court Cases 162,*** wherein it was held that a person undertaking an activity involving hazardous or risky exposure to human life, is liable under law of torts to compensate for the injury suffered by any other person, irrespective of any negligence or carelessness on the part of the managers of such undertakings. For ready reference para No. 8 of the judgment (supra) is extracted as under:

"Even assuming that all such measures have been adopted, a person undertaking an activity involving hazardous or risky exposure to human life, is liable under law of torts to compensate for the injury suffered by any other person, irrespective of any negligence or carelessness on the part of the managers of such undertakings. The basis of such liability is the foreseeable risk inherent in the very nature of such activity. The liability cast on such person is known, in law, as "strict liability". It differs from the liability which arises on account of the negligence or fault in this way i.e. the concept of negligence comprehends that the foreseeable harm could be avoided by taking reasonable precautions. If the defendant did all that which could be done for avoiding the harm he cannot be held liable when the action is based on any negligence attributed. But such consideration is not relevant in cases of strict liability where the defendant is held liable irrespective of whether he could have avoided the particular harm by taking precautions."

In view of the above referred ratio of law, the question of negligence does not at all arise in cases of strict liability, as the present one. In the present case as well, respondents were statutorily under duty to provide electricity, upkeep the electricity lines and also to prevent any peril to the human life. Thus, in cases of perilous threat to human life, contributory negligence of individual(s), as alleged by the respondents-Board, can always be given a go-by and the authority, which is under statutory duty to maintain such perilous activity, is under obligation to compensate for the injury/death of the individual(s). Therefore, the argument that the respondents were not negligent in maintaining their HT line and the deceased died due to the negligence of the petitioners is not acceptable, as irrespective of any negligence on the part of the respondents, they are liable to pay compensation to the petitioners and the respondents-Board cannot get the benefit of contributory negligence of the petitioners.

13. The learned counsel for the petitioners has also relied upon the judgment rendered by the Hon'ble Apex Court in ***M.P. Electricity Board vs. Shail Kumari and others, (2002) 2 Supreme court Cases 162,*** wherein it has been held that a person undertaking an

activity involving hazardous or risky exposure to human life, is liable under law of torts to compensate for the injury suffered by any other person, irrespective of any negligence or carelessness on the part of the managers of such undertakings. This judgment is applicable to the facts of the case in hand, thus the respondents are saddled with liability to pay damages to the petitioners.

14. In the instant case, the deceased was electrocuted and consequently he died. Admittedly, electricity is a dangerous commodity and statutory duty is on the shoulders of the respondents-Board. The respondents were duty bound to take preventive and protective measures to avoid perilous escape of electricity through their high tension electricity lines. The deceased came in contact with low and live high tension electricity wire, when he was working/playing on the lintel, thus the present is a case where principle of *'res ipsa loquitour'* is attracted. The principle of *res ipsa loquitour* means that *"the mere occurrence of some types of accident is sufficient to imply negligence"*, so accident only is sufficient for grant of compensation to the petitioners.

15. The judgment rendered by Hon'ble Delhi High Court in ***Delhi Development Authority vs. Bhagwan and others, 2015 ACJ 324,*** is also relied upon by the learned counsel for the petitioners, wherein it has been held that primary function of maxim *res ipsa loquitour* is to avoid injustice. Relevant portion of para 3 of the judgment (supra) is extracted as under:

> *"3. ………………………………*
>
> *"(9) … The maxim is only a convenient label to apply to a set of circumstances in which the plaintiff proves a case so as to call for a rebuttal from the defendant, without having to allege and prove any specific act or omission on the part of the defendant. The principal function of the maxim is to prevent injustice which would result if a plaintiff was invariably compelled to prove the precise cause of the accident and the defendants responsible for it, even when the facts bearing on the matter are at the outset unknown to him and often within the knowledge of the defendant…The maxim is based on common sense and its purpose is to do justice when the facts bearing on the causation and on the care exercised by defendant are at the outset unknown to the plaintiff and are or ought to be within the knowledge of the defendant."*

Thus, in the present set of circumstances, maxim *res ipsa loquitour* is relevant and applicable. The petitioners have a right to compensation, as mere occurrence of an accident, as in the present case, is sufficient to imply negligence of the respondents-Board and the judgment referred to above is also applicable to the facts of the present case.

16. The learned counsel for the petitioners has further relied upon a judgment of Hon'ble High Court of Punjab and Haryana rendered in ***Paramjit Kaur & others vs. State of Punjab & others, AIR 2009 Punjab and Haryana 27,*** wherein the deceased was 35 years of age and was earning Rs. 25,000/- per month, it was held that in cases of fatal accidents of electrocution while determining compensation underlying principles of Motor Vehicles Act, 1988, can be adopted. In the case in hand, the income of the deceased, as per the petitioners, was Rs. 4,500/- per month, however, there is nothing on record to establish this fact. So, the bald assertion of the petitioners, qua the income of the deceased, without any lateral support cannot be accepted. Therefore, the judgment (supra) is not applicable to the present case.

17. After exhaustively dealing both with facts and law, this Court is of the opinion that while exercising writ jurisdiction compensation can be granted and merely on the ground that other civil remedy was available to the petitioners, they cannot be relegated to resort to that, as that would defeat the very purpose of justice. This Court also comes to the conclusion that irrespective of any negligence or carelessness on the part of the respondents-Board, they are liable to pay compensation to the petitioners.

18. Now, the only point remains unaddressed is what should be the just and fair compensation? As already discussed above, parameters of Motor Vehicle Act, are not strictly

attracted in the present case, as nothing substantial, qua the income of the deceased, has come on record. As per the petitioners, the deceased, at the time of accident, was 13 years of age, however, income of the deceased cannot be construed only on the basis of pleadings made by the petitioners, especially when such pleadings lack any supporting mateiral. Therefore, this Court is left with no other option, but to grant lump sump general damages to the petitioners for non-pecuniary loss viz., pain, suffering, trauma, frustration, loss of love and affection etc. and the respondents-Board is directed to pay compensation of Rs. 6,00,000/- (Rupees six lac) to the petitioners within a period of three months, failing which it shall carry interest @ 7.5% per annum till disbursement of the same, from the date of passing of the judgment.

19. Taking into consideration the relationship of the petitioners with late Shri Vicky (father of deceased-Deepak Kumar), it is ordered that Smt. Rekha (mother of deceased-Deepak Kumar and wife of late Shri Vicky) is entitled to Rs. 2,00,000/- (Rupees two lac), Master Sahil (minor son of late Shri Vicky) is entitled to Rs. 2,00,000/- (Rupees two lac) and Smt. Dawarka Devi and Shri Biloo Ram alias Prithu (parents of late Shri Vicky) are entitled to Rs. 1,00,000/- (Rupees one lac) each. The amount falling to the share of Master Sahil be deposited in a Fixed Deposit till he attains the age of 25 years, however, the interest to be accrued thereupon will be disbursed to him after every three months, if he so chooses.

20. In view of the above, the writ petition is allowed and disposed. All pending application(s), if any, also stand(s) disposed of.

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

Smt. Ruma Devi ..... Petitioner.

Versus

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

CWP No.867 of 2009

Date of Decision: 1st April, 2017

Constitution of India, 1950- Article 226- Petitioner was appointed as anganwadi worker- her appointment was quashed and set aside in an appeal filed by respondent No.6- the petitioner filed an appeal, which was initially allowed but the order was set aside in review- aggrieved from the order, the present writ petition has been filed- held that Divisional Commissioner had set aside his order in review but there is no provision of review in the scheme – writ petition allowed and the order passed by Divisional Commissioner set aside. (Para-8 and 9)

For the Petitioner	Dr.Lalit K. Sharma, Advocate.
For the Respondents	Mr. P.M.Negi, Additional Advocate General, with Mr. Ramesh Thakur, Deputy Advocate General, for respondents No.1 to 5. Mr. G.R.Palsra, Advocate, for respondent No.6.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (Oral)

Petitioner, being aggrieved and dissatisfied with the order dated 24.2.2009 **(Annexure P-7)**, passed by the Divisional Commissioner, Mandi Division, H.P., in Miscellaneous Appeal No.588 of 2008, whereby the Review Petition having been filed on behalf of respondent No.6 came to be allowed, has approached this Court by way of present writ petition seeking following reliefs:-

> *" That the impugned order dated 24.2.2009 passed by Divisional Commissioner Mandi annexure P-7 may kindly be set-aside and quashed and the respondent may be directed to allow the petitioner to continue to work against the post of Anganwadi Worker in Anganwadi Centre Sungarahan, Tehsil and District Mandi on the strength of annexure P-2 and annexure P-6."*

2. Briefly stated facts, as emerged from the record are that petitioner namely Ruma Devi was appointed as Anganwadi Worker in Anganwadi Centre, Sungrahan vide appointment letter **(Annexure P-2)**, dated 18.8.2007. Respondent No.6, being aggrieved with the selection of the petitioner, preferred an appeal before the Deputy Commissioner, Mandi, who vide order **(Annexure P-4),** dated 23.6.2008, accepted the appeal and quashed and set-aside the selection of the petitioner and also ordered that next in merit be appointed as Anganwadi worker.

3. The petitioner, being aggrieved and dissatisfied with the order (**Annexure P-4)**, dated 23.6.2008, preferred an appeal under Section 12 of the Anganwadi Rules and Notification issued by the Government of Himachal Pradesh, laying therein challenge to the order dated 23.6.2008, which came to be registered as miscellaneous Appeal No.588 of 2008. The Divisional Commissioner, Mandi on the basis of material adduced on record by the respective parties as well as record made available by the authorities, accepted the appeal of the petitioner and accordingly, set-aside the order dated 23.6.2008. However, the aforesaid order **(Annexure P-6),** passed by the Divisional Commissioner, Mandi in the appeal preferred by the petitioner Smt. Ruma Devi, was not accepted by respondent No.6 and as such she preferred the Review Petition before the same authority i.e. Divisional Commissioner Mandi, Division Mandi, HP.

4. Perusal of Annexure P-7, suggests that learned Divisional Commissioner reviewed his earlier order (**Annexure P-6),** dated 24.12.2008 and vide order **(Annexure P-7),** dated 24.02.2009 upheld the order dated 23.6.2008 passed by the Deputy Commissioner by setting-aside his own order, dated 24.12.2008 passed in the appeal having been preferred by the petitioner Smt. Ruma Devi

5. Dr. Lalit Sharma, learned counsel representing the petitioner vehemently argued that the impugned order **(Annexure P-7),** dated 24.2.2009 is not sustainable in the eyes of law as the same is without any jurisdiction because as per Anganwadi guidelines/Rules, Divisional Commissioner has no power, whatsoever, to review his/her own orders. To substantiate his aforesaid argument, he also made available copy of order dated 27.6.2009, passed by the same authority in some other case, whereby revision petition was dismissed on account of maintainability. Aforesaid order dated 27.6.2009, passed by the Divisional Commissioner is taken on record and is made part of the file.

6. Mr. G.R.Palsra, learned counsel representing the respondent No.6 supported the order dated 24.2.2009, passed by the Divisional Commissioner, Mandi and stated that since there was a patent illegality in the order dated 24.12.2008, passed by the Divisional Commissioner, Mandi in the appeal preferred by the petitioner, Divisional Commissioner has rightly reviewed his earlier order dated 24.12.2008. Mr. Palsra, further contended that in case this Court comes to the conclusion that the Divisional Commissioner had no authority/power to review his order, the matter may be remanded back to him with the direction to decide the same afresh in accordance with law.

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

8. Perusal of order dated 27.6.2009, passed by the Divisional Commissioner, Mandi suggests that the Divisional Commissioner had no power/ authority to entertain the review petition against his own orders. In the aforesaid order, referred hereinabove, Divisional Commissioner himself concluded that perusal of the provisions of the scheme dated 11.4.2007 framed by the Government of Himachal Pradesh for the engagement of Anganwadi Worker/ Helper in the State reveals that there is no specific provision in the said scheme for review of the order passed by the Divisional Commissioner in the appeal. This Court also perused

the scheme/guidelines (**Annexure P-1)** for the engagement of the Anganwadi workers/Helpers on honorary basis under ICDS scheme run by Social Justice and Empowerment Department, perusal whereof, nowhere suggests that power of review, if any, lies with the Divisional Commissioner to review his/her own orders passed in an appeal. Learned counsel representing the respondent No.6 was unable to point out any provision in the guidelines, referred hereinabove, with regard to power of review, if any, with the Divisional Commissioner.

9. Consequently, this Court has no hesitation to conclude that Divisional Commissioner had no power/ authority to review his own order**(Annexure P-6),** dated 24.12.2008 passed in miscellaneous Appeal No.588 of 2008 preferred by the petitioner that too in the review petition preferred by respondent No.6 and as such, order dated 24.2.2009 (**Annexure P-7**) deserves to be quashed and set-aside. Accordingly, present petition is allowed and order dated 24.2.2009 **(Annexure P-7**) is quashed and set-aside. However, respondent No.6 is at liberty to lay challenge, if any, to the order dated 24.12.2008 passed by the Divisional Commissioner in the appeal, in accordance with law.

The petition stands disposed of, so also pending applications, if any.

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

Rajender Kumar …Appellant.

Versus

State of Himachal Pradesh …Respondent.

Cr. Appeal No. 596 of 2015
Judgment reserved on:27.03.2017
Date of Decision: April 3 , 2017

Indian Penal Code, 1860- Section 302- Dead body of wife of accusedwas found- it was revealed that accused had murdered the deceased by giving multiple blows with a rod- accused was subjecting the deceased to cruelty for more than 10 years- accused was tried and convicted by the Trial Court- held in appeal that incident was witnessed by PW-14 who called PW-1, PW-2, PW-3, R and also K to the spot- they did not support the prosecution version- witnesses to the recovery also did not support the prosecution version- Trial Court had relied upon the circumstantial evidence to convict the accused, whereas, it was a case of direct evidence – it was not obligatory for the accused to explain the presence of the blood stains- further, prosecution witness has stated that accused took the deceased on his lap and tried to wake her, which would explain the presence of blood on the person of the accused - the possibility of involvement of others cannot be ruled out- it was not established that weapon of offence contained the blood of the deceased- prosecution evidence did not prove the guilt of the accused- Trial Court had erred in convicting the accused- appeal allowed and accused acquitted. (Para-6 to 41)

Cases referred:

Shivaji Sahabrao Bobade and another Versus State of Maharashtra, (1973) 2 SCC 793
Aher Raja Khima Versus State of Surashtra, AIR 1956 SC 217
Lal Mandi v. State of W.B., (1995) 3 SCC 603
Bodhraj alias Bodha & others vs. State of Jammu and Kashmir, (2002) 8 SCC 45
Pudhu Raja and another Versus State Represented by Inspector of Police, (2012) 11 SCC 196;
Madhu Versus State of Kerala, (2012) 2 SCC 399
Dilip Singh Moti Singh versus State of Gujarat, (2010) 15 SCC 622
Ramreddy Rajesh Khanna Reddy v. State of A.P., (2006) 10 SCC 172

Trimukh Maroti Kiran versus State of Maharashtra, (2006) 10 SCC 681
Mulakh Raj and others Versus Satish Kumar and others, (1992) 3 SCC 43
Ashok Kumar Chatterjee vs. State of M.P., 1989 Supp. (1) SCC 560
Balwinder Singh vs. State of Punjab, (1987) 1 SCC 1
State of U.P. vs. Sukhbasi, 1985 Supp. SCC 79
Sharad Birdhichand Sarda Versus State of Maharashtra, (1984) 4 SCC 116
Earabhadrappa vs. State of Karnataka, (1983) 2 SCC 330
Hukam Singh vs. State of Rajasthan, (1977) 2 SCC 99
Eradu vs. State of Hyderabad, AIR 1956 SC 316
Sujit Biswas vs. State of Assam, (2013) 12 SCC 406
Hanumant Govind Nargundkar v. State of Madhya Pradesh, AIR 1952 SC 343
Dharam Deo Yadav v. State of Uttar Pradesh, (2014) 5 SCC 509
Sharad Birdhichand Sarda Versus State of Maharashtra, (1984) 4 SCC 116
Yomeshbhai Pranshankar Bhatt vs. State of Gujarat, (2011) 6 SCC 312
Bhajju alias Karan Singh vs. State of Madhya Pradesh, (2012) 4 SCC 327
Ramesh Harijan vs. State of Uttar Pradesh, (2012) 5 SCC 777

For the Appellant: Mr. N.S. Chandel, Advocate, for the appellant.
For the Respondent: Mr. V.S. Chauhan, Additional Advocate General with M/s Vikram Thakur, Puneet Rajta, Deputy Advocate Generals, for the respondent-State.

The following judgment of the Court was delivered:

Sanjay Karol, J.

Convict/accused has assailed the judgment dated 30.09.2015/03.10.2015, passed by the Sessions Judge, Hamirpur, H.P., in Sessions Trial No.02 of 2015, titled as *State of H.P. Versus Rajinder Kumar*, whereby he stands convicted and sentenced to undergo imprisonment for life and pay fine of Rs. 10,000/- for having committed an commission of offence punishable under the provisions of Section 302 of the Indian Penal Code and in default thereof, to further undergo simple imprisonment for three months.

2. It is the case of prosecution that on 04.06.2014, police received information of death of a lady by the name of Rajni, in village Ghartheri Brahamna, Post Office, Salasi, Tehsil and District Hamirpur. Immediately, Investigating Officer SI Mahinder Singh (PW-15) visited the spot, where he recorded statement (Ex.PW.14/A) of Smt. Chetna Devi (PW-14), to the effect that accused Rajinder Kumar had murdered his wife by giving multiple blows with a rod. Necessary investigation was conducted on the spot, by *inter alia,* preparing inquest report (Ex.PW.15/A); taking into possession the dead body; collecting samples of blood soiled earth. Also accused was arrested. Postmortem of the dead body was conducted by Dr.Resham Singh (PW.16). Samples of blood and soil, so collected in the presence of independent witnesses Naresh Kuamr (PW.11) and Rumel Singh (PW.2) were sent for chemical analysis and report of the Chemical Analyst (Ex.PW.15/R), taken on record. Police recovered blood stained shirt worn by the accused, which also was sent for chemical analysis and report whereof (Ex.PW.15/R) taken on record.

3. Investigation revealed that Rajinder Kumar (accused) who was married to Rajni (deceased), had been subjecting her to cruelty for last more than ten years. On the fateful day he gave blows to his wife with the rod which resulted into her death. Also the incident came to be partially witnessed by the family members, namely, Rumel Singh (PW.2), Vikas Kumar (PW.3) and Ravinder (not examined). Further on 06.06.2014, while in police custody, accused made a disclosure statement (Ex.PW.9/B), to the effect that he could get recovered the weapon of offence (Ex.P-4) from the place he had concealed it. Such fact came to be revealed in the presence of independent witnesses Arun Kumar (PW.9) and Satish Kumar (PW.10). Pursuant thereto,

accused took the police to the said place and in the presence of the very same witnesses, got it recovered. Since stains of blood were found thereupon, it was also sent for chemical analysis and report (Ex. PW.15/R) taken on record. Such proceedings of discovery of fact i.e. recovery of weapon of offence was videographed and CD (Ex.PW.10/B) taken on record. Scientific evidence did establish the deceased to have sustained injuries with the weapon of offence (Ex.P-4), duly corroborated by the postmortem report (Ex.PW.16/A). Further report of the chemical analyst, established signs of blood to have been found not only on the weapon of offence, but also on the shirt (Ex.P-2) worn by the accused. Hence *prima facie* finding the accused to be involved in the crime, challan was presented in the Court for trial.

4. The accused was charged for having caused death of his wife Smt.Rajni, an offence punishable under the provisions of Section 302 of the IPC, with a knife/dagger, of a length of 17 inches, a prohibited arm and as such, committed an offence punishable under the provisions of Section 25(1-A) of Arms Act, 1959, to which he did not plead guilty and claimed trial.

5. For establishing the aforesaid offences, in all, prosecution examined as many as sixteen witnesses. Statement of the accused under Section 313 of the Code of Criminal Procedure was also recorded, in which he took the following defence/*alibi*:-

> "Witnesses have deposed against me falsely. On my return after dumping cow-dung in the field I saw my wife in an injured state but none told me who had killed my wife."

For probablizing the same, he got examined his co-villager Vreet Singh (DW.1).

6. It is not a case of circumstantial evidence. According to the prosecution, incident came to be witnessed by Smt. Chetna (PW.14), who immediately called for help, when firstly Akshay Kumar (PW.1) reached the spot. Thereafter, she again called and Rumel Singh (PW.2), Vikas Kumar (PW.3) and Ravinder (not examined) came. It is only thereafter that the matter came to be reported to the police. It is a matter of record that none of these witnesses have supported the prosecution. They were declared hostile and cross-examined by the Public Prosecutor. It is also a matter of record that witnesses to the recovery of incriminating articles i.e. blood soiled earth; shirt as also the disclosure statement leading to the recovery of weapon of offence, including such fact, have also not supported the prosecution. They are Rumel Singh (PW.2), Naresh Kumar (PW.11), Arun Kumar (PW.9) and Satish Kumar (PW.10).

7. Despite these witnesses not having supported the prosecution, trial Court convicted the accused on both counts, for the following reason(s): (i) independent witnesses, being close relatives, chose to side with the accused and as such not deposed in favour of the prosecution; (ii) viewing of CD (Ex.PW.10/B) as also photographs (Ex.PW.10/A-1 to Ex.PW.10/A-15), establish the accused to have taken the police to the spot of concealment of weapon of offence (Ex.P-4) wherefrom he got it recovered. As such, circumstance of discovery of fact came to be established on record; (iii) failure on the part of accused to have explained traces of human blood on the weapon of offence (Ex.P-4); (iv) failure on the part of accused to have explained presence of blood stains on his shirt, matching with that of the blood group of the deceased; (v) failure on the part of the accused to have probablized his defence by not inquiring about the presence of the person from whom, or the manner in which his wife sustained serious injuries; (vi) failure on the part of the accused to have probablized his defence of *alibi* i.e. being present in the fields near the house of Vreet Singh (DW.1); (vii) presence of the accused on the spot of crime; (viii) mere absence of motive of crime itself would not render the prosecution story to be doubtful, much less false; (ix) description of weapon of offence, be it rod or sword would not shatter the prosecution case, more so, in view of corroborative evidence in the nature of photographs and CD prepared by the police; (x) failure on the part of prosecution to have not established the weapon of offence to be used by the accused, by getting prints of his fingers and hands matched thereupon, is a mere irregularity and failure on the part of the investigating agency would not itself render the prosecution case to be false; and (xi) the wound sustained by the victim i.e. of width of 1 cm

with a weapon 4 inches of width, is dependent upon the resultant force used by the assailant. As such, weapon was used by the accused in committing the crime.

8. Reading of the impugned judgment reveals the trial Court convicted the accused on the basis of circumstantial evidence and that being: (a) disclosure statement resulting into discovery of fact i.e. weapon of offence; (b) corroborative evidence, scientific in nature, establishing use of weapon of offence and signs of blood found on the shirt worn by the accused; and (c) presence of the accused on the spot.

9. Having heard Mr. N.S. Chandel, learned Counsel on behalf of the appellant as also Mr. V.S. Chauhan, learned Additional Advocate General, assisted by M/s Vikram Thakur & Puneet Rajta, learned Deputy Advocate Generals, on behalf of the State, as also minutely examined the testimonies of witnesses and other documentary evidence, so placed on record by the prosecution, Court is of the considered view that trial Court committed grave illegality in convicting the accused, for the reasons discussed hereinafter.

10. In *Shivaji Sahabrao Bobade and another Versus State of Maharashtra,* (1973) 2 SCC 793, the apex Court, has held as under:

> "…Lord Russel delivering the judgment of the Board pointed out that there was "no indication in the Code of any limitation or restriction on the High Court in the exercise of its powers as an appellate Tribunal", that no distinction was drawn "between an appeal from an order of acquittal and an appeal from a conviction", and that "no limitation should be placed upon that power unless it be found expressly stated in the Code". … (Emphasis supplied)

[See: *Aher Raja Khima Versus State of Surashtra*, AIR 1956 SC 217].

11. The apex Court in *Lal Mandi v. State of W.B.,* (1995) 3 SCC 603, has held that in an appeal against conviction, the appellate Court is duty bound to appreciate the evidence on record and if two views are possible on the appraisal of evidence, benefit of reasonable doubt has to be given to the accused.

12. Also it is settled position of law that graver the punishment the more stringent the proof and the obligation upon the prosecution to prove the same and establish the charged offences.

13. Hon'ble Supreme Court of India in *Shivaji Sahabrao Bobade (supra)* has held that:-

> "6. Even at this stage we may remind ourselves of a necessary social perspectives in criminal cases which suffers from insufficient forensic appreciation. The dangers of exaggerated devotion to the rule of benefit of doubt at the expense of social defence and to the soothing sentiment that all acquittals are always good regardless of justice to the victim and the community, demand especial emphasis in the contemporary contest of escalating crime and escape. The judicial instrument has a public accountability. The cherished principles of golden thread of proof beyond reasonable doubt which runs through the web of our law should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt. The excessive solicitude reflected in the attitude that a thousand guilty men may go but one innocent martyr shall not suffer is a false dilemma. Only reasonable doubts belong to the accused. Otherwise any practical system of justice will then break down and lose credibility with the community. The evil of acquitting a guilty person light heartedly as a learned author [*Glanville Williams in 'Proof of Guilt'*] has sapiently observed, goes much beyond the simple fact that just one guilty person has gone unpunished. If unmerited acquittals become general, they tend to lead to a cynical disregard of the law, and this in turn leads to a public demand for harsher legal presumptions against indicted 'persons' and more severe punishment of those who are found guilty.

> Thus, too frequent acquittals of the guilty may lead to a ferocious penal law, eventually eroding the judicial protection of the guiltless. For all these reasons it is true to say, with Viscount Simon, that " a miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of the innocent … …" In short, our jurisprudential enthusiasm for presumed innocence must be moderated by the pragmatic need to make criminal justice potent and realistic. A balance has to be struck between chasing chance possibilities as good enough to set the delinquent free and chopping the logic of preponderant probability to punish marginal innocents. We have adopted these cautions in analysing the evidence and appraising the soundness of the contrary conclusions reached by the Courts below. Certainly, in the last analysis reasonable doubts must operate to the advantage of the appellant. In India the law has been laid down on these times long ago." [Emphasis supplied]

14. In *Bodhraj alias Bodha & others vs. State of Jammu and Kashmir,* (2002) 8 SCC 45, Hon'ble the Supreme Court of India held that:-

> "9. Before analysing factual aspects it may be stated that for a crime to be proved it is not necessary that the crime must be seen to have been committed and must, in all circumstances be proved by direct ocular evidence by examining before the Court those persons who had seen its commission. The offence can be proved by circumstantial evidence also. The principal fact or *factum probandum* may be proved indirectly by means of certain inferences drawn from *factum probans*, that is, the evidentiary facts. To put it differently circumstantial evidence is not direct to the point in issue but consists of evidence of various other facts which are so closely associated with the fact in issue that taken together they form a chain of circumstances from which the existence of the principal fact can be legally inferred or presumed. ……………."
>
> 10. ………In *Bhagat Ram v. State of Punjab* [AIR 1954 SC 621], it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring the offences home beyond any reasonable doubt." (Emphasis supplied)

15. Also it is a settled proposition of law that when there is no direct evidence of crime, guilt of the accused can be proved by circumstantial evidence, but then the circumstances from which conclusion of guilt is to be drawn, should be fully proved and such circumstances must be conclusive in nature, to fully connect the accused with crime. All the links in the chain of circumstances, must be established beyond reasonable doubt, and the proved circumstances should be consistent only with the hypothesis of guilt of the accused, being totally inconsistent with his innocence. While appreciating the circumstantial evidence, Court must adopt a very cautious approach and great caution must be taken to evaluate the circumstantial evidence. [See: *Pudhu Raja and another Versus State Represented by Inspector of Police,* (2012) 11 SCC 196; *Madhu Versus State of Kerala,* (2012) 2 SCC 399; *Dilip Singh Moti Singh versus State of Gujarat,* (2010) 15 SCC 622; *Ramreddy Rajesh Khanna Reddy v. State of A.P.*, (2006) 10 SCC 172; *Trimukh Maroti Kiran versus State of Maharashtra,* (2006) 10 SCC 681; *Mulakh Raj and others Versus Satish Kumar and others,* (1992) 3 SCC 43; *Ashok Kumar Chatterjee vs. State of M.P.,* 1989 Supp. (1) SCC 560; *Balwinder Singh vs. State of Punjab,* (1987) 1 SCC 1; *State of U.P. vs. Sukhbasi,* 1985 Supp. SCC 79; *Sharad Birdhichand Sarda Versus State of Maharashtra,* (1984) 4 SCC 116; *Earabhadrappa vs. State of Karnataka,* (1983) 2 SCC 330; *Hukam Singh vs. State of Rajasthan,* (1977) 2 SCC 99; and *Eradu vs. State of Hyderabad,* AIR 1956 SC 316].

16. In *Sujit Biswas vs. State of Assam,* (2013) 12 SCC 406, Hon'ble the Supreme Court of India held that:-

> "13. Suspicion, however grave it may be, cannot take the place of proof, and there is a large difference between something that "may be" proved, and

something that "will be proved". In a criminal trial, suspicion no matter how strong, cannot and must not be permitted to take place of proof. This is for the reason that the mental distance between "may be" and "must be" is quite large, and divides vague conjectures from sure conclusions. In a criminal case, the court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof. The large distance between "may be" true and "must be" true, must be covered by way of clear, cogent and unimpeachable evidence produced by the prosecution, before an accused is condemned as a convict, and the basic and golden rule must be applied. In such cases, while keeping in mind the distance between "may be" true and "must be" true, the court must maintain the vital distance between mere conjectures and sure conclusions to be arrived at, on the touchstone of dispassionate judicial scrutiny, based upon a complete and comprehensive appreciation of all features of the case, as well as the quality and credibility of the evidence brought on record. The court must ensure, that miscarriage of justice is avoided, and if the facts and circumstances of a case so demand, then the benefit of doubt must be given to the accused, keeping in mind that a reasonable doubt is not an imaginary, trivial or a merely probable doubt, but a fair doubt that is based upon reason and common sense. [Vide: Hanumant Govind Nargundkar vs. State of M.P., AIR 1952 SC 343; State through CBI v. Mahender Singh Dahiya, (2011) 3 SCC 109: AIR 2011 SC 1017; and Ramesh Harijan vs. State of U.P., (2012) 5 SCC 777].

14. In Kali Ram vs. State of Himachal Pradesh, (1973) 2 SCC 808: AIR 1973 SC 2773, this Court observed as under:

> "25. Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. This principle has a special relevance in cases where in the guilt of the accused is sought to be established by circumstantial evidence.""

17. Relying upon its earlier decision in *Hanumant Govind Nargundkar v. State of Madhya Pradesh*, AIR 1952 SC 343, Hon'ble the Supreme Court of India in *Dharam Deo Yadav v. State of Uttar Pradesh,* (2014) 5 SCC 509, again reiterated that:-

> "15. …. … Each and every incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstances so proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn and no other hypothesis against the guilt is possible. Even when there is no eye-witness to support the criminal charge, but prosecution has been able to establish the chain of circumstances which is complete leading to inference of guilt of accused and circumstances taken collectively are incapable of explanation on any reasonable hypothesis save of guilt sought to be proved, the accused may be convicted on the basis of such circumstantial evidence."

18. In *Sharad Birdhichand Sarda Versus State of Maharashtra,* (1984) 4 SCC 116, Hon'ble the Supreme Court of India held that:-

> "Moreover the prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. It is not the law that where there is any infirmity or lacuna in the prosecution case, the same could be cured or supplied by a false defence or a plea which is not accepted by a court." …

… … "There is a vital difference between an incomplete chain of circumstances and a circumstance which, after the chain is complete, is added to it merely to reinforce the conclusion of the court."

19. Accused categorically denies his involvement in the alleged crime. It is his *alibi* that he had gone to the fields to throw the cow-dung and only on return, found his wife lying in an injured condition. None told him as to who had killed her. We find from the statement of Vreet Singh (DW.1) such defence and plea of *alibi* to have been probablized and established. This witness, at about 7.30-7.45 a.m. noticed the accused throw cow-dung in the fields. He is a shop keeper and in no manner associated with the accused, save and except that being an acquaintance.

20. Be that as it may, from the daily diary report (Ex.PW.4/A) it is also evident that initially Chetna Devi had only informed the police, on telephone, that Rajni had been murdered with a knife. Significantly information of the assailant was not disclosed. Also presence or involvement of the accused was not disclosed.

21. It is the case of prosecution that when SI Mahinder Singh (PW.15) reached the spot, Chetna Devi (PW.14) got recorded her statement to the effect that the accused had been subjecting his wife, i.e. the deceased, to physical cruelty. On 04.06.2014, at about 7.45 a.m. she noticed the accused abuse and give beatings to the deceased. One blow with an iron rod was given on the stomach and another on the back. This resulted in the bending of the iron rod i.e. the weapon of offence. Upon her raising alarm, her son Akshay Kumar (PW.1) reached and the accused ran away threatening to kill them. She immediately contacted the police. She further raised alarm which led Rumel Singh (PW.2) and his son Vikas Kumar (PW.3) reach the spot. Not only Rajni was not saying anything but accused was not allowing anybody to come near her. Though ambulance had come, but Rajni had expired on the spot.

22. Here her statement is self contradictory. If accused had run away then where was the question of his not allowing anyone to come near the deceased. What is the nature of threats is not explained.

23. Be that as it may, in Court, we find this witness not to have supported the prosecution. Despite being cross-examined, nothing fruitful could be elicited from her testimony. While admitting her signatures on statement (PW.14/A), she has explained that the document(s) came to be signed at the instance of the police. She is categorical of not having noticed the incident, much less accused having abused or given blows with an iron rod to the deceased. From her statement, it is evident that accused was married to the deceased for quite some time. He had three children and the elder one being 11 years of age. Her relationship with the accused is not cordial. She has explained that though accused resides in the neighbourhood but his house is not visible from her house. She could not see the spot of crime from her house. She is categorical that the accused arrived at the spot after sometime and inquired about the cause of injuries which the deceased had sustained. She is categorical that thereafter deceased tried to shake and awake the deceased by taking her in his lap. Hence, the star witness has not supported the prosecution.

24. At this juncture, we may only observe that all the other independent witnesses i.e. Akshay Kumar (PW.1), Rumel Singh (PW.2) and Vikas Kumar (PW.3), who also reached the spot, have not supported the prosecution. In fact, in one voice, they probablize the defence of the accused of not being present on the spot and having reached only after they noticed the deceased lying in an injured condition.

25. In *Yomeshbhai Pranshankar Bhatt vs. State of Gujarat,* (2011) 6 SCC 312 the apex Court has held that evidence of a hostile witness may contain elements of truth and should not be entirely discarded. Their Lordships have held that:

"22. The learned counsel for the appellant further submitted the doctor had not given his written opinion that the deceased was fit enough to give her statement.

Though orally, the doctor said so. Relying on this part of the evidence especially the evidence of the husband of the deceased, the learned counsel for the appellant submitted that even though the husband may have been declared hostile, the law relating to appreciation of evidence of hostile witnesses is not to completely discard the evidence given by them. This Court has held that even the evidence given by hostile witness may contain elements of truth.

23. This Court has held in State of U.P. vs. Chetram and others, AIR 1989 SC 1543, that merely because the witnesses have been declared hostile the entire evidence should not be brushed aside. [See para 13 at page 1548]. Similar view has been expressed by three-judge Bench of this Court in Khujji alias Surendra Tiwari vs. State of Madhya Pradesh, [AIR 1991 SC 1853]. At para 6, page 1857 of the report this Court speaking through Justice Ahmadi, as His Lordship then was, after referring to various judgments of this Court laid down that just because the witness turned hostile his entire evidence should not be washed out." [Emphasis supplied]

26. Further in *Bhajju alias Karan Singh vs. State of Madhya Pradesh,* (2012) 4 SCC 327 the Court held that evidence of hostile witnesses can also be relied upon by the prosecution to the extent to which it supports the prosecution version of the incident. It further held that:

"36. It is settled law that the evidence of hostile witnesses can also be relied upon by the prosecution to the extent to which it supports the prosecution version of the incident. The evidence of such witnesses cannot be treated as washed off the records, it remains admissible in trial and there is no legal bar to base the conviction of the accused upon such testimony, if corroborated by other reliable evidence. Section 154 of the Act enables the Court, in its discretion, to permit the person, who calls a witness, to put any question to him which might be put in cross-examination by the adverse party.

37. The view that the evidence of the witness who has been called and cross-examined by the party with the leave of the court, cannot be believed or disbelieved in part and has to be excluded altogether, is not the correct exposition of law. The Courts may rely upon so much of the testimony which supports the case of the prosecution and is corroborated by other evidence. It is also now a settled cannon of criminal jurisprudence that the part which has been allowed to be cross-examined can also be relied upon by the prosecution. These principles have been encompassed in the judgments of this Court in the cases:

(a) Koli Lakhmanbhai Chanabhai v. State of Gujarat (1999) 8 SCC 624

(b) Prithi v. State of Haryana (2010) 8 SCC 536

(c) Sidhartha Vashisht @ Manu Sharma v. State (NCT of Delhi) (2010) 6 SCC 1

(d) Ramkrushna v. State of Maharashtra (2007) 13 SCC 525"

[Emphasis supplied]

27. In *Ramesh Harijan vs. State of Uttar Pradesh,* (2012) 5 SCC 777 the Court held that seizure/recovery witnesses though turning hostile, but admitting their signatures/thumb impressions on recovery memo, could be relied on by prosecution and that:

"23. It is a settled legal proposition that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross examine him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent that their version is found to be dependable on a careful scrutiny thereof. (Vide: Bhagwan Singh v. The State of Haryana, AIR 1976 SC 202; Rabindra Kumar Dey v. State of Orissa, AIR 1977 SC 170; Syad Akbar v. State of Karnataka, AIR 1979 SC 1848; and Khujji @ Surendra Tiwari v. State of Madhya Pradesh, AIR 1991 SC 1853).

> 24. In State of U.P. v. Ramesh Prasad Misra & Anr., AIR 1996 SC 2766, this Court held that evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. A similar view has been reiterated by this Court in Balu Sonba Shinde v. State of Maharashtra, (2002) 7 SCC 543; Gagan Kanojia & Anr. v. State of Punjab, (2006) 13 SCC 516; Radha Mohan Singh @ Lal Saheb & Ors. v. State of U.P., AIR 2006 SC 951; Sarvesh Narain Shukla v. Daroga Singh & Ors., AIR 2008 SC 320; and Subbu Singh v. State by Public Prosecutor, (2009) 6 SCC 462. Thus, the law can be summarised to the effect that the evidence of a hostile witness cannot be discarded as a whole, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence. (See also: C. Muniappan & Ors. v. State of Tamil Nadu, AIR 2010 SC 3718; and Himanshu @ Chintu v. State (NCT of Delhi), (2011) 2 SCC 36)" **[Emphasis supplied]**

28. Thus the only thing which needs to be considered is as to whether that part of the testimony of the hostile witness, which inspires confidence, can be considered or not. In the given facts and circumstances, we do not find the witnesses, even when cross examined, to have deposed anything in favour of the prosecution. Their signatures on several documents stand explained by them. Only on the asking of the police they appended the same.

29. Assuming, as has been observed by the trial Court, that family members decided to side with the accused and not depose truthfully, still in our considered view, we do not find the prosecution to have established its case, beyond reasonable doubt, through the testimonies of police officials and other witnesses.

30. SI Mahinder Singh admits to have noticed only Chetna sitting near the dead body of the deceased. He has not ruled out the possibility of either her involvement or for that matter anyone else in the crime. He purely relied upon on her statement and conducted the investigation. Why children of the deceased were not associated remains unexplained. He could have also associated parents of the deceased to establish the nature of matrimonial relationship. There is no past history of violence. Also no local person from the community/village was associated. Undisputedly Chetna Devi was not in the best of the terms with the accused.

31. Significantly, there is discrepancy with regard to the use of weapon of offence and serious doubt with regard to its recovery, pursuant to the alleged disclosure statement.

32. Dr. Resham Singh (PW-16) who conducted the post mortem of the deceased, found following injuries on the dead body:

> "1) Stab wound 1.5 cm x 0.5 cm x 8 cm over the left side of chest 3 cm from the nipple, clotted blood positive, margins clean and everted.
>
> 2) Stab wound 1.5 cm x 0.5 cm x 8 cm over the left side of chest 2 cm from the injury No. 1, clotted blood positive, margins clean cut and everted, red in colour.
>
> 3) Stab would 1.5 cm x 1 cm x 6 cm over the left side of the chest 2 cm from the injury No. 2, clotted blood was positive, margins clean cut, everted and red in colour.
>
> 4) Stab wound .5 cm x .5 cm x 3 cm over the left side of chest 5 cm from the nipple laterly, clotted blood positive, margins clean cut and everted red in colour.
>
> 5) Stab would 4 cm x 2 cm x 3 cm over the T11 to T12 vertebra posteriorly, clotted blood around the wound positive, margins clean and everted and red in colour."

Also pericardium and heart were punctured which, as per opinion of the Expert, contributed to hemorrhagic shock and cause of death. Though the Doctor was of the view that injuries could have been caused with the weapon of offence (Ext. P-4), but in cross examination expressed doubt by stating that the width of the weapon qua injury No. (4) should have been 1 c.m. Chetna Devi (PW-14) is categorical that the blow was given on the stomach. If that were so then how could the lung be puncutured from the front side.

33. On the question of nature of weapon of offence itself, there is material contradiction. This issue, we are examining, notwithstanding the fact that independent witnesses to its recovery, namely Arun Kumar (PW-9) and Satish Kumar (PW-10), have not supported the prosecution. In the Daily Diary entry (Ext. PW-4/A), the weapon of offence is recorded as "chaaku" (knife). In the statement (Ext. PW-14/A) of Chetna Devi, so recorded under Section 154 Cr.P.C., it is recorded as an 'iron rod', which got twisted (bent) as a result of used force, whereas what police recovered and got scientifically examined is a 'sword' (Ext. PW-15/R).

34. It is a matter of record that weapon of offence was not found on the spot. Allegedly it was concealed by the accused who pursuant to disclosure statement (Ext. PW-9/B), got it recovered. Witnesses to the alleged disclosure statement have not supported the prosecution and despite their extensive cross examination, nothing fruitful could be elicited from their testimony. Be that as it may, these independent witnesses admit that it was the police who led them to the place of recovery of the said weapon. In our considered view, trial Court got swayed in assuming the prosecution case to be true, only, with the watching of the video (CD) so recorded by the police. In this regard, observations of the Court below, even on facts are incorrect. It was the police who led the witness to the place from where the weapon of offence was recovered and not the other way round. In view of the independent witnesses having turned hostile, Court below, should have looked into some more reliable piece of evidence, corroborating such fact. The video was not taken by a professional photographer. Also no respectable persons from the society were associated. There is serious doubt about the nature of weapon of offence used and its recovery, in the manner in which the police wants the Court to believe. Hence, it cannot be said to be a fact discovered, in accordance with law. Also we find the court below to have presupposed the weapon of crime, which assumption came from the fact that it contained blood. But then it lost sight of the fact that blood so found was insufficient for further serological examination. It is nobody's case that evidence stood tampered by the accused. Moreover, if stains of blood were insufficient for scientific evidence, at least, finger prints thereupon, could have got matched with that of the accused. No such attempt was made by the police.

35. Jurisprudentially, Court erred in observing that it was for the accused to have established as to how blood stains were found on the shirt worn by him. It be only observed that, in that regard, there is no scientific evidence on record. Any which way, Smt. Chetna explains in her uncontroverted and unrebutted testimony, by stating that after reaching the spot accused took the deceased on his lap and tried to wake her by shaking.

36. There was no basis for the Court below to have formed an opinion that the witnesses being close relatives were siding with the accused. In fact, from the testimony of Chetna (PW-14), it is clear that they did not enjoy best of relationship. Also it is not the case of prosecution that witnesses were won over by the accused or that during trial, accused intimidated or threatened them.

37. It is a settled principle of law that absence of motive alone would not render the prosecution story to be doubtful. But then, prosecution has to stand on its own legs and establish its case, beyond reasonable doubt.

38. In the instant case, suspicion alone, as has been discussed herein supra, cannot be a reason to hold the accused guilty, which in the instant case, erroneously, has been so done, by the trial Court. There is no evidence that accused alone used to reside in the house. Also there is no evidence that the children were not at home. Also there is no evidence that none else, except the accused, had access to his house or the deceased. Also possibility of involvement of others

has not been ruled out. It stands clarified that we have considered the case of the prosecution from both aspects. There is neither any direct nor any circumstantial evidence, worthy of credence, clinching affirmatively, factum of involvement of the accused alone, in the crime. As already observed, there was nothing on record to establish that the witnesses chose to side with the accused. At least, police had no such apprehension. Had it been so, they would have neither associated them during investigation nor examined them in Court. They would have not given up witnesses during trial. Additionally they would have associated or examined other persons from the neighbourhood. Evidence, by way of photographs and CD is only corroborative in nature. In this case primary evidence, linking the accused to the crime, is missing. The circumstance of discovery of fact, as discussed earlier remains unestablished on record. With certainty, it cannot be said that the weapon of offence, contained blood, only that of the deceased. Through the testimonies of the witnesses, it has come on record that the accused did try to talk to the deceased. In fact, he made an attempt of reviving her.

39. From the material placed on record, prosecution has failed to establish that accused is guilty of having committed the offences, he has been charged with. The circumstances cannot be said to have been proved by unbroken chain of unimpeachable testimony of the prosecution witnesses. The guilt of the accused does not stand proved, beyond reasonable doubt, to the hilt.

40. Findings returned by the trial Court, convicting the accused, cannot be said to be based on correct and complete appreciation of testimonies of prosecution witnesses. Such findings cannot be said to be on the basis of any clear, cogent, convincing, legal and material piece of evidence, leading to an irresistible conclusion of guilt of the accused. Incorrect and incomplete appreciation thereof, has resulted into grave miscarriage of justice, inasmuch as accused stand wrongly convicted for the charged offence.

41. Hence, for all the aforesaid reasons, appeal is allowed and the judgment of conviction and sentence, dated 30.09.2015/03.10.2015, passed by the Sessions Judge, Hamirpur, H.P., in Sessions Trial No.02 of 2015, titled as *State of H.P. Versus Rajinder Kumar,* is set aside and convict acquitted of the charged offences. Convict, who is in jail be released forthwith, if not required under any other process of law. Release warrants be prepared accordingly. Amount of fine, if deposited by the convict, be refunded to him.

42. Registrar (Judicial) to forthwith take appropriate action.

Appeals stand disposed of, 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
Hukam Chand and another ….Respondents.

Cr. Appeal No. 195 of 2007.
Date of Decision: 3rd April, 2017.

Indian Penal Code, 1860- Section 279 and 337- Complainant and her aunt were going to temple in a bus – when the complainant tried to get down from the bus, the conductor whistled - the complainant fell down and sustained injuries – the accused was tried and acquitted by the Trial Court- held in appeal that presence of PW-2 was suspect due to which the whole prosecution case also became suspect- it was admitted by the complainant in cross-examination that there was a heavy congestion of the passengers – possibility of complainant having fallen down cannot be ruled out –the Trial Court had correctly appreciated the evidence- appeal dismissed.(Para-9 to 13)

For the Appellant: Mr. R.S. Thakur, Addl. Advocate General.
For the Respondents: Ms. Arati Sharma, 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 17.3.2007 by the learned Judicial Magistrate 1st Class, Chamba in Crl. Case No. 96-1-03/99, whereby, he acquitted the accused for theirs allegedly committing offences punishable under Sections 279 and 337 of the IPC.

2. The facts relevant to decide the instant case are that on 26.5.1998, complainant Reena Devi recorded her statement under Section 154, Cr.P.C., with HC Narinder Kumar to the effect that on 26.5.1998 at about 10 a.m., she along with her aunt (Bua) Jai Dei was coming Sitla Temple for offering prayer and she had boarded into a bus at about 10.25 a.m. at bus stand Bhadrum. There was a great rush in the bus and when the bus stopped near Sitla bridge then, a person alighted from it and as soon as complainant tried to get down from the bus, then, conductor gave a whistle and driver started driving the bus as there was a rush at bus stop Sitla Bridge. Complainant fell down on the road from the bus and received simple injuries. The incident occurred by rash or negligent conduct of conductor and driver of the bus. 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 theirs committing offences punishable under Sections 279 and 337 of the IPC. In proof of the prosecution case, the prosecution examined 9 witnesses. On conclusion of recording of the prosecution evidence, the statements of the accused under Section 313 of the Code of Criminal Procedure were recorded by the learned trial Court 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 Additional 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 by it of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation by it of the material on record. Hence, he contends qua the findings of acquittal warranting reversal by this Court in the exercise of its appellate jurisdiction and theirs standing replaced by findings of conviction.

7. On the other hand, the learned counsel appearing for the accused/respondents 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. When the complainant/injured was in the process of alighting from bus bearing No.48-0826, its conductor by blowing "whistle", hence, signaled the driver qua her safely

egressing therefrom, whereupon, co-accused driver drove it negligently, sequelling the victim/complainant, who yet had not safely egressed therefrom to fall onto the road, whereupon, she suffered injuries on her person as stand reflected in the apposite medical certificate borne on Ex.PW5/A. The prosecution stood enjoined to prove the imperative factum of both the co-accused, the driver and the conductor of the bus respectively holding the relevant mens rea qua the apposite penal inculpability ascribed qua them arising from the co-accused conductor without ascertaining qua the victim/complainant making a safe departure from the bus, his yet blowing "whistle" qua the victim/complainant safely egressing therefrom, signal whereof led the co-accused driver also without his not personally ascertaining the said factum, to his hence proceed to drive the bus in a rash and negligent manner, whereupon, the victim fell from the bus onto the road, in sequel whereof, injuries stood entailed upon her.

10. To succor the version embodied in the FIR borne on Ex.PW6/D, the complainant/victim stepped into the witnesses box, wherein, she spelt out qua the blowing of "whistle" by co-accused conductor standing engendered by his omitting to adhere to the standards of due care and caution arising from the factum of his not ascertaining the trite factum qua hers safely disembarking from the relevant vehicle, though, the aforesaid factum probandum voiced by the victim, stands lent corroborative vigour by PW-2, nonetheless, the deposition of PW-2 is discardable arising from the factum of the complainant/victim not disclosing in the apposite FIR qua hers standing accompanied by PW-2, omission whereof is significant, especially, when PW-2 is evidently a close relative of the complainant. Moreover, what further stains the testimony of PW-2 stands comprised in the factum of the Investigating Officer concerned belatedly recording her statement on 13.6.1998 with respect to the relevant accident which occurred prior thereto on 26.05.1998, thereupon, also hers belatedly standing associated by the Investigating Officer concerned, as a witness, to the relevant occurrence visibly arouses a suspicion qua the genesis of the prosecution case, wherefrom, on factum aforesaid standing construed in coagulation with the omission of the complainant to recite the name of PW-2 in the apposite FIR, an inevitable inference spurs qua PW-2 not along with the victim/complainant occupying the relevant bus nor hers, thereupon, holding the capacity to render any ocular account in respect thereto, whereupon, her testimony in purported corroboration to the testimony of PW1 does not enjoy any probative worth.

11. Be that as it may, even if, the sole testimony of the complainant, is sufficient to prove the genesis of the prosecution case, nonetheless, when the prosecution, for the reasons aforestated, invented a purported ocular witness thereto, thereupon, the apposite concert of the prosecution to prove the charge against the accused gets stained besides when the other ocular witness to the occurrence PW-3 though also stood enjoined to with utmost tandem depose in conformity with the testimony of the complainant qua the co-accused conductor of the bus without ascertaining hers safely disembarking from the relevant bus, his blowing "whistle", in sequel whereto,the co-accused driver, drove the apposite bus at a rash and negligent pace, leading her to fall from the bus on to the road, hence, sequelling hers suffering injuries on her person, whereas, with PW-3, not in her testification rendered any echoings therein qua the aforesaid factum probandum, corollary thereof, is qua the prosecution thereupon not succeeding in proving charge qua both the co-accused/respondents.

12. Even otherwise, the complainant in her deposition comprised in her cross-examination has purveyed affirmative answers to the apposite suggestions put to her by the learned defence counsel while holding her to cross-examination qua hers alighting from the front door of the relevant bus also she has acquiesced to the suggestion(s) put thereat to her qua thereat there occurring a heavy congestion of passengers, all of whom were striving to alight therefrom, wherefrom, it is befitting to draw an inference qua an imminent jostling occurring amongst the passengers for facilitating their concert to alight therefrom, in sequel whereto, the victim/complainant appears to suffer a fall from the bus onto the road, falling whereof of the victim/complainant, hence, does not, prove any penal inculpability qua the accused/respondents.

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 SURESHWAR THAKUR, J.

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

Versus

Pradeep Singh ....Respondents.

Cr. Appeal No. 162 of 2008.
Date of Decision: 3rd April, 2017.

Indian Penal Code, 1860- Section 279, 337 and 201- Accused was driving a truck in a rash and negligent manner – the complainant was riding a scooter- the truck hit the scooter from the side as a result of which the complainant sustained injuries- accused was tried and convicted by the Trial Court- an appeal was preferred, which was allowed- held in appeal that it was duly proved that accused was driving the truck - accused had sped away from the spot which is inconsistent with his innocence – the Appellate Court had wrongly held that the identity of the accused was not established – the appeal allowed- judgment of Appellate Court set aside and judgment of Trial Court restored. (Para-9 to 12)

For the Appellant: Mr. R.S. Thakur, Addl. Advocate General.
For the Respondent: Mr. Raman Sethi, 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 03.10.2007 by the learned Addl. Sessions Judge, Fast Track Court, Solan, H.P. Case No. 12FTC/10 of 2007, whereby, he set aside the judgement of conviction and sentence recorded upon the accused/respondent herein, by the learned trial Court.

2. The facts relevant to decide the instant case are that on 2.12.1999, at about 8 P.M., one Jasvinder Singh was going on his scooter No. HP-12-0509 from Police Station, Parwanoo to Sector 3, Parwanoo. When he reached at Kasauli Chowk, Parwanoo, a truck bearing No. HP-11-2333, allegedly being driven by the accused rashly and negligently hit his scooter from the side as a result of which he along with scooter had fallen down and sustained injuries. The accused, after the accident had allegedly driven away the truck from the spot. Jaswinder Singh lodged report with the police on the basis of which FIR was recorded at Police Station, Parwanoo. 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 279, 337 and 201 of the IPC. In proof of the prosecution case, the prosecution examined 8 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 conviction upon the accused/respondent herein for his committing offences punishable under Sections 279, 337 and 201 of the IPC. In an appeal preferred therefrom by the accused/respondent herein before the learned Addl. Sessions Judge, Fast Track Court, Solan, H.P, the latter reversed the apposite findings of conviction and sentence recorded by the learned trial Court in its judgment also he acquitted the accused of the offence(s).

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

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

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

9. The complainant was atop scooter bearing No. HP-12-0609, on arrival whereof at Kasauli Chowk, Parwanoo, whereat a truck bearing registration No. HP-11-2333 stood parked on the inappropriate side of the road, it collided with the latter, collision inter se the aforesaid vehicles occurred, on the aforesaid truck standing abruptly driven by the accused, besides it standing suddenly put into motion by its driver, whereupon a penally incupable role stood ascribed to the accused/respondent. In sequel to the aforesaid collision, the complainant sustained injuries on his person, injuries whereof stand reflected in the apposite medical certificate borne on Ex. PW5/B. The learned Appellate Court imputed preponderance to the factum qua the independent ocular witnesses to the occurrence reneging from their previous statements recorded in writing also qua theirs not clinchingly deposing qua the accused assuredly being the person, who, at the relevant time occupied the driver's seat of the relevant truck, thereupon, it pronounced an order of acquittal upon the accused. However, the aforesaid reason as stood assigned by the learned Appellate Court to reverse the findings of conviction pronounced upon the accused by the learned trial Court, is unamenable to acceptance, even its slighting the testification of the owner of the vehicle, namely, PW-7 Smt. Madhu Kanwar, who therein categorically voiced qua the accused/respondent herein standing engaged by her as driver in the relevant truck, is grossly unwarranted. Consequently, when, thereupon, the factum of the accused/respondent, at the relevant time occupying the driver seat of the relevant truck, hence, stood conclusively established also concomitantly, his identity stood clinched dehors the purported ocular witnesses to the relevant incident not establishing his identity, it was insagacious for the learned Appellate Court to discard her testimony or to impute sanctity qua the factum aforesaid occurring in the testification of the purported ocular witnesses to the occurrence. In aftermath, with the identity of the accused/respondent standing hence convincingly established by the prosecution, thereupon, it stands concluded qua its succeeding in establishing the charge against the accused/respondent.

10. Even though, the purported ocular witnesses to the occurrence did not sustain the charge yet the sole testification of the complainant when construed in tandem with the factum of the accused/respondent fleeing from the site of occurrence hence evinces a marked echoing qua his aforesaid conduct being inconsistent with his innocence, surging forth whereof, dehors the purported ocular witnesses to the occurrence not sustaining the charge, hence, capatalizes a firm conclusion from this Court qua the findings of conviction recorded upon the accused by the learned trial Court standing based upon a mature and balanced appreciation of evidence on record.

11. For the reasons which have been recorded hereinabove, this Court holds that the learned Addl. Sessions Judge concerned has not appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by the learned Addl. Sessions Judge concerned suffers from a gross perversity or absurdity of mis-appreciation and non appreciation of germane evidence on record.

12. Consequently, the instant appeal is allowed. In sequel, the judgment of acquittal recorded by the learned Addl. Sessions Judge, Una in Case No. 12 FTC/10 of 2007 is quashed and set aside and the judgment of conviction recorded by the learned trial Court in Case No.84/2 of 2000 is affirmed and maintained. The learned trial Court is directed to henceforth put into prompt execution the sentences as imposed by it upon the convict/respondent herein. Records be sent back forthwith.

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

Tripta Devi and ors. …Appellants
Versus
Chuni Lal and ors. …Respondents

RSA No. 298/2002
Date of decision: 5th April, 2017

Code of Civil Procedure, 1908- Section 96- A suit for redemption was filed, which was decreed and a preliminary decree for redemption was passed- it was directed that the principal money be deposited along with interest @ 6% per annum within three months– an appeal was preferred, which was allowed on the ground that plaintiffs had failed to deposit the mortgage amount within the specified period – aggrieved from the decree, second appeal has been filed- held in appeal that the judgment and decree were passed on 16.12.1995- period of three months was granted to deposit the money – however, a stay order was issued by the Appellate Court prior to the expiry of the period – there was no willful disobedience on the part of the plaintiffs in not complying with the decree- the Appellate Court had wrongly allowed the appeal- judgment and decree of appellate court set aside. (Para-14 to 18)

For the appellants: Mr. Rajesh Mandhotra, Advocate
For the respondents: Mr. R.L. Chaudhary, Advocate, for respondents No. 1 to 6, 9 and 10.
Nemo for respondent No.14.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J *(oral)*

By way of this appeal, the appellants have challenged the judgment and decree dated 2.3.2002 passed by the court of learned Additional District Judge, Mandi, in Civil Appeal No.16/1996, vide which learned appellate court allowed the appeal filed by the present

respondents and set aside the judgment and decree dated 16.12.1995 passed by the learned trial court in Civil Suit No.65/1989 in favour of plaintiffs on the sole ground that the mortgage money was not deposited by the plaintiffs within the period so granted by the learned trial court.

2. Brief facts necessary for the adjudication of the present case are that the appellants (hereinafter referred to as the "plaintiffs") filed a suit for possession by way of redemption on the ground that the suit land comprised in Khewat Khatauni No.103 min/190, Khasra Nos. 1039, 1044, Kita 2, measuring 0-10-01 hectares was mortgaged by the father of plaintiffs, Sh. Narainoo to the predecessor-in-interest of defendants No. 1 and 2, Sh. Sant Ram on 25.3.1964. As per the plaintiffs, one Sh. Krishan Dayal, predecessor-in-interest of defendants No. 3 to 8 was closely related to Sh. Sant Ram being his brother-in-law. Sh. Sant Ram in connivance with the revenue staff as well as Sh. Krishan Dayal created tenancy, in papers only, in favour of predecessor-in-interest of defendants No. 3 to 8, for which Sh. Sant Ram had no right. Krishan Dayal, predecessor-in-interest of defendants No. 3 to 8, infact never occupied the suit land in his capacity as tenant prior to the mortgage. It was further the case of the plaintiffs that Sh. Sant Ram had executed a Will in favour of defendants No. 1 and 2. The original mortgagor, Sh. Narainoo, father of the plaintiffs, had executed a gift deed in favour of the plaintiffs. As per the plaintiffs, the entry of tenancy in favour of Sh. Krishan Dayal and thereafter in the name of defendants No. 3 to 8 was wrong and illegal as Sh. Sant Ram had no right to create any such tenancy over the mortgaged land. On these basis, the suit was filed and a decree for possession of the suit land by way of redemption was sought against the defendants.

3. No written statement was filed on behalf of defendants No. 1 and 2, though the suit was resisted by defendants No. 3 to 8 by filing joint written statement, who *inter alia* took the stand that the suit land was coming in possession of their father, Sh. Krishan Dayal as non-occupancy tenant since 1950, i.e. much prior to the alleged mortgage. As per the said defendants, the suit land was mortgaged by Sh. Narainoo, father of the plaintiffs with Sh. Sant Ram, father of defendants No. 1 and 2, however the suit land was previously in possession of their father, Sh. Krishan Dayal, in his capacity as non-occupancy tenant under Sh. Narainoo and after the death of Sh. Krishan Dayal, his tenancy rights devolved upon defendants No. 3 to 8, who thereafter were in possession of the suit land as non-occupancy tenants. It was further their case that at the time of creation of mortgage in favour of Sh. Sant Ram, the possession of the suit land was not delivered to him and rather, the mortgage with respect to ownership rights was created as possession was with Sh. Krishan Dayal as non-occupancy tenant. Though mutation No.83 regarding conferment of proprietary rights over the suit land was duly entered by Patwari Halqua on 24.3.1976, but the same was rejected by Assistant Collector, II grade, vide his order dated 23.5.1978 on the ground that since the plaintiffs were minor, proprietary rights qua the same could not be granted.

4. Replication was duly filed by the plaintiffs to the written statement filed by defendants No. 3 to 8, in which the plaintiffs reiterated their case.

5. On the basis of the pleadings of the parties, learned trial court framed the following issues:-

i) Whether the suit land was mortgaged by the father of the plaintiffs to deceased Sant Ram, as alleged ? OPP

ii) Whether deceased Sant Ram in connivance with the revenue staff created tenancy only on papers in favour of predecessor-in-interest of defendants No. 3 to 8 if so its effect ? OPP

iii) Whether the plaintiffs are entitled for the relief of possession by way of redemption ? OPP

iv) Whether suit is not maintainable ? OPD

v) Whether suit is barred by limitation ? OPD

vi) Whether suit is not properly valued for the purpose of court fee and jurisdiction, if so what is correct valuation ? OPD

vii) Whether suit is not properly verified if so to what effect ? OPD

viii) Whether suit is bad for mis-joinder and non-joinder of necessary party ? OPD.

ix) Whether suit is bad of principle of resjudicata and estoppel ? OPD

x) *Relief.*

6. On the basis of the evidence both documentary as well as ocular led by the respective parties, learned trial court returned the following findings to the issues so framed:

Issue No.1	*:*	*Yes*
Issue No.2	*:*	*Yes*
Issue No.3	*:*	*Yes*
Issue No.4	*:*	*No*
Issue No.5	*:*	*No*
Issue No.6	*:*	*No*
Issue No.7	*:*	*No*
Issue No.8	*:*	*No*
Issue No.9	*:*	*No*
Relief	*:*	*Suit decreed*

7. Learned trial court decreed the suit of the plaintiffs in the following terms on 16.12.1995:-

> *"As per my above discussion and reasons therefore the suit of the plaintiff is succeeded and preliminary decree be prepared to the effect that the plaintiffs are entitled for the possession of the suit land from the defendants which is compromised in Khewat khatauni No. 103 min/190 khasra Nos. 1039, 1044 kita 2 land measuring 0-10-01 hect, situated in village Dhatoli, Illaqua Hatli, Sub Tehsil Baldwara, District Mandi, H.P. by way of redemption, subject to their depositing in the court the principal money i.e. Rs. 565/- alongwith an interest @ 6% per annum from 25.3.64 till the date of preliminary decree alongwith an interest @ 6% per annum on the mortgage money from the date of preliminary decree till the depositing of the said amount in the court, within 3 months from the date of judgment".*

8. Feeling aggrieved with the judgment and decree so passed by the learned trial court, defendants therein preferred an appeal. In Appeal, learned appellate court while concurring with the findings returned by the learned trial court however set aside the judgment and decree so passed by the learned trial court on the ground that the plaintiffs had failed to deposit the mortgage money in order to redeem the mortgage as was directed by the learned trial court.

9. The judgment and decree so passed by the learned appellate court dated 2.3.2002 has been assailed by way this appeal by the plaintiffs. However, no appeal has been filed against the judgment and decree passed by the learned appellate court by the respondents herein.

10. This appeal was admitted by this Court on the following substantial question of law on 6.11.2003:-

> *"What is the effect of mortgagors not depositing the amount towards redemption of mortgage within the time allowed by the Court?"*

11. Mr. Rajesh Mandhotra, learned counsel for the appellants, has submitted that the judgment and decree passed by the learned appellate court is *prima facie* perverse as while allowing the appeal so filed by the defendants and setting aside the judgment and decree so passed by the learned trial court, learned appellate court erred in not appreciating the fact that the reason as to why the plaintiffs did not deposit the mortgaged money for the purpose of redeeming the mortgage, was that on an application filed under Order 41 Rule 5 CPC along with the appeal, there was an order passed by the learned appellate court staying the operation of judgment and decree so passed by the learned trial court. Mr. Mandhotra argued that it is not as if the plaintiffs did not purposely deposit the mortgage money as ordered by the learned trial court and even today they were ready and willing to deposit the amount. Mr. Mandhotra stated that amount could not be deposited as the operation of the impugned judgment and decree passed by the learned trial court was stayed by the learned appellate court and that too, at the behest of the defendants, who had filed an appeal against the judgment and decree so passed by the learned trial court. On these basis, he submitted that the factum of non deposition of mortgaged amount could not have gone against the plaintiffs as has been wrongly construed by the learned appellate court.

12. On the other hand, Mr. R.L. Chaudhary, learned counsel for respondents No. 1 to 6, 9 and 10 has argued that though there was an interim order passed by the learned appellate court, vide which the judgment and decree so passed by the learned trial court was stayed, however there was no embargo for the plaintiffs to have had deposited the mortgage money as ordered by the learned trial court. On these basis, he submitted that there is no perversity with the findings so returned by the learned appellate court and there is no merit in the instant appeal, which deserves dismissal.

13. I have heard learned counsel for the parties at length and have also gone through the judgments passed by the learned courts below as well as the record of the case.

14. In the present case, there are concurrent findings returned by both the learned courts below to the effect that the suit land was infact mortgaged by the father of the plaintiff with Sh. Sant Ram, predecessor in interest of defendants No. 1 and 2, who in connivance with the revenue staff as well as Sh. Krishan Dayal created tenancy, in papers only, in favour of predecessor-in-interest of defendants No. 3 to 8, therefore, the plaintiffs were entitled for relief of possession by way of redemption. The findings so returned by both the learned courts below are not under challenge in this appeal, as I have already stated above no appeal has been filed against the judgment and decree passed by the learned appellate court by the present respondents.

15. Be that as it may, the judgment and decree was passed by the learned trial court on 16.12.1995. As per the judgment and decree passed by the learned trial court, three months' time was granted to the plaintiffs to deposit the principal amount along with interest from the date of judgment and decree. Admittedly before expiry of period so granted by the learned trial court, the operation of the judgment and decree passed by the learned trial court was stayed by the learned appellate court in an appeal filed by the present respondents on 14.02.1996, on which date, the following order was passed:-

> "This appeal alongwith application under order 41 rule 5 C.P.C. moved before me as ld. District Judge, Mandi is on leave. Heard. Be put up before ld. District Judge, Mandi on 19-2-1996 and in the meantime, in view of the affidavit of the appellant, operation of the judgment and decree is stayed under order 41 rule 5 C.P.C. till further orders & status quo qua possession be maintained. Be put up before ld. District Judge, Mandi on 19-2-1996."

16. Therefore, in this view of the matter, learned appellate court has erred in not appreciating the fact that it is not as if there was a wilful disobedience on the part of the plaintiffs by not complying with the judgment and decree passed by the learned trial court, but it was on

account of the stay order so passed by the learned appellate court that the plaintiffs were not able to deposit the said amount as the operation of judgment and decree in compliance to which the plaintiffs were to deposit the money stood stayed by the learned appellate court.

17. Now, coming to the substantial question of law framed. In my considered view herein it is not a case that the mortgagors did not deposit the amount towards redemption of mortgage within the time allowed by the learned trial court *per se*. Here is a case where the mortgagors could not deposit the said amount within the time period so granted by the learned trial court as the operation of the judgment and decree passed by the learned trial court was stayed by the learned appellate court, therefore, there is no question of mortgagors not having deposited the mortgage amount within the time as was allowed by the learned trial court or disobeying the judgment and decree so passed by the learned trial court. The substantial question of law is answered accordingly.

18. In view of my findings returned above, the present appeal is allowed and the judgment and decree dated 2.3.2002 passed by the learned Additional District Judge, Mandi, in Civil Appeal No.16/1996 is set aside and the judgment and decree dated 16.12.1995 passed by the learned trial court in Civil Suit No.65/1989 is restored and upheld. The plaintiffs are further directed to comply with the judgment and decree dated 16.12.1995 on or before 30.6.2017. Pending application(s), if any, also stands disposed of. No order as to costs.

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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, VACATION JUDGE

Sh. Arvind Sharma ….Petitioner.
Vs.
State of Himachal Pradesh and another …..Respondents.

CWP No.: 813 of 2011
Reserved on: 03.04.2017
Date of Decision: 06.04.2017

Constitution of India, 1950- Article 226- Petitioner has done his B.Sc. in Medical Laboratory Technology from Janardhan Rai Nagar, Rajasthan Vidyapith University, Udaypur- he applied for registration but the registration was declined – aggrieved from the order of non-registration, the present writ petition was filed – the respondent pleaded that the university is not competent to run extension Centre/study Centre/learning Centre outside the State of its origin – the University did not have recognition to run the course in the year 2005 – the recognition was given in the year 2007-08- the degree obtained by the petitioner is not valid – held thata person cannot be registered as a paramedical practitioner unless he possesses a recognized qualification- Centre in Kurukeshtra was an authorized Distance Education Study Centre of the University - ex post facto approval/recognition was granted till 2005 – thereafter provisional approval was granted for the year 2007-08 – the qualification gained by the petitioner between 2005 to 2007 cannot be said to be recognized- respondent No.2 had rightly declined the recognition to the petitioner – writ petition dismissed.(Para-6 to 22)

Case referred:

Prof. Yashpal and Another Vs. State of Chhattisgarh and others, (2005) 5 Supreme Court cases 420

For the petitioner: Mr. Amit Singh Chandel, Advocate.
For the respondents: Mr. Pankaj Negi, Deputy Advocate General, for respondent No. 1.
Ms. Tanu Sharma, Advocate, for respondent No. 2.

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 Annexure P-2, dated 12.04.2010 may very kindly be quashed and set aside.

B. That respondents be directed to make the registration of the petitioner as Bachelor of Science in Medical Laboratory Technology from 12.11.2008 on which the petitioner applied for the registration.

C. That the relevant record may kindly be summoned.

D. Any other order which this Hon'ble Court deems just and proper in the facts and circumstances of the case submitted hereinafter may be passed in favour of petitioner and against the respondents."

2. The grievance of the petitioner is that he has done his B.Sc. (Bachelor of Science) degree in Medical Laboratory Technology from Janardan Rai Nagar Rajasthan Vidyapeeth University, Udaipur (hereinafter referred to as 'JRNRV University') in the year 2007 and thereafter he applied for registration with respondent No. 2 on 12.11.2008, however, respondent No. 2 rather than registering the petitioner with it, has denied his rightful claim on arbitrary and flimsy grounds. According to the petitioner, he completed the course in issue from Janardhan Rai Nagar Rajasthan Vidyapeeth University Udaipur, which was a deemed University, as per the notification issued by the Government of India, Ministry of Human Resource Development, dated 19.08.2003. It is further the case of the petitioner that vide Notification Annexure P-4, dated 08.10.2008, Indira Gandhi National Open University has confirmed the approval of programmes offered by the institution by according provisional recognition for academic year 2007-08, i.e. the year when the petitioner had obtained his Bachelor of Science degree in Medical Laboratory Technology from the said University. As per the petitioner, the issue of recognition of the degree stands settled by way of Annexure P-4, wherein it has been clarified by the University Grants Commission that the Joint Committee has already conveyed its provisional approval qua the degree which had been obtained by the petitioner from the said University. On these bases, it has been submitted by the petitioner that the act of respondent No. 2 of not registering the petitioner with it is an arbitrary act and amounts to malice in law on the part of the respondents as they have no legal excuse to deny recognition as well as registration of the petitioner with it.

3. In response, the stand of respondent No. 2 is that the petitioner has alleged that he has undergone 3 ½ years Bachelor of Science course in Medical Laboratory Technology and has also undergone a training of two years in the said course and one year certificate course in the same from G.N. Institute of Medical Technology, Kurukshetra, which as per petitioner is recognized to Janardhan Rai Nagar Rajasthan Vidyapeeth University, Udaipur, but the petitioner has not placed any material on record to demonstrate as to how the University in issue is running University Extension Centre/Study Centre/Learning Centre in Kurukshetra, Haryana, i.e. outside the State of its origin, especially in view of the law laid down by the Hon'ble Supreme Court in **Prof. Yashpal and Another** Vs. **State of Chhattisgarh and others**, (2005) 5 Supreme Court cases 420, wherein it has been held by the Hon'ble Supreme Court that no University can open Study Centres outside the territorial jurisdiction conferred upon it by its parent statute as far as the opening of Learning or Study Centres in Paramedical/Technical and Scientific Education is concerned. It is further the stand of respondent No. 2 that the petitioner was enrolled with the University in the year 2005, when the University in issue was not having any recognition to conduct the course in which degree has been obtained by the petitioner. It is further mentioned in the reply that though the University in issue was given provisional recognition in the year 2007-08, but the petitioner in fact had passed out the course before academic year 2007-08 in the year 2007 itself. Thus, the stand of the respondent-Council is that petitioner having enrolled with the University in the year 2005 and having passed out before the academic year 2007-2008

from the University concerned, in fact, was given a pass certificate for the academic year for which the University in issue was not having any recognition whether provisional or *post facto.* It was further stated in the reply that the University in issue had addressed a communication dated 3rd July, 2006 to Chairman of University Grants Commission, which demonstrated that the University in issue was given *ex post facto* approval under the Distance Education Mode from 1st June, 2001 to 31st August, 2005 upon an undertaking given by the said University to the effect that the said University would stop admitting students from 13th August, 2005 under Distance Education mode and that an advertisement to this effect was already published in the newspaper, however, as per the respondent-Council, the said University had breached its own undertaking and admitted students for the academic year 2005 also in 3 ½ year training course in Bachelor of Science in Medical Laboratory Technology. Thus, on these bases, the respondent-Council denied the claim of the petitioner.

4. On 19.04.2011, this Court had granted time to the petitioner to file rejoinder, however, no rejoinder has been filed by him nor any request was made in this regard during the course of arguments.

5. I have heard the learned counsel for the parties and have also perused the pleadings.

6. It is apparent from the pleadings as well as documents appended therewith that petitioner herein vide application dated 12.11.2008 (Annexure P-1) requested the Paramedical Council, IGMC to register his name in the said Council on the strength of his having completed his graduation in Science, i.e. B.Sc. (MLT) from JRNRV University in the year 2007.

7. Pursuant to this, vide communication dated 27.11.2008 (Annexure P-1/A), respondent No. 2 called upon the petitioner to produce documents as to from where he had gained two years training. In response to this, petitioner wrote a letter to Principal, GN Medical Institute, Jangra Dharamhala, Thaneshwar, Kurukshetra on the subject *"Registration with HP Para Medical Council, Shimla"* and requested them that as he was enrolled in the said institute from April, 2004 to September, 2007 for diploma/degree courses in Medical Lab Technology as a regular candidate from JRNRV University, Udaipur, therefore, he may be issued the documents of approval issued to the Study Centre by the University/State body alongwith copy of MOU of University for the courses in issue.

8. Vide communication dated 27.12.2008 (Annexure P-1/C), Registrar of respondent No. 2-Council was informed by Director of one G.N. Institute of Medical Technology, which as per this communication was Authorized Extention Centre of Rajasthan Vidya Peeth Deemed University, Udaipur, that the petitioner was imparted two years training from the said institute, which was fully recognized by Janardan Rai Nagar Rajasthan Vidyapeeth University Udaipur, (Rajasthan) and that in addition to above, the petitioner had also completed B.Sc. (MLT) degree from JRN Rajasthan Vidyapeeth University Udaipur.

9. On record, as part of Annexure P-1/C, is a diploma/certificate issued by Janardan Rai Nagar Rajasthan Vidyapeeth University issued in favour of the petitioner in Medical Lab Technology, in which it is mentioned that the petitioner attended two years course in this regard and passed out the examination in the year 2006. Now, incidentally this certificate is dated 16.01.2007 and beneath the subject of Medical Lab Technology, the words "LATERAL ENTRY" are mentioned.

10. Besides this, petitioner has also placed on record alongwith Annexure P-1/C three Memorandum of Marks. The first Memorandum of Marks pertains to diploma in Medical Lab Technology (Second Year) 2006, in which duration of course is mentioned as two years and the same is dated 10.08.2006. Second Memorandum of Marks pertains to Certificate Course in Medical Laboratory Technology in the year 2004 and the duration of the course is mentioned as one year. This certificate is dated 26.09.2004. The third Memorandum of Marks pertains to Certificate Course in the year 2005 and duration of course is one year and the same is dated 29.07.2005.

11. Petitioner has also placed on record alongwith Annexure P-1/C, a copy of certificate to the effect that the said certificate was being issued to the petitioner for having attended 3 ½ years course, who passed the examination in the year 2007 in " Science (Medical Laboratory Technology) (Lateral Entry). This certificate is dated 21.08.2008. Incidentally, it is not mentioned in the certificate as to whether it was a degree certificate or a diploma certificate. Alongwith this certificate, two Memorandum of Marks are appended, both dated 03 October, 2007 and 05 October, 2007, respectively, as per which, the petitioner had appeared in July/August, 2007 as a Lateral Entry regular candidate in Bachelor of Science in Medical Laboratory Technology (B.Sc.-MLT) in fifth and sixth semester respectively. He has also placed on record one more certificate dated 16.01.2007, in which it is mentioned that the petitioner has attended two years' course and has passed the examination in the year 2006 from the University in Medical Lab Technology (Lateral Entry). This certificate is also silent as to whether it is in lieu of a diploma course or a degree course. Alongwith this certificate, there is one Memorandum of Marks dated 10.08.2006, which reflects that it pertains to two years diploma in Medical Lab Technology (Second Year) 2006.

12. Thus, what is apparent and evident from the abovementioned Annexures, is that according to petitioner, he initially did two years diploma course in Medical Lab Technology and thereafter he took Lateral Entry in the degree course and after undergoing the degree course for one year, he was conferred 3 ½ years degree in the course named Bachelor of Science in Medical Laboratory Technology and on the strength of same, he had moved his application with respondent No. 2 to register him as such.

13. The Himachal Pradesh Paramedical Council is a statutory Council, which *inter alia* registers persons intending to carry on a para-clinical establishment. Section 38 of the same envisages that no person shall be registered on the State register as paramedical practitioner unless he possesses a recognized qualification. Section 43 of this Act further provides that a person who is aggrieved by rejection of his application *inter alia* under Section 38 may file an appeal against the said rejection to the State Government, whose decision in this regard shall be final. As the issue of alternative remedy was not seriously stressed, therefore, this Court is not dwelling on the same and the case is being decided on the merits of the case, as has been prayed for by the learned counsel for the parties.

14. Now, it is apparent from the stand of the respondent-Council that the said University was not having the requisite recognition for granting degree/diploma by way of Distance Education mode as has been done in the present case. In the present case, the petitioner claims himself to have undergone diploma/degree course in Medical Lab Technology from April 2004 to September 2007. Relevant issue for the purpose of adjudication of this Court is not whether the University in issue was granted the status of deemed University or not. Relevant issue is as to whether the course in issue was having the recognition to conduct courses through the Academic Centres/Study Centres/ Campus Centres by way of Distance Education. Memorandum of marks as well as diploma/degree certificates placed on record by the petitioner demonstrate that the same were issued to him from the year 2004 up to the year 2007. As per the petitioner, communication dated 04.04.2009, which is appended with Annexure P-1/D is self explanatory that G.N. Institute of Medical Technology, Jangra Dharamshala Campus, Near Chhota Railway Station, Kurukshetra (Haryana) was an authorized Distance Education Study Centre of Janardan Rai Nagar Rajasthan Vidyapeeth University, Udaipur. However, as per the respondent-Council, as JRNRV University has been granted *ex post facto* approval recognition only up till 2005 and thereafter provisional approval for the year 2007-08 only, the qualification gained by the petitioner between 2005-2007 cannot be recognized qualification as during this period, the University was not having any recognition either *post facto* or otherwise. This is evident from the stand taken by the respondent-Council in its communication dated 30.06.2009, which is on record as Annexure P-1/E.

15. There is another communication on record as Annexure P-2, dated 12.04.2010, which reads as under:

"To

Arvind Sharma,
S/o Ramesh Chand Sharma,
Village Rapper (Kharotta)
PO Berthin, Distt. Bilaspur
Pin -174029

Sub Registration in Para-Medical Council as B.Sc. (MLT).

Your letter has been received with the subject mentioned *above. As you are aware that the Council has written so many letters in response to your letters in which all queries from your side has been explained.*

A letter from this office HPPMC No. 3785 dated 30.6.2009 was sent to you in which it was clarified that you can be registered as Laboratory Technician one year Certificate course on the basis of your qualification as CMLT which you have done on or before 2005. Your registration with the qualification B.Sc. Medical Technology shall not be possible because as per the direction received from Director Indira Gandhi National Open University, it is clarified that the validity of Degrees during post facto approval is concerned, the students should have completed the Degrees during the period of post facto approval by DEC. Therefore, Council will not be able to register you with the qualification B.Sc. Medical Technology because you have completed your B.Sc. in the year 2007.

Yours faithfully,

Registrar,
HP Para-Medical Council
Old Dental Building
IGMC"

16. There is also on record communication dated 08.10.2008 (Annexure P-4) addressed from Indira Gandhi National Open University to Vice Chancellor, Janardan Rai Nagar Rajasthan Vidyapeeth (Deemed University) on the subject *"Continuation of provisional recognition-reg."*, which reads as under:

"Prof. Manjulika Srivastava

Subject: Continuation of provisional recognition-reg.

Dear Sir,

This has reference to your letter No. JRNRVU/DEW/2008-2009/811, dated 8 May, 2008 requesting Distance Education Council for continuation of recognition of your Institute for programmes offered through distance mode for the year 2008-09

In this connection we would like to inform you that vide our letter No. F.No. DEC/Univ./State/07/5739, dated 3.9.2007, your University was accorded Provisional recognition for one academic year i.e. 2007-08 for programmes offered through distance mode. Further, your proposal for grant of regular recognition of your University is under process. Meanwhile, your University has been granted continuation of provisional recognition till such time a visiting committee visits your Institute and submits its recommendation.

With regards,

Yours sincerely,
Sd/-
(Manjulika Srivastava)

Prof. Lokesh Bhatt
Vice Chancellor
Janardan Rai Nagar Rajasthan Vidyapeeth (Deemed University)
Pratap Nagar
Udaipur-313001
Rajasthan."

17. Now in this background, the moot issue which is to be answered by this Court is whether the diploma/degree in question gained by the petitioner can be said to be a recognized qualification for the purpose of petitioner being registered under the provisions of the Himachal Pradesh Paramedical Council Act.

18. It is borne out from the records and which fact was not disputed during the course of arguments also that the University from which diploma/degree has been obtained by the petitioner was not recognized between the year 2005 and the academic session 2007-2008. The certificate of diploma appended with the petition by the petitioner demonstrates that he was awarded this diploma in Medical Lab Technology (Lateral Entry) for having obtained two years course, examinations of which were passed by the petitioner in the year 2006. Now admittedly, in the year 2006, when the said diploma was obtained by the petitioner, University in issue was not having any recognition *post facto* or provisional or otherwise to impart education in the said course. Similarly, the certificate to the effect that the petitioner had obtained 3 ½ years course in Science (Medical Laboratory Technology) (Lateral Entry) demonstrates that the examinations of the same were held in the year 2007. Incidentally, the petitioner as per Memorandum of Marks appended with the petition is reflected to have had passed the backlog subjects as well as fresh subjects as a Lateral Entry candidate in one go in the months of July/August, 2007.

19. Be that as it may, the fact of the matter still remains that if this 3 ½ years course is to be taken as 3 years degree course undergone by the petitioner, then obviously this degree is undergone by the petitioner between 2005 and academic year 2007-2008, i.e. during the period for which the University in issue was not having any recognition. Incidentally, the University from which the diploma/degree was obtained by the petitioner was not even impleaded as a party respondent in the writ petition. Therefore, in these circumstances, when there is no material on record to demonstrate that the diploma/degree had been obtained by the petitioner during the period when the University in issue was duly authorized/recognized to offer said diploma/degree course, I do not find any fault with respondent No. 2-Medical Counsel for refusing to register the petitioner under the provisions of Himachal Pradesh Paramedical Council Act.

20. A coordinate Bench of this Court in **Jyoti Gautam** Vs. **State of Himachal Pradesh and others,** CWP No. 8917/2012-B has held:

> *"9. What emerges from the reading of Annexure P-15 is that the Allahabad Agriculture Institute (Deemed University) has been granted one time post-facto approval only upto 2005. Thereafter, the University has been granted provisional recognition for one academic year, i.e. 2007-08. The petitioner sat in the examination in the academic sessions 2005-2006 an d 2006-2007. There was no recognition for the years 2005-2006 and 2006-2007 by the Indira Gandhi National Open University. Petitioner's two academic sessions were under cloud. The State Government had again sought the clarification from the Indira Gandhi National Open University to clarify its position whether Allahabad Agriculture Institute (Deemed University) was recognized for the sessions 2005-2006 and 2006-2007, but no information was supplied to it.*

10. The matter is required to be considered from another angle. The Physiotherapist course is a paramedical course. The term "paramedical" has been explained by the Himachal Pradesh Paramedical Council Act, 2003 as under:

> *"Paramedical" means any person qualified in paramedical subject and who helps in teaching or practice of- (i) medicine with in the meaning of clause (f) of section 2 of the Indian Medical Council Act, 1956 (102 of 1956); or (ii) medicine in Homoeopathy with in the meaning of clause (4) of section 2 of the Himachal Pradesh Homoeopathic Parishioners Act, 1979 (3 of 1980); or*
>
> *(iii) medicine in Ayurvedic System and Unani System with in the meaning of clause (e) and (h) respectively of section 2 of the Himachal Pradesh Ayurvedic and Unani Practitioners Act, 1968 (2) of 1968).*

11. The definition suggests that it is a technical course. The paramedical courses, nursing courses and engineering courses cannot be imparted through distance education. The candidates undertaking these courses have to attend the regular classes. The question whether the technical courses can be run by the distance education has been gone into by this Court in CWP No.1771 of 2012-H decided on31.12.2012. The Court has held as under:

> *"22. Mr. Bhuvnesh Sharma has also argued that the degree awarded by the Indira Gandhi National Open University is valid for the purpose of employment in the State of Himachal Pradesh. Now, the Court will advert to the question of great public importance whether the Indira Gandhi National Open University can award degrees in technical courses like B.Sc. Nursing, diploma/degree in Engineering and other technical courses. The Board of Management of the Indira Gandhi National Open University has resolved on 19.7.1991 to insert Statute 28 in the Statutes of the University. According to Statute 28, Distance Education Council, has been constituted to take all such steps as it may deem fit for the promotion of the Open University and distance education systems in the educational pattern of the country and for the coordination and determination of standards of teaching, evaluation and research in such systems and in pursuance of the objects of the University to encourage greater flexibility, diversity, accessibility, mobility and innovation in education at the university level by making full use of the latest scientific knowledge and new educational technology. The functions of the distance education council have already been quoted hereinabove. The powers and functions of the Distance Education Council are to develop a network of open universalities/distance education institutions in the country in consultation with the State Governments and other concerned agencies, to identify priority areas in which distance education programmes should be organized and to provide such support as may be considered necessary for organizing such programmes and also to identify the specific client groups and the types of programmes to be organized for them, and to promote and encourage the organization of such programmes through the network of open universities/distance education institutions and also to promote an innovative system of University level education, flexible and open, in regard to methods and pace of learning, combination of courses, eligibility for enrolment, age of entry, conduct of examination and organize various courses and programmes and also to promote the organization of programmes of human-resource development for the open university/distance education system and to initiate and organize measures for joint development of courses and programmes and research in distance education technology and practices. The Distance Education Council has also issued guidelines in the year 2006 for regulating the establishment and operation of Open and Distance Learning Institutions in India. The Institutions are required to give undertaking that the provisions of Distance Education*

Council shall be observed. The parent institution which intends to start or which has already started Distance Education Institutions should have a provision in its Act/MoA for running Distance Education Programme. The parent institution cannot establish its Study Centres/Regional Centres outside its jurisdiction as specified in the parent institution Act/MoA. The parent institution is required to monitor the academic standard and quality of Distance Education within the parent institution.

23. What emerges from the combined reading of Statute 28 of the Indira Gandhi National Open University Statutes and the powers and functions of the Distance Education Council is that there is no provision for providing technical education by way of distance education. The courses of B.Sc. Nursing and M.Sc. Nursing are very technical in nature. The candidates besides possessing theoretical knowledge are also required to obtain practical knowledge. The candidates admitted in regular courses of B.Sc., M.Sc./B.E. in Engineering and other technical courses in recognized institution have to attend the minimum number of lectures in theory as well as in practical examination. The knowledge acquired by the candidates through regular courses cannot be compared with technical qualification obtained by way of distance education. The Regulations framed by the Indian Nursing Council are very comprehensive vis-à-vis the Regulations framed by the Indira Gandhi National Open University for awarding B.Sc. Nursing degree. The recognized/valid institutions are required to comply with all the academic regulations framed by the Indian Nursing Council with regard to the syllabus, curriculum, appointments of teachers, eligibility criteria, staffing pattern, including building etc. The major difference which has already been taken note of is that the duration of B.Sc. nursing course is four years as per the academic regulations framed by the Indian National Council and 3-5 years in case of Indira Gandhi National Open University. In the instant case, petitioner was admitted only for two years for the academic sessions 2007-2008 and 2008-2009.

12. Their Lordships of the Hon'ble Supreme Court in Annamalai University represented by Registrar Vs. Secretary to Government, Information and Tourism Department and others, (2009) 4 SCC 590 have held that the distinction between a formal system and an informal system is in the mode and manner in which education is imparted. Their Lordships have held as under:

"40. UGC Act was enacted by the Parliament in exercise of its power under Entry 66 of List I of the Seventh Schedule to the Constitution of India whereas Open University Act was enacted by the Parliament in exercise of its power under Entry 25 of List III thereof. The question of repugnancy of the provisions of the said two Acts, therefore, does not arise. It is true that the statement of objects and reasons of Open University Act shows that the formal system of education had not been able to provide an effective means to equalize educational opportunities. The system is rigid inter alia in respect of attendance in classrooms. Combinations of subjects are also inflexible.

41. Was the alternative system envisaged under the Open University Act was in substitution of the formal system is the question. In our opinion, in the matter of ensuring the standard of education, it is not. The distinction between a formal system and informal system is in the mode and manner in which education is imparted. UGC Act was enacted for effectuating co-ordination and determination of standards in Universities. The purport and object for which it was enacted must be given full effect."

13. What emerges from the analysis made hereinabove is that for two academic years, i.e. 2005-06 and 2006-07, there was no recognition by the Indira Gandhi National Open University. Moreover, the technical courses like

Physiotherapy cannot be undertaken by way of distance education. In view of this, there is no illegality or arbitrariness in the action of the respondents in denying the appointment to the petitioner to the post of Physiotherapist."

21. Coming to the facts of this case, the University was granted one time *post facto* approval only upto 2005 and thereafter the said University has been granted provisional recognition for one academic year, i.e. 2007-08. Petitioner appeared in the examination in the academic sessions 2005-2006 and 2006-2007, in which there was no recognition by Indira Gandhi National Open University. In this view of the matter, the aforesaid judgment aptly applies to the facts of this case also. In the present case also, the University which purportedly has issued the certificates in favour of the petitioner was not having any recognition in between 2005 and 2007, therefore, the diploma/degree certificates which have been obtained by the petitioner from the said University cannot be said to have been obtained by him during the academic session for which the said courses being run by the University were recognized either provisionally or *post facto.*

22. Therefore, in view of the discussion held above, I do not find any merit in the petition and the same is dismissed, so also miscellaneous applications, if any. No order as to costs.

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

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

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

Negotiable Instruments Act, 1881- Section 138- Accused was convicted by the Trial Court for the commission of offence punishable under Section 138 of N.I. Act- an appeal was filed, which was dismissed for non-appearance of the counsel – held that the Court should not have dismissed the appeal for want of appearance and should have issued the warrants to procure the presence of the appellant – revision allowed and order of the Appellate Court set aside. (Para-1 to 3)

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

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral)

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

pronounced upon him by the learned Chief Judicial Magistrate also when for want of his appearance before the learned Additional Sessions Judge-I, Mandi on 17.01.2017, his appeal stood dismissed, for hence his inability to prosecute it, yet any affirmation by this Court of the impugned verdict, would entail upon him the ill fate of his suffering the sentence of imprisonment imposed upon him by the learned Chief Judicial Magistrate. The aforesaid causality would impinge upon his liberty also would disrobe him of his legitimate statutory right to contest his conviction and consequent imposition of sentence(s) upon him by the learned Chief Judicial Magistrate, Mandi.

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

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

****

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

Ran Singh ....Petitioner.

Vs.

Himachal Pradesh Vidhan Sabha, Shimla and another ....Respondents.

CWP No.: 1973 of 2011
Reserved on: 08.03.2017
Date of Decision: 06.04.2017

Constitution of India, 1950- Article 226- Petitioner was appointed as a clerk in H.P. Vidhan Sabha Secretariat- he was promoted and was placed against the post of Superintendent (Ex-Cadre) in the year 2000- Himachal Pradesh Vidhan Sabha Secretariat (Recruitment and Condition of Service) Amendment Rules, 2008 were notified in the year 2008 – eight posts of Section Officers were to be filled on the basis of seniority – petitioner was promoted as Superintendent Grade-II on 1.7.2009 – respondent No.2 who was shown at Serial No.6 was promoted as Section Officer w.e.f. 1.4.2008 on notional basis – notional promotion of respondent No.2 was regularized and he was promoted on regular basis as Section Officer w.e.f. 1.10.2010 – respondent No.2 was wrongly promoted against ST category – respondent No.1 stated in the reply that the promotion was made in accordance with 13 points roster and in accordance with the instructions issued by Government from time to time – held that actual representation of incumbents belonging to different categories in a cadre isto be determined at the time of initial operation of the roster – any excess representation is to be adjusted at the time of future recruitment – respondent no.1 had wrongly adjusted a candidate belonging to ST category against

the post meant for unreserved category – ST candidate was to be adjusted against 7threplacement point and was adjusted against 6th replacement point – respondent No.2 could not have been adjusted against the reserved post for ST as it was already occupied by ST candidate- the petitioner was not unfit and was entitled to promotion – writ petition allowed- direction issued to consider the case of the petitioner for promotion in accordance with law and if the petitioner is found entitled to promotion, to grant him the consequential relief. (Para-9 to 20)

Case referred:
R.K. Sabharwal and others Vs. State of Punjab and others, (1995) 2 Supreme Court Cases 745

For the petitioner: Mr. Dilip Sharma, Senior Advocate, with Mr. Deven Khanna, Advocate.
For the respondents: Mr. Dushyant Dadwal, Advocate, for respondent No. 1.
Mr. Dibender Ghosh, Advocate, for respondent No. 2.

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:

"(i) That the impugned notifications dated 01.10.2010, Annexure P-4 and P-4/A, promoting respondent No. 2 to the post of Section Officer w.e.f. 01.04.2008 on notional basis and 01.10.2010 on regular basis may be quashed and set aside.

(ii) That the respondent No. 1 may be directed to consider the petitioner for promotion to the post of Section Officer with effect from 01.10.2010, with all consequential benefits.

(iii) Any other relief deemed fit and proper in the facts and circumstances of the case may also be granted to the petitioner.

(iv) The cost of the petition may also be awarded."

2. Case of the petitioner is that he was initially appointed as Clerk in Himachal Pradesh Vidhan Sabha Secretariat on 15.10.1981 and was placed in the pay scale of Senior Clerk w.e.f. 23.04.1983. Thereafter, the petitioner was promoted to the post of Senior Assistant vide order dated 06.06.1989 and was placed against the post of Superintendent (Ex-cadre) vide order dated 06.05.2000. Himachal Pradesh Vidhan Subha Secretariat (Recruitment & Conditions of Service) Amendment Rules, 2008 were notified vide notification dated 04.12.2008. As per these Rules, there were eight posts of Section Officers, which are non-selection posts and were to be filled up on the basis of seniority subject to rejection of unfit. The mode of promotion prescribed in the Rules was as under:

9.	Section Officer (Rs.7220-11660)	Non-selection	100% by promotion	NA	By promotion from amongst Superintendent Grade-II with three years regular service or regular combined with continuous adhoc service rendered, if any, in the grade; failing which by promotion from amongst the Superintendent Grade-II with nine years regular service or regular combined with continuous adhoc service as Superintendent Grade-II/Senior Assistant/Senior Translator combined including two years service as Superintendent

					Grade-II failing both by promotion from amongst the Superintendent Grade-II/Sr. Assistants and Sr. Translators with 11 years regular service or regular combined with continuous adhoc service rendered, if any, in the grade. For the purpose of promotion, a combined seniority of Superintendent Grade-II/Supdt. (Ex-cadre)/Senior Assistants and Translators based on the length of service without disturbing their cadre wise seniority shall be prepared.

3. According to the petitioner, vide order dated 17.01.2009, a seniority list of Superintendent (Ex-cadre) and Assistants in the respondent-Vidhan Sabha, as on 01.01.2009, was circulated, in which the petitioner was at Sr. No. 4, whereas respondent No. 2 was reflected at Sr. No. 6. Vide order dated 01.07.2009, petitioner was promoted to the post of Superintendent Grade-II with immediate effect as a stop gap arrangement against a leave vacancy and he joined as such on the same day. Thereafter, vide order dated 01.10.2010, respondent No. 2 was promoted as Section Officer on notional basis w.e.f. 01.04.2008 and the said notional promotion of respondent No. 2 was regularized and he was promoted on regular basis as Section Officer w.e.f. 01.10.2010. It is further the case of the petitioner that vide communication No.PER(AP)-C-B(12)-1/98 Government of Himachal Pradesh, Department of Personnel (AP-III), dated 20th August, 1998 (Annexure P-5), instructions were issued for maintaining post based reservation roster on the subject:

> *"Reservation roster- Post based-Implementation of Supreme Court Judgment in the case of R.K. Sabharwal Vs. State of Punjab and enhancement of reservation in services for Other Backward Classes."*

4. According to the petitioner, as on 12.12.1997, the following persons stood adjusted against cadre strength in the initial recruitment:

Cadre strength	Initial recruitment	Incumbent recruited	Dated of appointment	Whether utilized by SC/ST/ OBC or UR	Remarks
1.	UR	T.K. Vashisht	14.11.91	UR	Promoted on 1.1.1998 (regular)
2.	UR	R.L. Jamwal	19.12.91	UR	Promoted on 1.1.1998 (regular 1.7.98)
3.	UR	Goverdhan Singh	1.11.94	UR	Promoted on 22.2.99 (regular 1.3.2000)
4.	UR	V.C. Thapliyal	1.11.94	UR	Promoted on 1.3.2000 (regular 1.1.2001)
5.	UR	Kesar Dass	1.11.94	SC	Promoted 13.6.2000
6.	UR	Chuni Lal	27.6.96	ST	Promoted on 3.3.2005
7.	SC	Hashmat Rai	1.9.96	UR	Expired.

5. It is further the case of the petitioner that on 12.12.1997, against the cadre strength of 7, 6 posts were to be manned by Un-reserved category candidate and one post was to be manned by SC category candidate as per 13 point roster and as on the effective date, factually, out of the 7 incumbents who were holding the post of Section Officer, 5 belonged to Un-Reserved category, 1 belonged to SC category and 1 belonged to ST category. The case of the petitioner is that in fact when DPC was held wherein respondent No. 2 was considered for promotion to the post of Section Officer, the DPC was held by assuming that the post in question was a selection post, whereas as per the Recruitment and Promotion Rules, post in question was a non-selection post and it appears that DPC was mis-informed about the nature of the post, as it was not brought to the notice of DPC that in the initial cadre strength of 7, sixth point stood utilized by a ST category candidate and in the first 13 point roster cycle including initial recruitment/replacement points, the point of ST category stood exhausted and the said point would have had subsequently been available only to ST category at replacement point 13 in the second cycle roster. However, ignoring this important aspect of the matter, respondent No. 2 stood promoted against ST category candidate without appreciating that the roster point against which he was promoted, was to be filled in by an Un-reserved category candidate.

6. Respondent No. 1 in its reply has justified its stand by stating that respondent No. 1 has framed the Himachal Pradesh Vidhan Sabha Secretariat (Recruitment and Conditions of Service) Rules, 1974, which were last amended on 4th December, 2008 and in the Second Schedule of the Rules at Sr. No. 9 was the mode prescribed for promotion to the post of Section Officer. As per respondent No. 1, instructions issued by the Government vide letter No. PER (AP)-C-B(12) 1/98, dated 20th August, 1998 were made applicable in the Himachal Pradesh Vidhan Sabha Secretariat and roster for direct recruitments and promotions of various cadres was being maintained and recruitment and promotions were being made accordingly. It was mentioned in the reply that pursuant to instructions dated 20th August, 1998 and keeping in view the principles laid therein, a 13 point reservation roster to the post of Section Officer was being maintained reflecting therein the position on 12.12.1997 onwards, in which, the incumbents who were eligible at the relevant point of time, were placed seriatumwise vis-à-vis the category to which they belonged and thereafter subsequent promotions of Section Officers were made from time to time strictly in accordance with 13 point reservation roster and in rotation after enhancement of cadre strength of Section Officer upto 8 posts, the 6th post which was meant for Scheduled Tribe category horizontally was filled in accordingly. Relevant extract of para 9 of the reply so filed by respondent No. 1 is quoted hereinbelow:

> *"9…………That pursuant to the instructions issued by the Government vide letter No. PER (AP)-C-B(12_-1/98, dated 20.08.1998 and keeping in view the principles laid down thereunder, thirteen point reservation Roster to the post of Section Officer was maintained showing the position 12.12.97 onwards in which the incumbents who were in position at that point of time were placed seriatumwise by including the category to which they belonged. Thereafter subsequent promotions of Section Officers were made from time to time strictly according to the thirteen point reservation Roster and in rotation after enhancement of cadre strength of Section Officer upto eight posts the sixth point which was meant to Scheduled Tribe category horizontally was filled in accordingly. In the above referred to instructions dated 20.8.98 under para-7 it has specifically be laid down that excess, if any would be adjusted through future appointments and the existing appointments would not be disturbed, as such the point No. 6 which was occupied by the ST incumbent in view of his position in the old roster/instructions by placing him in the new Roster against unreserved point would be adjusted in future by appointing the unreserved eligible incumbent on becoming this unreserved point available.*
>
> *It is also clarified that during April 2000 the cadre strength of cadre of Section Officer rose to 8 from 7; and, accordingly the roster was correspondingly expanded in consonance with the contents of para-9 of the*

*Explanatory/Notes at **Annexure 'A'** to the instructions with regard to the implementation of the roster. It may be submitted here that Shri Chunni Lal was placed against the Scheduled Tribe category as per the instructions of 1998. Now by virtue of the roster Annexure P-5, Roster point 6 goes to the Scheduled Tribe Category and Shri Chander Prakash Negi was promoted against the same.*

It may be submitted here that the post of Section Officer is a 'non-selection' post as per provisions of the Himachal Pradesh Vidhan Sabha Secretariat (Recruitment and Conditions of Service) Rules, 1974 amended upto 4th December, 2008, but due to clerical mistake which occurred during the process of cut and paste this was shown as selection post, however to fill up the same by promotion, the process of filling up 'Non-selection' post has been adopted."

On the said basis, respondent No. 1 has justified its stand of promoting the private respondent over and above the petitioner.

7. Respondent No. 2 in its reply has also maintained that there is no violation of 13 point roster or instructions issued by the Government dated 20.08.1998, adopted by respondent No. 1, and in fact respondent No. 2 fulfilled the eligibility criteria and was found fit for promotion against 13 point reservation roster and in fact he was rightly promoted to the post of Section Officer. At the time of arguments, in the alternative, it was submitted on behalf of respondent No. 2 that in case this Court comes to the conclusion that the promotion conferred upon respondent No. 2 is not sustainable, then keeping in view the fact that said respondent already stands superannuated, this Court may consider grant of relief in favour of the petitioner without disturbing the promotion so conferred upon respondent No. 2.

8. I have heard the learned counsel for the parties and have also gone through the pleadings of the case.

9. Before proceeding further, it is relevant to mention here that pursuant to the judgment passed by the Hon'ble Supreme Court in **R.K. Sabharwal and others** Vs. **State of Punjab and others**, (1995) 2 Supreme Court Cases 745, the Department of Personnel, Government of Himachal Pradesh issued instructions dated 20th August, 1998 on the following subject:

"Subject: Reservation roster-Post based-Implementation of Supreme Court Judgment in the case of R.K. Sabharwal Vs. State of Punjab and enhancement of reservation in services for Other Backward Classes."

10. Clause 5(e) of these instructions deals with small cadres up to 13 posts, which is quoted hereinbelow:

"5(e) In small cadres of upto 13 posts, the method prescribed for preparation of rosters does not permit reservation to be made for all the three categories. In such cases, the concerned authorities may consider grouping of posts in different cadres in accordance with the existing instructions on the subject. In the event it is not possible to resort to such grouping, the enclosed rosters (Appendices to Annexure-B, C & D) for cadre strength upto 13 posts may be followed. The principles of operating these rosters are explained in the explanatory notes."

11. Clauses 6 and 7 of the said instructions provide as under:

"6. At the stage of initial operation of a roster, it will be necessary to adjust the existing appointments in the roster. This will also help in identifying the excesses, shortages, if any, in the respective categories in the cadre. This may be done starting from the earliest appointment and making an appropriate remark- "utilized by SC/ST/OBC/Gen. etc.", as the case may be against each point in the rosters as explained in the explanatory notes appended to the model rosters. In making these adjustments, appointments of candidates belonging to SCs/STs/OBCs which were made on merit (and not due to reservation) are not to

be counted towards reservation so far as direct recruitment is concerned. In other words, they are to be treated as general category appointments.

7. Excess, if any, would be adjusted through future appointments and the existing appointments would not be disturbed."

Clause 9 of the Explanatory Notes provides as under:

"9. Whenever there is any increase or decrease in the cadre strength, the roster shall be correspondingly expanded or contracted. The same will also apply whenever there is a change in recruitment rules which affects the proportion of posts to be filled by a particular mode of recruitment."

12. A perusal of said instructions demonstrates that it was mentioned therein that at the point of initial operation of the roster, it will be necessary to determine the actual representation of the incumbents belonging to different categories in a cadre vis-à-vis the points earmarked for each category, i.e. SC/ST/OBC and General in the roster by way of plotting the appointments made against each point of roster starting with the earliest appointee. It was further mentioned therein that if an earlier appointee in the cadre happens to be a candidate belonging to Scheduled Castes, against point No. 1 of the roster, the remark "utilized by SC" shall be entered. If the next appointee is a general category candidate, the remark "utilized by general category" shall be made against point No. 2 and so on and so forth till all appointments are adjusted in the respective rosters. It is further clarified therein that in making these adjustments, SC/ST/OBC candidates on merit, in direct recruitment, shall be treated as general category candidates and after completing the adjustment as indicated therein, a tally should be made to determine the actual percentages of representation of appointees belonging to different categories in the cadre and if there was excess representation of any of the reserved categories and if the same exceeded 50%, the same shall be adjusted in future recruitments and vacancies arising from retirement etc. of candidates belonging to such categories shall be filled by appointment of candidates belonging to the categories to which the relevant roster points against which the excesses occur belong. The relevant appendix to Annexure-"D" is quoted hereinbelow:

"APPENDIX TO ANNEXURE-"D"

Model Roster for promotion for cadre strength up to 13 posts

Cadre Strength	Initial Recruitment	REPLACEMENT NO. 1st	2nd	3rd	4th	5th	6th	7th	8th	9th	10th	11th	12th	13th
1.	UR	UR	UR	UR	UR	UR	SC	UR	UR	UR	UR	UR	UR	ST
2.	UR	UR	UR	UR	UR	SC	UR	UR	UR	UR	UR	UR	ST	
3.	UR	UR	UR	UR	SC	UR	UR	UR	UR	UR	UR	ST		
4.	UR	UR	UR	SC	UR	UR	UR	UR	UR	UR	ST			
5.	UR	UR	SC	UR	UR	UR	UR	UR	UR	ST				
6.	UR	SC	UR	UR	UR	UR	UR	UR	ST					
7.	SC	UR	UR	UR	UR	UR	UR	ST						
8.	UR	UR	UR	UR	UR	UR	ST							
9.	UR	UR	UR	UR	UR	ST								
10.	UR	UR	UR	UR	ST									
11.	UR	UR	UR	ST										
12.	UR	UR	ST											
13.	UR	ST"												

13. Now this Court will apply the said model roster provided in Appendix to Annexure "D" in order to ascertain as to whether the promotion conferred by respondent No. 1 to respondent No. 2 was in accordance with said roster so prepared under instructions dated 20th August, 1998 or not. It has come on record that the cadre strength of Section Officer in respondent No. 1 up to March 2000 was 7. The incumbents who were working as on the date when these instructions were implemented by respondent No. 1 were:

1.	Sh. T.K. Vashishat	General Category.
2.	Sh. R.L. Jamwal	General Category.
3.	Sh. Goverdhan Singh	General Category.
4.	Sh. V.C. Thapliyal	General Category.
5.	Sh. Kesar Dass	Scheduled Caste Category.
6.	Sh. Chunni Lal	Scheduled Tribe Category.
7.	Sh. Hashmat Rai	Scheduled Caste Category.

These details are available in para 9 of the petition, which have not been disputed by the respondents.

14. A perusal of roster of promotion for cadre strength up to 13 point, which is Appendix to Annexure "D" demonstrates that in a cadre of 7 posts, the post for a Scheduled Tribe candidate is available at 7th replacement point. Similarly, in a cadre strength of 8, the said post by way of promotion becomes available to Scheduled Tribe category at replacement point No. 6.

15. Now, it is evident and apparent from the reply which has been filed by respondent No. 1 that when the said 13 point roster was applied by respondent-Himachal Pradesh Vidhan Sabha, Shri Chunni LaL, who belonged to Scheduled Tribe category was adjusted by them at 6th vertical point of the said roster, which point otherwise belongs to Un-reserved category. It is further the stand of said respondent that as per Clause 7 of 1998 instructions, since excess appointment/promotion, if any, was to be adjusted through future appointments and existing appointments were not to be disturbed, therefore, the said respondent rightly adjusted Shri Chunni Lal at 6th vertical point and when a replacement point in its turn became available for Scheduled Tribe category candidate, the same was rightly offered to the private respondent.

16. In my considered view, respondent No. 1 has gravely erred in doing so. What has been done by respondent No. 1 is neither the letter nor spirit of 1998 instructions. In fact, a perusal of these instructions demonstrate that because it was the 7th replacement point which was available for a Scheduled Tribe category as per the model roster for cadre strength up to 7 posts, Shri Chunni Lal ought to have been adjusted by them against the 7th replacement point, that is the 7th horizontal point in the cadre strength of 7 and not against Sr. No. 6 against the vertical cadre strength, as reflected in the roster. Clause 7 of the instructions has also been totally misunderstood by respondent No. 1, because Clause-7 does not permit adjustment/plotting to be done in the roster as has been done by respondent No. 1, but intent of Clause 7 is that in case there is excess representation to a particular category under 13 point roster, then without disturbing the said incumbent, adjustments have to be made in future appointments.

17. In my considered view, gist of Clause 7 is that in case in a cadre of 7 posts, there happened to be two Scheduled Caste candidates and two Scheduled Tribe candidates available in its initial application, then simply because one post is available to Scheduled Caste category as well as Scheduled Tribe category in the 13 point roster, this does not means that the second initial appointee has to be disturbed. He has to be maintained in addition to the first candidate of the said category, however, when while applying 'L' shape roster the turn of this category comes, no further promotions are to be offered to the same and the vacancy which has now become available has to be so adjusted.

18. In this view of the matter, it is but obvious that respondent No. 1 has erred in offering respondent No. 2 replacement point meant for Scheduled Tribe category in the 13 point roster without appreciating that as the said replacement point stood consumed by Shri Chunni Lal, respondent No. 2 could not have had been offered the said roster point till this roster point was vacated by Shri Chunni Lal and the same again became available by applying 13 point roster in the mode and manner as is prescribed in the 1998 instructions in favour of Scheduled Tribe category. Therefore, the promotion of respondent No. 2 is in violation of the instructions dated 20th August, 1998. Not only this, even the point which has been erroneously reflected by respondent No. 1 as having been consumed by Shri Chunni Lal, has to be in fact taken to be consumed by a candidate belonging to Un-reserved category candidate. In addition, the roster point against which respondent No. 1 has promoted respondent No. 2, ought to have been offered to General Category candidate as per the Recruitment and Promotion Rules in force for filling up the vacancy in issue. It has not been disputed during the course of arguments that had this roster point been issued to a General Category candidate, then it was the turn of the petitioner for having been considered against the post in issue and as the post in issue was a non-selection post and as there was nothing against the petitioner from which it could be gathered that he was unfit for selection, he had all the chances of being promoted to the post in issue.

19. Besides this, as is evident from the discussion held hereinabove, here is a case where the right to be considered for promotion has been arbitrarily denied by respondent No. 1 to the petitioner. It is settled law that though right to promotion is not a fundamental right, but right to be considered for promotion is a fundamental right. As the petitioner was eligible to be considered for promotion to the post of Section Officer at the time when the Departmental Promotion Committee wrongly considered and promoted respondent No. 2 against the said post, in such circumstances, there is in fact a breach of fundamental right of the petitioner to be considered for promotion.

20. Accordingly, this writ petition is allowed. Though the notifications dated 01.10.2010, Annexure P-4 and Annexure P-4/A are not sustainable in the eyes of law, however, the same are not being quashed, as this Court is not setting aside the promotion which was conferred upon the private respondent. However, as this Court has come to the conclusion that the promotion conferred upon the private respondent was not as per law, therefore, the respondents are directed to consider and promote the petitioner to the post of Section Officer w.e.f. the date the private respondent was promoted to the said post, subject to the petitioner being found fit for the said promotion keeping in view the fact that the post in issue is a non-selection post and not a selection post. It is further directed that if the petitioner is not found otherwise unfit for the said promotion, he shall be given all consequential benefits which were conferred upon respondent No. 2 pursuant to his promotion as Section Officer, however, said consequential benefits will be deemed only and actual benefits shall be conferred upon the petitioner only from the date of his superannuation. No order as to costs.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

Surjit Singh …. Petitioner

Versus

Land Acquisition Collector, H.P. Housing and Urban Development Authority, Shimla. …. Respondent

CWP No.2704/2014

Decided on : April 6, 2017

Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013- Section 24- The Land was acquired, compensation was deposited and possession was taken – the acquisition was challenged by the petitioner pleading that the land

was not utilized and amount of compensation was not paid to the claimant – held that the Act was notified on 1.1.2004 before which date all actions were completed by the acquirer and beneficiaries- the actions taken under the earlier Act are saved by the saving clause – writ petition dismissed. (Para-3 to 7)

Case referred:
Pune Municipal Corporation and another vs. Harakchand Misirimal Solanki and others, (2014) 3 SCC 183

For the Petitioner : Ms. Megha Kapoor Gautam, Advocate, vice, Mr. Gaurav Gautam, Advocate.
For the Respondent : Mr. C.N. Singh, Advocate.

The following judgment of the Court was delivered:

Sanjay Karol, J. (oral)

Land in question, undisputedly, was acquired by the beneficiary in terms of the Land Acquisition Act, 1894 (hereinafter referred to as the 'Act'). Possession of the claimant's land was taken over, in accordance with law, i.e. under the proceedings initiated under the Act.

2. According to the respondent, the amount of compensation so adjudicated by the Collector Land Acquisition, came to be deposited with the Collector Land Acquisition. This was so done in terms of Section 31 of the Act and pursuant to award passed under the Act.

3. In this petition, petitioner, taking strength of the provisions of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (hereinafter referred to as the 'Amended Act'), assails the actions initiated by the State under the Act. Challenge is two fold:- (a) land was never put to use by the beneficiary; (b) amount of compensation never came to be paid to the claimant.

4. With respect to ground (a), beneficiary points out that in fact, the land stands fully utilized and as such it is a disputed question of fact. With respect to the amount of compensation, it is pointed out that amount stood deposited, before the enactment of the Amended Act, in terms of the Act, before the appropriate authorities.

5. The Amended Act came to be notified only w.e.f. 1.1.2014, before which date, all actions, contemplated under the Act, stood initiated and completed by the acquirer and the beneficiary. Thus, it would not be open for the claimant to seek recourse to the provisions of Section 24 of the Amended Act which only contemplate following situation for initiation of such like action:-

(i) Where no award under Section 11 of the Act is issued;

(ii) Where no possession of land, for a period more than five years, prior to the commencement of the Amended Act, pursuant to award passed under Section 11 of the Act, came to be taken over by the acquirer or where no compensation in terms of the Act, stood paid under the provisions thereof.

6. It is no doubt true that the provisions of the Act, by virtue of Section 114 of the Amended Act came to be repealed, but then, there is a saving clause, contemplating all actions initiated under the Act, to be completed only in terms thereof and not under the provisions of the Amended Act, to the extent permissible in terms thereof.

7. The claimant seeks reliance on the decision rendered by the apex Court in *Pune Municipal Corporation and another vs. Harakchand Misirimal Solanki and others,* (2014) 3 SCC 183, which also is of no consequence or benefit to them. In fact, the ratio as laid down therein,

supports the beneficiary. The Court clarified that mere deposit of the amount for the land so acquired under the Act, in terms thereof, itself, would be sufficient enough, and it is not the mandate of law, that either the acquirer or the beneficiary is required to pay or offer the said amount to the claimant, more so, when, as is the position in the instant case, is not acceptable by the latter.

With the aforesaid observations, present petition, devoid of merit is dismissed, so also, pending application(s), if any.

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

Bajaj Allianz General Insurance Company Limited …Appellant.
Versus
Shrimati Reshma and others …Respondents.

FAO No. 300 of 2012
Decided on: 07.04.2017

Motor Vehicles Act, 1988- Section 149- It was contended that driver did not possess a valid driving licence – held that owner/insured –cum- driver had a valid and effective driving licence to drive the offending vehicle – endorsement was not required and insurer was rightly saddled with liability- appeal dismissed. (Para-10 to 12)

For the appellant: Mr. Aman Sood, Advocate.
For the respondents: Mr. Nimish Gupta, Advocate, for respondents No. 1 to 5.
Nemo for respondent No. 6.

The following judgment of the Court was delivered:

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

This appeal is directed against award, dated 23rd January, 2012, made by the Motor Accident Claims Tribunal, Chamba, Division Chamba, H.P. (for short "the Tribunal") in MAC Petition No. 14 of 2010, titled as Smt. Reshma and others versus Shri Kamal Deen and another, whereby compensation to the tune of ₹ 5,70,000/- 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 was saddled with liability (for short "the impugned award").

2. The claimants and the owner/insured-cum-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-insurer has questioned the impugned award on the following two grounds:

(i) That the owner/insured-cum-driver of the offending vehicle was not having a valid and effective driving licence at the time of the accident; and

(ii) That the amount awarded is excessive.

4. Both the grounds are not sustainable for the following reasons:

5. The claimants filed claim petition before the Tribunal for grant of compensation, as per the break-ups given in the claim petition, was resisted by the respondents and the following issues came to be framed by the Tribunal:

"1. Whether deceased Raj Deen died because of rash and negligent driving of vehicle No. HP-73-0791 by respondent No. 1 on 27.3.2010 at Kaman near Chowari, Tehsil Bhattiyat, District Chamba as alleged? OPP

2. If issue No. 1 is proved in the affirmative, how much compensation the petitioners are entitled to and from whom? OPP

3. Whether the driver of vehicle in question was not holding a valid and effective driving licence at the relevant time, if so, its effect? OPR2

4. Whether the vehicle in question was being driven at the relevant time against the terms and conditions of Insurance Policy, as alleged? OPR2

5. Relief."

6. Parties have led evidence.

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

Issue No. 1:

8. The Tribunal, while determining issue No. 1, held that deceased-Raj Deen died because of rash and negligent driving of the offending vehicle by its driver on 27th March, 2010 at Kaman. There is no dispute viz-a-viz the said findings. Accordingly, the findings returned by the Tribunal on issue No. 1 are upheld.

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

Issues No. 3 and 4:

10. It was for the insurer to prove that the driver of the offending vehicle was not holding a valid and effective driving licence at the time of the accident and the offending vehicle was being driven in violation of the terms and conditions of the insurance policy. Though, it has examined Shri Ashok Kumar, Senior Assistant from the office of RLA Chowari, as RW-1, but, has failed to prove both these issues.

11. I have gone through the record. There are two driving licences on the record as Ext. R-1 and Ext. RW-1/A. In terms of Ext. R-1, the owner/insured-cum-driver of the offending vehicle was having a valid and effective driving licence to drive the offending vehicle. Even if we take Ext. RW-1/A to be the original driving licence, then also the owner/insured-cum-driver of the offending vehicle was holding a valid and effecting driving licence to drive the offending vehicle, which is a light motor vehicle, as it has been held by the Apex Court and this Court in a series of cases that endorsement is not required.

12. The Tribunal has rightly made the discussion, while determining issues No. 3 and 4, in paras 20 and 21 of the impugned award, needs no interference. Accordingly, the findings returned by the Tribunal on issues No. 3 and 4 are upheld.

Issue No. 2:

13. The amount awarded is too meagre, but, unfortunately, the claimants have not questioned the same, is reluctantly upheld. Even otherwise, the insurer cannot question the adequacy of compensation. Accordingly, the findings returned by the Tribunal on issue No. 2 are also upheld.

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

15. 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.

16. 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.

Deputy Commissioner, Bilaspur .....Appellant
Versus
Mahender Kumar & others ...Respondents

FAO No. 498 of 2010
Decided on : 07.04.2017

Motor Vehicles Act, 1988- Section 149- Claimant sustained injuries in an accident involving two cars - it was specifically pleaded that the drivers of both the cars were driving the vehicles rashly and negligently, which caused the accident – the Tribunal held both the drivers to be rash and negligent – the insurer had not led any evidence to absolve itself of liability – the injured had remained on leave for more than six months – the Tribunal had awarded just compensation- appeal dismissed. (Para-7 to 15)

For the Appellant :	Mr. Pramod Thakur, Additional Advocate General with Mr. Kush Sharma, Deputy Advocate General.
For the Respondents:	Mr. T.S. Chauhan, Advocate, for respondent No. 1. Nemo for respondent No. 2. Mr. Rajiv Rai, Advocate, for respondents No. 3 & 4. Mr. Lalit K. Sharma, Advocate, for respondent No. 5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

Subject matter of this appeal is the award dated 4th June, 2010, made by the Motor Accident Claims Tribunal, Ghumarwin, District Bilaspur, Himachal Pradesh (hereinafter referred to as 'the Tribunal') in MAC No. 39 of 2006/03, titled **Mahender Kumar versus Chhota Ram & others,** whereby compensation to the tune of Rs. 1,33,500/-, alongwith interest at the rate of 9% per annum and costs to the tune of Rs. 2,000/-, came to be awarded in favour of the claimant and owners and drivers of both the vehicles, i.e. car bearing registration No. HP-24-0007 and car bearing registration No. PB-02U-2934 were saddled with liability (for short the "impugned award").

2. The appellant-owner of vehicle-car bearing registration No. HP-24-0007 has questioned the impugned award on the grounds taken in the memo of appeal.

3. The claimant, drivers of both the offending vehicles, owner of car No. PB-02U-2934 and its insurer have not questioned the impugned award, on any count. Thus, it has attained finality, so far the same relates to them.

4. The claimant has specifically pleaded in the claim petition that drivers of both the offending vehicles were driving their vehicles rashly and negligently and caused the accident, in which the claimant sustained injuries and suffered 9% permanent disability. FIR was lodged against drivers of both the offending vehicles.

5. The respondents contested the claim petition on the grounds taken in their memo of objections.

6. Following issues came to be framed by the Tribunal:

" 1. Whether the petitioner had suffered injuries on account of rash and negligent driving of respondent No. 1 and respondent No. 4?....OPP

2. If issue No. 1 is proved, to what amount of compensation and from whom is the petitioner entitled to? ....OPP

> 3. *Whether the respondent No. 4 had not been in possession of a valid and effective driving licence at the time of the accident, if so, with what effect? …OPR-5*
>
> 4. *Relief.”*

Issue No. 1.

7. The parties have led evidence. The Tribunal after scanning the evidence, oral as well as documentary, has rightly held that drivers of both the offending vehicles had driven the said vehicles, rashly and negligently, at the relevant point of time and caused the accident.

8. Learned Counsel for the appellant was not able to show as to how the driver of vehicle No. HP-24-0007 was not rash and negligent while driving the said vehicle. The driver and owner of another vehicle has not questioned the findings returned by the Tribunal on Issue No. 1.

9. Having said so, the discussion made by the Tribunal in paras-9 to 18 of the impugned award needs no interference. Accordingly, the findings returned by the Tribunal on Issue No. 1 are upheld.

10. Before dealing with Issue No. 2, I deem it proper to deal with Issue No. 3.

Issue No. 3.

11. It was for respondent No. 5-insurer of vehicle No. PB-02U-2934 to discharge the onus, has not led any evidence, thus has failed to do so. Accordingly, the findings returned by the Tribunal on issue No. 3 are upheld.

Issue No. 2.

12. Admittedly, the claimant sustained injuries in the said accident, was taken to Zonal Hospital, Bilaspur and thereafter was referred to PGI, Chandigarh and remained on medical and earned leave w.e.f. 29.06.2002 to 31.01.2003.

13. The Tribunal has made discussion in paras 20 to 30 of the impugned award relating to issue No. 2 and has awarded the just and appropriate compensation, is accordingly upheld.

14. Having said so, the impugned award is upheld.

15. 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.

16. The appeal stands disposed of, as indicated above.

17. 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 SANDEEP SHARMA, J.

Joginder Singh & another …..Appellants.

Versus

State of H.P. ….. Respondents.

RSA No. 579 of 2006
Reserved on: 03.04.2017
Date of Decision: 7th April,2017

Specific Relief Act, 1963- Section 34 and 38- Plaintiff filed a civil suit seeking declaration that order of ejectment passed by the Collector is wrong, illegal, null and void and he be declared owner in possession of the suit land – the suit was decreed by the Trial Court- an appeal was

filed, which was allowed- held in appeal that the First Appeal is a valuable rights of the parties – the First Appellate Court is required to address itself to all issues and decide the appeal by giving reasons – no reasons were given for differing with the findings of the Trial Court – documents relied upon by the defendants were not referred – the judgment set aside- matter remanded to the Appellate Court for a fresh decision.(Para-8 to 12)

Cases referred:

Laliteshwar Prasad Singh versus S.P. Srivastava (2017) 2SCC 415

Shasidhar and others versus Ashwini Uma Mathad and another (2015)11 Supreme Court Cases 269

For the Appellants Mr. Sanjeev Kuthiala, Advocate.

For the Respondent Mr. P.M.Negi, Additional Advocate General, with Mr. Ramesh Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge

Instant Regular Second Appeal filed under Section 100 of the Code of Civil Procedure, is directed against the judgment and decree dated 31.10.2006, passed by learned District Judge, Solan, District Solan, H.P., in Civil Appeal No. 32-NL/13 of 2006, reversing the judgment and decree dated 17.1.2006, passed by learned Civil Judge (Senior Division), Nalagarh, District Solan, H.P., in civil Suit No.9/1 of 2002, whereby suit of the plaintiff for declaration with consequential relief of permanent prohibitory injunction came to be decreed.

2. Having regard to the nature of the order, this Court purposes to pass after examining the record as well as hearing the submissions having been advanced on behalf of the learned counsel for the parties, it may not be necessary to deal with the facts of the case save and except that the respondent/ plaintiff ***(hereinafter referred to as the 'plaintiff)*** filed a suit for declaration with consequential relief of permanent prohibitory injunction against the defendant/ appellant ***(hereinafter referred to as the defendant),*** praying therein that the ejectment order Ex.P-9, dated 30.6.2001, passed by the Assistant Collector 1st Grade in case No.3 of 1999 and order Ex.P-13, dated 31.10.2001, passed by the Collector, Nalagarh in Appeal No.20-VIII/2001, may be declared wrong, illegal, null and void, inoperative, ineffective and incompetent against the mandatory provisions of law.

3. By way of aforesaid suit, plaintiff also claimed that he be declared owner in possession of the suit land measuring 0-18 biswas, bearing khasra No.618/152, situated in the area of village Dadi Kaniyan, Tehsil Nalagarh, District Solan, H.P., as entered in the jamabandi for the year1996-97. The learned trial Court vide judgment and decree dated 17.1.2006, decreed the suit of the plaintiff and declared him to be owner in possession of the suit land measuring 0-18 biswas bearing khasra No.618/152. The learned trial Court also declared that the ejectment order dated 30.6.2001 and order of Collector dated 31.10.2001, are wrong, illegal, null and void.

4. Defendant, being aggrieved and dissatisfied with the passing of aforesaid decree, preferred an appeal under Section 96 CPC before the learned District Judge, Solan, which came to be registered as Civil Appeal No.32-NL/13 of 2006. Learned District Judge vide judgment and decree dated 31.10.2006, allowed the appeal having been preferred by the defendant and set-aside the judgment and decree dated 17.1.2006, passed by the learned trial Court. In the aforesaid background, appellants/plaintiff approached this Court by way of instant appeal, praying therein for setting-aside the judgment and decree of the learned First Appellate Court and restoring the judgment and decree passed of learned trial Court.

5. This Court vide order dated 28.5.2007, admitted the instant Regular Second Appeal, on the following substantial questions of law:-

1. ***Whether there has been misreading of oral as well as documentary evidence in regard to the fact that plaintiff had become owner under the provisions of H.P. Tenancy and Land Reforms Act?.***
2. ***Whether without initiating any enquiry under Rule 9 of the H.P. Village Common Lands(Vesting & Utilization) Rules, 1975 and the provisions of Section 3(5) of the Act, 1974, eviction proceedings under Section 163 of the H.P. Land Revenue Act could be initiated and could be said to be valid and whether such orders would affect the rights of the person in possession and whether on such orders, the affected person was entitled to the permanent injunction?.***

6. While hearing the arguments having been advanced by the learned counsel for the parties, this Court had an occasion to peruse the impugned judgment passed by the learned First Appellate Court, perusal whereof, clearly suggests that learned First Appellate Court has not appreciated the evidence in its right perspective and while differing with the findings recorded by the learned trial Court, it has failed to assign its reasons for doing so. Learned First Appellate Court, after recording the brief facts of the case as well as submission having been made by the learned counsel for the parties, failed to examine the pleadings as well as evidence led on record by the respective parties *viz-a-viz* findings/reasoning recorded by the learned trial Court while allowing the suit having been filed by the plaintiff. Perusal of the evidence, more particularly documentary evidence available on record clearly suggest that the plaintiff in support of his contentions as raised in the plaint, placed reliance on the oral as well as ample documentary evidence, but, it appears that learned First Appellate Court failed to take note of the same and merely on the basis of one document i.e.Ex.P-15 proceeded to hold that entry with respect of possession of the plaintiff in the revenue record has been with respect to two bighas seven biswas of land denoted by khasra Nos.653/152/5 and 655/152/11.

7. This Court after carefully examining the material available on record has no hesitation to conclude that learned First Appellate Court while returning the aforesaid findings on the basis of Ex.P-15, has miserably failed to take note of pleadings of the parties, wherein apparently dispute is/was with regard to land allotted to the plaintiff by the Gram Panchayat Kirpalpur vide resolution Ex.P-1, dated 20.9.1970. Since, this Court after being satisfied that learned First Appellate Court has failed to address itself to all issues and decide the same by giving reasons in support of such findings, intends to remand the case back to learned First Appellate Court for deciding afresh and as such, has purposely avoided to make any findings/observations qua the evidence, be it ocular or documentary available on record. Perusal of the judgment passed by the learned trial Court clearly suggests that on the basis of the pleadings of the parties, as many as seven issues were framed and decided the same on the basis of the evidence led on record. But unfortunately, learned First Appellate Court has not dealt with all issues and merely passed its findings on one document Ex.P-15. Otherwise, also careful perusal of para-8 of the judgment passed by the learned First Appellate Court itself suggests that learned First Appellate Court has returned contradictory findings while placing reliance on Ex.P-15.

8. It is well settled 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. This Court is unable to find any reason much less cogent and convincing reasons assigned by the learned first appellate Court while differing with the findings returned by the learned trial Court. It is always open for the learned first appellate court to take different view on question of facts after adverting to the reasons given by the trial Court 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 reserves 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. In this regard reliance is placed upon the judgment passed by the Hon'ble Apex Court ***in Laliteshwar Prasad Singh versus S.P. Srivastava*** reported in (2017) 2SCC 415, wherein, it has been held as under:-

> "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)
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> > > "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:
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> (a) the points for determination;
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> (b) the decision thereon;
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> (c) the reasons for the decision; and
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> (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 reasoning of the trial court is erroneous."

9. Careful perusal of law, as referred above, clearly suggests that first 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 and as such, judgment of the appellate Court must, therefore, reflect its conscious application of mind and must record findings supported by reasons on all the issues arising from the pleadings of the parties. In the instant case, record made available to this Court clearly suggest that plaintiff in support of his claim placed reliance upon as much as 16 documents i.e. Ex.P-1 to P-16, which were also taken note of by the learned trial Court while decreeing the suit of the plaintiff, but as has been noticed above, learned first appellate Court while accepting the appeal preferred by the defendant has failed even to refer these documents in the judgment, which action of the learned first appellate Court certainly compels this Court to draw an inference that there is non application of mind while passing the judgment in appeal. Once, learned first appellate court proceeded to reverse the findings returned by the learned trial Court, it must have recorded reasons while differing with the findings assigned by the learned trial Court while decreeing the suit of the plaintiff.

10. Issues, as were framed by the learned trial Court certainly suggests that it required proper analysis of evidence led on record by the respective parties. This court sees substantial force in the arguments of the learned counsel for the appellants/plaintiff that there is no attempt to appreciate the evidence adduced on record by the parties. It has been repeatedly held by the Hon'ble Apex Court as well as this Court that first appellate court being last fact finding court is bound to take into consideration all issues raised in the appeal and decide the

same by giving cogent and convincing reasoning. In the instant case, learned first appellate Court has failed to exercise its power under Section 96 read with Order XLI Rule 31 of the CPC because first appeal is valuable right of the appellant and as such, matter needs to be decided afresh by the learned first appellate Court.

11. After carefully examining the judgment passed by the learned first appellate Court, it can be safely concluded that learned first appellate court failed to discuss the evidence, assign reasons for its conclusion and has passed cryptic order. Keeping in view the controversy involved in the matter, learned first appellate Court ought to have appreciated entire evidence led on record by the respective parties in its proper perspective and then recorded findings regarding the claim of the plaintiff qua the suit land. In this regard, reliance is placed upon the judgment passed by the Hon'ble Apex Court in ***Shasidhar and others versus Ashwini Uma Mathad and anothe***r (2015)11 Supreme Court Cases 269, wherein it has been held as under:-

> "10. The powers of the first appellate Court, while deciding the first appeal under Section 96 read with Order XLI Rule 31 of the Code, are indeed well defined by various judicial pronouncements of this Court and are, therefore, no more res integra.
>
> 11. As far back in 1969, the learned Judge - V.R. Krishna Iyer, J (as His Lordship then was the judge of Kerala High Court) while deciding the first appeal under Section 96 of the CPC in Kurian Chacko vs. Varkey Ouseph, AIR 1969 Kerala 316, reminded the first appellate Court of its duty as to how the first appeal under Section 96 should be decided. In his distinctive style of writing and subtle power of expression, the learned judge held as under: (SCC Online Ker Paras 1-3)
>
>> "1. The plaintiff, unsuccessful in two Courts, has come up here aggrieved by the dismissal of his suit which was one for declaration of title and recovery of possession. The defendant disputed the plaintiff's title to the property as also his possession and claimed both in himself. The learned Munsif, who tried the suit, recorded findings against the plaintiff both on title and possession. But, in appeal, the learned Subordinate Judge disposed of the whole matter glibly and briefly, in a few sentences.
>>
>> 2. An appellate court is the final Court of fact ordinarily and therefore a litigant is entitled to a full and fair and independent consideration of the evidence at the appellate stage. Anything less than this is unjust to him and I have no doubt that in the present case the learned Subordinate Judge has fallen far short of what is expected of him as an appellate Court.
>>
>> 3. Although there is furious contest between the counsel for the appellant and for the respondent, they appear to agree with me in this observation....."(Emphasis supplied)
>
> 12. This Court in a number of cases while affirming and then reiterating the aforesaid principle has laid down the scope and powers of the first appellate Court under Section 96 of the Code. We consider it apposite to refer to some of the decisions.
>
> 16. In Santosh Hazari vs. Purushottam Tiwari(2001)3 SCC 179, this Court held as under: (SCC pp 188-189)
>
>> 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..........."

The above view has been followed by a three-Judge Bench decision of this Court in Madhukar & Ors. v. Sangram & Ors.,(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.

14***. 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."

15. Again in Jagannath v. Arulappa (2005) 12 SCC 303, while considering the scope of Section 96 of the Code this Court observed as follows: (SCC pp. 303, para 2)

> "2. A court of first appeal can reappreciate the entire evidence and come to a different conclusion........"

16. Again in B.V Nagesh vs. 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 305)

> "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 at p. 188, para 15 and Madhukar v. Sangram, (2001) 4 SCC 756 at 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."

17. The aforementioned cases were relied upon by this Court while reiterating the same principle in State Bank of India & Anr. vs. Emmsons International Ltd. & Anr., (2011) 12 SCC 174. This Court has recently taken the same view on similar facts arising in Vinod Kumar vs. Gangadhar, 2015(1) SCC 391.

18. Applying the aforesaid principle to the facts of the case, we find that the High Court while deciding the first appeal failed to keep the aforesaid principle in consideration and rendered the impugned decision. Indeed, it is clear by mere reading of the impugned order quoted below: (Shasidhar case 2012 SCC Online Kar 8774).

"1.The appellants are defendants in the suit. The plaintiffs are the respondents. The respondents are the children of the 1st appellant born in the wedlock between 1st appellant and his divorced wife Smt. Uma Mathad. It is admitted fact that the 1st appellant has married the 2nd respondent after the divorce and in the wedlock he has two children and they are appellant Nos.3 and 4. The suit properties at item Nos.1 and 4 are admitted to be the ancestral properties. Item Nos.2 and 3 are the properties belonging to the mother of the 1st appellant and after her demise the said properties are bequeathed to the 1st appellant. Therefore, the said properties acquired the status of self-acquired properties.

2.The respondents filed a suit for partition. The parties are governed by Bombay School of Hindu Law. In view of the provisions of Hindu Succession Amendment Act of 2005, respondent Nos. 1 and 2 are entitled to a share as co-parceners in the ancestral properties. The wife who is the second appellant also would be entitled to a share in the partition. In that view, appellant Nos. 1 and 2 and respondent Nos.1 and 2 will have 1/4th share each in item Nos.1 and 4 of the suit properties.

3.The learned counsel for the appellants submitted that appellants 2 to 4 would not claim any independent share in items 1 and 4 of the suit properties, but they would take share in the 1/4th share allotted to their father.

4.In view of the said submissions, the appellant Nos.1 and 2 and respondent Nos.1 and 2 would be entitled to 1/4th share in item Nos.1 and 4 of the suit properties.

5.Accordingly, a preliminary decree to be drawn and the appeal and cross objections are disposed of in the terms indicated above."

19. In our considered opinion, the High Court did not deal with any of the submissions urged by the appellants and/or respondents nor it took note of the

grounds taken by the appellants in grounds of the appeal nor took note of cross objections filed by the plaintiffs under Order XLI Rule 22 of the Code and nor made any attempt to appreciate the evidence adduced by the parties in the light of the settled legal principles and decided case laws applicable to the issues arising in the case with a view to find out as to whether the judgment of the trial Court can be sustained or not and if so, how, and if not, why? "

12. Consequently, in view of the detailed discussion made hereinabove as well as salutary principles, as have been laid down by the Hon'ble Apex Court in the judgments referred hereinabove, this Court is of the view that learned First Appellate Court has failed to discharge the obligation placed on it being a First appellate Court. Accordingly, without going into the merits of the claim of both the parties, impugned judgment passed by the learned First Appellate Court is quashed and set-aside and the case is remanded back to the learned first appellate Court with the direction to decide the same afresh in accordance with law. While passing the aforesaid judgment, this Court has not passed any order on the merits of the case and as such, any observations made in the process of passing of this judgment may not be construed as opinion of this Court, especially qua the issues involved in the present controversy. The learned first appellate Court may decide the case afresh without being influenced by any of the observation made in the present judgment passed by this Court.

13. The parties through their respective counsel are directed to appear before the learned First Appellate Court on **21.4.2017.** Since, the parties are litigating in the Court of law since 2002, learned First Appellate Court is expected to decide the matter within a period of six months from the date of passing of this judgment. The record of the learned trial Court be returned back forthwith to enable the learned First Appellate Court to do the needful in terms of the instant judgment.

Accordingly, the present appeal is disposed of along with pending application(s), if any.

****

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

FAOs No. 249 & 266 of 2011
Decided on: 07.04.2017

FAO No. 249 of 2011

Oriental Insurance Company …Appellant.
Versus
Smt. Achari Devi and others …Respondents.

FAO No. 266 of 2011

Achari Devi and others …Appellants.
Versus
Smt. Savitri Devi and others …Respondents.

Motor Vehicles Act, 1988- Section 149- It was contended by the Insurer that licence of the owner/insured-cum-driver had expired on 17.12.2007 – accident took place on 6.1.2008 and the Tribunal wrongly held the Insurer to be liable – held that as per proviso to Section 14 of Motor Vehicles Act, 1988 licence continues to be effective for a period of 30 days from the date of its expiry – the accident had taken place within 30 days from the date of expiry and the licence was valid – there was no requirement of endorsement – the insurer was rightly saddled with liability- appeal dismissed.(Para-12 to 33)

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,
United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others, (2002) 6 SCC 281
Santosh Devi versus National Insurance Company Ltd. and others, 2012 AIR SCW 2892
Amrit Bhanu Shali and others versus National Insurance Company Limited and others, (2012) 11 SCC 738
Smt. Savita versus Binder Singh & others, 2014 AIR SCW 2053
Kalpanaraj & others versus Tamil Nadu State Transport Corpn., 2014 AIR SCW 2982
Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others, (2015) 4 SCC 433
Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another, (2015) 4 SCC 434
Oriental Insurance Company versus Smt. Indiro and others, ILR 2015 (III) HP 1149

FAO No. 249 of 2011:

For the appellant: Mr. Deepak Gupta, Advocate.
For the respondents: Mr. Raman Sethi, Advocate, for respondents No. 1 to 3.
Mr. G.S. Rathore, Advocate, for respondents No. 4 to 9.

FAO No. 266 of 2011:

For the appellant: Mr. Raman Sethi, Advocate.
For the respondents: Mr. G.S. Rathore, Advocate, for respondents No. 1 to 6.
Mr. Deepak Gupta, Advocate, for respondent No. 7.

The following judgment of the Court was delivered:

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

Since both these appeals are outcome of common award, the same are clubbed and being disposed of by this common judgment.

2. Subject matter of both these appeals is award, dated 30th March, 2011, made by the Motor Accident Claims Tribunal, Shimla (for short "the Tribunal") in M.A.C. Petition No. 33-S/2 of 2008, titled as Smt. Achari Devi and others versus Smt. Savatri Devi and others, whereby compensation to the tune of ₹ 3,02,400/- with interest @ 8% per annum from the date of institution of the claim petition till its realization and costs assessed at ₹ 5,000/- came to be awarded in favour of the claimants and the insurer was saddled with liability (for short “the impugned award”).

3. The insurer has called in question the impugned award by the medium of FAO No. 249 of 2011 on the ground that the Tribunal has fallen in an error in saddling it with liability as the owner/insured-cum-driver of the offending vehicle was not having a valid and effective driving licence at the time of the accident.

4. The claimants have questioned the impugned award by the medium of FAO No. 266 of 2011 on the ground of adequacy of compensation.

5. In order to determine both these appeals, it is necessary to give a brief resume of the facts of the case, the womb of which has given birth to the appeals in hand.

6. The claimants filed claim petition before the Tribunal for grant of compensation, as per the break-ups given in the claim petition, on the ground that they became the victims of the vehicular accident, which was caused by the owner/insured-cum-driver, namely Shri Keshav Ram Sharma, while driving Bolero Camper, bearing registration No. HP-01 A-3718, rashly and negligently on 6th January, 2008 at about 5.35. P.M. near Shilli Mor, in which Shri Parma Nand sustained injuries and succumbed to the same. It is apt to record herein that the owner/insured-cum-driver of the offending vehicle also died in the said accident.

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

> *"i). Whether Sh. Parma Nand died due to rash and negligent driving of Maxi Cab No. HP-01 A-3718 by Sh. Keshav Ram? OPP*
>
> *ii) If issue No. 1 is proved in affirmative, to what amount of compensation the petitioners are entitled to and from whom? OPP*
>
> *iii) Whether the petition is result of collusion between the petitioners and respondents No. 1 to 6? OPR-7*
>
> *iv). Whether the vehicle in question was being driven in contravention of the terms and conditions of the insurance policy? OPR-7*
>
> *v) Whether Sh. Keshav Ram was not holding valid and effective driving licence at the time of accident? OPR-7*
>
> *vi). Whether Sh. Parma Nand was a gratuitous/unauthorized passenger in the vehicle at the time of accident? OPR-7*
>
> *vii) Whether the petition is not maintainable? OPR-1 to 6*
>
> *viii) Relief."*

8. Parties have led evidence.

<u>Issue No. (i):</u>

9. The Tribunal, after examining the evidence, oral as well as documentary, held that the owner/insured-cum-driver of the offending vehicle had driven the same rashly and negligently at the time of the accident and caused the accident in which deceased-Parma Nand sustained injuries and succumbed to the injuries, thus, decided issue No. (i) accordingly.

10. There is no dispute viz-a-viz the findings recorded on issues No. (i). However, I have perused the impugned award and gone through the record and am of the considered view that the Tribunal has rightly determined issue No. (i), needs no interference. Accordingly, the findings recorded by the Tribunal on issue No. (i) are upheld.

11. Before dealing with issue No. (ii), I deem it proper to determine issues No. (iii) to (vii).

<u>Issues No. (iii), (iv) and (vi):</u>

12. It was for the insurer to prove these issues, have not led any evidence to prove the same, thus, has failed to discharge the onus. Even otherwise, there is not even a single iota of evidence on record to prove the said issues. The Tribunal has rightly made the discussion and determined the said issues. Accordingly, the findings returned by the Tribunal on issues No. (iii), (iv) and (vi) are upheld.

<u>Issue No. (v):</u>

13. It was for the insurer to prove that the owner/insured-cum-driver of the offending vehicle was not having a valid and effective driving licence to drive the same at the time of the accident, has failed to do so.

14. Learned counsel for the insurer argued that the driving licence of the owner/insured-cum-driver of the offending vehicle had expired on 17th December, 2007 and the accident took place on 6th January, 2008, thus, the Tribunal has fallen in an error in saddling the insurer with liability.

15. The argument, though attractive, is devoid of any force for the reason that the proviso to Section 14 of the Motor Vehicles Act, 1988 (for short "MV Act") provides that every driving licence shall continue to be effective for a period of thirty days from the date of its expiry.

16. It is apt to reproduce the relevant portion of Section 14 of the MV Act herein:

> ***"14. Currency of licences to drive motor vehicles.***

....

PROVIDED that every driving licence shall, notwithstanding its expiry under this sub-section continue to be effective for a period of thirty days from such expiry."

17. In the instant case, admittedly, the accident has taken place within thirty days of the expiry of the driving licence, thus, it cannot lie in the mouth of the insurer that the owner/insured-cum-driver of the offending vehicle was not having a valid and effective driving licence.

18. At this stage, learned counsel for the insurer argued that there was no endorsement on the driving licence. This argument is also not forceful for the following reasons:

19. Admittedly, the owner/insured-cum-driver was driving the offending vehicle, i.e. Bolero Camper, bearing registration No. HP-01 A-3718, at the relevant point of time, the gross vehicle weight of which is 2480 kilograms, as per the insurance policy, Ext. RW-1/B, is a light motor vehicle.

20. I deem it proper to reproduce the definitions of "driving licence", "light motor vehicle", "private service vehicle" and "transport vehicle" as contained in Sections 2 (10), 2 (21), 2(35) and 2 (47), respectively, of the MV Act herein:

"2. ....

(10) "driving licence" means the licence issued by a competent authority under Chapter II authorising the person specified therein to drive, otherwise than a learner, a motor vehicle or a motor vehicle of any specified class or description.

xxx xxx xxx

(21) "light motor vehicle" means a transport vehicle or omnibus the gross vehicle weight of either of which or a motor car or tractor or road-roller the unladen weight of any of which, does not exceed 7,500 kilograms.

xxx xxx xxx

(35) "public service vehicle" means any motor vehicle used or adapted to be used for the carriage of passengers for hire or reward, and includes a maxicab, a motorcab, contract carriage, and stage carriage.

xxx xxx xxx

(47) "transport vehicle" means a public service vehicle, a goods carriage , an educational institution bus or a private service vehicle."

21. Section 2 (21) of the MV Act provides that a "light motor vehicle" means a transport vehicle or omnibus, the gross vehicle weight of either of which or a motor car or tractor or road roller the unladen weight of any of which, does not exceed 7500 kilograms. Section 2 (35) of the MV Act gives the definition of a "public service vehicle", which means any vehicle, which is used or allowed to be used for the carriage of passengers for hire or reward and includes a maxicab, a motorcab, contract carriage and stage carriage. It does not include light motor vehicle (LMV). Section 2 (47) of the MV Act defines a "transport vehicle". It means a public service vehicle, a goods carriage, an educational institution bus or a private service vehicle.

22. At the cost of repetition, definition of "light motor vehicle" includes the words "transport vehicle" also. Thus, the definition, as given, mandates that the "light motor vehicle" is itself a "transport vehicle", whereas the definitions of other vehicles are contained in Sections 2(14), 2 (16), 2 (17), 2 (18), 2 (22), 2 (23) 2 (24), 2 (25), 2 (26), 2 (27), 2 (28) and 2 (29) of the MV Act. In these definitions, the words "transport vehicle" are neither used nor included and that is the reason, the definition of "transport vehicle" is given in Section 2 (47) of the MV Act.

23. In this backdrop, we have to go through Section 3 and Section 10 of the MV Act. It is apt to reproduce Section 3 of the Act herein:

*"**3. Necessity for driving licence.** - (1) No person shall drive a motor vehicle in any public place unless he holds an effective driving licence issued to him authorising him to drive the vehicle; and no person shall so drive a transport vehicle [other than a motor cab or motor cycle hired for his own use or rented under any scheme made under sub-section (2) of section 75] unless his driving licence specifically entitles him so to do.*

(2) The conditions subject to which sub-section (1) shall not apply to a person receiving instructions in driving a motor vehicle shall be such as may be prescribed by the Central Government."

24. It mandates that the driver should have the licence to drive a particular kind of vehicle and it must contain endorsement for driving a transport vehicle. In this section, the words "light motor vehicle" are not recorded. Meaning thereby, this section is to be read with the definition of other vehicles including the definition given in Section 2 (47) of the MV Act except the definition given in Section 2 (21) of the MV Act for the reason that Section 2 (21) of the MV Act provides, as discussed hereinabove, that it includes transport vehicle also.

25. My this view is supported by Section 10 of the MV Act, which reads as under:

*"**10. Form and contents of licences to drive.** - (1) Every learner's licence and driving licence, except a driving licence issued under section 18, shall be in such form and shall contain such information as may be prescribed by the Central Government.*

(2) A learner's licence or, as the case may be, driving licence shall also be expressed as entitling the holder to drive a motor vehicle of one or more of the following cases, namely:-

(a) motor cycle without gear;

(b) motor cycle with gear;

(c) invalid carriage;

(d) light motor vehicle;

(e) transport vehicle;

(i) road-roller;

(j) motor vehicle of a specified description."

26. Section 10 (2) (d) of the MV Act contains "light motor vehicle" and Section 10 (2) (e) of the MV Act, was substituted in terms of amendment of 1994, class of the vehicles specified in clauses (e) to (h) before amendment stands deleted and the definition of the "transport vehicle" stands inserted. So, the words "transport vehicle" used in Section 3 of the MV Act are to be read viz-a-viz other vehicles, definitions of which are given and discussed hereinabove.

27. 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."

28. 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'."

29. 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."

30. 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.

31. The same principle has been laid down by this Court in a series of cases.

32. The owner/insured-cum-driver was having a driving licence to drive 'LMV', as has been stated by RW-2, Smt. Sheela Shyam, the Licence Clerk from the office of SDM Theog, thus, was having a valid and effective driving licence to drive the offending vehicle.

33. Having said so, the Tribunal has rightly determined issue No. (v) and saddled the insurer with liability. Accordingly, the finding returned by the Tribunal on issue No. (v) are upheld.

Issue No. (vii):

34. It was for respondents No. 1 to 6 in the claim petition to prove how the claim petition was not maintainable, have not led any evidence to this effect, thus, have failed to discharge the onus. Accordingly, the findings returned by the Tribunal on the said issue are also upheld.

Issue No. (ii):

35. The claimants have sought enhancement of the awarded amount. I have gone through the impugned award and the record and am of the considered view that the Tribunal has rightly assessed the amount of compensation and no ground for interference is made out. However, the Tribunal has fallen in an error in not awarding compensation under the heads 'loss of consortium', 'funeral expenses', 'loss of love and affection' and 'loss of estate'. Accordingly, the claimants are also held entitled to compensation to the tune of ₹ 10,000/- each under the heads 'loss of consortium', 'funeral expenses', 'loss of love and affection' and 'loss of estate'.

36. The Tribunal has also committed a legal mistake while awarding interest @ 8% per annum, which was to be awarded as per the prevailing rates.

37. It is a beaten law of the land that the rate of interest should be awarded as per the prevailing rates, in view of the judgments rendered by the Apex Court in cases titled as **United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others,** reported in (**2002) 6 SCC 281; Santosh Devi versus National Insurance Company Ltd. and others,** reported in **2012 AIR SCW 2892**; **Amrit Bhanu Shali and others versus National Insurance Company Limited and others,** reported in **(2012) 11 SCC 738; Smt. Savita versus Binder Singh & others**, reported in **2014 AIR SCW 2053; Kalpanaraj & others versus Tamil Nadu State Transport Corpn.,** reported in **2014 AIR SCW 2982; Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others,** reported in **(2015) 4 SCC 433;** and **Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another,** reported in **(2015) 4 SCC 434,** and discussed by this Court in a batch of FAOs, **FAO No. 256 of 2010,** titled as **Oriental Insurance Company versus Smt. Indiro and others,** being the lead case, decided on 19.06.2015.

38. Having said so, I deem it proper to reduce the rate of interest from 8% per annum to 7.5% per annum from the date of filing of the claim petition till its realization.

39. Having glance of the above discussions, compensation to the tune of ₹ 3,02,400/- + ₹ 10,000/- + ₹ 10,000/- + ₹ 10,000/- + ₹ 10,000/- = ₹ 3,42,400/- with interest @ 7.5% per annum alongwith costs assessed at ₹ 5,000/- is awarded in favour of the claimants and the insurer is saddled with liability.

40. In view of the above, the impugned award is modified, as indicated hereinabove, and both the appeals are disposed of accordingly.

41. The enhanced amount of compensation be deposited before the Registry within eight weeks. On deposition, the same be released 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.

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

****

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

Oriental Insurance Company …Appellant.
Versus
Sunita Devi and others …Respondents.

FAO No. 187 of 2011
Decided on: 07.04.2017

Motor Vehicles Act, 1988- Section 149- Deceased died in a motor vehicle accident- claimants filed a claim petition, which was allowed- aggrieved from the award, present appeal has been filed contending that deceased was travelling as gratuitous passenger and Insurer is not liable – held that claimants had specifically pleaded that deceased had boarded the vehicle with his luggage and other household goods – this fact was admitted by the owners – thus, it was rightly held by the Tribunal that Insurer is liable – appeal dismissed. (Para-6 to 12)

For the appellant: Mr. Deepak Gupta, Advocate.
For the respondents: Mr. Vikrant Chandel, Advocate, vice Mr. Lovneesh Kanwar, Advocate, for respondents No. 1 and 2.
Nemo for respondent No. 3.

The following judgment of the Court was delivered:

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

Subject matter of this appeal is award, dated 16th February, 2011, made by the Motor Accident Claims Tribunal-cum-Presiding Officer, Fast Track Court, Mandi, District Mandi, H.P. (for short "the Tribunal") in Claim Petition No. 99/2003; 78/2005, titled as Sunita Devi and another versus Krishana Devi and another, whereby compensation to the tune of ₹ 9,55,448/- with interest @ 9% per annum from the date of the petition till its realization came to be awarded in favour of the claimants and the insurer was saddled with liability (for short "the impugned award").

2. The claimants and the owner-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. Learned counsel for the appellant-insurer argued that deceased-Bihari Lal was travelling in the offending vehicle as a gratuitous passenger at the time of the accident, thus, the Tribunal has fallen in an error in saddling the appellant-insurer with liability.

5. The argument, though attractive, is devoid of any force for the following reasons:

6. The claimants have specifically pleaded in para 24 of the claim petition that deceased-Bihari Lal had boarded the offending vehicle alongwith his luggage and other household goods. The said fact has been admitted by the owner-insured in her reply. It is apt to reproduce relevant portion of para 24 of the reply filed by owner-insured herein:

> *"24. Para No. 24 of the petition is admitted to the extent that deceased boarded the truck No. HP-14-7073, at Darcha for Kanaid, Teh. Sunder Nagar, Distt. Mandi, H.P. and also carried his luggage and others house hold goods in the said truck to his home at Kanaid as this fact came to notice of respondent No. 1 after accident. However it is submitted that the deceased alongwith some other persons hired the truck and were sitting in the truck as a custodian of luggage and other household goods............."*

7. Viewed thus, there is an admission on the part of the owner-insured that deceased-Bihari Lal was travelling in the offending vehicle as owner/custodian of the luggage and household goods and not as a gratuitous passenger.

8. Learned counsel for the appellant-insurer has drawn attention of this Court to the definition of 'goods' contained in Section 2 (13) of the Motor Vehicles Act, 1988 (for short “MV Act”), which reads as under:

> ***“2. Definitions. -***
>
> *...........*
>
> *(13) “goods” includes live-stock, and anything (other than equipment ordinarily used with the vehicle) carried by a vehicle except living persons, but does not include luggage or personal effects carried in a motor car or in a trailer attached to a motor car or the personal luggage of passengers travelling in the vehicle.”*

9. The said provision of law contains definition, which is inclusive and not exclusive. Deceased-Bihari Lal was travelling in the offending vehicle alongwith his luggage and household goods. Thus, by no stretch of imagination, it can be said that deceased-Bihari Lal was travelling in the offending vehicle as a gratuitous passenger.

10. Having said so, the Tribunal has rightly held that deceased-Bihari Lal was not a gratuitous passenger but was travelling in the offending vehicle as the owner of the goods.

11. Even otherwise, there was no need to determine the issue for the reason that the owner-insured of the offending vehicle has made admission and the judgment was to be made on the basis of said admission in terms of the mandate of Order XII Rule 6 of the Code of Civil Procedure (for short “CPC”).

12. The offending vehicle was duly insured with the appellant-insurer and the appellant-insurer has failed to prove that the owner-insured of the offending vehicle had committed any willful breach. Viewed thus, the Tribunal has rightly saddled the appellant-insurer with liability in terms of the impugned award, is legal one and needs no interference.

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

14. 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.

15. 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.

Sabita Sharma and others …Appellants.
Versus
Amrit Pal Singh and others …Respondents.

FAO No. 354 of 2012
Decided on: 07.04.2017

Motor Vehicles Act, 1988- Section 166- The Tribunal held that the deceased had contributed to the cause of accident as he was carrying two pillion riders in violation of Section 128(1) – held that Section 128 clearly provides that the driver of two wheeled motorcycle shall not carry more than one person in addition to himself – the deceased had violated this provision by carrying two pillion riders- the Tribunal had rightly saddled the insurer of the vehicle with liability to the

extent of 70% - however, Tribunal fell in error in deducting 1/3rd towards personal expenses – claimants were four in number and 1/4th was to be deducted towards personal expenses – his salary was Rs.19,400/- per month after deducting 1/4th amount towards personal expenses, claimants have suffered loss of dependency to the extent of Rs.14,550/- per month – age of the deceased was 42 years and multiplier of 14 is applicable – thus, claimants are entitled to Rs.14,550 x 12 x 14= Rs. 24,44,400/- under the head loss of income- claimants are also entitled to Rs.10,000/- each under the heads loss of love and affection, loss of consortium, loss of estate and funeral expenses – since the deceased had contributed towards the accident to the extent of 30%, therefore, compensation of Rs.17,39,080/- awarded in favour of the claimants with interest @ 7.5% per annum. (Para- 7 to 24)

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

United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others, (2002) 6 SCC 281

Santosh Devi versus National Insurance Company Ltd. and others, 2012 AIR SCW 2892

Amrit Bhanu Shali and others versus National Insurance Company Limited and others, (2012) 11 SCC 738

Smt. Savita versus Binder Singh & others, 2014 AIR SCW 2053

Kalpanaraj & others versus Tamil Nadu State Transport Corpn., 2014 AIR SCW 2982

Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others, (2015) 4 SCC 433

Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another, (2015) 4 SCC 434

Oriental Insurance Company versus Smt. Indiro and others, ILR 2015 (III) HP 1149

For the appellants: Mr. Shanti Swaroop, Advocate.

For the respondents: Nemo for respondents No. 1 and 2.
Mr. Ashwani K. Sharma, Senior Advocate, with Mr. Duni Singh, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

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

Subject matter of this appeal is award, dated 13th April, 2012, made by the Motor Accident Claims Tribunal, Fast Track Court, Una, Distt. Una, H.P. (for short "the Tribunal") in M.A.C. Petition No. 01/2010, titled as Sabita Sharma and others versus Amritpal Singh and others, whereby after holding the deceased to be negligent to the extent of 30% in causing the accident, compensation to the tune of ₹ 15,40,000/- with interest @ 7% per annum from the date of filing of the petition till its realization came to be awarded in favour of the claimants and the insurer was saddled with liability to the extent of 70% (for short "the impugned award").

2. The insurer, 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. The appellants-claimants have questioned the impugned award on the following grounds:

(i) That the Tribunal has awarded inadequate compensation; and

(ii) That the accident was caused by the driver of the offending vehicle, i.e. Bolero car, bearing registration No. RJ-03U-0070 and deceased-Gurbir Kumar had not contributed towards the cause of accident, thus, the insurer was to be saddled with the entire liability.

4. In order to determine this appeal, it is necessary to give a brief resume of the facts of the case, the womb of which has given birth to the instant appeal.

5. The claimants invoked the jurisdiction of the Tribunal in terms of the mandate of Section 166 of the Motor Vehicles Act, 1988 (for short "MV Act") for grant of compensation to the tune of ₹ 35,00,000/-, as per the break-ups given in the claim petition. The claim petition was resisted by the respondents and the following issues came to be framed by the Tribunal:

> *"1. Whether deceased Gurbir Kumar died in an accident on 2.12.2009 at about 9.30 a.m. at Chowk Kuthar Beet due to rash and negligent driving of Bolero car bearing registration No.RJ-03U-0070 by respondent No. 1? OPP*
>
> *2. If issue No. 1 is proved in affirmative whether the petitioners are entitled to compensation, if so, how much and from whom? OPP*
>
> *3. Whether the petitioners have no cause of action? OPR-3*
>
> *4. Whether the vehicle No. RJ-03U-0070 was being used against the terms and conditions of insurance policy? OPR-3*
>
> *5.Whether respondent No. 1 driver of the vehicle was not holding valid and effective driving licence at the time of accident? OPR-3*
>
> *6. Whether the vehicle was being plied without any valid RC, fitness certificate? OPR-3*
>
> *7. Whether the petition is bad for non-joinder of necessary parties? OPR-1&2*
>
> *8. Relief."*

6. The claimants have examined HC Vipon Kumar as PW-1, Shri Dilbag as PW-3, Shri Yash Maurya as PW-4 and one of the claimants, Smt. Savita Sharma, herself appeared in the witness box as PW-2. The driver of the offending vehicle, namely Shri Amrit Pal Singh, himself stepped into the witness box as RW-1 and examined Smt. Anjana, Criminal Ahlmad from the office of JMIC, Court No. 2, Una, as RW-2. It is apt to record herein that the owner-insured and insurer of the offending vehicle have not led any evidence.

Issue No. 1:

7. The Tribunal, after scanning evidence, oral as well as documentary, held that deceased-Gurbir Kumar had also contributed towards the cause of the accident for the reason that at the time of the accident, he was carrying two pillion riders, which is violation of Section 128 (1) of the MV Act.

8. It is apt to reproduce Section 128 (1) of the MV Act herein:

> *"**128. Safety measures for drivers and pillion riders.** (1) No driver of a two-wheeled motor cycle shall carry more than one person in addition to himself on the motor cycle and no such person shall be carried otherwise than sitting on a proper seat securely fixed to the motor cycle behind the driver's seat with appropriate safety measures."*

9. The said provision of law clearly mandates that the driver of a two wheeler shall not carry more than one person in addition to himself. Thus, deceased-Gurbir Kumar had committed breach of the mandate of Section 128 of the MV Act, therefore, was himself rash and negligent and contributed towards the cause of the accident.

10. The Tribunal has rightly made the discussions and relied upon the judgments made by the Apex Court, this Court and other High Courts, in paras 8 to 28 of the impugned award, need no interference. Accordingly, the findings returned by the Tribunal on issue No. 1 are upheld.

11. Before dealing with issue No. 2, I deem it proper to determine issues No. 3 to 7.

Issues No. 3 to 6:

12. It was for the insurer to prove all these issues, has not led any evidence, thus, has failed to discharge the onus. Accordingly, the findings returned by the Tribunal on issues No. 3 to 6 are upheld.

Issue No. 7:

13. It was for the driver and owner-insured of the offending vehicle to prove how the claim petition was suffering from mis-joinder of necessary parties, have not led any evidence to this effect, thus, have failed to discharge the onus. Accordingly, the findings returned by the Tribunal on issue No. 7 are also upheld.

Issue No. 2:

14. The Tribunal has rightly saddled the insurer of the offending vehicle with liability to the extent of 70% by holding that the deceased himself had contributed towards the cause of the accident to the extent of 30%, but has fallen in an error in deducting one third towards the personal expenses of the deceased, as the claimants were four in number, thus, one fourth was to be deducted in terms of para 30 of the judgment rendered 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 reads as under:

> *"30. Though in some cases the deduction to be made towards personal and living expenses is calculated on the basis of units indicated in Trilok Chandra, the general practice is to apply standardised deductions. Having considered several subsequent decisions of this Court, we are of the view that where the deceased was married, the deduction towards personal and living expenses of the deceased, should be one-third (1/3rd) where the number of dependent family members is 2 to 3, one-fourth (1/4th) where the number of dependent family members is 4 to 6, and one-fifth (1/5th) where the number of dependent family members exceeds six."*

15. Admittedly, the deceased was a government employee and his salary was ₹ 19,400/- per month, as per the discussions made by the Tribunal in para 27 of the impugned award, which is not in dispute. Accordingly, it is held that the claimants have suffered loss of dependency to the tune of ₹ 14,550/- per month.

16. The age of the deceased was 42 years at the time of the accident. Thus, the Tribunal has rightly applied the multiplier of '14' keeping in view the ratio laid down by the Apex Court in the case titled as **Sarla Verma's case (supra),** which has been upheld by a larger Bench of the Apex Court in **Reshma Kumari & Ors. versus Madan Mohan & Anr.,** reported in **2013 AIR SCW 3120,** read with the Second Schedule appended with the MV Act.

17. Viewed thus, the claimants are held entitled to compensation to the tune of ₹ 14,550/- x 12 x 14 = ₹ 24,44,400/- under the head 'loss of income'.

18. The amount of compensation awarded under the head 'loss of consortium' to the tune of ₹ 10,000/-and ₹ 10,000/- under the head 'loss of love and affection' is just and appropriate, is accordingly upheld.

19. The amount awarded by the Tribunal under the head 'funeral charges' to the tune of ₹ 5,000/- is too meagre. The Tribunal has also fallen in an error in not awarding compensation under the head 'loss of estate'. Viewed thus, the claimants are also held entitled to compensation to the tune of ₹ 10,000/- each under the head 'funeral charges' and 'loss of estate'.

20. Having said so, it is held that the claimants are entitled to compensation to the tune of ₹ 24,44,400/- + ₹ 10,000/- + ₹ 10,000/- + ₹ 10,000/- + ₹ 10,000/- = ₹ 24,84,400/-. Since the deceased has been held to have contributed towards the cause of accident to the extent of 30%, compensation to the tune of ₹ 17,39,080/- is awarded in favour of the claimants.

21. The Tribunal has also committed a legal mistake while awarding interest @ 7% per annum, which was to be awarded as per the prevailing rates.

22. It is a beaten law of the land that the rate of interest should be awarded as per the prevailing rates, in view of the judgments rendered by the Apex Court in cases titled as **United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others,** reported in (**2002) 6 SCC 281; Santosh Devi versus National Insurance Company Ltd. and others,** reported in **2012 AIR SCW 2892**; **Amrit Bhanu Shali and others versus National Insurance Company Limited and others,** reported in **(2012) 11 SCC 738; Smt. Savita versus Binder Singh & others**, reported in **2014 AIR SCW 2053; Kalpanaraj & others versus Tamil Nadu State Transport Corpn.,** reported in **2014 AIR SCW 2982; Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others,** reported in **(2015) 4 SCC 433;** and **Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another,** reported in **(2015) 4 SCC 434,** and discussed by this Court in a batch of FAOs, **FAO No. 256 of 2010,** titled as **Oriental Insurance Company versus Smt. Indiro and others,** being the lead case, decided on 19.06.2015.

23. Having said so, I deem it proper to enhance the rate of interest from 7% per annum to 7.5% per annum from the date of filing of the claim petition till its realization.

24. The insurer is directed to deposit the enhanced awarded amount before the Registry of this Court 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 through payee's account cheque or by depositing the same in their respective bank accounts.

25. The impugned award is modified and the appeal is disposed of, as indicated hereinabove.

26. 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
Narender Chand ….Respondent.

Cr. Appeal No. 159 of 2008.
Date of Decision: 7th April, 2017.

Indian Penal Code, 1860- Section 279, 337, 338 and 304-A- Accused was driving a bus in a rash and negligent manner – the bus hit a car due to which one occupant of the car sustained injuries and another died at the spot- the accused was tried and acquitted by the Trial Court- held in appeal that the vehicles were moved after the accident and site plan does not reflect the position at the time of accident– however, the pieces of glass were found in the middle of the road, which shows that bus was being driven on inappropriate side of the road – identity of the accused was established – the Trial Court had not properly appreciated the evidence- appeal allowed- judgment of the Trial Court set aside. (Para-9 to 13)

For the Appellant: Mr. Vivek Singh Attri, 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 by the State of Himachal Pradesh against the judgment rendered on 04.12.2007 by the learned Judicial Magistrate 1st Class, Court No. III, Hamirpur, H.P. in Police Challan No. 60-1-2005, RBT 2-II-05, whereby, he acquitted the accused for his allegedly committing offences punishable under Sections 279, 337, 338 and 304-A of the IPC.

2. The facts relevant to decide the instant case are that on 2.7.2004 an information was received at police station, Hamirpur about accident having taken place near Jhaniari on Nadaun road and that injured had been brought to Zonal Hospital, Hamirpur. In the hospital, complainant Ranjit Singh Rana, got his statement recorded under Section 154 of the Cr.P.C., whereby he unfolded that on 2.7.2004, he had started from Shimla to his village and the car was being driven by him. His friend L.R. Rana and wife Tripta Rana were also travelling along with him. At about 4.45 p.m near Jhaniari, Dinesh Bus No. HP-55-4390 came from the opposite side and struck against his car. Because of the impact his friend Lekh Ram Rana died whereas he along with his wife got injured. The accident stated to have taken place due to the rash and negligent driving of the bus by its driver. On the aforesaid statement of the complainant, FIR was registered in the police station concerned. 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 279, 337, 338 and 304-A of the IPC. In proof of the prosecution case, the prosecution examined 13 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.

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. In a collision which occurred inter se the bus driven by the accused/respondent vis-a-vis the car driven by the complainant, an occupant in the latter vehicle, as divulged by postmortem report comprised in Ex.PW8/C, suffered his demise, on account of injuries reflected therein, befalling upon him. Also the complainant suffered on his person injuries as stand reflected in MLC Ex.PW8/B besides his wife also suffered injuries on her person, injuries whereof stand borne on Ex.PW8/A.

10. The learned trial Court had proceeded to pronounce findings of acquittal upon the accused/respondent, on anvil of a purported eye witness to the occurrence, one Sh. Jagdish Chand, PW-6, benumbing in his testification ascriptions of negligence vis-a-vis the accused, as comprised in the charge, whereupon, the accused/respondent faced trial, contrarily, he attributed negligence upon the complainant, comprised in his disclosing qua his driving the relevant car on the inappropriate site of the road. He also voiced in his testification qua bus bearing No. HP-55-4390 standing driven by the accused on the appropriate side of the road besides has echoed therein qua despite the utmost strenuous efforts made by the accused/respondent to forestall the ill-fated collision, comprised in his maneuvering the relevant bus to the katcha portion of the road, yet not ensuring its obviation given, the enormous speed at which the complainant was plying his car on the inappropriate side of the road.

11. The efficacy of the aforesaid testification purveyed qua the occurrence by PW-6, is to be tested by making an allusion to the relevant unfoldments borne on site plan embodied in Ex.PW12/A. A wholesome reading of the deposition of PW-12, who prepared site plan borne on Ex.PW12/A, unfolds qua his preparing it at a stage when the positions of the relevant vehicles stood disturbed, for hence facilitating the smooth plying of vehicles on the road whereat the ill-fated collision occurred, thereupon, the reflections embodied in Ex.PW12/A do not prima facie warrant qua implicit reliance standing placed thereupon for, hence, concluding the trite factum qua whether the bus or the car stood plied on the inappropriate or the appropriate side of the road. However, the learned Deputy Advocate General submits that with reflection occurring at serial No.4 of Ex.PW12/A qua broken pieces of glasses finding their existence on the middle of the road, thereupon, with the aforesaid portion of the road constituting the appropriate portion of the road vis-a-vis the car, thereupon, it naturally constituting the inappropriate portion of the road for the plying thereon of the bus driven by the accused/respondent whereupon the charge qua the accused stands proven. Nowat, it is to be determined whether the glasses of the car or of the bus suffered breakage, arising from the impact of the collision which occurred inter se both. A perusal of the photographs unveils qua the window panes besides the front glasses of the car suffering breakage, whereas, the glasses of the bus apparently did not suffer any damage nor they got broken, corollary whereof is qua the occurrence, on the middle of the road, of pieces of glass, hence, warranting a conclusion qua theirs comprising the broken glasses of the car, breakage whereof occurred, in sequel to the impact of a collision which occurred thereat inter se the bus and the car. Since, the place denoted as 'X' in Ex.PW12/A stands concluded to be the site whereat the accident occurred also with its constituting the appropriate side of the road for the plying thereon of the car driven by the complainant besides its constituting the inappropriate side of the road for plying thereon of the bus driven by the respondent/accused, yet the mere occurrence of glasses at point 'X' in Ex.PW12/A stands contended by the learned counsel for the accused/respondent, to not constrain this Court to conclude qua its constituting the site of collision which occurred inter se the car and the bus. Nonetheless, the aforesaid submission is inefficacious, significantly, when with at the time contemporaneous to the preparation of Ex.PW12/A, the position of the vehicles stood disturbed also with accused/respondent while holding the prosecution witnesses to cross-examination, his merely suggesting them to qua on account of rain fall, the broken glasses of the car finding their existence at point 'X' in Ex.PW12/A. Consequently, the aforesaid stray suggestion(s) unaccompanied by best evidence comprised in the adduction of photographic evidence by the defence witnesses, with portrayals therein qua the occurrence of glasses at point “X”, owing their existence thereat owing to heavy rainfall, yet the aforesaid evidence stood unadduced, whereupon, this Court is constrained to conclude qua the aforesaid endeavour of the defence for benumbing the incriminatory role of the accused/respondent, hence, holding no efficacy. In sequel, this Court on anvil of mark 'X' depicted in site plan Ex.PW12/A concludes qua it constituting the site of occurrence also when it constituted the appropriate site of the road for plying thereon of the vehicle driven by the complainant besides its constituting the inappropriate side of the road vis-a-vis the plying thereon of the bus driven by the accused/respondent, thereupon, the testification of PW-6, wherein he omits to lend succor to the prosecution case, does not hold the apposite creditworthiness, his testification vis-a-vis the defence of the accused/respondent ensuing from

his holding inclinations vis-a-vis him, inclination vis-a-vis the accused stemming from his being his employer. Also with the evident arrival at the site of occurrence, of PW-6, being subsequent to the relevant collision taking place thereat thereupon his purportedly, rendering an ocular version qua the occurrence does not hold any crediworthiness .

12. The learned trial Court had pronounced an order of acquittal upon the accused/respondent, on the anvil of the complainant revealing the identity of the accused to be one Naresh, whereas the name of the accused/respondent being Narender Chand. However, the aforesaid prime factum is not sufficient to conclude qua the prosecution not succeeding in establishing the factum of the accused/respondent occupying the driver(s) seat of the bus, especially when, the complainant had identified the accused/respondent in Court besides when the best evidence to succor the defence of the accused/respondent qua his not holding the apposite employment under the owner(s) of the bus, stood comprised in the learned defence counsel putting apposite suggestion to PW-6, the owner of the offending bus, holding communications in repudiation to his not holding the relevant employment under him, whereas, his omission(s) to put the apposite suggestions to PW-6 constrains this Court to conclude qua his thereupon acquiescing qua hence the accused also acquiescing qua his holding the apposite employment as a driver in the relevant bus under PW-6 also his thereupon acquiescing qua his at the relevant time manning the driver's seat of the relevant bus. Moreover, the learned defence counsel throughout during the course of his holding the prosecution witnesses to cross-examination nor in his statement recorded under Section 313 Cr.P.C., has made any disclosure therein qua his not holding the driving licence for driving the category of the vehicle wherewithin the relevant bus fell or his not holding the relevant employment under its owner rather his holding employment under some other person, thereupon also it is befitting to conclude qua the prosecution establishing the identity of the accused/respondent.

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

14. Consequently, the instant appeal is allowed and the impugned judgment is set aside. In sequel, the accused/respondent is convicted for his committing offences punishable under Sections 279, 337, 338 and 304-A of the IPC. The accused/convict/respondent be produced before this Court on 28.04.2017 for his being heard on the quantum of sentence.

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

The Kohinoor Sarvahitkari Parivahan Sahkari Sabha Samiti .....Petitioner.
Versus
State of Himachal Pradesh and others .....Respondents.

CWP No.3564 of 2015.
Date of decision: 7th April, 2017.

Constitution of India, 1950- Article 226-Respondent No.4 was engaged by the petitioner – a dispute arose between different societies, which was ultimately referred to Divisional Commissioner- work was re-distributed and the petitioner was left with no work – a decision was taken to remove respondent No.4- a demand was raised by respondents No. 4 and 5– Labour Inspector-cum-Conciliation Officer directed the petitioner to re-engage the respondents No. 4 and 5– aggrieved from the order, present writ petition has been filed – held that conciliation had not taken place and the Conciliation Officer has no adjudicatory powers- his duties are administrative

and not judicial – petition allowed – order of the Labour Officer set aside.(Para-5 to 8)

For the Petitioner : Mr.Rajiv Rai, Advocate.
For the Respondents: Ms.Meenakshi Sharma & Mr.Rupinder Singh, Additional Advocate Generals, for respondents No. 1 to 3.
Mr.Tara Singh Chauhan, Advocate, for respondents No.4 and 5.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral).

The moot question involved in this petition is as to whether the Conciliation Officer under the Industrial Disputes Act can direct reinstatement of a workman?

Necessary facts may be noticed.

2. Respondent No.4 was engaged by the Managing Committee of the petitioner-Society vide resolution dated 03.06.2010. Thereafter, some dispute arose amongst the various Co-operative Societies relating to allocation of transportation work which eventually reached this Court. This Court directed the Divisional Commissioner, Mandi, to convene a meeting of the representatives of the Societies on 01.07.2010 wherein it was decided that the transportation work for the time being would be carried out through the Bilaspur District Co-operative Federation (for short 'Federation') and consequently the work of the petitioner-Society came to be shifted and allocated to the Federation. Now that there was no work left for the Society, it took a decision to remove respondent No.4 vide resolution dated 02.09.2012. Respondent No.4 alongwith respondent No.5 thereafter raised a demand notice dated 29.10.2013 before the Labour Inspector-cum-Conciliation Officer (respondent No.3), who during the course of conciliation proceedings directed the petitioner to re-engage respondents No.4 and 5.

3. It is this order which has been assailed in the instant petition as being contrary and in violation of law, more particularly, the provisions of the Industrial Disputes Act (for short 'Act').

4. Reply has been filed only on behalf of the official respondents wherein they have sought to justify the action of respondent No.3 by placing reliance upon Section 12 of the Act and would further contend that it was not a direction but an amicable settlement that had been reached during the course of conciliation between the petitioner and the workmen i.e. respondents No.4 and 5.

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

5. The proceedings conducted by respondent No.3 on 10.03.2014 are placed as Annexure P-5 and read thus:-

> *"<u>Conciliation Proceeding dated 10-03-2014</u>*
>
> *Sh. Durga Singh Thakur, Secretary of the Society appeared in dispute. Sh. Vinod Rana advocate appeared on behalf of Pradhan/Kohinoor Sarvhitkari Parivahan Sahkari Sabha Samiti Rani Kotla, VPO Ranikotla, Tehsil Sadar, Distt. Bilaspur, H.P. appeared in the conciliation meeting.*
>
> *Sh. Gopal Verma appeared in the conciliation meeting and Sh. Pravesh Chandel advocate appeared on behalf of Sh. Gopal Verma, Sh. Ranjeet Singh in the meeting.*
>
> *No reply and record has been submitted by the Pradhan/Secretary in this office despite of order issued by this office in the conciliation meeting.*
>
> *<u>Sh.Durga Singh Thakur, Secretary has stated that the record of Society has been lost and in lack of any record, the Labour Inspector, Bilaspur, has decided that these two workers named, Sh.Gopal Verma and Sh. Ranjeet Singh be reinstated</u>*

from the date of order. The intimation to this office be given on the implementation of this order.

The Pradhan and the Secretary be directed to implement the same order w.e.f. the date of order. Case closed."

6. It would be evidently clear from the aforesaid order that no conciliation infact had taken place and rather respondent No.3 of his own had directed reinstatement of the workmen. Therefore, in the given facts and circumstances whether respondent No.3 could have legally adopted such a course or was vested with such power and authority to order reinstatement is a question which really brooks no dispute. For, it is more than settled that a Conciliation Officer is not an adjudicatory authority under the Act nor is he a Court within the meaning of Section 195(1)(c) of the Code of Criminal Procedure. He is not invested with the powers to adjudicate on industrial disputes even though there are opposing parties and various points at issue between them before him during the course of conciliation. All that he can do is to try to persuade the parties to come to a fair and amicable settlement. In other words, his duties are only administrative and are purely incidental to industrial adjudication. His function under Section 12 (upon which much reliance has been placed by the official respondents) is not of judicial or quasi-judicial nature, for if it were so, then in connection with everything he does, the formalities of a judicial trial would have to be observed.

7. Therefore, once it is concluded that a Conciliation Officer is neither an adjudicatory authority nor is vested with judicial or quasi-judicial powers, then obviously, the proceedings held on 10.03.2014 whereby the Conciliation Officer directed reinstatement of respondents No.4 and 5 cannot withstand the test of judicial scrutiny and is accordingly set aside.

8. The petition is accordingly allowed, leaving the parties to bear their own costs. Pending application, if any, also stands disposed of.

9. Before parting, it needs to be observed that this order shall not come in the way of the petitioners in resorting to such remedies, as may be available to them, under the law and in case they so choose to avail of any of the available remedies within one month from the date of receipt of this order, then in that event, the Authority, Tribunal/Court, as the case may be, will decide their claim, as expeditiously as possible and in no event later than 31.12.2017.

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

Anil Kumar .....Petitioner/tenant.

Versus

Vijay Kumar and another .....Respondents/landlords.

Civil Revision No. 23 of 2015.
Reserved on :30th March, 2017.
Decided on : 10th April, 2017.

H.P. Urban Rent Control, 1987- Section 14- An eviction petition was filed on the ground of arrears of rent, the premises being more than 100 years old having outlived its life, the premises having become unfit and unsafe for human habitation, the tenant having sublet the premises and the premises being required bonafide for reconstruction, which cannot be carried out without vacating the building – the petition was allowed by the Rent Controller- an appeal was filed, which was allowed and the order of the Rent Controller was set aside- held in revision that the eviction petition has been filed for eviction of the tenant from the ground floor but no eviction petition was filed for eviction of the tenant residing on the upper floor- the premises is owned by various co-owners and all of them have not been impleaded- the Appellate Authority had not

taken into consideration the relevant factors while deciding the appeal- revision allowed and order of Appellate Authority set aside.(Para-8 to 12)

For the Petitioner : Mr. N. S. Chandel, Advocate.
For the Respondents: Mr. B.C. Verma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant Civil Revision Petition stands directed against the impugned order recorded by the learned Appellate Authority-IV, Shimla in Rent Appeal No. 37-S/14 of 2013/2011 on 11.11.2014, whereby, it reversed the verdict recorded by the learned Rent Controller, Shimla in Rent Petition No. 76-2 of 2008, whereby, the latter had partly allowed the apposite petition constituted therebefore by the landlords/respondents herein, wherein they sought the eviction of the petitioner herein/tenant, from the demised premises.

2. Briefly stated the facts of the case are that the respondents herein claimed themselves to be the owners of a four storeyed building also housing a shop having dimension of 7x8 feet situated in ground floor of the building as specifically depicted in the enclosed site plan, hereinafter referred to as demised premises, situated in Lakkar Bazar, had sought the eviction of the tenant from the demised premises on the ground that the petitioner herein/tenant has been in possession of demised premises as tenant on monthly rent of Rs.300/-, since 1.7.1998, has not paid rent thereof to them w.e.f. 01.07.1999 and that as such he is now also liable to pay statutory interest at the rate of 9% per annum thereon. Moreover, the building housing the demised premises is more than 100 years old and has outlived its life. Its wall constructed in stone and brick masonry with wooden rafters (dhajji) have plumbed. CGI sheets laid down on the roof have rusted and as a consequence, thereof, during the rainy and winter season, the water percolates therefrom into the walls and as a result thereof cracks have occurred in the walls. In fact the structure as a whole has been rendered unsafe and unfit for human habitation. Respondent is running a shop I the demised premises. In the first floor thereof, they are residing. The second floor thereof is in possession of one Sh. O.P. Sharma as tenant. The top floor which earlier was in the tenancy of Sh. O.P. Sharma, is in possession of same third person who has been unauthorisedly inducted therein as a tenant by above referred Sh. O.P. Sharma without their permission and consent. The building is situated in heart of the town and as such has vast commercial potential. They, intend to demolish the present structure and construct in place thereof a modern RCC structure with a view to exploit its commercial potentiality so as to enhance their income. To accomplish their plan, they are also going to file a separate eviction petition against above named Sh. O.P. Sharma and would also vacate their part of premises as proposed reconstruction is not feasible without vacation of the entire structure by all the occupants. They are having sufficient resources at their command to put their plan into action and in this behalf, they have also moved Municipal Corporation, Shimla for obtaining requisite permission for reconstructing a new structure on old lines. Hence, the present petition.

3. The petitioner herein/tenant contested the petition and filed reply thereto, wherein, he had taken preliminary objection qua malafide, maintainability, non joinder of necessary party and cause of action. On merits, he did not dispute his status as tenant in respect to the demised premises but questioned the status of the petitioners as landlord by taking the plea that they in fact are representatives of the landlord and he has been paying rent to him in that capacity. He however, did not deny the factum of arrears of rent but refuted the reasons there for. He submitted that he has been always willing to pay the arrears of rent and thus denied his liability to pay any interest there over. As regard averments with respect to reconstruction, he denied that the building has outlived its life or that it has become unsafe and unfit for human habitation. Renovation work of the ground floor as well as that of the first floor had been done in the year 1997-98 by the predecessors-in-interest of the petitioners and after the

execution of the aforesaid work, the building is now in good condition. He pleaded that the petitioners are only owners to the extent of 33% and the remaining shares are owned by different owners. AS such, in the absence of the consent of the remaining owners, the petition preferred is not maintainable. Hence, he prayed for the dismissal of the petition.

4. The landlords/respondents herein filed rejoinder to the reply of the tenant/petitioner herein, wherein, they denied the contents of the reply and re-affirmed and re-asserted the averments, made in the petition.

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

1. Whether the respondent is in arrears of rent, if so to what amount? OPP

2. Whether the suit premises is bonafide required for reconstruction and rebuilding which is not possible without getting the suit premises vacated? OPP

3. Whether the petition is not maintainable ?OPR

4. Whether the petition is bad for non joinder of necessary parties? OPR

5. Whether the petitioner has no cause of action? OPR

6. Relief.

6. On an appraisal of evidence, adduced before the learned Rent Controller, the learned Rent Controller partly allowed the petition of the landlords/respondents herein. In an appeal, preferred therefrom by the landlords/respondents herein before the learned Appellate Authority, the Appellate Authority allowed the appeal and set aside the order(s) recorded by the learned Rent Controller.

7. Now the tenant/petitioner herein has instituted the instant Civil Revision Petition before this Court assailing the findings recorded in its impugned order by the learned Appellate Authority.

8. The demised premises are located on the ground floor of a building situated in 19/34 Lakkar Bazar, Shimla, wherein, the tenant/petitioner herein is running a commercial venture. The relevant contestable ground qua the firm entitlement of the landlords/respondents herein to seek eviction of the tenant/petitioner herein from the aforesaid demised premises, stands anvilled upon the latter satiating, by adduction of cogent evidence, the factum probandum qua ill health besides the dilapidated condition of the demised premises, whereupon, hence, its reconstruction is warranted, for facilitation whereof, the eviction of the tenant therefrom is imperative. In proof of the aforesaid ill health of the demised premises also qua its dilapidated condition, whereupon, its reconstruction is necessitated, for leveraging facilitation whereof, the eviction therefrom of the petitioner herein/tenant is imperative, the landlords/respondents herein had led into witness box, one Shri Shiv Saran, PW-2. In his deposition the aforestated witness has succored the relevant pleadings echoed in the apposite petition wherein unfoldments occur qua the dilapidated condition of the demised premises also has testified therein qua its warranting its reconstruction, for facilitation whereof, the eviction of the tenant/petitioner herein, from the relevant demised premises occurring on its ground floor, is imperative, importantly when the reconstruction of the building has to commence from its base, by excavation of foundations thereto. The aforesaid communications occurring in the testimony of PW-2, the purported expert, though succor the apposite pleadings constituted in the apposite petition for eviction, wherein unfoldments occur qua the ill health of the demised premises also qua unless the petitioner herein/tenant is ordered to be evicted therefrom, its reconstruction when is a dire necessity for hence improving its health also for enhancing its longevity, would hence stand forestalled, nonetheless, the import of his testification qua the entire building warranting reconstruction, in a portion whereof, the relevant demised premises occur, cannot neither stand undermined nor slighted nor also can the admission(s) held in the pleadings constituted in the

apposite petition qua on the top floor of the relevant building, a tenant named one Shri O.P. Sharma holding occupation thereof, in respect wheretowhom, no petition for eviction stands instituted besides with the landlord while testifying as PW-1 omitting to underscore therein qua any apposite petition for seeking eviction of one Mr. O.P. Sharma, who holds occupation as a tenant in a part of the building, remaining yet instituted, whereupon, the effect of both the aforesaid material/pronouncements is qua the respondents herein/landlords singularly selecting the petitioner herein/tenant for seeking his eviction from the demised premises, whereas, their excluding other tenant(s) in the building, for seeking their eviction from portions occupied therein by him/them as tenant(s). The further effect of the aforesaid pronouncements occurring in the aforesaid material, is qua with PW-2 testifying qua the entire building being in a state of ill health also in a state of dilapidation, whereupon, its reconstruction is warranted for hence enhancing its longevity, when nowat, stand coagulated with the relevant demised premises hereat evidently occurring on the ground floor of the building, whereas, portions above it stand occupied by other tenant(s) qua whom no petition for their eviction therefrom stand instituted, thereupon, if the apposite petition for seeking eviction of the petitioner herein/tenant, who occupies the ground floor of the relevant building, wherefrom, the reconstruction activity of the building is to commence, is hence permitted to succeed, it would sequel the collapsing of the entire building, begetting the concomitant inapt sequel, of the tenant(s) occupying the floors existing above the demised floor with respect to whom, no petition for their eviction therefrom stand instituted, hence, ipso facto suffering their eviction therefrom despite no pronouncement standing rendered upon them by competent Courts. Also their/his eviction would naturally ensue(s) on the floors occurring above the ground floor, upper floor(s) whereof stand occupied by him/them, on commencement, after eviction of the tenant hereat of the relevant reconstruction from its base, portion whereof is the relevant demised premises, hence, naturally obviously collapsing. In case, the aforesaid eventuality is permitted to be effectuated, thereupon, the inevitable ensuing sequel therefrom would be even without the fiat of the Courts of law pronouncing upon the eviction of tenants occupying the floor(s) above the relevant premises, the upper floors standing impermissibly subjected to reconstruction, permitting occurrence of eventuality whereof would tantamount to rendition of a grossly unwarranted order.

9. Be that as it may, the learned Appellate Authority had dispelled the vigour of the aforesaid pleadings constituted in the apposite rent petition also it had blunted the effect of the testification of PW-2, who had in his relevant testification voiced qua the relevant reconstruction activity warranting its commencement from its base, whereat the demised premises stand located, significantly also it drove rough shod qua the factum of floor(s) above the ground floor standing occupied by a tenant in respect whereto no executable decree of eviction stood pronounced by competent courts of law, floors whereof would collapse, if the decree impugned herebefore stands affirmed leading to the ill-fate of tenant(s) occupying them hence ipso fato without authority of law hence suffering eviction therefrom, whereupon, it has committed a gross illegality or impropriety. Contrarily, the effect of the aforesaid pleadings unfolded in the apposite petition for eviction also the effect of the testification of the aforesaid PW-2, is qua the choosing besides selecting by the respondents herein, of the petitioner herein/tenant for his eviction from the demised premises, being palpably construable to be an invention or a concoction bereft of any virtues of any bonafides inhering in the respondent(s) herein, for hence theirs seeking his eviction therefrom on the score of the ill-health of the building besides on the score of its dilapidated condition, in a part whereof the demised premises stand located, hence, its thereupon warranting its immediate reconstruction, for facilitation whereof, the eviction of the tenant is imperative. Resultantly, contrived besides invented grounds for eviction,on facet aforesaid, of the petitioner herein/tenant from the demised premises, cannot come to be either sustained or countenanced by this Court.

10. Dehors the above, the respondents herein are co-owners along with other co-owners in the building, in part whereof, the petitioner herein is a tenant under the respondents herein, yet other co-owners stood not impleaded as co-petitioners with the respondents herein. Though, the non impleadment of other co-owners along with the respondents herein, as co-

petitioners in the apposite eviction petition would not preempt, the learned Courts below to pronounce a conditional order of eviction upon the petitioner herein/tenant, significantly, when the petitioner herein uncontrovertedly attorns only qua the respondents herein, yet with surfacing of evidence herebefore unveiling qua the entire building warranting reconstruction, whereupon, its commercial utility would stand enhanced also when on its reconstruction it would hence rear incremental pecuniary benefits qua the co-owners of the building yet uncontrovertedly with the relevant building standing located within municipal limits, whereupon, with the ground for eviction of the tenant hereat residing in a part thereof, standing strived besides anchored upon its warranting its reconstruction, for absolute success whereof, all the co-owners stood enjoined to obtain the apposite sanction for its reconstruction from the Municipal Corporation, Shimla, whereas, with no sanction for the relevant purpose standing obtained therefrom by all the co-owners of the building renders the apposite ground, whereupon, the respondents herein seek eviction of the tenant from the demised premises to be also construable to be contrived or invented. However, though, even want of apposite sanction by the Municipal Corporation, Shimla, for the relevant purpose would not forestall Courts of law to pass a conditional decree qua eviction of the tenant herein from the building, building whereof is concerted to, on their eviction therefrom, to be rebuilt, yet, the effect of non joinder of all the co-owners of the relevant building by the respondents herein as co-petitioners with them in the apposite eviction petition, when construed in tandem with the factum of Ex.PW4/A comprising the plan for reconstruction of the building submitted for approval before the Municipal Corporation, Shimla, not holding the signatures of all the co-owners nor any affidavit standing placed on record, of all the co-owners, holding articulations qua theirs consenting to the submission of Ex.PW4/A before the Municipal Corporation, Shimla for its approval therefrom, wherefrom, it appears qua the omission of joinder by the respondents herein of other co-owners as co-petitioner(s) in the apposite eviction petition, standing engendered by theirs in their relevant endeavour of rebuilding it, not holding their consensus ad idem qua its rebuilding nor also hence the aspiration of the respondents herein being for their monetary betterment. Contrarily, it appears qua theirs with utmost stealth contriving a pretextual ground of eviction of the petitioner herein/tenant from the demised premises. Moreover, the effect of the respondents herein not obtaining the signatures of the co-owners on Ex.PW4/A nor tendering into evidence their affidavits unveiling qua theirs consenting for the reconstruction of the building , renders open an inference qua, thereupon, Ex.PW4/A suffering rejection from the Municipal Corporation, Shimla, whereas, its approval therefrom would facilitate this Court to render a conditional decree of eviction upon the tenant/petitioner herein, corollary whereof is dehors the non approval yet of Ex.PW 4/A by the Municipal Corporation, Shimla, no conditional decree of eviction of the tenant being amenable for pronouncement, its submission therebefore lacking the consent of other co-owners, whereupon, it would suffer rejection hence rendering the ground qua reconstruction of the relevant building to be illusory besides unwarranted.

11. The above discussion unfolds qua the conclusions arrived by the learned Appellate Authority standing not based upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned Appellate Authority has excluded germane and apposite material from consideration.

12. In view of above discussion, the present petition is allowed and the judgment rendered by the learned Appellate Authority in Rent Appeal No. 37-S/14 of 2013/2011 on 11.11.2014 is set aside. In sequel, the order rendered by learned Rent Controller, Shimla, in Rent Petition No. 76/2 of 2008 on 17.10.2011 is affirmed and maintained. 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.

Brestua & ors. ……Appellants.

Versus

Rajinder Singh & ors. …….Respondents.

RSA No. 394 of 2003.
Decided on: 10.4.2017.

Specific Relief Act, 1963-Section 38- Plaintiffs claimed right of passage through the edges (mainds) by way of custom – they further pleaded that the passage was blocked by the defendants without any right to do so- the defendants denied the existence of passage – held that wazib-ul-arj shows the existence of custom of using the passage through the edges – oral evidence also proved the existence of the passage – courts had rightly appreciated the evidence - appeal dismissed. (Para-7 to 15)

For the appellant(s): Mr. G.D.Verma, Sr. Advocate with Mr. B.C.Verma, Advocate.

For the respondents: Mr. Rajnish K. Lall, Advocate, vice counsel for respondents No. 1, 5 to 7.
Respondent No. 3 already deleted.
Respondents No. 4(a) and 4(b) already ex parte.

The following judgment of the Court was delivered:

Justice Dharam Chand Chaudhary, J.

The judgment and decree dated 13.6.2003 passed by learned District Judge, Kinnaur, at Rampur Bushahr, H.P. in Civil Appeal No. 26 of 1999 is under challenge in this appeal. The appeal has been admitted on the following substantial question of law:

> "1. Whether the findings arrived at by the trial Court as affirmed by the first Appellate Court are perverse and dehors the evidence on record?"

2. Therefore, in order to determine the legality and validity of the impugned judgment and decree, facts of the case and evidence produced by the parties on both sides is required to be taken note of briefly.

3. The dispute in the present lis is qua the existence of path allegedly through edges (mainds) of the fields of appellant-defendant No. 2 Rati Sukh bearing Khata Khatoni No. 77 min/151 min Kh. No. 774, measuring 0-40-68 hectares and that of Bhaginar appellant-defendant No. 3 entered in Khata Khatoni No. 80/154, Kh. No. 696 measuring 0-23-58 hectares and Kh. No. 697 measuring 0-01-68 hectares situated in Up-mohal Powari Tehsil Kalpa, Distt. Kinnaur.

4. The plaintiffs (respondents herein) claim that as per the custom prevalent in the area where the abovesaid land is situated, they were exercising their rights of using the edges (mainds) of the western end of upper part of field of defendant No. 3 bearing Kh. No. 697 and that of defendant No. 2 bearing Kh. No. 774 and Kh. No. 775 alongside water channel (Kuhl) shown with points A to B in the tatima Ext. PW-7/A to have access to their adjoining fields and orchard along with other members of their family, labourers, bullocks and cattle etc. openly, continuously and without any interruption by the defendants. It is, however, in June, 1992, the defendants had blocked the said access by fencing the same with barbed wire and thorny bushes at points A to B in the tatima and also by constructing a wall over their fields bearing Kh. Nos. 774 and 775 as well as at the western end of upper portion of Kh. No. 697. The parties, being agriculturist by profession and the fields in their area, generally small in size, surrounded by the fields of others, is not connected by a private or public path. As such, the right of using edges (mainds) of each other fields to have access to their respective fields along with other members of their families,

labourers, cattle and bullock etc. is a customary right and in the exercise of such right, the plaintiffs are entitled to have access and use the passage running alongside edges of the fields of defendants for agricultural purposes. The obstruction to the exercise of their right at the behest of the defendants, was claimed to be illegal, arbitrary and against the factual position on the spot. Therefore, the defendants by a decree of permanent prohibitory injunction were sought to be restrained from causing interference with the plaintiffs' right of using the said approach to their respective fields through the abovesaid fields of the defendants.

5. The defendants when put to notice, by contesting the suit, in preliminary, have raised various objections qua the maintainability, valuation and jurisdiction of the trial Court etc. On merits, while claiming that the land belonging to the plaintiffs was barren (banjar) up to 1980, they never used the edges of the fields of the defendants to have access to their land for carrying out agricultural pursuits. While disputing the sale-deeds and ownership as well as possession of the plaintiffs over the land in question, it has been claimed that the sale thereof being violative of the provisions of Registration Act, is *void abinitio* and as such the land in question should vest in the State of H.P. It is denied that there exists a path over their field bearing Kh. Nos. 697, 774 or 775. Points A to B of the *Tatima,* allegedly prepared by the Patwari, are against the true facts of the case being prepared in connivance with the plaintiffs. No such path is stated to be shown in *Shajra* of Up-Mohal Powari. The indication drawn in the form of a line in the *Shajra* infact is local water channel and not a path. The plaintiffs allegedly manipulated and created a false tatima which is contrary to the possession reflected in the *Shajra* on the spot. The complaint under Section 133 Cr.P.C. filed by the plaintiffs against one Liaq Ram and the defendants allegedly stands dismissed by the Sub Divisional Magistrate, Kalpa. Another complaint in which the plaintiffs have claimed that the disputed path is the only path available for them to have access to their fields is stated to be pending before the SDM, Kalpa. The plaintiffs, who allegedly are claiming the path illegally through the fields of the defendants, are influential persons and they intend to carve out a new path which is not legally permissible. It is denied that the defendants had blocked the path in question in the year 1992 as no such path is in existence on the spot.

6. On such pleadings of the parties, the following issues were framed:

"1. Whether the plaintiffs have customary right of easement to pass through the disputed land as alleged? OPP.

2. Whether the defendants have raised temporary structure over the disputed path and thereby blocked the same as alleged? OPP.

3. Whether the plaintiffs are entitled for the relief of permanent prohibitory injunction as prayed for? OPP.

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

5. Whether the plaintiffs have no locus-standi to file the present suit? OPD.

6. Whether the suit does not disclose any cause of action and therefore, liable to be dismissed? OPD.

7. Whether the suit has not been properly valued for the purpose of Court fees and jurisdiction? OPD.

8. If issue No. 7 is proved whether this Court has no pecuniary jurisdiction to try the present suit? OPD.

9. Whether the suit is not competent in view of preliminary objection No. 7? OPD.

10. Whether the suit is barred by limitation? OPD.

11. Whether the suit is bad for mis-joinder of the parties? OPD.

12. Relief."

7. Now, if coming to the evidence, comprising oral as well as documentary, the copy of ***'Wazib-ul-Arj'*** is Ext. PB. The relevant extract of the same reads as follows:

"न. फसल काश्त करते समय हल के बैल खड़ी फसल के होते हुअ छीका या रस्सी मुँह में लगा कर एक दूसरे को मलकियत से बिना रोके टोके ले जा सकते है /

प. एक दूसरे की मर्जी से मनुषय के चलने के वास्ते जो काश्त करने से मादूम हो जाते है और फिर चलने से जारी हो जाते है, ऐसे रस्ते जाल में चलने की कोई रोक टोक नहीं है/"

8. The document Ext. PB, therefore makes it crystal clear that as per the customs prevalent in the area, edges of the fields of each other in the area are being used by the local residents to have access to their fields along with bullocks, cattle and for carrying agricultural implements for ploughing/cultivating their fields. The only precaution need to be taken is to tie the mouth of the cattle with a cover made of rope or with rope. The another material piece of evidence is the Tatima Ext. PW-7/A, the same has been proved by PW-7 Kishan Singh, the then Patwari, Patwar Circle Tangling. The Tatima has been prepared by this witness after spot inspection The path in existence is alongside the fields bearing Kh. Nos. 774, 775 and the same is marked A to B in red dotted line. This path, according to him is also in existence over the field bearing Kh. No. 696 and 697. There is nothing to disbelieve the statement of PW-7 Patwari Kishan Singh.

9. The position, as reflected in Tatima Ext. PW-7/A, finds support from the oral evidence as has come on record by way of the testimony of PW-1 Gian Singh (plaintiff No. 4), who has categorically stated that the path shown in the tatima Ext. PW-7/A crosses through the edges of the fields of defendants and that as per the customs prevalent in the area they are using the same to have access to their fields since time immemorial. As per his further version, defendants did not object to the use of the edges of their fields by the plaintiffs to have access to their fields till June, 1992. It is, however, in the month of June 1992, the defendants blocked the passage in question by way of fencing and putting thorny bushes on the spot. The obstruction was removed by them consequent upon the interim order passed by the Civil Court, however, blocked again in violation of the said order. Not only this, but as per his further version a complaint under Section 133 Cr.P.C. was also filed before SDM, Kalpa.

10. Another material witness examined by the plaintiffs is Balak Ram PW-2, the then Field Kanungo, Kalpa. According to him, Mohal Powari where the land of the parties situates was under his jurisdiction and in the year 1988 when he went to the spot to demarcate the land, he used the path in question. When again he went to the spot to demarcate the land of one Surinder in the year 1990, this path was used by him. In the year 1991, when he evicted one Charan Sukh, he used the said path at that time also. When in the year 1992, he visited the spot as per the direction of the Sub Divisional Magistrate, the path was found to have been blocked by the defendants. The path, according to him, exists along side the edges of water channel. The defendants had blocked the path by putting barbed wire and thorny bushes. Prior to 1992, this path, according to him was open. The suggestion given to him that the path in question as a whole exists on the edges of the water channel has been admitted being correct. It is, thus seen that by putting such suggestion to this witness, the defendants have themselves admitted the existence of path on the spot.

11. PW-3 Kundan Sain and PW-4 Sahi Ram, both have deposed qua the existence of the path in question. According to them, the same was being used by the plaintiffs for taking their cattle to their fields and that no alternative path is in existence for being used by them. They have also deposed about the path blocked by the defendants in the year 1992 by putting barbed wire, thorny bushes and raising construction of kiosk (kutcha dhara). PW-5 Bhagi Dass also belongs to the same village and as per his version also, the path in dispute is the only path for the plaintiffs to have access to their fields. He has also deposed about the customs in the area to use the fields of each other to have access to their land for performing agricultural pursuits through the edges of the fields of each other. Similar is the version of PW-6 Kuljan Tenzin as according to him being the employee of Gian Singh (PW-1), during the period from 1974 to 1980, he used the path in question to have access to the fields of said Sh. Gian Singh for performing

agricultural pursuits and to take cattle for ploughing the fields. As per his version also, no other path is in existence to have access to the fields of the plaintiffs.

12. The another material witness is PW-8 Vishwa Karma Negi, the then Tehsildar, Kalpa. He remained posted as such during the period from 1990 to 1994. According to him, the land of the parties situate in Mousima Talingpi and he had visited the same many a times for different purposes. On one occasion, he went there to demarcate the land and at that time he had seen the disputed path in existence on the spot. The path, according to him starts from main road Shong Tong-Purvani, Mauza Balinga and reaches at the orchard of Amar Singh, Subhash and Gian Singh etc. The path runs partly along side the kuhl and partly through the land of defendants.

13. On the other hand, Shiv Ram, defendant No. 4 has stepped into the witness-box as DW-1 and examined Narpur DW-2 and Chet Ram DW-3. No doubt, they all have stated in one voice that no path is in existence over the land of the defendants, however, in view of the overwhelming documentary as well as oral evidence produced by the plaintiffs and discussed supra belies their testimony. They, as such, have deposed falsely to defeat the just and legitimate claim of the plaintiffs to have access to their fields through the fields belonging to the defendants.

14. The contentions raised on behalf of the defendants that the plaintiffs have neither pleaded nor proved the existence of any customary right to use path in question are without any substance for the reason that the ***'Wazib-ul-Arj'*** Ext. PB amply demonstrate that the custom of using mainds of fields of other right holders is long standing and right holders had been using the mainds of the fields of each other to have access to their respective fields to perform agricultural pursuits. The plaintiffs have sufficiently proved so in the plaint. In order to prove the same, plaintiff No. 4 has himself stepped into the witness-box as PW-1. The remaining plaintiffs' witnesses, whose testimony is discussed in detail in para supra have also supported the plaintiffs case qua existence of customary rights of right holders to use mainds of the fields of each other to have access to their respective fields. The plaintiffs, as such, have established the existence of customary right on record and as such, learned lower appellate Court has not committed any illegality or irregularity while decreeing the suit to the limited extent of restraining the defendants from causing any interference in the rights of the plaintiffs to use the edges of the fields of the defendants bearing Kh. Nos. 696, 697, 774 and 775 to have access to their fields situated in Up-Mohal Powari Khas, Tehsil Kalpa, District Kinnaur, of course, for performing agricultural pursuits alone. The defendants by way of a direction mandatory in nature, have also been rightly directed to remove the barbed wire and thorny bushes put there to block the path in question and also to remove the construction of kiosk raised on the spot. The plaintiffs, in modification of the judgment and decree passed by learned trial Court have however been rightly not held entitled to claim path from middle of the fields of the defendants.

15. As a matter of fact, the path in question is not a general or public path and rather exists partly along side water channel whereas partly through the mainds of the fields of the defendants. The same is meant to have access by the plaintiffs to their adjoining fields for the purpose of performing agricultural pursuits. The plaintiffs have satisfactorily proved this part of their case. This path may have not been entered in the revenue record and in *girdawris* being not general path. As already said, the path in dispute is not a general or public path and rather being used for limited purpose i.e. to have access to the fields to perform agricultural pursuits and as such this path is not permanent and rather temporary being not entered in the revenue record and used by the villagers with mutual understanding and as an arrangement personal to them. Support in this regard can be drawn from the judgment of this Court in ***Smt. Kamla Devi vs. Uttam Singh, RSA No. 241 of 2004 decided on 20.6.2015***. The present, as such, is not a case where it can be said that on account of mis-appreciation and misreading of the evidence, the findings arrived at by the trial Court and affirmed by the first appellate Court are perverse and dehors the evidence. The substantial question of law as arises for determination in this appeal is, therefore, answered accordingly.

16. In view of what has been said hereinabove, there is no force in this appeal and the same is accordingly dismissed. No orders as to costs.

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

Smt. Hazar Mani ……Appellant.

Versus

The Secretary, H.P. State Electricity Board & another …….Respondents.

FAO No. 404 of 2012.
Decided on: 10.04.2017.

Employees Compensation Act, 1923- Section 4- S was employed as additional foreman-cum-driver with H.P. Power Corporation Limited – he died while discharging his duties- Commissioner assessed the compensation as Rs.2,71,120/- and awarded the same without interest- aggrieved from the award, present appeal has been filed- held that where an employer is in default in paying due compensation, the Commissioner shall award the interest @ 12% per annum or higher – the interest of 12% per annum is statutory and has to be awarded along with compensation- appeal allowed- interest awarded @ 12% per annum from a date after one month when the same fell due. (Para- 2 to 5)

For the appellant: Mr. H.S.Rawat, Advocate.
For the respondents: Mr. Satyen Vaidya Sr. Advocate with Mr. Vivek Sharma, Advocate, for respondent No.1.
Mr. Y.S. Thakur, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Justice Dharam Chand Chaudhary, J (Oral).

In this appeal the impugned award dated 28.8.2012 passed by learned Commissioner, Employees' Compensation, Rohru, District Shimla, in case RBT No. 8-2 of 2011 is under challenge to the limited extent that on the compensation awarded by learned Commissioner, the statutory interest on the default of the employer to pay the compensation due to the appellant-claimant within one month when it fell due has not been awarded. Being so, on the compensation i.e. Rs. 2,71,120/- awarded to the appellant-claimant by learned Commissioner below, interest @ 12% per annum has been sought to be awarded.

2. One Sh. Saina Ram, husband of the appellant-claimant Hazar Mani was employed as Additional Foreman-cum- Driver in Sawra Kuddu Hydro Electric Project, H.P. Power Corporation Limited (HCL), Rohru on secondment basis. He died on 17.12.2008. In a claim petition filed under Section 22 of the Employees Compensation Act, 1923 (hereinafter referred to as he Act), learned Commissioner below while holding that said Sh. Saina Ram was employee of the respondents and died during the course of his employment, has assessed the compensation to the tune of Rs. 2,71,120/- and awarded the same to the appellant-claimant, however, without statutory interest @ 12% as the employer has admittedly failed to pay the compensation to the appellant-claimant within one month from the date when the same fell due to her.

3. Section 4-A (3)(a) of the Act provides that where any employer is in default in paying the compensation due within one month when the same fell due, the Commissioner shall in addition to the compensation amount due to the claimant shall order to pay the same together with simple interest @ 12% per annum or at such higher rate not exceeding the maximum of the lending rates of the scheduled bank.

4. It is seen that the interest @ 12% per annum is statutory and in a case where the employer fails to pay the compensation due to the claimant within one month from the date when the same fell due, the compensation payable to the claimant should be awarded together with interest @ 12% per annum from the date i.e. one month when the same fell due to the claimant.

5. Learned counsel representing the respondents has failed to persuade this Court to concur with that part of the award which provides for award of interest on happening of an event i.e. the failure of the respondents to pay the awarded amount within one month from the date of the impugned award. Therefore, instead of awarding the interest @ 12% per annum on happening of an event i.e. failure of the respondents to pay the awarded amount to the appellant-claimant within one month from the date of award, the compensation should have been awarded to her together with simple interest @ 12% per annum from a date after one month when the same had fallen due to her. Admittedly, the compensation due to the appellant-claimant under the Act has not been paid to her within one month when the same fell due to her. Therefore, this appeal is allowed and consequently the compensation i.e. 2,71,120/- awarded by the learned Commissioner below to the appellant-claimant shall carry simple interest @ 12% per annum from a date after one month when the same fell due to her. The impugned order shall stand modified to this limited extent.

6. The appeal is accordingly disposed of in the above terms, so also the pending application(s), if any.

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

HP State Civil Supplies Corporation Ltd. ....Petitioner
Versus
Presiding Judge and another ....Respondents

CWP No. 2417 of 2009
Decided on : April 10, 2017

Industrial Disputes Act, 1947- Section 25- The workman was employed as a helper on daily wage basis for a period of one month – the employment continued and the workman completed 240 days each year during the period of employment – his services were terminated by an oral order without assigning any reason- a reference was made and the Labour Court ordered the reinstatement of the workman with seniority and continuity of service – however, he was not held entitled for the back wages– aggrieved from the award, present writ petition has been filed- held that workman was employed on 12.12.1995 – an office order regarding the appointment being co terminus with the tenure of chairman was issued on 5.2.1997 –the order issued in 1997 cannot govern the appointment made in the year 1995 - workman had completed more than 240 days in a calendar year and a notice under Section 25-F was required to be issued prior to the termination of his services – no notice was issued – the award was rightly passed – High Court has limited jurisdiction to re-appreciate the facts while deciding writ petition - no error of law was pointed out - writ petition dismissed.(Para-8 to 11)

Case referred:

Bhuvnesh Kumar Dwivedi vs. M/s Hindalco Industries Ltd., 2014 AIR SCW 3157

For the petitioner : Mr. Navlesh Verma, Advocate.
For the respondents : Nemo for respondent No.1.
Mr. P.P. Chauhan, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:

By way of instant petition filed under Article 226 of the Constitution of India, petitioner-Corporation ('Corporation', hereafter) has laid challenge to the award dated 24.3.2009, passed by the learned Industrial Tribunal-cum-Labour Court, Shimla ('Tribunal', for short) in Ref. No. 17 of 2002, whereby reference has been answered against the Corporation.

2. Briefly stated facts, as emerge from the record are that respondent No.2-workman ('workman', hereafter) claimed that he was appointed as a Helper with the Corporation with effect from 23.12.1995. Being aggrieved with his termination by the Corporation, workman served a demand notice under Section 2A of the Industrial Disputes Act (in short, 'Act') before the Labour Officer-cum-Conciliation Officer, Shimla but, since there was no amicable settlement of dispute inter se parties, matter was referred under Section 10 of the Act to the Tribunal below by the appropriate Government, for adjudication of following term of reference:

> "Whether the termination of the services of Shri Puran Dutt s/o Shri Bala Ram w.e.f. 5.2.1997 by the Managing Director, HP Civil Supplies Corporation Ltd. Shimla without serving notice and without complying section 25-F of the Industrial Disputes Act, 1947 is proper and justified? If not, what salary, seniority, service benefits and amount of compensation, the above workman is entitled to?"

3. Workman, by way of filing statement of claim before the Tribunal below stated that he was appointed as a Helper on daily wage basis with effect from 23.12.1995 for one month in the headquarters and then he continued with further extension and had completed 240 days in each calendar year prior to the alleged termination. He further stated that he was discharging his duties to the best of his abilities and entire satisfaction of his superiors. Workman further claimed that on 5.2.1997, his services were terminated by oral order without assigning any reason, which action of the Corporation was arbitrary, malafide and in colourable exercise of power. By way of aforesaid statement of claim, workman further claimed that the action of Corporation in resorting to offering him contract appointment instead of appointing him on ad hoc basis and subsequently on regular basis on a regular post, is/was in sheer violation of Rules, Regulations and Standing Orders as well as provisions contained in Articles 14 and 16 of the Constitution of India. Workman further claimed that his services were terminated solely with a view to prevent him from completing 240 days in each calendar year so that he may not become eligible to be regularized with the afflux of time. Workman further claimed that since while terminating his services, no speaking order was passed, same can not be allowed to be sustained being totally contrary to the provisions of law as contained in the Act. In the aforesaid background, workman claimed that since his termination was against the provisions of Sections 25-F, 25-G and 35-H of the Act, Corporation was estopped on account of its own act, conduct, deed and omission from issuing impugned order and Corporation was bound to retain his services till regularization in accordance with law, against the vacant post, on which he was already working.

4. Corporation, by way of filing detailed reply to the statement of claim, resisted aforesaid claim of the workman by raising preliminary objections that workman was not a 'workman' and as such dispute, if any, before the Tribunal below was not maintainable. However, on merits, Corporation admitted that the workman had completed 240 days in calendar year and he was appointed on daily wage basis on 12.12.1995, vide order dated 5.2.1997, after obtaining ex post facto sanction in the case, on co-terminus basis with the appointment of Chairman and as such provisions of Section 25-F are not applicable as the appointment on daily wages was specifically for the limited period i.e. upto the tenure of the then Chairman of the Corporation and after the resignation of the Chairman, on 24.1.1998, services of workman automatically ceased as per office order dated 5.2.1997. Corporation further contended before the learned Tribunal below that since the workman was initially appointed for a specific period with the tenure of the then

Chairman, action of the Corporation in not continuing with the services of workman after expiry of the tenure of the then Chairman is/was in accordance with law and there is no requirement for the Corporation to comply provisions of the Act. Corporation specifically denied that the workman was appointed on regular basis and he was entitled to any notice under Section 25-F of the Act. Corporation specifically placing reliance upon order dated 5.2.1997, whereby services of workman were made co-terminus with the office of Chairman, claimed that there is no violation of any provisions of the Act and prayed for dismissal of the claim petition having been filed by the workman. Learned Tribunal below, on the basis of pleadings, framed following issues:

> "1. Whether the services of the petitioner were illegally terminated w.e.f. 5.2.1997 without complying the provisions of section 25-F of the ID Act, 1947? If so, its effect? OPP
>
> 2. If issue no. 1 is proved in affirmative, whether the petitioner is entitled for relief claimed? OPP
>
> 3. Whether the petition is not maintainable in the present form? OPR
>
> 4. Relief."

5. However, subsequently, vide award dated 24.3.2009, learned Tribunal below accepted the claim petition of the workman and answered the reference in the affirmative, against the Corporation. Vide aforesaid award, learned Tribunal below ordered reinstatement of the workman in service forthwith, with seniority and continuity in service, however, workman was not held entitled for back-wages. In the aforesaid background Corporation approached this Court, by way of instant petition.

6. Mr. Navlesh Verma, learned counsel representing the Corporation vehemently argued that impugned award is not sustainable in the eyes of law as the same is contrary to the provisions of law, as such, same deserves to be set aside. While referring to the impugned award passed by learned Tribunal below, Mr. Verma, strenuously argued that provisions of Section 25-F, 25-G and 35-H of the Act could not be made applicable in the present case as the Corporation does not fall under the category of 'industrial establishment' or 'industry', as such on this very ground, impugned award passed by the learned Tribunal below deserves to be set aside. Mr. Verma, contended further that the learned Tribunal below while adjudicating reference made to it, failed to appreciate that services of the workman automatically ceased strictly in terms of appointment order dated 5.2.1997, issued by it and as such there was no occasion for the Corporation to comply with the provisions contained in the Act. Learned counsel representing the Corporation, while placing reliance on order dated 5.2.1997 (Ext. PX), forcefully contended that learned Tribunal below miserably failed to appreciate that workman was engaged as daily wager peon on co-terminus basis and his services were to be dispensed with automatically with the tenure of the Chairman of the Corporation. Learned counsel representing the Corporation further contended that the learned Tribunal below erred in coming to the conclusion that condition of appointment being co-terminus with the tenure of Chairman of the Corporation, was not incorporated in the appointment letter of the workman in 1995 and as such condition contained in the letter, which is of subsequent date, shows malafides on the part of the Corporation, which amounts to unfair labour practice. To substantiate his aforesaid argument, Mr. Verma argued that the learned Tribunal below failed to appreciate that once the workman had entered into service contract with the Corporation, and he was aware of the fact that his services would be terminated with the tenure of the Chairman of the Corporation, he could not be allowed to raise aforesaid issue at the time of adjudication of the reference by the learned Tribunal below. While concluding his arguments, learned counsel representing the Corporation contended that learned Tribunal below erred in concluding that the petitioner failed to comply with the mandatory provisions of law under Section 25 of the Act, while deciding issue No.1, without appreciating provisions contained in aforesaid provisions of law, because, admittedly, Section 25 of the Act is/was not applicable to the workman since he was appointed purely on co-terminus basis and his services were bound to be terminated with the tenure of Chairman as per service contact. In the aforesaid background, learned counsel representing the Corporation prayed that impugned award passed by learned Tribunal below may be quashed and set aside.

7. Mr. P.P. Chauhan, learned counsel representing the workman supported the impugned award passed by the learned Tribunal below. Mr. Chauhan, while referring to the impugned award passed by learned Tribunal below, strenuously argued that there is no illegality or infirmity in the same as such there is no scope of interference by this Court, especially in the writ proceedings, where findings of fact have been recorded by the Court below that too on the appreciation of the evidence adduced before it. While specifically inviting attention of this Court to impugned award passed by learned Tribunal below, Mr. Chauhan, stated that the learned Tribunal below has specifically returned its findings qua terms of reference as sent to it by the appropriate Government, for adjudication to demonstrate that the learned Tribunal below, while adjudicating the claim of the workman, Mr. Chauhan invited attention of this Court to the terms of reference made to the learned Tribunal below by the appropriate Government, for adjudication, to demonstrate that learned Tribunal below has rightly answered the reference, that too on the basis of evidence adduced on record by respective parties and by no stretch of imagination, it can be said that the learned Tribunal below exceeded its jurisdiction while adjudicating claim referred to it. Mr. Chauhan, further contended that it is admitted case of the parties that the workman was appointed with the Corporation with effect from 12.12.1995 and as such he continued till his illegal termination on 5.2.1997, meaning thereby that the workman before his illegal termination had completed 240 days in preceding calendar year and as such there was a requirement of serving him with notice as envisaged under Section 25 of the Act. Apart from above, Mr. Chauhan, also invited attention of this Court to the award to suggest that question of jurisdiction, if any, of the learned Tribunal below to adjudicate the claim of the workman was never raised before the learned Tribunal below and as such same can not be allowed to be raised at this stage. Mr. Chauhan, further contended that only objection raised before the learned Tribunal below was that respondent No.2 was not a 'workman' but no evidence worth the name was led on record to prove that he was not a workman and as such learned Tribunal below rightly concluded that before terminating services of workman, Corporation ought to have issued notice as envisaged under Section 25-F of the Act. While concluding his arguments, Mr. Chauhan contended that since workman had completed 240 days in calendar year, prior to his termination, it was incumbent upon the Corporation to have served notice upon him under Section 25-F of the Act. He further contended that there is no illegality or infirmity in the impugned award passed by learned Tribunal below and same is 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 while exercising writ jurisdiction. While refuting the submissions having been made by the learned counsel representing the Corporation, Mr. Chauhan, contended that points raised before this Court by the learned counsel representing the Corporation were never raised before the learned Tribunal below, and as such, present petition deserves to be dismissed. Mr. Chauhan further contended that no cogent and convincing evidence was led on record by the Corporation to prove its case within the ambit of the question posed to the learned Tribunal below by the appropriate Government as such there is no force in the contentions of the learned counsel representing the Corporation.

8. During the proceedings of the case, this Court had an occasion to peruse the pleadings as well as documents annexed there to, perusal whereof clearly suggests that the learned Tribunal below while exploring answer to the specific term of reference has dealt with each and every aspect of the matter meticulously and this Court sees no force, much less substantial, in the arguments having been advanced on behalf of the Corporation that evidence adduced on record by the respective parties has not been dealt in its right perspective. It is admitted case of the parties that the workman was appointed as Helper with the Corporation with effect from 12.12.1995 and as such he continued to work till 5.2.1997, when his services were allegedly terminated illegally, without resorting to the provisions of Industrial Disputes Act. Workman while making statement of claim before the learned Tribunal below specifically stated that he was appointed as a Helper with the Corporation with effect from 12.12.1995, for one month but his services were extended from time to time and as such he completed more than 240 days in each calendar year. Workman further stated before the learned Tribunal below that though he was discharging his duties to the best of his abilities and entire satisfaction of his

superiors, but on 5.2.1997, his services were terminated by an oral order without assigning any reason. In his cross-examination, workman admitted that he was engaged as daily wager with Shri Singhi Ram, the then Chairman of the Corporation. However, workman denied the suggestion put to him that appointment was co-terminus with the Chairman. Workman admitted office order dated 5.2.1997 but specifically denied that his appointment was co-terminus with the office of Chairman. On the other hand, Corporation examined one Shri Attar Singh, Assistant Divisional Manager who deposed before the learned Tribunal below that workman was engaged as daily wage basis with the then Chairman on 12.12.1995 on co-terminus basis and in this regard, proved appointment letter Ext. PX on record. Aforesaid officer while placing reliance upon Ext. PX specifically deposed before the learned Tribunal below that workman has no legal right to claim his reengagement with the Corporation. However, in his cross-examination, he admitted that workman was engaged in 1995 but office order dated 5.2.1997 was issued in 1997. Aforesaid witness feigned ignorance that why office order dated 5.2.1997 was issued in 1997 instead of 1995, when workman was initially engaged. He also stated that he does not know whether any office order was issued in 1995 when the workman was engaged and he also feigned ignorance whether staff is only provided when the Chairman is not a Minister.

9. Conjoint reading of evidence adduced on record by the respective parties proves beyond doubt that workman was initially appointed with the Corporation on 12.12.1995 and at that time no appointment letter was ever issued whereby his services were held to be co-terminus with the Chairman, rather careful perusal of office order dated 5.2.1997 (Ext. PX) clearly suggests that workman was appointed on daily wage basis with effect from 12.12.1995 but vide aforesaid letter, ex post facto sanction was obtained and his appointment was held to be co-terminus with the tenure of Chairman. Since it is admitted case of the parties that the office order Ext. PX was issued on 5.2.1997, condition contained in the same could not be made applicable to the appointment, which was admittedly made on 12.12.1995.

10. In nutshell, case of the workman before the learned Tribunal below is that since he had worked for more than 240 days, his termination without there being any notice and compensation as envisaged under Section 25-F of the Act, is illegal and as such he is entitled for protection of Section 25 of the Industrial Disputes Act. Careful perusal of documents available on record suggests that workman successfully proved on record that prior to his illegal termination, he had completed more than 240 days in calendar year and as such Corporation ought to have issued notice as per Section 25-F of the Act before terminating his service. Though, the Corporation by way of filing reply to the claim petition made an attempt to prove that workman was engaged as daily wager on co-terminus basis as Peon, whose services were required to be suspended with the Chairman of Corporation on his resignation but save and except communication dated 5.2.1997, there is no evidence worth the name led on record by the Corporation suggestive of the fact that before alleged termination of workman, workman had not completed 240 days in a calendar year. It stands proved on record that workman was engaged as daily wager peon in 1995 but condition if any, contained in office order Ext. PX, which is admittedly dated 5.2.1997 can not have any bearing upon the initial appointment of workman, who successfully proved on record that at the time of his illegal termination, he had completed more than 240 days in preceding calendar year. There is no explanation worth the name available on record by the Corporation that why letter of appointment, if any, to the workman was issued on 5.2.1997, incorporating therein condition that services of workman would be co-terminus with the Chairman. Similarly, there is no evidence available on record suggestive of the fact that condition of appointment of workman being co-terminus with the Chairman of the Corporation was incorporated in initial appointment of workman in 1995 as such, learned Tribunal below rightly came to the conclusion that mere issuance of appointment letter in the year 1997, suggests malafides on the part of the Corporation, which amounts to unfair labour practice, especially when workman successfully proved on record that he had been working as Peon on daily wage basis since 1995 without any interruption and completed 240 days in calendar year proceeding his termination. At the cost of repetition, it is stated that condition, if any contained in letter dated 5.2.1997 Ext. PX could not be made applicable in the case of workman, who was

admittedly appointed in 1995. There is no evidence available on record suggestive of the fact that prior to illegal retrenchment, workman had not completed 240 days in every calendar year preceding to his termination. This Court was not able to lay its hand to any document led on record by the Corporation save and except Ext. PX suggestive of the fact that workman had not completed 240 days in calendar year preceding to his termination, as such termination of workman without there being compliance of mandatory provisions of law as contained in Section 25 of the Act, can not be allowed to sustain, as such, was rightly set aside by the learned Tribunal below. Otherwise also, no reliance, if any, could be placed upon appointment letter dated 5.2.1997, as relied upon by the Corporation, because, condition of appointment being co-terminus as contained in aforesaid letter could not be imposed subsequently, especially when workman had worked for two years from 1995, without there being any condition as contained in the aforesaid letter.

11. Hence, this Court after carefully perusing impugned award, which is based upon correct appreciation of evidence adduced on record by the respective parties, has no hesitation to conclude that there is no illegality or infirmity in the same.

12. Another contention of the learned counsel representing the Corporation is that the learned Tribunal below had no jurisdiction to entertain the claim of the workman, also deserves to be rejected because, admittedly, pleadings as well as impugned award nowhere suggest that aforesaid point ever was raised before the learned Tribunal below and as such same can not be allowed to be raised at this stage, in writ proceedings, where legality of impugned award is under challenge. Learned Tribunal below in reference petition was only bound to answer specific term of reference referred to it. Term of reference, nowhere suggests that learned Tribunal below was required to decide with regard to its jurisdiction to decide the claim of workman, who successfully proved on record that he had completed 240 days in calendar year preceding his termination.

13. This Court, is in agreement with the arguments having been made by the learned counsel representing the workman that this Court has very limited jurisdiction to re-appreciate findings of fact returned by the learned Tribunal below, while exercising writ jurisdiction under Article 226 of the Constitution of India and it has a limited scope of appreciating findings of fact. In this regard, reliance is placed upon judgment passed in case ***Bhuvnesh Kumar Dwivedi vs. M/s Hindalco Industries Ltd. 2014 AIR SCW 3157.***

14. As far as judgment passed by the Hon'ble Apex Court in case ***Bhuvnesh Kumar Dwivedi vs. M/s Hindalco Industries Ltd.*** is concerned, there can not be any quarrel with the settled proposition of law that the Courts while examining correctness and genuineness of the Award passed by Tribunal has very limited powers to appreciate the evidence adduced before the Tribunal below, especially the findings of fact recorded by the Tribunal below and same can not be questioned in writ proceedings and writ court can not act as an appellate Court. Careful perusal of aforesaid judgment having been relied upon by the learned counsel representing the Management, clearly suggests that error of law which is apparent on the face of record, can be corrected by writ Court but not an error of fact, however, grave it may appear to be. Hon'ble Apex Court has further held in the aforesaid judgment that if finding of fact is based upon no evidence that would be recorded as error of law which can be corrected by a writ of certiorari. Hon'ble Apex Court has further held that in regard to findings of fact recorded by Tribunal, writ of certiorari can be issued, if it is shown that in recording said findings, tribunal erroneously refused to admit admissible evidence or erroneously admitted inadmissible evidence, which influenced impugned findings. It would be profitable to reproduce following paras of the judgment:

> "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.

15. In the instant case, learned counsel representing the Corporation was unable to point out any error of law committed by the Tribunal while allowing claim of the workman. Similarly, learned counsel representing the Corporation was unable to point out any illegality committed by the learned Tribunal below, while recording findings of fact, as such, this Court sees no perversity or illegality in the award passed by the learned Tribunal below.

16. Accordingly, the writ petition is dismissed. Impugned award passed by the learned Tribunal below is upheld. Pending applications are disposed of.

****

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

Smt. Loti ….Plaintiff-Appellant

Versus

Shri Balak Ram & Another ….Respondents-Defendants

Regular Second Appeal No.439 of 2008
Date of decision: 10.04.2017

Indian Succession Act, 1925- Section 63- Plaintiff pleaded that K had executed a Will in her favour– defendant No.1 executed a sale deed in favour of defendant No.2 in order to deprive the plaintiff of her rightful property – mutation was wrongly attested in favour of the defendant on the basis of the forged will – defendant No.1 pleaded that K was his legally wedded wife and had executed a Will in her sound disposing state of mind – suit was dismissed by the Trial Court- an appeal was filed which was dismissed – held in second appeal thatversion of the plaintiff that K was unmarried was not proved – the version of the defendant that K was married to defendant

No.1 was duly proved – the Will of the plaintiff was shrouded in suspicious circumstances while the Will of the defendant was duly proved- the Courts had dealt with the matter in a proper manner- appeal dismissed.(Para-14 to 38)

Cases referred:
Laxmidevamma and Others vs. Ranganath and Others, (2015)4 SCC 264
H.Venkatachala Iyengar vs. B.N. Thimmajamma and others, AIR 1959 SC 443.
Shashi Kumar Banerjee and Others vs. Subodh Kumar Banerjee since deceased and after him his legal representatives and others, AIR 1964 SC 529
Daulat Ram and Others vs. Sodha and Others, (2005)1 SCC 40

For the Appellant: Mr.Vivek Singh Thakur, Advocate.
For the Respondents: Mr.Rajnish K.Lall, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

Instant Regular Second Appeal filed under Section 100 of the Code of Civil Procedure is directed against the impugned judgment and decree dated 28.05.2008 passed by learned District Judge, Kullu in Civil Appeal No.27/07, affirming therein judgment and decree dated 10.7.2007, passed by learned Civil Judge(Junior Division), Manali in Civil Suit No.32/05, whereby suit for declaration having been filed by the appellant-plaintiff came to be dismissed.

2. Briefly stated facts, as emerged from the record, are that the plaintiff filed a suit seeking declaration to the effect that she has become owner in possession of land comprised in Khata/Katauni No.631/1045 bearing Khasra No.5224, measuring 5-0-0 bigha, situated in Phati Burua Kothi and Tehsil Manali, District Kullu as per Jamabandi for the year 1988-89 *(hereinafter referred to as the 'suit land')* on the basis of last and final Will dated 1.3.2002 executed by deceased Khekhi Devi. Plaintiff also prayed by way of aforesaid suit that Mutation No.3158, dated 29.6.2002, which has wrongly been attested and sanctioned in the name of defendants, may also be declared wrong, illegal, null and void, inoperative against the plaintiff and defendants be restrained from causing any sort of interference in peaceful ownership and possession of the plaintiff in the suit land. Plaintiff claimed that Smt.Kheki Devi daughter of Uttam Ram, who was unmarried, was owner in possession of the suit land and was her real sister. Plaintiff also claimed herself to be sole legal heir of Smt.Kheki Devi. As per plaintiff, Smt.Kheki Devi was residing at village Goshal Phati Burua Kothi, Tehsil Manali, District Kullu, at her parental house because she was unmarried uptill her death. The plaintiff alongwith her family members used to render services to Smt.Kheki Devi, who, inturn having pleased with the services rendered by the plaintiff and her family members, executed last Will dated 1.3.2002 bequeathing thereby suit land in favour of plaintiff. Plaintiff-appellant claimed that Smt.Kheki Devi, after executing Will dated 1.3.2002 in her favour, deposited the same with Registrar, Kullu vide document No.1 dated 1.3.2002. Plaintiff further averred that Kheki Devi died on 10.6.2002 at village Goshal and her last rites were performed by her. Plaintiff further claimed that defendant No.1 has sold the entire suit land to defendant No.2 in order to deprive her from the right which accrued to her after execution of Will in her favour by Smt.Kheki Devi and as such sale deed is mere paper entry and is not binding upon her. Plaintiff further claimed that since no possession was ever delivered to defendant No.2, sale deed being a mere paper entry cannot be looked into. Plaintiff further claimed that in terms of Will dated 1.3.2002 executed by deceased Kheki Devi, she has inherited the entire estate of deceased and has become owner in possession of the suit land. Plaintiff further alleged that defendant in the month of June, 2004 alongwith one Chattar Singh of village Goshal came to the plaintiff and asked her to leave the entire suit land because they have become owners of the suit land. Subsequently, on inquiry, it emerged that the defendant, in connivance with revenue officials, has got mutation No.3158 dated 29.6.2002 attested in his favour on the

basis of some forged and fictitious Will. Since, both the Patwari Halqua as well as the defendant refused to enter and admit the last and final Will of Kheki Devi, she was compelled to file the instant suit.

3. Both the defendants, by way of detailed separate written statements, raised various preliminary objections qua maintainability and competency of the suit, suit being bad for non-joinder of necessary parties, *locus standi*, plaintiff estopped by her acts and conduct to file the present suit and suit not being properly valued for the purpose of court fee and resisted the aforesaid claim of the plaintiff. Aforesaid defendants specifically stated that the plaintiff has not approached this Court with clean hands and concealed the material facts from the Court. On merits, defendant No.1 specifically stated in his written statement that deceased Kheki Devi was owner in possession of the suit land, however, he pleaded that Smt.Kheki before her marriage with him had acquired the suit land by way of Nautor and thereafter, solemnized marriage with him and she lived with him as his wife uptill her death. He also admitted that deceased Kheki was sister of plaintiff, but, denied that deceased Kheki was unmarried and the plaintiff was only legal heir of deceased Kheki. The aforesaid defendant No.1 specifically pleaded in his written statement that deceased Kheki Devi daughter of Uttam Chand, resident of village Goshal Phati Burua Kothi Manali, District Kullu, is his legally wedded wife as their marriage took place according to the local custom in the year 1977 and deceased Kheki was living with him at his house and he was looking after, maintaining and rendering all kinds of services to his wife during her life time, who in turn having been pleased with the services rendered by the defendant to her, executed her last Will on 8.6.2002 and Mutation No.3158, dated 29.6.2002 was rightly attested and sanctioned in his favour. Defendants further denied the assertion having been made by the plaintiff that Kheki being unmarried was residing at her parental house at village Goshal Phati Burua and plaintiff and her family members had rendered services to her, who, in turn, having been pleased with the services rendered by the plaintiff and her family members, executed Will dated 1.3.2002 in favour of plaintiff. Defendant No.1 also denied that the plaintiff, on the basis of Will dated 1.3.2002, became owner in possession of the suit land and claimed that alleged Will dated 1.3.2002 was managed and procured by the plaintiff by mis-representation and undue influence and on the basis of aforesaid Will dated 1.3.2002 the plaintiff is not entitled to inherit the suit land. Similarly, defendant though admitted that Smt.Kheki Devi died on 10.6.2002 but specifically denied that she died at village Goshal. Defendant No.1, while denying that the plaintiff is in possession of the suit land, has specifically pleaded that he had sold the suit land to defendant No.2 Chhatar Singh for a sale consideration of Rs.3,50,000/- vide sale deed No.329, dated 27.12.2003 and since then defendant No.2 is sole absolute owner of the suit land. Defendant No.2, in his separate written statement, has adopted the defence as taken by defendant No.1 and has also denied the execution of Will dated 1.3.2002 in favour of plaintiff by deceased Kheki. Defendant No.2 also pleaded that deceased Kheki has executed Will dated 8.6.2002 as her last Will in favour of her husband defendant No.1, in her sound disposing state of mind. He also supported the version put forth by defendant No.1 that after death of deceased Kheki Devi, defendant No.1 had performed her last rites and inherited the suit land qua which mutation No.3158 dated 29.6.2002 had been attested and sanctioned rightly. Apart from above, defendant No.2 also claimed himself to be bonafide purchaser of the suit land and claimed that he is owner in possession of the same because he had purchased the same from defendant No.1 for consideration of Rs.3,50,000/- vide sale deed No.379, dated 27.12.2003. In the aforesaid background, defendants sought dismissal of the suit having been filed by the plaintiffs.

4. On the pleadings of the parties, the learned trial Court framed the following issues:-

> *"1. Whether the plaintiff is owner-in-possession of suit land on the basis of Will dated 1.3.2002 alleged to have been executed by deceased Smt.Kheki Devi as alleged? OPP.*
>
> *2. Whether Mutation No.3158 dated 29.6.2002 is wrong, illegal and void as alleged? OPP.*

3. Whether the plaintiff is entitled for consequential relief of injunction as prayed for? OPP.

4. Whether the suit of plaintiff is not maintainable in the present form? OPD.

5. Whether the suit of plaintiff is bad for non-joinder for necessary parties as alleged? OPD.

6. Whether the plaintiff is estopped from filing the present suit by her act and conduct? OPD.

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

8. Whether deceased Kheki Devi executed valid Will dated 8.6.2002 in favour of defendant No.1, if so, its effect? OPD-1

9. Whether defendant No.2 is bonafide purchaser for consideration of the suit land as alleged? OPD-2.

10. Relief".

5. Subsequently, vide judgment and decree dated 10.7.2007, learned trial Court dismissed the aforesaid suit of the plaintiff.

6. Feeling aggrieved and dissatisfied with the aforesaid judgment and decree passed by the learned trial Court, appellant-plaintiff filed an appeal under Section 96 of the Code of Civil Procedure *(for short `CPC')* before the learned District Judge, Kullu, which came to be registered as Civil Appeal No.27/07, however, fact remains that appeal was dismissed, as a result of which judgment and decree passed by learned trial Court below came to be upheld. In the aforesaid background, appellant-plaintiff approached this Court in the instant proceedings praying therein for decreeing her suit after setting aside the judgment and decree passed by both the Courts below.

7. This Court, on 3.9.2008, admitted the instant appeal on the following substantial question of law:

"(1) Whether the ld.Courts below mis-read and mis-appreciated the bare provision of law regarding the due execution of the will dated 1.3.2002 and findings to the contrary are sustainable in the eyes of law or not?

2. Whether the document can be reliable even which is registered under the authority of registration and further the registered document can be discarded in the light of the unregistered document, even when registration and execution of the registered document has been proved?"

8. Mr.Vivek Singh Thakur, learned counsel representing the plaintiff, vehemently argued that the impugned judgments passed by the learned Courts below are not sustainable in the eyes of law as the same are not based upon proper appreciation of evidence and as such the same deserve to be quashed and set aside. Mr.Thakur, while specifically referring to the impugned judgment passed by first appellate Court, contended that bare perusal of the same suggests that 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 plaintiff, who successfully proved on record that the deceased Kheki Devi had executed Ex.PW-1/A, Will dated 1.3.2002 in her favour bequeathing thereby entire movable and immovable property in her favour. With a view to substantiate his aforesaid arguments, Mr.Thakur also invited the attention of this Court to the statements of plaintiff witnesses i.e. PW-1 and PW-2 as well as documentary evidence to demonstrate that plaintiff successfully proved on record that Will Ex.PW-1/A was duly executed by Smt.Kheki Devi in favour of the plaintiff and as such judgment and decree passed by the Courts below deserve to be quashed and set aside being contrary to the record available on the file. Mr.Thakur further contended that learned Courts below have specifically failed to return findings qua each issue separately as was incumbent upon them in terms of the provisions contained in Order 20 Rule 5 CPC, but, while referring to the issues framed by Courts

below, Mr.Thakur contended that bare perusal of the judgments passed by both the Courts below clearly suggest that none of the issues were discussed and decided separately by assigning cogent and convincing reasons as a result of which great prejudice has been caused to the plaintiff, who, by way of leading cogent and convincing evidence, successfully proved on record that she was the only legal heirs of Smt.Kheki Devi, who died unmarried.

9. Mr.Thakur further contended that both the Courts below have failed to take note of the fact that Will Ex.PW-1/A dated 1.3.2002 was registered document and its execution was duly proved in accordance with law by the plaintiff, but despite that learned Courts below placed undue reliance upon the other registered Will placed on record by defendants to defeat the genuine claim of the plaintiff. While specifically inviting the attention of this Court towards the statement given by defendant, Mr.Thakur contended that defendants specifically admitted before the Courts below that land in question was of deceased Kheki Devi and same was acquired by her before her marriage and as such presumption of truth is/was attached to execution of Will in favour of plaintiff-appellant, more particularly, when defendant No.1 claimed himself to be legally wedded husband of deceased Kheki Devi.

10. While concluding his arguments, Mr.Thakur contended that there is no evidence led on record by the defendants suggestive of the fact that he was legally wedded husband of Smt.Kheki Devi, who, as per plaintiff, was unmarried. Mr.Thakur, while specifically inviting the attention of this Court to Ex.DW-2/A i.e. Will executed by Kheki Devi in favour of defendant No.1, forcefully contended that learned Courts below failed to appreciate that the same is/was shrouded by suspicious circumstance because no mention, if any, has been made of date of earlier Will executed by Kheki Devi in favour of plaintiff, while making recitement, if any, with regard to withdrawal of earlier Will made in favour of plaintiff. Mr.Thakur also stated that age of the testator; namely; Kheki Devi has been shown to be 75 years at the time of execution of Will, whereas, age of the defendant as recorded at the time of recording his statement was 55 years and as such it could not be accepted by the Courts below that defendant No.1 was legally wedded husband of deceased Kheki Devi. In the aforesaid background, Mr.Thakur prayed that the suit having been filed by the plaintiff may be decreed after setting aside the judgment passed by both the Courts below.

11. Mr.Rajnish K.Lall, learned counsel appearing for the respondents, supported the impugned judgments passed by both the Courts below. Mr.Lall, while specifically inviting the attention of this Court to the impugned judgments passed by both the Courts below, strenuously argued that the same are based upon correct appreciation of evidence led on record by the respective parties and as such there is no occasion for this Court to interfere in the well reasoned findings of both the Courts below, especially when perusal of the same suggests that Courts below have dealt with each and every aspect of the matter very meticulously. While refuting the arguments having been made by Mr.Thakur, learned counsel representing the plaintiff, Mr.Lall invited the attention of this Court to the plaintiffs witnesses to demonstrate that none of plaintiff's witness was able to prove due execution of Will Ex.PW-1/A in favour of plaintiff. Mr.Lall, while specifically referring to the statement made by the plaintiff witnesses, stated that learned Courts below rightly concluded that Will Ex.PW-1/A was actually scribed at the behest of plaintiff. Mr.Lall further contended that none of the marginal witnesses as cited by the plaintiff could prove due execution of Will in favour of plaintiff. Mr.Lall specifically invited the attention of this Court to the statement of PW-3 Chhavinder Thakur i.e. Scribe of the Will to demonstrate that Will Ex.PW-1/A, allegedly executed by Kheki Devi in favour of plaintiff, was wholly doubtful and as such learned Courts below rightly came to the conclusion that Will Ex.PW-1/A is shrouded by suspicious circumstances. While referring to the evidence led on record by defendants, Mr.Lall contended that bare perusal of pleadings as well as evidence adduced on record by defendants clearly suggests that subsequent Will Ex.DW-2/A was executed by Smt.Kheki Devi in sound, disposing state of mind in favour of defendant No.1 bequeathing thereby her entire movable and immovable property in favour of defendant No.1.

12. While concluding his arguments, Mr.Lall contended that this Court has very limited jurisdiction to re-appreciate the evidence especially in view of the concurrent findings on the facts as well as on law recorded by both the Courts below. In this regard, to substantiate his aforesaid plea, he placed reliance upon the judgment passed by Hon'ble Apex Court in ***Laxmidevamma and Others vs. Ranganath and Others,*** **(2015)4 SCC 264.**

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

14. Needless to say that law regarding nature and onus of the proof of the Will is by way of propounder and in that regard the manner, in which the evidence is required to be appreciated, has been duly prescribed in the judgment passed by the Hon'ble Apex Court in ***H.Venkatachala Iyengar vs. B.N. Thimmajamma and others, AIR 1959 SC 443***.

15. Guidelines framed in ***H.Venkatachala Iyengar*** case (*supra*) were further reiterated by Constitutional Bench of Hon'ble Apex Court in ***Shashi Kumar Banerjee and Others vs. Subodh Kumar Banerjee since deceased and after him his legal representatives and others, AIR 1964 SC 529.*** The Court held:

> *"4. The principles which govern the proving of a will are well settled; (see H. Venkatachala Iyengar v. B. N. Thimmajamma, 1959 (S1) SCR 426 : 1959 AIR(SC) 443) and Rani Purniama Devi v. Khagendra Narayan Dev, 1962 (3) SCR 195 : 1962 AIR(SC) 567). The mode of proving a will does not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a will by S. 63 of the Indian Succession Act. The onus of proving the will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the will, proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus. Where however there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the Court before the Court accepts the will as genuine. Where the caveator alleges undue influence, fraud and coercion, the onus is on him to prove the same. Even where there are no. such pleas but the circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the Court. The suspicious circumstances may be as to genuineness of the signature of the testator, the condition of the testator's mind, the dispositions made in the will being unnatural improbable or unfair in the light of relevant circumstances or there might be other indication in the will to show that the testator's mind was not free. In such a case the Court would naturally expect that all legitimate suspicion should be completely removed before the document is accepted as the last will of the testator. If the propounder himself takes part in the execution of the will which confers a substantial benefit on him, that is also a circumstance to be taken into account, and the propounder is required to remove the doubts by clear and satisfactory evidence. If the propounder succeeds in removing the suspicious circumstances the Court would grant probate, even if the will might be unnatural and might cut off wholly or in part near relations. It is in the light of these settled principles that we have to consider whether the appellants have succeeded in establishing that the will was duly executed and attested.*
>
> *(Page-531)*

16. Though normally onus to prove the execution and validity of the Will lies upon the propounder but in case when it is alleged by the opposite party that Will is not genuine document, onus shifts on the person who alleges the Will to be forged, to prove the same.

17. In ***Daulat Ram and Others vs. Sodha and Others,*** (***2005)1 SCC 40,*** the Hon'ble Apex Court held:

> *"10. Will being a document has to be proved by primary evidence except where the Court permits a document to be proved by leading secondary evidence. Since it is*

> *required to be attested, as provided in Section 68 of the Indian Evidence Act, 1872, it cannot be used as evidence until one of the attesting witnesses 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. In addition, it has to satisfy the requirements of Section 63 of the Indian Succession Act, 1925. In order to assess as to whether the Will has been validly executed and is a genuine document, the propounder has to show that the Will was signed by the testator and that he had put his signatures to the testament of his own free will; that he was at the relevant time in a sound disposing state of mind and understood the nature and effect of the dispositions and that the testator had signed it in the presence of two witnesses who attested it in his presence and in the presence of each other. Once these elements are established, the onus which rests on the propounder is discharged. But where there are suspicious circumstances, the onus is on the propounder to remove the suspicion by leading appropriate evidence. The burden to prove that the will was forged or that it was obtained under undue influence or coercion or by playing a fraud is on the person who alleges it to be so." (Page 43)*

18. Since both the substantial questions of law, as reproduced hereinabove, are interlinked, they are taken up together for consideration.

19. This Court carefully examined the pleadings as well as evidence adduced on record by respective parties to explore the answer to the aforesaid substantial questions of law, perusal whereof nowhere suggests that there has been misreading and mis-appreciation of evidence led on record by the respective parties, rather, this Court has no hesitation to conclude that both the Courts below had dealt with each and every aspect of the matter meticulously and has assigned valid reasons in support of its findings. This Court sees no force much less substantial in the arguments having been made by learned counsel representing the plaintiff that both the Courts below have erred in concluding that Will Ex.PW-1/A is shrouded by suspicious circumstance. It clearly emerge from the pleadings as well as evidence, be it ocular or documentary, that there is no dispute, if any, with regard to the fact that deceased Smt.Kheki Devi was owner in possession of the suit land. Similarly, there is no dispute with regard to fact that the plaintiff is/was sister of deceased Smt.Kheki Devi and deceased Smt.Kheki Devi had passed away on 10.6.2002. As per plaintiff, Smt.Kheki Devi was unmarried and she before her death was residing at Goshal Phati Burwa with plaintiff and her family members. But, interestingly, there is no evidence led on record by the plaintiff suggestive of the fact that Smt.Kheki Devi was unmarried and she had been residing with the plaintiff at her native village Gushal till her death.

20. PW-1 Smt.Kalpna Sharma, Registration Clerk in the office of Registrar, Kullu, deposed before the Court that as per record brought by her, there is/was entry in Register No.3 qua depositing of Will in the office of Registrar, Kullu by Ms.Kheki Devi. She also stated that after the death of Ms.Kheki Devi, plaintiff Loti Devi applied for the Will and after unsealing the sealed parcel, copy of Will was given to Kheki Devi and copy of the same was kept in the record. She further stated that Will Ex.PW-1/A was given to plaintiff Loti Devi by the office of Registrar. She also stated that perusal of Will dated 1.3.2002 Ex.PW-1/A suggests that the same was scribed by Chhavinder Thakur, Advocate and the same was attested by attesting witnesses; namely; Hukam Ram and Mehar Singh.

21. Plaintiff herself appeared as PW-2 and deposed before the Court that her father was owner of the suit land and Kheki Devi was her sister. It has also come in her statement that Kheki Devi used to live with her during her life time and she executed Will Ex.PW-1/A bequeathing thereby whole property in her favour. She also stated that Will Ex.PW-1/A was deposited in the office of Registrar, Kullu and she was also taken by her sister. Aforesaid witness

also stated that after death of deceased Kheki Devi, her son performed her last rites and since then she is in possession of the suit land.

22. PW-3 Chhavinder Thakur, Advocate Scribe of the Will Ex.PW-1/A stated before the Court that Will Ex.PW-1/A was got scribed from him by Kheki Devi and he read-over the contents of the same to Kheki Devi, who, after admitting the same to be correct, appended her thumb impression. However, in his cross-examination, he admitted that he did not recognize Kheki Devi personally. But, interestingly, submissions having been made by the plaintiff witnesses suggest that he stated before the Court that at the time of making statement, Kheki Devi was also sitting in the Court room. But, perusal of statement having been made by PW-3 clearly suggests that aforesaid witness was examined by the Court on 10.1.2006, whereas it is undisputed that deceased Kheki Devi had died on 10.6.2002. Hence, admission having been made by PW-3 Chhavinder Thakur in his cross-examination that Kheki Devi was present in the Court at the time of his making statement completely falsify the claim of the plaintiff qua valid execution of Will dated 1.3.2002 Ex.PW-1/A by deceased Kheki Devi. Since Kheki Devi had expired on 10.6.2002, there was no occasion for the aforesaid PW-3 to see Kheki Devi on 10.1.2006, which certainly suggests that at the time of execution of alleged Will deceased Kheki Devi was not present, rather some other woman was produced before him.

23. Similarly, PW-4 Mehar Singh and PW-5 Hukam Ram, who are alleged attesting witnesses, also not supported the case of the plaintiff. If the statements having been made by the aforesaid marginal and attesting witnesses are examined and read in its entirety, these nowhere suggest that Will Ex.PW-1/A was got scribed by Kheki Devi from PW-3 Chhavinder Thakur, rather, it can easily be inferred that Will was got scribed by plaintiff Loti Devi. Both the aforesaid witnesses have categorically stated that they did not know Kheki Devi personally, rather, they were called by plaintiff Loti Devi to be witnesses of the Will Ex.PW-1/A. Aforesaid witnesses have also stated that they were informed by Loti Devi that Kheki Devi, her sister, was to execute Will in her favour and they put their signatures on the same by reposing faith on plaintiff Loti Devi.

24. Apart from above, perusal of the statements of plaintiff witnesses as referred hereinabove, nowhere suggests that they saw deceased Kheki Devi appending her thumb impression in their presence. None of these witnesses categorically stated that deceased Kheki Devi, after admitting the contents of the Will to be correct, appended her thumb impression in their presence and as such Courts below have rightly came to the conclusion that statements of PW-4 and PW-5 do not prove the due execution of Will dated 1.3.2002 Ex.PW-1/A.

25. Conjoint reading of aforesaid plaintiff witnesses nowhere suggests that plaintiff was successfully able to prove on record by leading cogent and convincing evidence that Will Ex.PW-1/A was duly executed by Smt.Kheki Devi bequeathing thereby movable and immovable property in favour of the plaintiff. Rather, this Court, after carefully examining the statements having been made by the plaintiff witnesses, has no hesitation to conclude that Ex.PW-1/A was scribed at the behest of plaintiff Loti Devi.

26. Apart from above, alleged marginal witness stated before the Court that they had come at the place of scribing of Will at the behest of plaintiff, meaning thereby learned trial Court below rightly concluded that plaintiff Loti Devi took active part in the preparation of Will. Learned counsel appearing for the plaintiff placed much reliance upon statement of PW-1 i.e. Smt.Kalpana Sharma, Registration Clerk to demonstrate that Will in question being registered could not be ignored by the Courts below, but his aforesaid arguments deserves outright rejection solely for the reasons that bare perusal of statement of PW-1 nowhere proves execution of Will, if any, by Smt.Kheki Devi. True, it is that PW-1 in her statement stated that there is/was entry with regard to depositing of Will in the office of Registrar by Kheki Devi, but as has been observed above, there is no convincing evidence suggestive of the fact that Will in question Ex.PW-1/A was actually executed by Smt.Kheki Devi in favour of plaintiff. Aforesaid witness though has stated that Will in question was deposited in the office of Registrar, Kullu by Kheki Devi, but she has nowhere stated that at the time of depositing of Will somebody identified Kheki Devi, who

allegedly deposited the Will in the office of Sub Registrar, Kullu. Since, this Court after carefully examining the version put forth by PW-3 Chhavinder Thakur, Scribe of the Will, has also come to the conclusion that execution of Will Ex.PW-1/A is wholly doubtful, especially in view the admission made by PW-3 in his cross-examination, which was made on 10.1.2006 that Smt.Kheki Devi was present in the Court at the time of making statement, no much reliance can be placed upon statement of PW-1, who otherwise referred to be as official witness.

27. Leaving everything aside, this Court was unable to find reference, if any, in the statement of aforesaid plaintiff witness with regard to marital status of Smt.Kheki Devi who, as per plaintiff was unmarried, during her life time. Since defendant No.1, by way of written statement, claimed himself to be legally wedded husband of deceased Smt.Kheki Devi, onus was definitely upon plaintiff to prove on record by leading cogent and convincing evidence that Kheki Devi was not legally wedded wife of defendant No.1. But, interestingly, none of the plaintiff witnesses stated anything with regard to marriage, if any, of Kheki Devi with defendant No.1. In this view of the matter, this Court sees that there was sufficient evidence on record that Will Ex.PW-1/A, dated 1.3.2002, allegedly executed by Smt.Kheki Devi in favour of plaintiff, was shrouded by suspicious circumstances and as such onus was upon the plaintiff being propounder of the Will to dispel such suspicious circumstances. But perusal of evidence led on record clearly suggests that plaintiff was not able to prove beyond reasonable doubt that Will Ex.PW-1/A was free from suspicion.

28. On the other hand, defendant No.1 successfully proved execution of Will dated 8.6.2002, Ex.DW-2/A executed by Kheki Devi in his favour bequeathing thereby her entire property in favour of defendant No.1.

29. DW-2 Gokul Chand, Scribe of the Will dated 8.6.2002 specifically stated that plaintiff Loti Devi is his grandmother in relation. He specifically stated that Will Ex.DW-2/A was scribed by him at the instance of Kheki Devi and he read-over the contents of the same to Kheki Devi, who, after admitting the contents of the Will to be correct, appended her thumb impression on the Will in the presence of witnesses. At the time of execution of aforesaid Will, mental position of Kheki Devi was well and Kheki Devi executed the Will in favour of her husband Balak Ram and witnesses put their signatures on the Will at the instance of Kheki Devi. If statements of aforesaid witness is read in its entirety, it also suggest that Kheki Devi was married to defendant No.1 in the year 1977 and since then they used to reside as husband and wife. He also stated that after death of Kheki Devi, her last rites were performed by defendant No.1 Balak Ram and plaintiff did not do anything. In his cross-examination DW-2 specifically denied that due to illness, Kheki Devi was not able to remember anything. But, interestingly, there is no suggestion, if any, put to this witness with regard to marital status of Kheki Devi, who, as per plaintiff, remained unmarried throughout her life, meaning thereby assertion put forth by plaintiff witness in examination-in-chief remained un-rebutted where he specifically stated that Kheki Devi was married with defendant No.1 and since then they used to reside as husband and wife.

30. DW-3 Chaman Lal, attesting witness of the Will dated 8.6.2002 Ex.DW-2/A, also corroborated the version put forth by DW-2 with regard to due execution of Will dated 8.6.2002 and stated that he was earlier Up-Pradhan and he recognized Kheki Devi, who was wife of Balak Ram. He also stated that Kheki Devi executed Will Ex.DW-2/A in favour of Balak Ram. He also stated that Will was scribed by DW-2 Gokul Chand at the instance of Kheki Devi, who, after admitting the contents of the same to be correct, appended her thumb impression upon the said Will. Similarly, there is nothing in the cross-examination of this witness from where it can be inferred that plaintiff was able to shatter the testimony of aforesaid witness, rather, careful perusal of statements having been made by DW-2 and DW-3 prove beyond reasonable doubt that Will Ex.DW-2/A was executed by Smt.Kheki Devi in favour of defendants.

31. Similarly, aforesaid witnesses clearly proved on record that Smt.Kheki Devi was legally wedded wife of defendant No.1 and they were married in the year 1977 and since then they had been residing together.

32. Defendant No.1 Balak Ram, while appearing as DW-1, also corroborated the version put forth by him in his written statement and specifically stated that he was married to deceased Kheki Devi in the year 1977 and since then they had been residing together. He also stated that deceased Kheki Devi executed Will Ex.DW-2/A in his favour. Close scrutiny of statement of DW-1 also clearly proves on record that marriage of Kheki Devi daughter of Uttam Chand was solemnized with defendant No.1 in the year 1977, according to the local custom and since then they had been residing at village Gushal. This Court also carefully examined the cross-examination, conducted on this witness, perusal whereof suggests that he has not stated anything contrary what he has deposed in his examination-in-chief. Similarly, this Court sees no suggestion, if any, with regard to marital status of defendant No.1 as well as Smt.Kheki Devi, meaning thereby that version put forth by DW-1, DW-2 and DW-3 with regard to marriage of Smt.Kheki Devi remained unrebuted and as such both the Courts below rightly came to the conclusion that Smt.Kheki Devi was legally wedded wife of defendant No.1.

33. Hence, after carefully examining the pleadings as well as evidence led on record, this Court has no hesitation to conclude that defendants have successfully proved on record that deceased Kheki Devi had executed Will dated 8.6.2002 Ex.DW-2/A, bequeathing her entire property in sound disposing state of mind in favour of defendant No.1. Since Will dated 8.6.2002 Ex.DW-2/A stands duly proved to be executed by deceased Kheki Devi in favour of defendant No.1 qua her property, there is no illegality, if any, can be found with the Mutation No.3158 dated 29.6.2002 because suit land was inherited by defendant No.1 Balak Ram on the basis of Will Ex.DW-2/A and he had become owner in possession of the suit land and as such there is no illegality, if any, of further sale made by him in favour of defendant No.2.

34. This Court, after perusing evidence led on record by the defendant, has no hesitation to conclude that defendant was able to prove on record that Will Ex.DW-2/A was duly executed by late Smt.Kheki Devi in his favour in sound disposing state of mind. At this juncture, it would be relevant to refer to the provisions of Section 63 of the Indian Succession Act, 1925:

> *"63. Execution of unprivileged Wills. —Every testator, not being a soldier employed in an expedition or engaged in actual warfare, [12] [or an airman so employed or engaged,] or a mariner at sea, shall execute his Will according to the following rules:—*
>
> *(a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.*
>
> *(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.*
>
> *(c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."*

"Section 68 of Indian Evidence Act, 1872"

> *"68 Proof of execution of document required by law to be attested.—If a document is required by law to be attested, it shall not be used as evidence until 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: 1[Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been*

registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.]"

35. Perusal of aforesaid provision clearly suggests that for valid attestation of Will, it must be proved that Will was attested by at least two witnesses and each of these witnesses must either see the testator signing or affixing his mark on the Will or it shall be signed by some other person, in their presence, on the direction of testatrix. Similarly, these witnesses must receive from the testator a personal acknowledgement of his signature or mark or the signature of such other person. Apart from above, these witnesses must sign Will in the presence of the testator.

36. This Court is fully satisfied that both the Courts below have very meticulously dealt with each and every aspect of the matter and there is no scope of interference, whatsoever, in the present matter. Since both the Courts below have returned concurrent findings, which otherwise appears to be based upon proper appreciation of evidence, this Court has very limited jurisdiction/scope to interfere in the matter. In this regard, it would be apt to reproduce the relevant contents of judgment rendered by Hon'ble Apex Court in ***Laxmidevamma's*** case *supra***,** wherein the Court has held as under:

> *"16. Based on oral and documentary evidence, both the courts below have recorded concurrent findings of fact that the plaintiffs have established their right in A schedule property. In the light of the concurrent findings of fact, no substantial questions of law arose in the High Court and there was no substantial ground for reappreciation of evidence. While so, the High Court proceeded to observe that the first plaintiff has earmarked the A schedule property for road and that she could not have full-fledged right and on that premise proceeded to hold that declaration to the plaintiffs' right cannot be granted. In exercise of jurisdiction under Section 100 CPC, concurrent findings of fact cannot be upset by the High Court unless the findings so recorded are shown to be perverse. In our considered view, the High Court did not keep in view that the concurrent findings recorded by the courts below, are based on oral and documentary evidence and the judgment of the High Court cannot be sustained." (p.269)*

37. In view of detailed discussion made hereinabove, this Court is of the view that there is no illegality and infirmity in the judgment and decree passed by the Courts below, which are based upon proper appreciation of evidence, be it ocular or documentary, adduced on record. Similarly, this Court sees no reason to differ with the findings returned by the Courts below that the plaintiff has miserably failed to prove on record by leading cogent and convincing evidence that a valid will has been executed in her favour by Smt.Kheki Devi. Therefore, substantial questions of law are answered accordingly.

38. Consequently, in view of the facts and circumstances discussed hereinabove, this Court is of the view that there is no illegality and infirmity in the judgments passed by both the learned Courts below and as such the same do not warrant any interference by this Court, moreover, as has been discussed in detail hereinabove, appellant-plaintiff was not able to make out her case to persuade this Court that Will Ex.DW-2/A is fake and fictitious document procured by the defendant by undue influence. Similarly, this Court, after perusing the evidence led on record by the plaintiff, was unable to see any circumstance which could compel this Court to return the findings that Will Ex.DW-2/A is shrouded by suspicious circumstances. Hence present appeal fails and is dismissed, accordingly.

39. All the interim orders are vacated. All the miscellaneous applications are disposed of.

****

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

Sunil Dutt ………Petitioner

Versus

Mohan Lal ……….Respondent

Cr. Revision No. 118 of 2016

Decided on: April 10, 2017

Negotiable Instruments Act, 1881- Section 138- Complainant handed over Rs.60,000/- to the accused and accused issued a cheque for the return of the amount- cheque was dishonoured – notice was issued but the amount was not paid – accused was tried and convicted by the Trial Court- an appeal was filed, which was partly allowed and the sentence was modified – held in revision that the power of revision can be exercised, when there is failure of justice or misuse of judicial mechanism or where procedure, sentence or order is not correct- issuance of cheque and signature on the same were admitted – advancing of money was also proved – the defence taken by the accused that cheque was issued as a security was not established – the accused was rightly convicted in these circumstances - revision dismissed.(Para-7 to 14)

Cases referred:

State of Kerala versus Puttumana Illath Jathavedan Namboodiri (1999)2 Supreme Court Cases 452

Krishnan and another Versus Krishnaveni and another, (1997) 4 Supreme Court Case 241

Jugesh Sehgal vs. Shamsheer Singh Gogi reported in 2009 (2) SLJ (SC) 1385

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

For the respondent: Ms. Kulbhushan Khajuria, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Instant revision petition under Section 397 CrPC is directed against judgment dated 11.12.2015 passed by the Additional Sessions Judge (II) Shimla, camp at Rohru, in Criminal Appeal No. 6-S/10 of 2015, partly modifying the judgment dated 27.8.2015 passed by Additional Chief Judicial Magistrate, Rohru, Shimla in Criminal Case No. 243-3 of 2011, whereby the learned trial Court while holding present petitioner-accused (hereafter, 'accused') guilty of having committed offence under punishable under Section 138 of the Negotiable Instruments Act, ('Act', for short) sentenced him to undergo simple imprisonment for a period of six months and further to pay compensation of Rs. 80,000/- to the complainant.

2. Brief facts, as emerge from the record are that the respondent-complainant, (hereafter, 'complainant') filed a complaint under Section 138 of the Act in the court of Additional Chief Judicial Magistrate, Rohru stating therein that he was running a barber shop in the name of '4-in-one beauty parlour', near Meat Market, Rohru. On 1.9.2011, accused approached him and demanded Rs. 60,000/- as he was in dire need of money to run his mobile business. The complainant handed over Rs. 60,000/- in cash to the accused and accused agreed to return aforesaid amount within two months. In order to discharge aforesaid legal liability, accused issued a cheque bearing No. 995319 amounting to Rs. 60,000/- drawn on Punjab National Bank, Branch at Rohru. Accused at the time of handing over the cheque assured that he was having sufficient funds in his bank account and cheque would be encashed on presentation in the Bank. However, on presentation, same was dishonoured on account of 'insufficient funds' in the account of the accused. Accordingly, on 17.11.2011, complainant got issued a legal notice through registered A.D. to the accused, advising him to make payment within 15 days. Since

accused failed to pay the amount as demanded by way of legal notice, complainant was compelled to initiate proceedings under Section 138 of the Act, in the trial Court. Learned trial Court, on the basis of material adduced on record by the respective parties, held accused guilty of having committed offence punishable under Section 138 of the Act and accordingly, sentenced him to undergo simple imprisonment and to pay compensation, as described above.

3. Being aggrieved and dissatisfied with the aforesaid judgment of conviction, accused filed an appeal before the Additional Sessions Judge, (II), Shimla, camp at Rohru, which came to be registered as Civil Appeal No. 6-S/10 of 2015. Aforesaid appeal was dismissed by the first appellate Court, however, the amount of compensation was modified to Rs. 70,000/-. Hence, this petition by the accused praying for acquittal after setting aside the judgments passed by both the learned Courts below.

4. Mr. B.C. Verma, learned counsel representing the accused vehemently argued that the impugned judgments of conviction as recorded by the learned Courts below are not sustainable as the same are not based upon correct appreciation of evidence adduced on record by the respective parties and deserve to be set aside. Mr. Verma, while referring to the impugned judgments passed by the first appellate Court and trial Court, strenuously argued that a bare perusal of same suggests that the Courts below have failed to appreciate the evidence in its right perspective, as a result of which, erroneous findings have been recorded to the detriment of the accused, who successfully proved on record that no amount was payable to the complainant as claimed in the complaint filed under Section 138 of the Act. Mr. Verma while referring to the cross-examination conducted upon accused, forcefully contended that it is ample clear that cheque, if any, was issued as security and not towards any lawful discharge of his liability as claimed by the complainant. In the aforesaid background, Mr. Verma sought acquittal of the accused, after setting aside the judgments of conviction and compensation recorded by the Courts below.

5. Mr. Kulbhushan Khajuria, learned counsel representing the complainant, supported the judgments passed by both the learned Courts below. While refuting aforesaid contentions having been raised by the learned counsel representing the accused, Mr. Khajuria invited attention of this Court to the findings recorded by the Courts below to demonstrate that each and every aspect of the matter has been dealt with meticulously by the Courts below and there is no scope of interference by this Court, especially in view of concurrent findings of facts and law recorded by the Courts below. Mr. Khajuria, also invited attention of this Court to the statement made on record by the accused under Section 313 CrPC, wherein he has admitted his signatures as well as issuance of cheque. While concluding his arguments, Mr. Khajuria also reminded this Court of its limited jurisdiction under Section 397 as far as re-appreciation of evidence is concerned. He has placed reliance upon the judgment passed by Hon'ble Apex Court in case **State of Kerala versus 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."

6. I have heard learned counsel representing the parties and have carefully gone through the record made available.

7. True, it is that while exercising the power under Section 397 of Criminal Procedure Code, this Court has very limited power to re-appreciate the evidence available on record. But, this Court solely with a view to ascertain that the judgments passed by both the Courts below are not perverse and the same are based upon correct appreciation of evidence available on record, undertook an exercise to critically examine the evidence available on record to reach fair and just decision in the case.

8. 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 or 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."

9. During proceedings of the case, this Court had occasion to peruse the pleadings as well as entire record of the Court below, perusal whereof clearly suggests that there is no mis-appreciation and misconstruction of evidence by the courts below, as alleged by the learned counsel representing the accused, rather, close scrutiny of evidence available on record clearly suggests that both the learned Courts below have dealt with each and every aspect of the matter meticulously and have rightly held accused guilty of having committed offences punishable under Section 138 of the Act.

10. After carefully examining the statement having been made by the accused under Section 313 CrPC before the learned trial Court, there can not be any dispute, if any, with regard to the issuance of cheque as well as signatures of accused on the same, because, he himself stated before the Court that he had to pay Rs. 25,000/- to the complainant, which he had paid. Though he admitted his signatures on the cheque but denied that he had issued any cheque dated 3.11.2011 amounting to Rs. 60,000/- in favour of the complainant to discharge his legal liability, rather, his defence simpliciter is that aforesaid cheque was unsigned and was paid as security towards amount of Rs. 25,000/-, which he had taken from the complainant. On the other hand, complainant namely Shri Mohan Lal with a view to prove the averments made in the complaint, examined himself as CW-1 and also tendered his evidence by way of affidavit i.e. Ext. CW-2/A. Aforesaid witness categorically stated that he had advanced Rs. 60,000/- to the accused on his asking. Accused had re-assured that amount would be returned within stipulated time. He further stated that accused issued cheque amounting to Rs. 60,000/- in his favour but the same was dishonoured on presentation to the Bank, on account of 'insufficient funds'.

11. This Court carefully perused the cross-examination conducted on this witness, perusal whereof nowhere suggests that defence was able to extract anything contrary to what was stated in the examination in chief. Much emphasis was laid on the answer given by the complainant to the suggestion put by the defence that blank cheque was issued but even to that

suggestion, complainant replied in negative. Hence, this Court sees no force in the averments as well as substance in the arguments having been made by the learned counsel representing the accused that there is admission on the part of complainant with regard to issuance of blank cheque in his favour. Apart from above oral evidence, accused also placed on record cheque Ext. CW-2/A, dishonouring memo Ext. CW-2/C, copy of legal notice Ext. CW-2/D, and postal receipt, Ext. CW-2/E, perusal whereof clearly suggest that cheque in question was presented to the Bank for encashment but the same was dishonoured on account of, 'insufficient funds'. Similarly, perusal of Exts. CW-1/D and CW-1/E clearly suggests that after dishonour of cheque, legal notice was issued to the accused, to make payment within 15 days.

12. After carefully examining the oral as well as documentary evidence as discussed herein above, this Court has no hesitation to conclude that complainant successfully proved on record ingredients/requirements of Section 138 of the Act, required under law for proving his case. Though the learned counsel representing the accused vehemently argued that the learned Courts below failed to take note of the fact that cheque in question was issued as a security and not towards lawful discharge of the liability towards complainant but there is no evidence worth the name available on record suggestive of the fact that cheque in question was ever issued as security, rather own admission of accused in his statement recorded under Section 313 CrPC, proves beyond doubt that cheque in question was issued towards discharge of lawful liability.

13. Perusal of judgment of the learned trial Court suggests that while holding accused guilty of having committed offence punishable under Section 138 of the Act, it has rightly placed reliance upon judgment passed by Apex Court in **Jugesh Sehgal** vs. **Shamsheer Singh Gogi** reported in 2009 (2) SLJ (SC) 1385, wherein the Apex Court has laid down certain factors, which are to be weighed by the Court while ascertaining whether accused is guilty of having committed offence punishable under Section 138 of the Act or not.

14. In the instant case, though the accused has taken defence that cheque in question was issued as a security but as has been stated above, there is nothing on record suggestive of the fact that cheque was ever issued as security. Similarly, accused has not led any evidence to demonstrate that he had not issued any cheque for the discharge of his lawful liability and as such learned Courts below rightly came to the conclusion that presumption in the instant case is required to be held in favour of the complainant under Section 118-A of the Act that cheque in question was issued by the accused to the complainant for discharge of his lawful liability.

15. After bestowing my thoughtful consideration to the material on record, I see no reason to interfere in the well reasoned judgments passed by the learned Courts below.

16. In view of above, the present revision petition is dismissed. Judgments passed by the trial court and appellate Court are upheld. Pending applications, if any are disposed of. Bail bonds, if any, furnished by the accused are cancelled.

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

Balbir Singh …Petitioner
Versus
State of H.P. and others …Respondents.

Review Petition No. 47 of 2016.
Judgment reserved on: 28.3.2017
Date of Decision : 11 April, 2017.

Code of Civil Procedure, 1908- Order 47 Rule 1- Section 114- An application was filed for review of the judgment passed by the Court vide which the appeal filed by the petitioner was dismissed with a cost of Rs.10,000/- - it was pleaded that there is an error apparent on the face of record as the Court had wrongly concluded that allotment was not questioned – held that review proceedings are not similar to the appeal – an error which is self-evident can be called to be an error apparent on the face of record – the error which is to be established by long drawn reasoning is not an error apparent on face of record – it was contended that the order was challenged in a civil suit before Learned Civil Judge- however, no declaration was sought regarding its invalidity – the Court had rightly concluded that the order was not challenged- the review petition is an abuse of the process of the Court- hence, dismissed with the cost of Rs.50,000/-. (Para-7 to 22)

Cases referred:

Kamlesh Verma vs. Mayawati and others (2013) 8 SCC 320
South Eastern Coalfields Limited vs. State of M.P. and others (2003) 8 SCC 648
Indian Council for Enviro Legal-Action vs. Union of India and others (2011) 8 SCC 161

For the Petitioner: Ms. Ritta Goswami, Advocate.
For the respondents: Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan, Mr. Romesh Verma, Addl. Advocate Generals with Mr. J.K.Verma, Deputy Advocate General, for respondents No. 1 to 4.
Mr. Dushyant Dadwal, Advocate, for respondent No.5.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

This petition under Order 47 Rule 1 and Section 114 of the Code of Civil Procedure read with Civil Writ Rules 13 read with Original Side Rule 1.18 seeks review of the judgment passed by this Court on 26.4.2016 in LPA No. 172 of 2014 whereby the appeal filed by the review petitioner against the judgment of the learned writ Court came to be dismissed with costs of Rs. 10,000/-..

2. It is averred that there is an error apparent on the face of the record inasmuch as this Court while deciding the appeal has erred in concluding that none of the parties had questioned the order of allotment of the shops and had further erred in concluding that the shop No.18 had been allotted to the petitioner and in fact it was shop No. 17 that had been allotted in his favour.

3. The official respondents have filed reply to this petition wherein it has been specifically averred that as regards the shop No. 17, the same was allotted to respondent No.5 herein (original writ petitioner), whereas no shop was allotted to the review petitioner.

4. Respondent No.5 has filed separate reply wherein it is averred that the review petitioner was never allotted shop No.17 as alleged, therefore, he had no right to remain in possession thereof.

5. The learned writ Court had directed respondent No.5 to be put in possession of shop No. 17 which admittedly was in possession of the review petitioner and said findings had been affirmed by us vide the impugned judgment.

6. As noticed above, the only question required to be determined by this Court in LPA was whether the review petitioner in fact had a right to remain in possession of shop No.17 and this question as observed earlier had been answered against the petitioner.

7. However, before considering the case on merits, the scope of review is required to be considered. It is well settled that the review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47, Rule 1 and Section 114 of CPC. There must be 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. Similarly, wherein 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 way of review. Review Petition has a limited purpose and cannot be allowed to be "an appeal in disguise".

8. What would be the scope and ambit of review petition has been considered in detail by the Hon'ble Supreme Court in ***Kamlesh Verma vs. Mayawati and others (2013) 8 SCC 320*** and thereafter the legal position has been summarized as follows:

> ***Summary of the Principles:***
>
> ***20***. *Thus, in view of the above, the following grounds of review are maintainable as stipulated by the statute:*
>
> ***20.1***. *When the review will be maintainable:-*
>
> *(i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the petitioner or could not be produced by him;*
>
> *(ii) Mistake or error apparent on the face of the record;*
>
> *(iii) Any other sufficient reason.*
>
> *The words "any other sufficient reason" has been interpreted in Chhajju Ram vs. Neki, AIR 1922 PC 112 and approved by this Court in Moran Mar Basselios Catholicos vs. Most Rev. Mar Poulose Athanasius & Ors. , (1955) 1 SCR 520, to mean "a reason sufficient on grounds at least analogous to those specified in the rule". The same principles have been reiterated in Union of India vs. Sandur Manganese & Iron Ores Ltd. & Ors., JT 2013 (8) SC 275.*
>
> ***20.2***. *When the review will not be maintainable:-*
>
> *(i) A repetition of old and overruled argument is not enough to reopen concluded adjudications.*
>
> *(ii) Minor mistakes of inconsequential import.*
>
> *(iii) Review proceedings cannot be equated with the original hearing of the case.*
>
> *(iv) Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.*
>
> *(v) A review is by no means an appeal in disguise whereby an erroneous decision is re-heard and corrected but lies only for patent error.*
>
> *(vi) The mere possibility of two views on the subject cannot be a ground for review.*
>
> *(vii) The error apparent on the face of the record should not be an error which has to be fished out and searched.*
>
> *(viii) The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition.*
>
> *(ix) Review is not maintainable when the same relief sought at the time of arguing the main matter had been negatived."*

9. The same principle has been laid down by this Court in **M/s Harvel Agua India Private Limited Versus State of H.P. & Ors., Review Petition No. 4084 of 2013,** decided on **9th July, 2014** and in a very recent judgment delivered on 28.3.2017 in ***Review Petition No. 45 of 2015, titled Kameshwar Sharma and others*** Versus ***State of H.P. and others.***

10. Adverting to the facts of the case, it would be noticed that on 28.12.1999, a Committee was constituted by the official respondents to allot the shops firstly to the existing tenants and only thereafter consider the claim of the new allottees through open auction. Respondent No.5, who was the writ petitioner before this Court was allotted shop No.17 by the Additional Deputy Commissioner, Kangra vide his order dated 7.4.2000 and was simultaneously directed to remove the *Khokha* which had unauthorisedly been constructed by him. However, the writ petitioner failed to get the possession of shop No. 17 and had instead been allotted shop No.18, which constrained him to approach this Court by filing CWP No. 6159 of 2010, claiming therein the following relief:

> *"(a) Direct the respondents to allot Shop No.17, at Shopping Complex, Jawalamukhi Temple Road, Dehra, District Kangra and to give the possession of shop No.17 to the petitioner in terms of order dated 7.4.2000 (Annexure PD)".*

11. In the reply filed by the official respondents, it was admitted that the shop No.17 had been allotted to respondent No.5 herein, but the said shop was in illegal and unauthorized use and occupation of the review petitioner since 1998 and, therefore, the shop No.17 could not be allotted to respondent No.5.

12. As observed earlier, learned writ Court allowed the writ petition by directing the official respondents to evict the review petitioner from the shop No.17, which judgment was affirmed by us vide the impugned judgment sought to be reviewed.

13. Ms. Ritta Goswami, learned counsel for the petitioner would vehemently argue that the findings rendered by this Court that the order of allotment made by the Additional Deputy Commissioner was not assailed by any of the parties is factually incorrect, inasmuch as the review petitioner had specifically assailed this order by filing a suit before the learned Civil Court i.e. the Court of Sub Judge, Dehra, District Kangra.

14. Now, adverting to the suit filed by the review petitioner, it would be noticed that the same has been filed under Sections 38 and 39 of the Specific Relief Act whereby only a decree for perpetual and prohibitory injunction restraining the official respondents from interfering in the possession and dispossessing the petitioner from shop No.17 has been sought for, while no separate declaration under Section 34 assailing the order of allotment had been prayed for.

15. Ms. Ritta Goswami, learned counsel for the petitioner would vehemently argue that in para-6 of the plaint, a specific reference has been made with regard to the order passed by learned Additional Deputy Commissioner, Kangra dated 7.4.2000 and would contend that the challenge to the decision is therefore implicit in the suit so filed.

16. We are afraid that this contention is rather too far-fetched. In case the petitioner was really aggrieved by the order passed by the learned Additional Deputy Commissioner whereby shop No.17 was allotted to respondent No. 5, then it was incumbent upon him to have sought a specific declaration to this effect under Section 34 of the Specific Relief Act and having failed to do so, this Court has rightly concluded that none of the parties had assailed the order of allotment of the shops.

17. As a matter of fact, this Court while disposing of LPA No.172 of 2014, had in no uncertain terms concluded that the petitioner in order to retain the premises which were in his illegal possession had instituted the aforesaid frivolous appeal and yet the review petitioner does not seem to have learnt any lesson despite this Court having imposed costs upon him. Therefore,

this Court has no hesitation to once again hold that this petition is nothing but an abuse of the process of the Court.

18. This Court while disposing of LPA No.172 of 2014 had observed as follows:

> *"19. It is evident from the material placed on record that the entire endeavour of both the parties was only to get illegal and undue enrichment that too by raising untenable pleas. It is well settled that a party, who approaches a court of law, must not only come with clean hands, but also clean heart, clear mind and clear objective. The court proceedings are not a game of chess. At no cost can the stream of justice be permitted to be polluted by unscrupulous litigants. The writ court while exercising the writ jurisdiction exercises equitable jurisdiction. The estoppel stems from equitable doctrine and it requires that he who seeks equity must do equity. Not only this, a person who seeks equity, must act in a fair and equitable manner. The equitable jurisdiction cannot be exercised in case of a person who himself has acted unfairly. Even compassion cannot be shown in such cases. The compassion cannot be allowed to bend the arms of justice in a case where an individual(s) have tried to acquire the property by unscrupulous method and by forcibly occupying the premises which neither belong to them nor have been allotted in their favour.*
>
> *20. Now, coming to the question of adjustment of equities. As already observed earlier, the principle that one who seeks equity must do equity is well known. Writ jurisdiction is equitable jurisdiction. It is well settled that the High Court in exercise of its jurisdiction under Article 226 of the Constitution of India can take cognizance of the entire facts and circumstances of the case and pass appropriate orders to give the parties complete and substantial justice. This jurisdiction of the High Court, being extraordinary, is normally exercisable keeping in mind the principles of equity. One of the ends of the equity is to promote honesty and fair play. If there be any unfair advantage gained by a party priorly, before invoking the jurisdiction of the High Court, the court can take into account the unfair advantage gained and can require the party to shed the unfair gain before granting relief.*
>
> *21. We have referred to the provisions of Article 226 of the Constitution being fully conscious of the fact that we are dealing with Letters Patent Appeal. As it is more than settled that a writ appeal is a continuation of the writ petition and merely because it is an appeal under the Letters Patent of the Court, it does not change its character from being a writ appeal and, therefore, the appellate powers of this Court cannot be circumscribed and would remain the same as that of the writ Court. It is equally settled that Letters Patent Appeal being an intra-Court appeal and in continuation of the writ petition under Article 226 of the Constitution of India, the relief prayed for can be moulded and final relief can be granted. The proceedings of the intra-Court appeal are, normally, governed and regulated by the statutory provisions conferring right of appeal and jurisdiction to decide the appeal. However, intra-Court appeal under Clause 10 of the Letters Patent, arising out of the proceedings under Article 226 of the Constitution, is not at par with other statutory intra-Court appeals. It is, indeed, continuation of the proceedings under Article 226 of the Constitution.*
>
> *22. Evidently, both the parties to the lis have reaped undue advantage by resorting to all sorts of unscrupulous methods in order to retain possession of the properties which had not even been allotted to them. None of the parties had the right to take law in their own hands and were required to approach the official respondents to resolve any difficulty rather than forcibly occupying the shops as per their convenience. Even the writ petitioner could not have retained and carried his business from the Khokha in violation to the orders passed by the Samiti. To say the least, the conduct of both the parties has been reprehensible and definitely not above board.*
>
> *23. In view of the aforesaid discussion, there is no merit in this appeal and the same is dismissed with costs assessed at Rs. 10,000/- to be paid by the appellant to the Samiti. However, at the same time, even the conduct of the writ petitioner has been totally unfair and he is therefore, required to compensate the Samiti for having gained unfair advantage*

by retaining possession of the Khokha as also shop No.18, therefore, before taking possession of shop No. 17, the writ petitioner is directed to pay a sum of Rs. 20,000/- to the Panchayat Samiti towards unfair advantage gained by him prior to filing of the petition."

19. As would be evident from the aforesaid discussion, despite this Court having made scathing observations against the conduct of both the individual parties to this lis, the petitioner does not appear to have taken these seriously and has rather ventured for another misadventure by instituting this frivolous review petition which clearly establishes that his conduct is nothing short of being cantankerous. The manner in which the petitioner has successfully managed to prolong this litigation not only indicates rather establishes that he has successfully turned this litigation into a fruitful litigation. It is, therefore, the duty of this Court to neutralize any unjust enrichment and undeserved gain made by any litigants only on account of keeping the litigation alive.

20. The Hon'ble Supreme Court in ***South Eastern Coalfields Limited vs. State of M.P. and others (2003) 8 SCC 648***, held as under:

> *"28 ......Litigation may turn into a fruitful industry. Though litigation is not gambling yet there is an element of chance in every litigation. Unscrupulous litigants may feel encouraged to approach the courts, persuading the court to pass interlocutory orders favourable to them by making out a prima facie case when the issues are yet to be heard and determined on merits and if the concept of restitution is excluded from application to interim orders, then the litigant would stand to gain by swallowing the benefits yielding out of the interim order even though the battle has been lost at the end. This cannot be countenanced. We are, therefore, of the opinion that the successful party finally held entitled to a relief assessable in terms of money at the end of the litigation, is entitled to be compensated by award of interest at a suitable reasonable rate for the period for which the interim order of the court withholding the release of money had remained in operation."*

21. Similar issue came up before the Hon'ble Supreme Court in ***Indian Council for Enviro Legal-Action vs. Union of India and others (2011) 8 SCC 161***, wherein after taking into notice the conduct of the parties, the Hon'ble Supreme Court held as follows: -

> *"197. The other aspect which has been dealt with in great details is to neutralize any unjust enrichment and undeserved gain made by the litigants. While adjudicating, the courts must keep the following principles in view:*
>
> *1. It is the bounden duty and obligation of the court to neutralize any unjust enrichment and undeserved gain made by any party by invoking the jurisdiction of the court.*
>
> *2. When a party applies and gets a stay or injunction from the court, it is always at the risk and responsibility of the party applying. An order of stay cannot be presumed to be conferment of additional right upon the litigating party.*
>
> *3. Unscrupulous litigants be prevented from taking undue advantage by invoking jurisdiction of the Court.*
>
> *4. A person in wrongful possession should not only be removed from that place as early as possible but be compelled to pay for wrongful use of that premises fine, penalty and costs. Any leniency would seriously affect the credibility of the judicial system.*
>
> *5. No litigant can derive benefit from the mere pendency of a case in a court of law.*
>
> *6. A party cannot be allowed to take any benefit of his own wrongs.*

7. *Litigation should not be permitted to turn into a fruitful industry so that the unscrupulous litigants are encouraged to invoke the jurisdiction of the court.*

8. *The institution of litigation cannot be permitted to confer any advantage on a party by delayed action of courts."*

22. In view of aforesaid discussion, not only has the petitioner failed to make out a case calling for interference in this review petition, but we are of the firm view that by keeping the litigation alive, the petitioner has reaped certain undue benefits which needs to be neutralized. Accordingly, the review petition is dismissed with costs of Rs. 50,000/- to be paid by the petitioner to respondent No.2 within 30 days from the receipt of this order, failing which, the respondents shall be at liberty to execute the said order, which needless to say shall be entirely at the risk, peril and costs of the review petitioner.

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

Jai Kishan and others ..Appellants
Versus
Mehar Chand and others ..Respondents

RSA No. 128 of 2017
Date of decision: 11/04/2017

Code of Civil Procedure, 1908- Order 22 Rule 4- Respondent No.30 died during the pendency of the appeal before the Appellate Court, while the respondent No.38, 50 and 51 had died during the pendency of the civil suit before the Trial Court- the judgments passed by the Courts are nullity – hence, they are set aside and matter remanded to the Appellate Court. (Para-2 to 5)

For the appellants: Mr. Aman Deep Sharma, Advocate.
For the respondents: Mr. Neeraj Gupta, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (Oral):

Heard. Considering the grounds meted in the application qua the applicants thereupon being deterred to move this Court within time for filing an appeal herebefore against the impugned judgements and decree, hence delay, stands satisfactorily explained. Consequently, the apposite delay stands condoned. Application allowed.

Be registered.

CMP (M) No. 2144 of 2016.

2. The learned counsel for the appellants seeks permission to withdraw the instant application. Permission granted. Accordingly, the application stands dismissed as withdrawn.

CMP (M) No. 8504 of 2016.

3. In the afore-stated CMP, an unfoldment occurs qua demise of respondent No. 30 Smt. Bhago Devi occurring on 25.12.2012, demise of co-respondent No. 38 Jai Devi occurring on 7.8.2006, demise of co-respondent No. 50 Nardu Devi occurring on 17.10.2007 and the demise of co-respondent No. 51 Smt. Prarti Devi occurring on 8.10.2007. Apparently, the demise of co-respondent No. 30 Bhago Devi occurred during the pendency of the apposite civil appeal before the learned Appellate Court, whereas the demise of co-respondent(s) No. 38, 50 and 51

respectively occurred during the pendency of the Civil Suit before the learned trial Court. However, through the instant application, the applicants strive to constrain this Court for ordering qua the deletion of the name(s) of the aforesaid deceased co-respondents from the apposite array, significantly when their estates stand already sufficiently represented, comprised in their proposed LRs standing already arrayed in the apposite array of co-respondent(s). The aforesaid prayer made by the learned counsel for the applicants remains unopposed by the counsel for the respondents. Cumulatively, the effect of all the evident factum aforesaid, of demise of co-respondent No. 30 Bhago Devi even if occurring before the learned First Appellate Court also the respective demise(s) of co-respondents No. 38, 50 and 51 even if occurring during the pendency of the Civil Suit before the learned trial Court, stirs the counsel for the respondents to espouse qua dehors the factum qua on their respective demise(s) thereat besides theirs not standing ordered to be substituted by their respective LRs, to, yet not work as a constraint upon this Court, to, order for the deletion of their names from the apposite array of respondents, reiteratedly when their respective estates stand sufficiently represented, comprised in their legal representative(s) standing already arrayed in the array of co-respondents, thereafter the learned counsel for the respondents, proceeds to submit with utmost vigour qua the mere occurrence of the names of the aforesaid deceased co-respondents in the apposite memos of parties in the verdicts pronounced respectively by the learned First Appellate Court besides by the learned trial Court also not begetting the ill-sequel qua 'the suit' suffering abatement nor hence any injunction standing fastened upon this Court to decide the question of abatement. Also he contends qua a simplicitor order pronounced by this Court for deleting the name(s) of the aforesaid deceased respondents from the memo of parties held in the aforesaid verdicts pronounced respectively by the learned First Appellate Court and by the learned trial Court also would thereupon constitute an exception qua the normal rule qua whereat the demise of a deceased litigant occurs, qua thereat, an appropriate application for the relevant purpose standing constituted also the Court concerned alone standing bestowed with the jurisdiction to render an order for his substitution or to render an order for his deletion from the apposite array of contestants. The aforesaid submission addressed herebefore by the learned counsel for the respondents, stands considered with utmost circumspection by this Court, yet the solitary factum of occurrence of the name of co-respondent No. 30 Smt. Bhago Devi in the apposite array of co-respondents in the memo of parties of the verdict pronounced by the learned First Appellate Court besides the occurrence of names of deceased co-respondents concerned in the memo of parties of the verdict pronounced by the learned trial Court, dehors the factum of their respective estate(s) standing sufficiently represented, thereupon would ipso facto vitiate the pronouncement(s) made both by the learned First Appellate Court besides by the learned trial Court, whereupon, concomitantly this Court stands constrained to conclude qua the jurisdiction for the ordering qua the deletion of the name of deceased co-respondent No. 30 from the apposite array of co-respondents besides of the names of other deceased co-respondents, names whereof stand unveiled in the memo of parties occurring in the verdicts respectively pronounced by the courts below, standing solitary bestowed upon the learned First Appellate Court and upon the trial Court, wherefrom this Court concludes qua the application constituted herebefore for the aforesaid purpose warranting its standing dismissed. Significantly, when the judgement(s) rendered by the first Appellate Court and by the learned trial Court respectively constitute the documents of adjudication(s) authored respectively by them, thereupon rendition of any order by the Court qua the name(s) of deceased co-respondents being thereupon ordered to be deleted from the respective memo(s) of parties occurring in the respective verdicts of the aforesaid 'Courts' would tantamount to this Court tampering with documents of adjudication authored respectively by the learned First Appellate Court and by the ld. trial Court, whereas the respective adjudicating forums who authored them alone hold the jurisdiction to make apposite alterations therein.

4. Consequently, with the learned First Appellate Court proceeding to pronounce its impugned verdict, with the occurrence in the memo of parties thereof, the name of deceased co-respondent No. 30 one Bhago Devi and the learned trial Court also proceeding to likewise pronounce an adjudication despite occurrence in the apposite memo of parties thereof, the names of deceased co-respondents concerned, thereupon their respective verdicts visibly stands

pronounced against dead persons whereupon they acquire a stain of nullity thereupon the verdicts rendered by the learned First Appellate Court and by the learned trial Court are quashed and set-aside. The learned First Appellate Court, is directed to, on an apposite motion standing made therebefore, proceed to strike/delete the name of deceased co-respondent No. 30 from the apposite memo of parties whereafter it shall proceed to remand the matter to the learned trial Court, for facilitating the latter Court, to beget apposite rectifications in its judgement, it, standing afflicted with an inherent legal malady qua its standing pronounced upon respectively deceased co-respondent No. 38, 50 and 51, all of whose demise(s) occurred during the pendency of the Civil Suit therebefore, rectification whereof would stand comprised, in its, on an apposite motion promptly made therebefore hence order for deletion of the names of the aforesaid deceased co-respondents from the apposite array of co-respondents, whereafter the learned trial Court shall record a fresh pronouncement upon the Civil Suit. The pronouncement recorded upon the suit by the learned trial Court after its receiving, it, on remand from the learned First Appellate Court, shall stand recorded thereon within three months since its receiving the file of the Civil Suit from the learned first Appellate Court. Moreover, the learned First Appellate Court is directed to upon the Civil Appeal instituted therebefore by the aggrieved, make an adjudication thereon within two months thereafter.

5. The parties are directed to appear before the learned First Appellate Court on 28.5.2017 whereat the counsel for the defendants is directed to on the date aforesaid, file an application before the learned First Appellate Court, for deletion of the name of Bhago Devi from the array of co-respondents whereafter the learned First Appellate Court shall pronounce an order within one month and remand it to the learned trial Court. The application is disposed of accordingly. RSA also accordingly allowed and disposed of.

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

Kuldeep Singh ....Petitioner.

Versus

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

Cr. Revision No. 78 of 2017.

Date of Decision: 11.4.2017.

H.P. Excise Act, 2011- Section 39- A vehicle was seized for transporting 7 bottles of English Wine - An application for release of vehicle was filed, which was dismissed by the Trial Court- aggrieved from the order, present revision has been filed- held that there is provision of confiscation of the vehicle under Section 60 of the Act – however, this power can be exercised only after final adjudication of the case – this provision is not relevant while deciding the interim custody of the vehicle - there is no bar for the interim release of the vehicle – the order set aside and direction issued to the Trial Court to decide the same afresh.(Para-7 to 16)

Cases referred:

Bhim Sen v. State of U.P., AIR 1955 SC 435 (Vol.42, C.N. 71)

Sunderbhai Ambalal Desai v. State of Gujarat, AIR 2003 SC 638

For the petitioner: Mr. H.S. Rangra, Advocate.

For the respondent: Mr. P.M. Negi, Additional Advocate General with Mr. Ramesh Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

By way of instant criminal revision petition filed under Sections 397/401 of the Criminal Procedure Code, the petitioner-applicant has laid challenge to the order dated 15.3.2017 passed by the learned Judicial Magistrate, Ist Class, Court No. 3 Mandi, District Mandi, passed in Criminal complaint No. 136/17, whereby the application for release of vehicle having been filed by the petitioner-applicant stood dismissed.

2. Briefly stated facts as emerge from the pleadings as well as impugned order having been passed by the learned court below suggests that the applicant petitioner preferred an application for interim release of vehicle bearing registration No. HP-33-1022 (LML Vespa) Scooter along with its documents and key, which was impounded by the police, police post Mandi, District Mandi, in case FIR No. 52/2017 dated 6.3.2017 under Section 39 of the HP Excise Act, 2011 (In short "the Act"). It also emerge from the impugned order passed by the learned trial Court that investigation in the case is/was complete and vehicle is/was no more required by the police. By way of application, the petitioner prayed for interim release of the vehicle in question on spurdari and stated that he is ready to furnish surety bonds of reasonable amounts and also will abide by all the terms and conditions, which shall be imposed by the Court. As per the report of the police, vehicle in question was being used to carry seven bottles of English wine (Green Label) and the applicant-petitioner is the actual owner of the vehicle and he used the scooter for commission of offence under Section 39 of the HP Excise Act.

3. Learned court below on the basis of police report as well as arguments having been made by the learned counsel representing the respondent-State rejected the application filed for interim custody of the vehicle in question having been filed by the petitioner-accused, by concluding that the Magistrate has no power to order for interim custody/release of the impounded vehicle. Learned court further concluded that only authorized officer as prescribed under Section 62 of the Act is empowered to confiscate or set penalty of the said vehicle. The petitioner applicant aggrieved and dis-satisfied with the aforesaid order having been passed by the learned trial Court has approached this Court by way of instant proceedings, praying therein for interim custody of vehicle after setting aside the impugned order dated 15.3.2017, passed by the learned court below.

4. Mr. H.S. Rangra, Advocate, representing the petitioner, vehemently argued that the impugned order passed by the court below is against the law and fact and as such, same cannot be allowed to sustain. While referring to the impugned order passed by the court below, Mr. Rangra, strenuously argued that court below has failed to exercise the jurisdiction vested in it by not giving the interim custody of vehicle in favour of the applicant-petitioner, who happened to be the owner of the vehicle. Mr. Rangra, while inviting attention of this Court to the impugned order passed by the learned trial Court also stated that police specifically stated before the Court that investigation in the case is complete and the vehicle is no more required by the police but despite aforesaid fact, learned trial Court failed to order for interim custody of vehicle in favour of the petitioner, which action of the court is illegal and deserves to be quashed and set-aside. Mr. Rangra, further contended that the court below failed to appreciate the fact that when police had conducted investigation and had submitted the challan before the Judicial Magistrate, it was only the court of learned judicial magistrate, which was competent to order for interim custody of the vehicle during the pendency of the trial. While specifically inviting attention of this court to the Section 51 of the Act, Mr. Rangra contended that provision of criminal procedure Code, 1973 are applicable in the present case and as such, learned court below wrongly and illegally interpreted the provisions of the Act and arrived at wrong conclusion that order for interim custody of vehicle could only be passed by the authorized officer as prescribed under Sections 61 and 62 of the Act. While concluding his arguments, learned counsel for the petitioner vehemently contended that Judicial magistrate, Ist Class is empowered to adjudicate all the matters/ trial under the said act and also competent to dispose the property/articles seized under the Act and as such, finding

returned by the court below is totally perverse and same is required to be rectified in accordance with the law. Mr. Rangra, further contended that even the impugned order having been passed by the learned trial Court is totally contradictory because while refusing to pass order for interim custody, learned counsel itself has concluded that there is no specific bar in the Act for this Court to order interim custody of the vehicle in question to its owner.

5. Per contra, Mr. P.M. Negi, learned Additional Advocate General, duly assisted by Mr. Ramesh Thakur, learned Deputy Advocate General, representing the respondent-State supported the impugned order passed by the learned trial Court and stated that there is no illegality and infirmity in the same and same deserves to be upheld. While specifically referring to the impugned order passed by the learned trial Court, Mr. Negi contended that in the event of any seizure of vehicle or conveyance under the Act, power to confiscate such vehicle or investigation is vested in the Excise officer in charge of District, who is only authorized to confiscate the seized vehicle or accept penalty. Hence, learned trial Court has rightly concluded that the authorized officer as described under HP Excise Act, 2011 is only empowered to give the interim custody/release of the vehicle. While refuting the contention of learned counsel for the petitioner that provisions of Cr.PC are also applicable, Mr. Negi contended that only authorized officer is empowered to confiscate or accept penalty of seized vehicle under the Act and as such, power vested in Magistrate in terms of Section 451 of the Cr.PC for interim custody/release of the vehicle under the Cr.PC, cannot be invoked in such cases, especially when Excise Act is a special law and the same shall prevail upon the general law. Though, Mr. Negi during arguments having been made by him fairly stated that there is no specific bar in the HP Excise Act as far as jurisdiction of judicial Magistrate to release the vehicle is concerned but he stated that when there is specific provision with regard to confiscation/release of vehicle provided in the Act, learned court rightly chose not to exercise the power which vests with the Exercise Officer in-charge of District, for interim custody of vehicle.

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

7. There is no dispute inter-se the parties qua the fact that police of police post Mandi, District Mandi, in excise of its power, under Section 9 of the HP Excise Act, 2011 registered a FIR bearing No. 52 of 2017 dated 6.3.2017, against the applicant-petitioner under Section 39 of HP Excise Act. By way of application, applicant-petitioner sought interim custody of vehicle in question on spurdari but learned trial Court rejected the same on the ground that order, if any, for interim custody can only be passed by the Excise Officer in charge of District, who in terms of Sections 60 to 64 of the HP Excise Act, 2011, is only competent authority to pass order of interim custody.

8. Before ascertaining the merit of the impugned order, it would be profitable to reproduce herein below Sections 60 to 64 of the HP Excise Act:-

60. Confiscation of article in respect of which offence committed:

(1) Whenever an offence punishable under this Act has been committed,-

(a) every liquor or excise bottle in respect of which such offence has been committed, together with the contents of such bottle, if any;

(b) every still, utensil, implement or apparatus and all material in respect of or by means of which such offence has been committed;

(c) every liquor or excise bottle lawfully imported, transported or manufactured, had in possession or sold alongwith or in addition to, any liquor liable to confiscation under clause (a);

(d) every receptacle, package, container and covering in which any liquor, excise bottle, materials, still, utensil, implement or apparatus as aforesaid is or are found together with the other

contents, if any, of such receptacle, package, container or covering; and

(e) every cart, vessel, raft or other conveyance used in carrying such receptacle, package, container, covering or articles as aforesaid; shall be liable to confiscation.

(2) when in the trial of any offence punishable under this Act, the Judicial magistrate decides that anything specified in clauses (a), (b), (c) or (d) of sub-section (1) is liable to confiscation, he may order confiscation thereof, except the liquor, the vehicle or the conveyance as specified in section 61.

(3) When there is reason to believe that an offence under this Act has been committed, but the offender is not known or cannot be found and when anything liable to confiscation under this Act and not in the possession of any person cannot be satisfactory accounted for, the case shall be enquired into and determined by the Collector concerned, who may order confiscation thereof:

Provided that no such order shall be made until the expiration of one month from the date of seizing the thing in question or without hearing the person, if any, claiming any right thereto, and considering the evidence, if any, which he produces in support of his claim:

Provided further that if the thing in question is liable to speedy and natural decay or if the Collector concerned is of opinion that the sale of the thing in question would be for the benefit of its owner, he may, at any time, direct it to be sold; and the provisions of this section and section 62 shall, so far as may be, apply to the net proceeds of such sale.

61. Inspection and seizure of vehicle, conveyance and liquor liable to confiscation.-

(1) Any Excise Officer may, if he has reasons to believe that a vehicle or conveyance has been or is being used in the commission of offence under section 39 of this Act, require the driver or other person-in–charge of such vehicle or conveyance to stop it and cause it to remain stationary as long as may reasonably be necessary to examine the contents in it and inspect all records relating thereto, which are in the possession of such driver or other person-in-charge of such vehicle or conveyance.

(2) When there is reason to believe that an offence has been committed under section 39, in respect of any liquor, such liquor together with vehicle or conveyance used in committing such offence, may be seized by any Excise Officer.

(3) Every Excise Officer seizing any liquor or vehicle or conveyance under this section shall place on such liquor or vehicle or conveyance a mark indicating that the same has been seized and shall, as soon as may be, make a report of such seizure to the Excise Officer-in-charge of the district.

(4) The Excise Officer seizing the liquor or vehicle or conveyance shall take appropriate steps for the safe custody of the liquor, vehicle or conveyance till the orders under Section 62 are passed by the Excise Officer-in-charge of the district.

62. Confiscation of vehicle or conveyance by Excise Officer in certain cases.-(1) Where an offence is believed to have been committed under section 39 of this Act, in respect of any liquor, the Excise Officer-in –charge of the district on being satisfied that the vehicle or conveyance has been used for commission of offence under section 39, may order confiscation of the vehicle or conveyance so seized together with the liquor.

(2) Where the Excise Officer-in-charge of the district, after passing an order of confiscation under sub-section (1) , is of the opinion that it is expedient in the public interest so to do, he may order confiscated vehicle or conveyance or liquor to be sold by public auction, and the proceeds thereof, after deduction of the expenses of any such auction or other incidental expenses relating thereto, shall, where the order of the confiscation made under sub-section (1) is set aside or annulled by an order under section 68 or 69, be paid to the owner thereof or the person from whom it was seized.

63. Issue of show cause notice before confiscation under section 62.-

(1) No order confiscating any vehicle or conveyance shall be made under section 62, except after notice in writing to the person from whom it is seized and the registered owner thereof, and considering their objections, if any.

(2) Without prejudice to the provisions of sub-section (1), no order confiscating any vehicle or conveyance shall be made under section 62 of this Act, if the owner of such vehicle or conveyance proves to the satisfaction of the Excise Officer-in-charge of the district that it was used in carrying the liquor without the knowledge or connivance of the owner himself, his agent, if any, and the person-in-charge of such vehicle or conveyance and that each of them had taken all reasonable and necessary precautions against such use:

Provided that the confiscation made under section 62 of this Act shall not affect the punishment of the accused for the offence for which he is liable under this Act.

64. Penalty in lieu of confiscation-

Notwithstanding anything contained in section 62, the Excise Officer-in-charge of the district may, in lieu of confiscation of the vehicle, accept by way of penalty a sum not exceeding the market price of the vehicle or the conveyance."

Careful perusal of the aforesaid provisions of law as contained in the Excise Act, clearly suggests that these provisions mainly deal with confiscation of vehicle, conveyance and liquor allegedly used for commission of offence under Section 39 of the Act. Similarly Section 9 of the Act empowers the Excise Officer, to investigate into the matter. It would be apt to reproduce the relevant paras of the Section 9 herein below:-

"9. Power to investigate-

(1) The State government may, by notification, invest any Excise Officer, with power to investigate any offence punishable under this Act, committed within the limits of the area in which the officer exercises jurisdiction.

(2) Every officer so empowered may within those limits exercise the same powers in respect of such investigation as an officer-in-charge of a police station may exercise in a cognizable case under the provisions of Chapter XII of the Code of Criminal Procedure, 1973."

Aforesaid Section empowers the Excise Officer to investigate any offence punishable under this Act, committed within the limits of the area in which the officer exercises jurisdiction. Similarly Section 9 (2) also suggests that every officer so empowered by the State Government can also investigate any offence punishable under this Act committed within their territorial jurisdiction.

9. Section 60 of the Act suggests that conveyance and vehicle used in carrying such liquor in violation of provision of Act, shall be liable to confiscation. But careful perusal of Section 60 (2) suggests that if Judicial Magistrate comes to conclusion that anything specified in clauses (a) to (d) of sub-section (1) of Section 60 is liable, to be confiscated, he or she may order

confiscation thereof, except the liquor, vehicle or the conveyance as specified under Section 61, meaning thereby, wherever the Judicial Magistrate comes to conclusion that there is a violation of aforesaid provisions of act, he/she may order for confiscation of the articles taken into custody at the time of registration of the case by the authority/Excise Department or police, who are empowered to investigate in terms of Section 9 of the Act, save and except liquor and vehicle involved in the case. Conjoint reading of Sections 60 to 64 clearly suggests that order of confiscation of liquor as well as vehicle impounded at the time of commission of offence can only be passed by the Excise Officer in-charge of District, who is vested with the power to pass order of confiscation.

10. Section 62 clearly provides that wherever the Excise Officer in charge of District is convinced and satisfied that the offence has been committed under Section 39 of the Act, and the vehicle or conveyance has been used for commission of offence, he/she may order for the confiscation of the vehicle or conveyance so seized together with the liquor, Section 63 of the Act further provides that before passing any order of confiscation of any vehicle or conveyance, authority concerned is bound to issue notice to the person from whom it is seized and registered owner thereof. Section 64 suggests that Excise Officer, in-charge of District may accept penalty i.e. a sum not exceeding the market price of the vehicle or the conveyance, in lieu of confiscation of vehicle.

11. This Court after carefully examining the provisions contained in Sections 60 to 64 of the Himachal Pradesh Excise Act, has no hesitation to conclude that provisions contained in aforesaid sections relate to confiscation of vehicle or conveyance as well as liquor seized at the time of registration of case. But authority concerned can only order for confiscation of vehicle as well as liquor as referred above, after final adjudication of the case by the concerned Judicial Magistrate, who, on the basis of material adduced on record by the prosecution, be it police or excise officer, may either acquit the accused or may hold him guilty of having committed offences punishable under this Act. Provisions contained in the aforesaid sections 61 to 64, would only come to operation once learned Magistrate comes to conclusion that offence punishable under this Act has been committed and property seized at the time of commission of offence is required to be confiscated in terms of Section 60.

12. True it is, in terms of section 60, learned Judicial Magistrate has no power to order for confiscation of liquor, vehicle or conveyance and in that regard, only Excise Officer in charge of District is authorized to either confiscate the vehicle or to release the same in terms of Section 64 in lieu of penalty of sum not exceeding the market price of the vehicle or conveyance but provisions as contained in 60 to 64 of the Act shall only come to operation after final adjudication of the dispute by the Judicial Magistrate, before whom challan is presented either by police or by Excise Officer in terms of Section 9 of the Act. As far as power to give interim custody by Judicial Magistrate, during the pendency of trial is concerned, there is no specific bar as such, contained in the Act and Judicial Magistrate is competent to release the vehicle in favour of registered owner on spurdari subject to certain conditions as envisaged under Section 451 of the Cr.PC.

13. In the instant case, perusal of impugned order clearly suggests that learned court below misdirected itself by referring to provisions contained in Sections 61 to 64 of the Act because admittedly, those are/were not relevant at the time of consideration of the application for interim release of vehicle preferred by the registered owner of the vehicle and in no manner these provisions could be construed as a bar for Judicial Magistrate to order for interim custody of the vehicle during the pendency of the trial. Rather at the cost of repetition, it may be stated that provisions contained in the aforesaid sections shall only come into operation after final adjudication of the matter. After adjudication of the case, by Judicial Magistrate, power to confiscate, if any, can be exercised by the Excise Officer in-charge not by the Judicial Magistrate. In the instant case, where admittedly FIR was registered by the police against the registered owner under Section 39 of the Act and pursuant to same, challan, if any, may be submitted by the police in the competent court of law, meaning thereby, it was only police, who is/was in

custody of articles/vehicle seized at the time of registration of case. Since police is required to present challan after the completion of investigation before the Judicial Magistrate, proper course for registered owner for interim custody of vehicle in question is to only file application before the Judicial Magistrate before whom the challan is presented or to be presented. It is not the case of the respondent-state that in the instant case, case was registered by the Excise Officer and as such, order if any, for interim custody of the vehicle was to be passed only by the excise officer, rather, case is /was registered by the police, which was also authorized under Section 9 of the Act to investigate the case.

14. After careful examination of the aforesaid provisions of law there cannot be any quarrel with regard to the limited power of Judicial Magistrate to order for confiscation of articles including vehicle after completion of trial, but definitely, he/she is not precluded from ordering interim custody of vehicle in exercise of power conferred upon him/her under Section 451 of Cr.PC, on the application of registered owner. Further perusal of aforesaid provisions of law leaves no doubt in the mind of the Court that confiscation in terms of Sections 61 to 64 though can be ordered by the Excise Officer in-charge of the area but same can only be ordered after completion of trial and as such, there cannot be any bar for Judicial Magistrate to order for interim custody of vehicle to the registered owner during the pendency of the trial. Provisions contained in Section 4 (i) of the Cr.PC, clearly suggest that all offences under the Indian Penal Code shall be investigated, inquired into, tried and otherwise dealt with according to the provisions contained in the Cr.PC. Similarly Section 4 (ii) suggests that all offences under any other law are required to be investigated, inquired into, tried and otherwise dealt with according to the same provisions but subject to any enactment for the time being in force regulating the manner or place of investigation, inquiring into, trying or otherwise dealing with such offences. It is apt to reproduce Section 4 of the Cr.PC, herein below:-

> *"(i). All offences under the Indian Penal Code (45 of 1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.*
>
> *(ii). All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the lime being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences."*

Careful perusal of aforesaid provisions as contained in Section 4 of the Cr.PC certainly suggests that jurisdiction of the Court to deal with the matter and pass order in accordance with the Cr.PC, should be presumed and to hold contrary, there must be specific bar. In this regard, reliance is placed upon judgment titled ***Bhim Sen v. State of U.P., AIR 1955 SC 435*** (Vol.42, C.N. 71), wherein the Hon'ble Apex Court has held as under:-

> *"5.Now, in these circumstances, it has to be considered whether the trial of this case by the ordinary criminal Court is barred. The bar of the jurisdiction of the ordinary criminal Court is brought about by Section 55 of the Act. But it requires to be noticed that the bar which is brought about by the section, is a bar which relates to the case as a whole. Because, in, terms, what it says is "no court shall take cognizance of any case which is cognizable under the Act by a Panchayati Adalat". Under Section 2(a) of the Act a "case" is defined as meaning "criminal proceeding in respect of an offence triable by a Panchayati Adalat" and "Panchayati Adalat" is defined as "including a bench thereof". It is clear, therefore, that this bar has reference to the entire proceeding, i.e., as involving all the accused together. Such a bar in. respect of the entire case can be operative only where there is a valid machinery for the trial thereof. In the present case in which at 'least one of the accused (though not this very. appellant) is a person coming from an area outside the local extent of the Act, any -bench of the Adalat that can be validly formed there-. under cannot try the three accused together and hence can have no Jurisdiction over the whole case. The jurisdiction of the regular*

criminal court in respect of such a case cannot be taken away by the operation of Section 55 of the Act. It is to be remembered that the jurisdiction of the criminal courts under section 5 of the Code of Criminal Procedure is comprehensive. That section enjoins, that all offences under the Indian Penal Code shall be investigated, enquired into, tried and otherwise dealt with "according 'to the provisions hereinafter contained". To the extent that no valid machinery is set up under the U.P. Panchayat Raj' Act for the trial of any Particular case, the jurisdiction of the ordinary criminal court under Section 5 Code of Criminal Procedure cannot be held to have been excluded. Exclusion of jurisdiction of a court of general jurisdiction, can be brought about by the setting no of a court of limited jurisdiction, in respect of the limited field, only if the vesting and the exercise of that limited jurisdiction is clear and operative. Where, as in this case, there is no adequate machinery for the exercise of this jurisdiction in a specific case, we -cannot hold that the exercise of jurisdiction in respect of such a case by the Court of general jurisdiction is illegal."

15. In view of the discussion made herein above, as well as specific provisions contained in the HP Excise Act, wherein, admittedly, no bar as such, has been created/provided for interim release of the vehicle by the Judicial Magistrate before whom the application for release of vehicle is filed, this Court has no hesitation to conclude that learned trial Court, while rejecting the application for release of vehicle having been preferred on behalf of the registered owner, wrongly placed reliance upon Sections 61 to 64 of the HP Excise Act, which are definitely not attracted/ applicable in the present case at this stage. Provisions as contained in Sections 61 to 64 shall only come into operation after final adjudication of the case. Let the matter be viewed from another angle, if competent Court of law i.e. Judicial Magistrate, after conclusion of trial comes to conclusion that no case is made out pursuant to case registered by the Investigating Agency under the Excise Act, natural corollary of the same would be the release of seized articles including vehicle in favour of the owner/proprietor. Under Section 452 Cr.PC, after conclusion of inquiry or trial, Court is empowered to pass order or as it thinks fit for disposal, by destruction, confiscation or delivery to any person claiming it to be entitled to possession thereof. It is apt to reproduce Section 452 (1) of the Cr.PC, herein below:-

"1. When an inquiry or trial in any Criminal Court is concluded, the Court may make such order as it thinks fit for the disposal, by destruction, confiscation or delivery to any person claiming to be entitle to possession thereof or otherwise, of any property or document produced before it or in its custody, or regarding which any offence appears to have been committed, or which has been used for the commission of any offence."

Certainly, in cases as prescribed under the HP Excise Act, 2011, order with regard to confiscation, if any, after conclusion of trial can only be passed by the Excise Officer In-charge, as prescribed under Sections 61 to 64 of the HP Excise Act, but admittedly, there is no embargo, as such, for the Judicial magistrate to order for interim custody and disposal of property pending trial in certain cases while exercising power under Section 451 Cr.PC. Section 451 Cr.PC, is being reproduced as follows:-

"451. Order for custody and disposal of property pending trial in certain cases-

When any property is produced before any Criminal Court during an inquiry or trial, the Court may make such order as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial, and, if the property is subject to speedy and natural decay, or if it is otherwise expedient so to do, the Court may, after recording such evidence as it thinks necessary, order it to be sold or otherwise disposed of.

Explanation – For the purposes of this section, "property" includes:

(a) property of any kind or document which is produced before the Court or which is in its custody.

(b) any property regarding which an offence appears to have been committed or which appears to have been used for the commission of any offence."

Careful perusal of Section 451, reproduced herein above, suggests that criminal Court is empowered to pass order as it thinks fit for such property pending conclusion or inquiry or trial. Aforesaid provision of law empowers the criminal Court to even pass order for sale of the property which is subject to speedy and natural decay. The Hon'ble Apex Court has specifically held in ***Sunderbhai Ambalal Desai v. State of Gujarat, AIR 2003 SC 638*** that power under Section 451 should be exercised expeditiously and judiciously, the relevant paras whereof, are being reproduced herein below:-

6. It is submitted that despite wide powers proper orders are not passed by the Courts. It is also pointed out that in the State of Gujarat there is Gujarat Police Manual for disposal and custody of such articles. As per the Manual also, various circulars are issued for maintenance of proper registers for keeping the muddamal articles in safe custody.

7. In our view, the powers under Section 451 Cr.P.C. should be exercised expeditiously and judiciously. It would serve various purposes, namely:-

1. Owner of the article would not suffer because of its remaining unused or by its misappropriation.

2. Court or the police would not be required to keep the article in safe custody;

3. If the proper panchanama before handing over possession of article is prepared, that can be used in evidence instead of its production before the Court during the trial. If necessary, evidence could also be recorded describing the nature of the properly in detail; and

4. This jurisdiction of the Court to record evidence should be exercised promptly so that there may not be further chance of tampering with the articles.

21. However these powers are to be exercised by the concerned Magistrate. We hope and trust that the concerned Magistrate would take immediate action for seeing that powers under Section 451 Cr.P.C. are properly and promptly exercised and articles are not kept for a long time at the police station, in any case, for not more than fifteen days to one month. This object can also be achieved if there is proper supervision by the Registry of the concerned High Court in seeing that the rules framed by the High Court with regard to such articles are implemented properly."

16. Consequently, for the reasons stated herein above, present petition is allowed and the impugned order is quashed and set-aside. In view of the above, let learned court below decide the application afresh within a period of ten days from the date of receipt of the copy of the judgment taking into consideration the observations/findings returned in the instant judgment.

17. Parties are directed to appear before the learned trial Court on **1.5.2017** so that the needful is done within the stipulated time. Record, if any, of the case be also sent back forthwith. Pending applications, if any, also stand disposed of. Copy **dasti.**

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

CWP Nos. 8035 and 11826 of 2011
Date of Decision: 11.4.2017

CWP No. 8035 of 2011

Nagar Panchayat Santokhgarh. ….Petitioner
Versus
Kamal Dev. …Respondent

CWP No. 11826 of 2011

Kamal Dev. ....Petitioner

Versus

State of H.P. & another. ...Respondents

Industrial Disputes Act, 1947- Section 25- K was engaged by Nagar Panchayat on 5.9.1999- he was disengaged on 30.6.2004 – he approached the authority under Industrial Disputes Act, which set aside the disengagement and directed re-engagement with consequential benefits- aggrieved from the said order, present writ petitionhas been filed – held that K was engaged for a work, which was continuously available – however, the nomenclature was contract assignment – some other person was engaged after dis-engaging K- the benefit of the legislation cannot be denied by using clever phraseology – no error was committed by the Labour Court by directing the re-engagement of K – however, keeping in view the fact that the work has been outsourced, direction issued to pay compensation of Rs.1 lac to K with interest @ 7.5% per annum from the date of award of Labour Court. (Para- 6 to 25)

Cases referred:

Transport Corporation of India Vs. Employees' State Insurance Corpn. and another, (2000) 1 SCC 332

Delhi Gymkhana Club Limited vs. Employees' State Insurance Corporation, (2015) 1 SCC 142

Union of India and another Vs. Surendra Pandey (2015) 13 SCC 625

Royal Western India Turf Club Limited Vs. Employees' State Insurance Corporation and others, (2016) 4 SCC 521

Raj Kumar Vs. Director of Education and others (2016) 6 SCC 541

S.M. Nilajkar and Others Vs. Telecom District Manager, Karnataka AIR 2003 SC 3553=(2003) 4 SCC 27

Bangalore Water Supply & Sewerage Board Vs. A. Rajappa & others AIR 1978 SC 548=(1978) 2 SCC 213

Senior Superintendent Telegraph (Traffic), Bhopal Vs. Santosh Kumar Seal and others (2010) 6 SCC 773

Bharat Sanchchar Nigam Limited Vs. Man Singh (2012) 1 SCC 558

Assistant Engineer Rajasthan Development Corporation and another Vs. Gitam Singh (2013) 5 SCC 136

CWP No. 8035 of 2011

For the Petitioner: Mr.N.K. Thakur, Senior Advocate with Mr.Divya Raj Singh, Advocate.

For the Respondent: Mr. Dalip K. Sharma, Advocate.

CWP No. 11826 of 2011

For the Petitioner: Mr.Dalip K. Sharma, Advocate.

For the Respondents: Mr.Pankaj Negi, Deputy Advocate General, for respondent No. 1.
Mr.N.K. Thakur, Senior Advocate with Mr.Divya Raj Singh, Advocate for respondent No. 2.

The following judgment of the Court was delivered:

Vivek Singh Thakur , Judge (Oral)

Award dated 28.4.2011 passed in Reference No. 169 of 2006 by Presiding Judge Industrial Tribunal cum Labour Court directing Nagar Panchayat, Santokhgarh Una (herein after referred as Nagar Panchayat) to reengage Kamal Dev forthwith on same terms and conditions, he was working with Nagar Panchayat i.e. on the basis of trips made by him on the tractor trolley as

per existing rate, is subject matter of both writ petitions CWP No. 8035 of 2011 and CWP No. 11826 of 2011. Hence both are heard and decided with this common judgment.

2. In CWP No. 8035 of 2011 Nagar Panchayat has prayed for quashing and setting aside of impugned award, whereas in CWP No. 11826 of 2011 Kamal Dev has prayed for modification of award so as to grant him all consequential benefits, seniority and back wages from due date in addition to relief already granted by the Labour Court.

3. It is admitted case of parties that Kamal Dev, engaged by Nagar Panchayat on 5.9.1999, worked with Nagar Panchayat till 30.6.2004 and thereafter he was disengaged, whereupon he approached the authority under Industrial Disputes Act, in pursuance of which a reference was made by appropriate authority to Labour Court for adjudication as under:-

> *"Whether the termination of services of Sh.Kamal Dev S/o Shri Krishan Chand by the Secretary, Nagar Panchayat, Santokhgarh, District Una, H.P. w.e.f. 01.07.2004 without complying the provisions of the Industrial Disputes Act, 1947 as alleged by the workman is proper and justified? If not, what relief of service benefits and amount of compensation the above aggrieved workman is entitled to?"*

4. Kamal Dev submitted claim before Labour Court asserting that he was engaged by Nagar Panchayat w.e.f. 5.6.1999 till 30.6.2004 for cleaning streets, roads and clean garbage bins etc. and also for loading and unloading of solid waste in tractor trolley for dumping and he was made to work on all 7 days of the week and in lieu of that he was drawing Rs. 1800/- per month on the date of his termination. It was also claimed that one Mr.Showara Singh, junior to him had been entrusted the work being performed by him and he was terminated without any charge-sheet, inquiry or show cause notice and in violation of principles of natural justice and Nagar Panchayat has committed breach of Section 25-F of Industrial Disputes Act. He claimed reengagement with all consequential benefits including continuity of service.

5. As per stand of Nagar Panchayat, Kamal Dev was not falling in definition of 'workman' as defined in Industrial Disputes Act as he had been engaged for disposal of solid waste with tractor trolley on trip basis at the rate of Rs. 50-60/- per trip and workman was a contract labourer and payment to him was being made on trip basis. To substantiate its claim, Nagar Panchayat also placed on record various receipts of payment made to Kamal Dev on trip basis. Nagar Panchayat disputed stand of Kamal Dev as 'workman' and consequently disputed claim of Kamal Dev being retrenched under I.D. Act.

6. Section 2(s) of the Industrial Disputes Act provides definition of 'workman' as under:-

> *"2(s) "workman" means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person—*
>
> > *(i) who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 957 (62 of 1957); or*
> >
> > *(ii) who is employed in the police service or as an officer or other employee of a prison; or*
> >
> > *(iii) who is employed mainly in a managerial or administrative capacity; or*
> >
> > *(iv) who, being employed in a supervisory capacity, draws wages exceeding one thousand six hundred rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature."*

7. Retrenchment has been defined under Section 2(oo) of I.D. Act, which reads as under:-

> *"2(oo). retrenchment means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include-*
>
> *(a) voluntary retirement of the workman; or*
>
> *(b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or*
>
> *(bb) termination of the service of the workman as a result of the non- renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein; or*
>
> *(c) termination of the service of a workman on the ground of continued ill- health."*

8. The workman in any industry in continuous service for not less than 1 year shall not be retrenched without complying the provisions of Section 25-F of I.D. Act. Section 25-F of the Act reads as under:-

> *"25-F. Conditions precedent to retrenchment of workmen.- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-*
>
> *(a) the workman has been given one month' s notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:*
>
> *(b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay 2 for every completed year of continuous service] or any part thereof in excess of six months; and*
>
> *(c) notice in the prescribed manner is served on the appropriate Government 3 or such authority as may be specified by the appropriate Government by notification in the Official Gazette."*

9. Dealing with cases related to Employees' State Insurance Act, 1948, the Apex Court in case titled ***Transport Corporation of India Vs. Employees' State Insurance Corpn. and another, reported in (2000) 1 SCC 332*** has held as under:-

> *"27. Before parting with the discussion on this point, it is necessary to keep in view the salient fact that the Act is a beneficial piece of legislation intended to provide benefits to employees in case of sickness, maternity, employment injury and for certain other matters in relation thereto. It is enacted with a view to ensuring social welfare and for providing safe insurance cover to employees who were likely to suffer from various physical illnesses during the course of their employment. Such a beneficial piece of legislation has to be construed in its correct perspective so as to fructify the legislative intention underlying its enactment. When two views are possible on its applicability to a given set of employees, that view which furthers the legislative intention should be preferred to the one which would frustrate it………"*

10. Similarly, in case ***Delhi Gymkhana Club Limited vs. Employees' State Insurance Corporation,*** reported in ***(2015) 1 SCC 142*** the Apex Court has held that in a beneficial legislation, a liberal interpretation has to be adopted. (see para 20).

11. Dealing with a case related to the Entitlement Rules for Casualty Pensionary Awards, 1982, titled ***Union of India and another Vs. Surendra Pandey*** reported in ***(2015) 13***

SCC 625, Hon'ble Supreme Court, referring its earlier judgments, re-iterated that legislation, beneficial in nature, ought to be liberally construed. (see para 15).

12. In a recent case pertaining to Employees' State Insurance Act, 1948, titled ***Royal Western India Turf Club Limited Vs. Employees' State Insurance Corporation and others,*** reported in ***(2016) 4 SCC 521,*** the Apex Court has held as under:-

> *"5……. The Act is a welfare legislation and is required to be interpreted so as to ensure extension of benefits to the employees and not to deprive them of the same which are available under the Act."*

13. Recently, in case related to Industrial Disputes Act, titled ***Raj Kumar Vs. Director of Education and others*** reported in ***(2016) 6 SCC 541***, the Apex Court re-iterated the spirit and scheme of I.D. Act as under:-

> *"25. The spirit and scheme of the ID Act was discussed by a Seven-Judge Bench of this Court in the case of Bangalore Water Supply and Sewerage Board v. A. Rajappa (1978) 2 SCC 213 as under: (SCC p. 323, para 18)*
>
> > *"18. …..To sum up, the personality of the whole statute, be it remembered, has a welfare basis, it being a beneficial legislation which protects Labour, promotes their contentment and regulates situations of crisis and tension where production may be imperiled by untenable strikes and blackmail lock- outs. The mechanism of the Act is geared to conferment of regulated benefits to workmen and resolution, according to a sympathetic rule of law, of the conflicts, actual or potential, between managements and workmen. Its goal is amelioration of the conditions of workers, tempered by a practical sense of peaceful co-existence, to the benefit of both-not a neutral position but restraints on laissez faire and concern for the welfare of the weaker lot. Empathy with the statute is necessary to understand not merely its spirit, but also its sense."* *(emphasis supplied).*

14. Industrial Disputes Act is a beneficial legislation for protection of labour class and therefore, where two interpretations or view are possible, the interpretation favourable to beneficiary is to be adopted by the Court.

15. In light of above principle, material on record in present case is to be considered for deciding the legality of impugned award.

16. Kamal Dev had filed affidavit in his evidence, reiterating his statement of claim filed before Labour Court. He was cross-examined on behalf of Nagar Panchayat. In cross-examination, he admitted signatures on bills/receipts produced by Nagar Panchayat as Ex. R-1 to R-29 and also payment of amount to him every month on the basis of these bills, but denied knowledge about calculation of amount on trip basis. There was positive suggestion to him that he was assigned work to transport garbage in tractor trolley. It was also suggested to him that person appointed in his place was also being paid on trip basis.

17. From evidence on record, it was clearly established that Kamal Dev was engaged by Nagar Panchayat for a work which was continuously available with them, but nomenclature to his assignment was given as a contract assignment on trip basis, whereas he was regularly assigned work for about 5 years and was paid every month for his work. Therefore, he cannot be considered as a casual labourer. The work of loading and unloading in tractor trolley was not only continuously available during his engagement but even after his removal, as it was admitted case of Nagar Panchayat, that someone else was engaged w.e.f. 1.7.2004 who was also being paid on trip basis.

18. By using clever phraseology or merely changing nomenclature, one cannot be denied benefits for which he is otherwise entitled under beneficial legislation on the basis of ground reality of the case. The Court, always, has power to unveil the truth.

19. Kamal Dev was disengaged for engaging someone else and not on account of unsatisfactory work, punishment for disciplinary action, continued ill health, voluntarily retirement or on retirement attaining age of superannuation. It is claimed that engagement of Kamal Dev was a trip based contract engagement. But even then, this contract was not time bound but against the work which was available continuously. In absence of term of contract engaging a workman, he should not be removed/replaced arbitrarily in derogation of law. Removal/replacement of Kamal Dev is neither a result of non-renewal of contract of employment on expiry of such contract nor on termination of contract under a stipulation contained in such contract. Therefore, replacement/removal of Kamal Dev is retrenchment under I.D. Act.

20. Kamal Dev was hired for a continuous work, though payment for his work was not termed as daily wage, but payment on trip basis, but it is hard fact that removal and transportation of garbage work is of continuous and regular work, which is available with any Nagar Panchayat and therefore, payment on trip basis for performing a work, which was bound to be available every day, tantamounts to payment on daily basis at the end of every month.

21. Learned Labour Court has considered provisions of I.D. Act as well as ratio of law laid down by Hon'ble Apex Court in ***S.M. Nilajkar and Others Vs. Telecom District Manager, Karnataka AIR 2003 SC 3553=(2003) 4 SCC 27*** and ***Bangalore Water Supply & Sewerage Board Vs. A. Rajappa & others AIR 1978 SC 548=(1978) 2 SCC 213*** and has rightly held that Kamal Dev was a workman for the purpose of I.D. Act and Nagar Panchayat has violated provisions of Section 25-F of the Act in dispensing his services.

22. There is no material illegality or irregularity in the proceedings of Labour Court and also there is no error or mistake in appreciating the evidence on record and Labour Court has completely and correctly appreciated the material placed before it and no ground for interference, in findings that Kamal Dev was a workman under I.D. Act and his replacement/removal was illegal as Nagar Panchayat has violated the provisions of Section 25-F of the Act, is made out.

23. Labour Court has directed to reengage Kamal Dev on the same terms and conditions, he was working. Learned counsel for Nagar Panchayat, under instructions of Executive Officer of Nagar Panchayat, submits that as of now system has changed and Nagar Panchayat has discontinued engaging person(s) itself for disposal of garbage and now work of cleaning and management of solid waste has been out sourced and there is neither work nor post with Nagar Panchayat to re-engage Kamal Dev and therefore, the directions issued by Labour Court is practically impossible to execute and relief granted to Kamal Dev has become redundant.

24. Learned counsel for respondent relying upon judgments of Hon'ble Apex Court in ***Senior Superintendent Telegraph (Traffic), Bhopal Vs. Santosh Kumar Seal and others (2010) 6 SCC 773, Bharat Sanchchar Nigam Limited Vs. Man Singh (2012) 1 SCC 558*** and ***Assistant Engineer Rajasthan Development Corporation and another Vs. Gitam Singh (2013) 5 SCC 136*** submits that in view of ratio of law laid down by Hon'ble Apex Court, in case of impossibility of re-engagement of his client, reasonable compensation in lieu of his re-engagement for his unlawful termination by Nagar Panchayat be awarded to him.

25. Respondent was engaged 17 years back and he worked for 5 years till his removal/replacement by another. At present scenario has changed as Nagar Panchayat has opted for outsourcing the work of solid waste management, therefore, in any case, even after 2004, working for some years, Kamal Dev was bound to be disengaged on adopting different mode and manner for cleaning and management of solid waste by Nagar Panchayat. Therefore, keeping in view the overall aspect of the case, it would be appropriate that instead of directions to reengage Kamal Dev with or without back wages, Nagar Panchayat is directed to pay a lump sum compensation of Rs. 1,00,000/- to Kamal Dev. The said payment shall be made by Nagar Panchayat, Santokgarh, District Una, H.P. to Kamal Dev on or before 30th June, 2017. In case amount of compensation is not paid on or before 30th June, 2017, Kamal Dev shall also be

entitled for interest @ 7 ½ % per annum from the date of award passed by the Labour Court till realization of the same.

26. Both petitions are disposed of in above terms along with pending application(s), if any.

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

Rahul Thakur @ Lucky ....Petitioner
Versus
State of Himachal Pradesh ....Respondent

Cr. MP(M) No. 389 of 2017
Decided on: 11th April, 2017

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the accused for the commission of offences punishable under Sections 376, 354-A, 328 and 506 of I.P.C. and Sections 4 and 8 of POCSO Act – the petitioner filed an application seeking bail pleading that he is innocent and has been falsely implicated – he is behind bar for a long time and he be released from custody – held that the Court has to consider nature of crime, seriousness of the offence, character of the evidence, circumstances of the case, possibility of securing the presence of the accused, apprehension of the witnesses being tampered with and the larger interest of the public – prosecutrix had made material improvements in her statement- no injury was found on her person- there was delay in recording the FIR – hence, the bail application allowed and petitioner ordered to be released on bail of Rs.25,000/- with one surety for the like amount.(Para-7 to 10)

Cases referred:

State of Maharashtra vs. Anand Chintaman Dighe, 1990(1) SCC 397
The State of Rajasthan vs. Balchand, 1977(4) SCC 308
Mohd. Juyal vs. State, 2014(17) R.C. R.(Criminal) 704

For the petitioner: Mr. Anoop Chitkara and Ms. Neha Scott, Advocates.
For the respondent: Mr. Virender Kumar Verma, Additional Advocate General, with Mr. Rajat Chauhan, Law Officer.
ASI Ashok Kumar, I.O. P.S. Nerwa, District Shimla, H.P.

The following judgment of the Court was delivered:

<u>Chander Bhusan Barowalia, Judge.</u> *(oral).*

The present bail application has been maintained by the petitioner under Section 439 of the Code of Criminal Procedure seeking his release in case FIR No.2 of 2017, dated 04.01.2017, under Sections 376, 354(A), 328, 506 IPC & Sections 4 and 8 of POCSO Act, registered at Police Station, Nerwa, District Shimla, H.P.

2. As per the petitioner, he is innocent and has been falsely implicated in the present case. The petitioner has further averred that taking into consideration his age and the time since when he is behind the bars, he may be released on bail.

3. Police reports stand filed. As per the prosecution, on 04.01.2017 the child victim/prosecutrix (name withheld) made a statement under Section 154 Cr.P.C. before the police, wherein it has been alleged that she is a student of 10+1 and on 31.12.2016, after the school she was staying in her uncle's room at Bhatti Nala. On the subsequent morning, the

prosecutrix did not go to her home, as her cousin sister (uncle's daughter) was alone. Around 8:15 p.m., the petitioner, who was acquainted with the prosecutrix, called her on her mobile. The petitioner was willing to come to the house where the prosecutrix was staying. Around 9:15 p.m. the petitioner came there and they (petitioner, prosecutrix and her cousin sister) remained seated near the heater. The prosecutrix felt stomach pain, upon which the petitioner gave her a pain killer and she consumed the same, however, she did not know about the said pain killer. After some time, when the prosecutrix was talking with the petitioner, she felt restlessness and giddiness. Thereafter, all of them went to sleep separately. The prosecutrix lost her consciousness. On the subsequent morning, around 10:30 a.m., the prosecutrix was awakened by her cousin, but she could not stand. At that time the petitioner was there in the room. All of them came to Nerwa and around 11:00 a.m. the cousin sister of the prosecutrix went to her house. The prosecutrix also wanted to go to her native place, however, she could not go as she forget her bag in the room of her uncle. The petitioner and prosecutrix again came back to the room for taking the bag, however, as she was still under the influence of medicine, which the petitioner gave to her, she slept in the room. The petitioner took advantage of the unconsciousness of the prosecutrix and committed rape upon her. The proseuctix was feeling intense pain and due to that she consumed 5-6 tablets of pain killer, which she was having in her purse. The petitioner also threatened the prosecutrix and then she became unconscious. When the prosecutrix regained consciousness, around 2:30 p.m., she was at Bhatti Nala. On being noticed by her neighbourers, her brother was telephonically informed, however, in the interregnum, the petitioner and cousin sister of the prosecutrix also came there and they took her to Nerwa hospital, in a private vehicle. While they were enroute, near Shawala road, brother of the prosecutrix reached and he took all of them to Nerwa Hospital. The prosecutrix was admitted in the hospital. The petitioner and cousin sister of the prosecutrix left the hospital. On 02.01.2017, the prosecutrix was referred to I.G.M.C. Shimla. On the statement of the prosecutrix, police investigated the matter and FIR was registered. The prosecutrix was medically examined and statements of the witnesses were also recorded. Section 328 IPC was added in the case. Accused was arrested and medically examined. After completing all the codal formalities, police presented the challan in the learned Trial Court. Lastly, the prosecution has prayed that the bail application of the petitioner may be dismissed.

4. I have heard Mr. Anoop Chitkara, learned counsel for the petitioner, Mr. Virender Kumar Verma, learned Additional Advocate General and has gone through the record carefully.

5. Mr. Chitkara, learned counsel for the petitioner has argued that the prosecutrix divulged her medical history to the doctor, while she was being medically examined by the doctor. However, her medical history, recorded by the doctor, nowhere suggests that any offence was committed on her by the petitioner. He has further argued that there is no case of sexual assault, as no semen was traced/found on any of the recovered articles. As per the learned counsel for the petitioner, taking into consideration the statement of the prosecutrix, on its face value, present is a totally false case. He has argued that the petitioner is only 19 years of age and has been falsely implicated. The learned counsel for the petitioner has placed reliance on the following judicial pronouncements:

1. ***State of Maharashtra vs. Anand Chintaman Dighe, 1990(1) SCC 397;***
2. ***The State of Rajasthan vs. Balchand, 1977(4) SCC 308; &***
3. ***Mohd. Juyal vs. State, 2014(17) R.C. R.(Criminal) 704.***

Conversely, Mr. Verma, learned Additional Advocate General, has argued that the petitioner has committed a heinous crime. He has further argued that the petitioner had no right to visit the prosecutrix when she was staying with her cousin. He has further argued that the petitioner has also no business to accompany the prosecutrix on the subsequent day. In case the petitioner is enlarged on bail, it will give a wrong signal in the society. Lastly, he has argued that keeping in view the heinousness of the offence, the bail application of the petitioner may be rejected. In rebuttal, Mr. Chitkara, learned counsel for the petitioner has vehemently argued that no case is

made-out against the petitioner and the petitioner has been falsely implicated in the present case. He has further argued that taking into consideration the facts, which have come on record, the petitioner may be released on bail.

6. I have gone through the rival contentions of the parties and the police reports in detail.

7. Firstly, this Court would like to deal with the judicial pronouncements cited by Mr. Chitkara. The Hon'ble Apex Court in ***State of Maharashtra vs. Anand Chintaman Dighe, 1990(1) SCC 397,*** has held as under vide para 7 of the judgment:

> ***"7. There are no hard and fast rules regarding grant or refusal of bail, each case has to be considered on its own merits. The matter always calls for judicious exercise of discretion by the court. Where the offence is of serious nature the court has to decide the question of grant of bail in the light of such considerations as the nature and seriousness of offence, character of the evidence, circumstances which are peculiar to the accused, a reasonable possibility of presence of the accused not being secured at the trial and the reasonable apprehension of witness being tampered with, the larger interest of the public or such similar other considerations."***

The learned counsel for the petitioner has primarily accentuated that even at the stage of bail, the Court is required to go into the merits of the case. The above referred judgment also exemplifies that in cases of serious crimes, the Court has to consider nature of crime, seriousness of the offence, character of the evidence, circumstances of the case, possibility of securing the presence of the accused, apprehension of witnesses being tampered with and the larger interest of the public. Another vital aspect, which the above referred judgment deals with, is that there are no hard and fast rules qua grant/refusal of bail and each case has to be considered on its own merits. This Court is also of the opinion that merits of the case are to be touched while exercising discretionary jurisdiction under Section 439 Cr.P.C. The spirit of the judgment (supra) is fully applicable to the facts of the present case.

8. Mr. Chitkara has also placed reliance on another judgment of Hon'ble Apex Court in ***The State of Rajasthan vs. Balchand, 1977(4) SCC 308,*** wherein vide para 2 of the judgment it has been held as under:

> ***"2. The basic rule may perhaps be tersely put as bail, not jail, except where there are circumstances suggestive of fleeing from justice or thwarting the course of justice or creating other troubles in the shape of repeating offences or intimidating witnesses and the like, by the petitioner who seeks enlargement on bail from the Court. We do not intend to be exhaustive but only illustrative."***

It is beaten law of the land that the fundamental rule is bail, not jail. This Court is also of the opinion that there is no denial to the above rule, thus the judgment (supra) is also fully applicable to the present case.

9. Lastly, Mr. Chitkara, has relied upon judgment of Hon'ble Delhi High Court, rendered in ***Mohd. Juyal vs. State, 2014(17) R.C. R.(Criminal) 704,*** wherein it has been held that the nature of allegations are required to be considered at the stage of the bail. This Court is also of the view that while granting/refusing bail, the nature of the allegations does play an imperative role and the same cannot be overlooked at any cost.

10. It has come in the prosecution story that when the prosecutrix was taken for treatment and examined by the doctor, she did not disclose anything with respect to offence committed upon her by the petitioner. Further, as per the final opinion of the doctor, the possibility of sexual assault cannot be ruled-out. The prosecutrix, as per her own statement, on

the next day consumed 5-6 tablets, which she was carrying in her purse. The prosecutrix has made material improvements time and again when her statement was recorded. She has also made many improvements in her statement under Section 164 Cr.P.C. Further no semen was detected from any exhibits in the forensic science laboratory. No injury was found on the person of the prosecutrix by the doctor. The presence of the cousin of the prosecutrix in the room and other material aspects, which have come on record, have also been considered and without discussing the same at this stage, and also considering the age of the petitioner, delay in recording the statement of the prosecutrix under Section 164 Cr.P.C., wherein she has made improvements and also the law, as citied by the learned counsel for the petitioner, and the fact that the petitioner is not in a position to tamper with the prosecution evidence and also not in a position to flee from justice, this Court finds that the present is a fit case where the judicial discretion to admit the petitioner on bail is required to be exercised in his favour. Therefore, it is ordered that the petitioner be released forthwith on bail, on his furnishing personal bond to the tune of Rs. 25,000/- (rupees twenty five thousand only) with one surety in the like amount to the satisfaction of learned Trial Court, in case FIR No.2 of 2017, dated 04.01.2017, under Sections 376, 354(A), 328, 506 IPC & Sections 4 and 8 of POCSO Act, registered at Police Station, Nerwa, District Shimla, H.P. The bail is granted subject to the following conditions:

(i) That the petitioner will appear before the learned Trial Court as and when required.

(ii) That the petitioner will not leave India without prior permission of the Court.

(iii) That the petitioner will not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Investigating Officer or Court.

11. In view of the above, the petition is disposed of.

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

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

Cr. Revision No. 49 of 2010
Decided on: April 11, 2017

Indian Penal Code, 1860- Section 498-A- Complainant was married to the petitioner – petitioner and the other accused started maltreating the complainant- she was not provided with clothes and shoes and when she demanded them, petitioner and other accused misbehaved with her – she was told that she had not brought any dowry – she replied that her parents were poor and unable to give anything – petitioner and other accused started beating the complainant - the matter was reported to the police- petitioner and other accused were tried - petitioner was convicted by the Trial Court while other accused were acquitted- an appeal was preferred, which was dismissed – aggrieved from the judgment, present petition has been filed – held that the Court has very limited power to re-appreciate the evidence while exercising revisional jurisdiction- however, where there is failure of justice or misuse of judicial mechanism, it is the duty of the High Court to prevent miscarriage of justice – no specific allegation of cruelty was made against the petitioner- no specific allegation of demand of dowry was made against the petitioner – there was delay in reporting the matter to the police for which no explanation was provided – the

allegations were made against all members of the family and once the members of the family were acquitted, there was no occasion for convicting the petitioner on the same set of evidence – the Courts had wrongly convicted the accused – revision allowed and accused acquitted.

(Para- 10 to 27)

Cases referred:

State of Kerala versus Puttumana Illath Jathavedan Namboodiri (1999)2 Supreme Court Cases 452
Krishnan and another Versus Krishnaveni and another, (1997) 4 Supreme Court Case 241
Raj Rani v. State (Delhi Admn.), AIR 2000 SC 3559
Girdhar Shankar Tawade v. State of Maharashtra, AIR 2002 SC 2078
Manju Ram Kalita v. State of Assam, (2009) 13 SCC 330
Sarla Prabhakar Waghmare v. State of Maharashtra, 1990 CrLJ 407
Jiwan Lal V/s State of Himachal Pradesh, Latest HLJ 2012 (HP) Vol. 1. 231
Shobha Rani v. Madhukar Reddi, AIR 1988 SC 121
Samar Ghosh vs. Jaya Ghosh, (2007) 4 SCC 511
Manisha Tyagi vs. Deepak Kumar, 2010(1) Divorce & Matrimonial Cases 451
Ravi Kumar vs. Julumidevi, (2010) 4 SCC 476

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

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Instant criminal revision petition is directed against judgment dated 9.12.2009 passed by the learned Sessions Judge, Sirmaur at Nahan, in Cr. Appeal No. 08-Cr.A/10 of 2006, affirming judgment and order of conviction dated 16.2.2006/17.2.2006 passed by the Additional Chief Judicial Magistrate, Rajgarh, District Sirmaur, Himachal Pradesh in Cr. Case No. 22/2 of 2005, whereby the learned trial Court while holding petitioner guilty of having committed offence punishable under Section 498A IPC, convicted and sentenced him to undergo simple imprisonment, for a period of six months and to pay a fine of `3,000/- and in default of payment of fine, to further undergo simple imprisonment for two months.

2. Briefly stated the facts as emerge from the record are that the complainant, namely Promila Devi, who happened to be wife of the petitioner Ramesh Chand, lodged an FIR i.e. Ext. PW-1/A in the Police Station, stating therein that her marriage was solemnized with petitioner on 23.6.2004 according to Hindu rites and ceremonies and local customs. After two months of marriage, in the month of August, 2004, petitioner and other accused persons i.e. father-in-law, mother-in-law and sister-in-law of the complainant, started maltreating her. She further stated that she kept on tolerating the atrocities of the petitioner so that family does not break. She also complained that she was not provided with clothes and shoes to wear and whenever she asked her husband for such things, he did not behave properly. Complainant further reported to the police that petitioner repeatedly teased her that she had not brought any money at the time of her marriage and she replied that since her parents are poor, she was not able to give them anything. Complainant further reported that whenever, accused accompanied her to her parents' house in village Dhali Dibber, Tehsil Rajgarh, he did not stay with her, rather visited other ladies in the village. She further alleged that with the passage of time, petitioner started proclaiming that he would not keep her at his house. His beatings increased with the passage of time. Finally, after becoming totally helpless, she narrated entire facts to her parents and sister, who repeatedly counseled petitioner to behave properly with the complainant but to no avail. Complainant specifically complained that her mother-in-law, father-in-law and sister-in-law, also misbehaved with her and she was not provided meals etc. As per complainant, she

became pregnant but despite that petitioner kept on committing atrocities upon her and finally in August, 2004, she with her two months old pregnancy, was left in the house of her parents, by the mother-in-law, Smt. Kaulan Devi. Complainant while lodging report on 9.4.2015, also proclaimed that she was pregnant for the last nine months and during this period, nobody from her in-laws bothered to maintain her and as such sought action against her in-laws including her husband, in terms of Section 498A IPC.

3. Subsequently, on the basis of investigation carried out by the police, pursuant to registration of FIR, as referred above, and on the conclusion thereof, police presented challan in the competent court of law. Learned trial Court being satisfied that prima facie case exists against petitioner, proceeded to frame charge under Section 498A IPC against the petitioner as well as other family members of the petitioner, to which they pleaded not guilty and claimed trial. Accused also got recorded their statements under Section 313 CrPC, wherein they denied the case of the prosecution in toto. However, the fact remains that the learned trial Court below, on the basis of material adduced on record by the prosecution held petitioner guilty of having committed offence punishable under Section 498A IPC and acquitted other co-accused.

4. Being aggrieved with the aforesaid judgment passed by learned trial Court, petitioner preferred an appeal before the learned Sessions Judge, Sirmaur at Nahan, who also dismissed the same while upholding the judgment of conviction passed by learned trial Court. Hence, this petition by the petitioner praying therein for his acquittal after setting aside judgments of conviction passed by the learned Courts below.

5. Mr. Vinay Thakur, learned counsel representing the petitioner, vehemently argued that impugned judgments of conviction recorded by the Courts below are not sustainable as the same are not based upon correct appreciation of evidence adduced on record by the respective parties, hence deserve to be set aside. Mr. Thakur, while inviting attention of this Court to the impugned judgments passed by the learned Courts below, strenuously argued that bare perusal of same suggests that the courts below have not appreciated evidence in its right perspective, as a result of which, erroneous findings have come on record to the detriment of the petitioner, who is an innocent person. Mr. Vinay Thakur specifically invited attention of this Court to Section 498A IPC, to state that cruelty, if any, was required to be proved by the prosecution within the ambit of explanation as provided to Section 498A IPC, but in the instant case, bare perusal of evidence available on record nowhere suggests that prosecution was able to prove beyond reasonable doubt that cruelty, if any, was meted out to the complainant by the petitioner, as defined under Section 498A IPC, and, as such, no conviction, if any, could be recoded by the learned Courts below. Mr. Thakur, while advancing arguments fairly conceded that though defence was taken by the petitioner that complainant was not his legally wedded wife, but it stands duly proved on record that complainant is/was legally wedded wife of the petitioner and as such that aspect of the matter need not be looked into by this Court.

6. While concluding his arguments, Mr. Thakur made this Court to travel through the evidence adduced on record by the prosecution to demonstrate that there is no iota of evidence suggestive of the fact that complainant was maltreated and dowry, if any, was ever demanded, which could compel her to cause grave injury or danger to her life. Mr. Vinay Thakur, also contended that approach adopted by the learned Courts below also can not be accepted because, on the same set of evidence, other co-accused have been acquitted whereas, petitioner has been held guilty of having committed offence punishable under Section 498A IPC, as such judgments passed by learned Courts below deserve to be set aside. Mr. Vinay Thakur, also stated that both the learned Courts below failed to take note of the fact that as per own statement of the complainant, she had left house of petitioner in the month of August, 2004, whereas, FIR in question was lodged in the month of April, 2005 i.e. approximately after nine months of leaving the house by the complainant. Mr. Thakur, further contended that there is no explanation worth the name that why complainant kept mum for nearly nine months, if cruelty, if any, was meted to her by the petitioner and his family members.

7. Mr. Ramesh Thakur, Deputy Advocate General, supported the impugned judgments passed by the courts below. Mr. Ramesh Thakur vehemently argued that bare perusal of the impugned judgments of conviction recorded by courts below suggests that same are based upon correct appreciation of evidence adduced on record by the respective parties and there is no scope of interference by his Court, especially in view of the concurrent findings of fact and law recoded by the courts below. Mr. Thakur, with a view to refute aforesaid contentions having been made by the learned counsel representing the petitioner, also invited attention of this Court to the judgments passed by the courts below to demonstrate that each and every aspect of the matter has been dealt with meticulously by the Courts below while holding petitioner guilty of having committed offence punishable under Section 498-A IPC and as such there is no illegality or infirmity in the impugned judgments and same deserve to be upheld. While concluding his arguments,

8. Mr. Ramesh Thakur, Deputy Advocate General, reminded this Court of its limited jurisdiction under Section 397 as far as re-appreciation of evidence is concerned. He has placed reliance upon the judgment passed by Hon'ble Apex Court in case **State of Kerala versus 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."

9. I have heard learned counsel representing the parties and have carefully gone through the record made available.

10. True, it is that while exercising the power under Section 397 of Criminal Procedure Code, this Court has very limited power to re-appreciate the evidence available on record. But in the present case, where accused has been convicted and sentenced under Sections 498-A IPC, this Court solely with a view to ascertain that the judgments passed by both the Courts below are not perverse and the same are based upon correct appreciation of evidence available on record, undertook an exercise to critically examine the evidence available on record to reach fair and just decision in the case.

11. 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 or 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."

12. While hearing arguments having been made by the learned counsel representing the parties, this Court had occasion to peruse records of the courts below, perusal whereof certainly compels this Court to agree with the arguments having been made by the learned counsel representing the petitioner that there was no occasion for the Courts below to hold the petitioner guilty on the same set of evidence, on the basis of which other co-accused were acquitted, because, bare perusal of evidence led on record by the prosecution suggests that allegations of cruelty, if any were not specifically against petitioner and there was no specific allegation of cruelty as provided under Section 498 IPC against the petitioner, which could compel the Courts below to record conviction under Section 498-A IPC against petitioner. Since, there is no dispute, if any, with regard to the factum of marriage inter se complainant and petitioner, this Court, need not look into that aspect, as agreed by the learned counsel representing the petitioner also. This Court, solely with a view to find answer to the arguments having been made by the learned counsel representing the petitioner, carefully perused Section 498-A IPC, perusal whereof certainly suggests that 'cruelty', if any, is to be construed strictly in terms of explanation given to aforesaid Section. At this stage, it may be profitable to reproduce Section 498A IPC 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 purposes 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.]."

13. Perusal of aforesaid provision of law, clearly suggest that if husband or relatives of the husband of woman subject(s) such woman to cruelty, would be liable to be punished with imprisonment for a term, which may exceed to 3 years. For the purpose of this Section, 'cruelty' has been specifically defined. Hence, Courts below, while adjudicating whether any cruelty is/was metered out to the complainant, were bound to ascertain the question with regard to "cruelty", if any, within parameters as provided in the definition of 'cruelty' under Section 498-A IPC. This Court, after carefully examining the evidence led on record by prosecution, sees substantial force in the arguments having been made by the learned counsel representing the petitioner that the prosecution was unable to prove on record that complainant was meted cruelty as defined under Section 498A IPC and as such no conviction, if any, could be recorded against the petitioner under Section 498A IPC. This Court, after carefully examining evidence is also of the view that complainant made general allegations and there is no specific allegation, if any, of demand of dowry either by the petitioner or by his family members. There is nothing in the statement of the complainant suggestive of the fact that demand was ever made by petitioner or his family members, directly or indirectly, from the complainant or from her parents, rather, complainant herself stated that when she asked for maintenance from her husband, petitioner told her that she had not brought anything from her house. Complainant has also stated that since her

parents were poor, she had not brought anything. But definitely, she stated nothing with regard to demand of dowry made by the petitioner or family members of the accused. Similarly, there is nothing in the statement of the complainant as well as other material prosecution witnesses suggestive of the fact that conduct, if any, of the petitioner caused stress, if any, to the complainant, which could drive the complainant to either to commit suicide or cause grave injury.

14. Interestingly, apart from above, there is no explanation worth the name on record that what prevented the complainant from making complaint either to the police or Gram Panchayat from August, 2004 to 9.4.2005, which inaction on the part of the complainant certainly compels this Court to draw an adverse inference against the complainant, who, admittedly, kept mum for approximately for nine months. If she was actually maltreated or meted cruelty, strictly in terms of explanations (a) and (b) to Section 498A IPC, she would have lodged complaint with the Gram Panchayat or to the police immediately in the month of August, 2004 but, neither complainant nor her family members with whom she admittedly started living in August, 2004, bothered to lodge complaint against petitioner as well as his family members.

15. In the instant case, this Court was unable to lay its hand on any evidence, be it ocular or documentary, suggestive of the fact that petitioner had ever proclaimed publically or teased the complainant that she was not his legally wedded wife and similarly, this Court was unable to see any evidence on record that the petitioner ever proclaimed publically that he was not the father of the child born to the complainant. Careful perusal of complaint submitted by the complainant to the police praying therein for initiating action against petitioner and his family members, under Section 498-A IPC, also nowhere discloses aforesaid allegations, as such, it is not understood how the first appellate Court came to the conclusion that denial of marriage as well as pregnancy of complainant amounts to 'cruelty' punishable under Section 498A IPC. At the cost of repetition, it may be stated that there is/was no allegation as such, made by the complainant rather, allegations, if any, were of misbehaviour by the petitioner and his family members. Though complainant made an attempt to state before police that she was given repeated beatings but, unfortunately, there is no evidence available on record to support the contention, if any, with regard to beatings.

16. This Court, after carefully examining the record is of the view that the petitioner solely with a view to defend himself in the proceedings under Section 498A IPC, initiated at the behest of the complainant, took the defence, whereby he claimed that complainant was not his legally wedded wife but, certainly, aforesaid defence taken by the petitioner before the court below in the proceedings under Section 498A IPC nowhere amounts to 'cruelty', as defined under Section 498A IPC. Had the complainant alleged in the complaint and stated before the Court that petitioner proclaimed publically that the complainant was not his legally wedded wife and had the petitioner disputed paternity of the child born to the complainant, Courts below would have been right in concluding that complainant successfully proved 'cruelty' in terms of Section 498-A IPC.

17. Further, there are no specific allegations against petitioner and all the allegations, if any, are/were against the whole of the family, that too general and vague. Hence, once the courts below acquitted other accused on same set of evidence, conviction of petitioner is also not sustainable.

18. Their lordships of Supreme Court in **Raj Rani** v. **State (Delhi Admn.)** reported in AIR 2000 SC 3559 have held that it is not enough that the deceased felt those words hurting. It must be subjected to judicial scrutiny and the Court must be in a position to hold that those words were sufficiently hurting enough as to amount to 'cruelty' falling within the pararmeters fixed in S. 498-A of the Indian Penal Code. Their lordships have held as under:

> "3. Both sides submitted that the only reliable evidence which can be looked into is the suicide note left behind by Veena which should have been scribed by her on 17-4-1984, the date of the commission of suicide.

4. We have gone through the entire writings contained in the suicide note. It makes a serious castigation against her husband for being an addict to narcotic drugs. Then she made a general allegation against her mother-in-law and in a lesser degree towards the appellant. But unfortunately she did not advert to any concrete instance which can be termed as cruelty as defined in Section 498A of the Indian Penal Code. The utterances said to have been made by the appellant towards the deceased were to her chagrin and she had taken them very seriously in the suicide note she described such utterances as not worthy of reproduction.

5. It is not enough that the deceased felt those words hurting, it must be subjected to judicial scrutiny and the Court must be in a position to hold that those words were sufficiently hurting enough as to amount to "cruelty" falling within the parameters fixed in Section 498A of the Indian Penal Code. The area remains grey and vague. Not a single word said to have been spoken to by the appellant as against the deceased had been put on record by the deceased in the suicide note in spite of the fact that the said note is a very lengthy letter running into several paragraphs. The tenor and language of the suicide note would reflect that she was not an illiterate lady. As the Court is rendered helpless to judge whether the words which deceased heard from the appellant would amount to cruelty, it is far from possibility for the Criminal Court to hold that she is guilty of the offence of cruelty as envisaged in the section. It is also to be pointed out that the deceased did not mention a single deed which the appellant would have done against her. All that is said against the appellant were that she spoke same thing which she took objectionable."

19. Their lordships of Hon'ble Apex Court in **Girdhar Shankar Tawade** v. **State of Maharashtra** reported in AIR 2002 SC 2078, have held that in the absence of cogent evidence to bring home charge under S. 498-A, accused was entitled to be acquitted. Their lordships have held as under:

"16. We have already noted Section 498-A herein before in this judgment and as such we need not delve upon the same in greater detail herein excepting recording that the same stands attributed only in the event of proof of cruelty by the husband or the relatives of the husband of the woman. Admittedly, the finding of the trial Court as regards the death negated suicide with a positive finding of accidental death. If suicide is rule out then in that event applicability of Section 498-A can be had only in terms of explanation (b) thereto which in no uncertain terms records harassment of the woman and the Statute itself thereafter clarifies it to the effect that it is not every such harassment but only in the event of such a harassment being with a view to coerce her to 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- there is total absence of any of the requirements of the Statute in terms of Section 498-A. The three letters said to have been written and as noticed earlier cannot possibly lend any credence to the requirement of the Statute or even a simple demand for dowry."

20. Their lordships of Hon'ble Apex Court in **Manju Ram Kalita** v. **State of Assam** reported in (2009) 13 SCC 330 have held that cruelty for purpose of S. 498-A is to be established in that context as it may be different from other statutory provisions. It is to be determined/ inferred by considering conduct of the man, weighing gravity or seriousness of his acts and to find out as to whether it is likely to drive the woman to commit suicide etc. Their lordships have held as under:

"12 Issue no. 2 relates to the applicability of 498A I.P.C. As it has been alleged by the complainant that she had been given physical and mental torture by the appellant and it was not possible for her to stay with the appellant after

1993 though she was having seven months' pregnancy at that time. She gave birth to a male child in the hospital and the appellant did not even come to see the child. The question would arise as to whether in the facts and circumstances where the complainant had left the matrimonial home and started living with her father in 1993, could a case be registered against the appellant under Section 498A I.P.C. in 1997?

13. The provisions of Section 498A IPC read 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 purposes of this section `cruelty' means -

> (a) any welful 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;
>
> (b) harassment of the woman where such harassment is with a view to coercing her to 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."

Cruelty has been defined by the explanation added to the Section itself. The basic ingredients of Section 498A I.P.C. are cruelty and harassment.

14. In the instant case, as the allegation of demand of dowry is not there, we are not concerned with clause (b) of the explanation. The elements of cruelty so far as clause (a) is concerned, have been classified as follows :

> (i) any `wilful' conduct which is of such a nature as is likely to drive the woman to commit suicide; or
>
> (ii) any `wilful' conduct which is likely to cause grave injury to the woman; or
>
> (iii) any `wilful' act which is likely to cause danger to life, limb or health, whether physical or mental of the woman.

15 In S. Hanumantha Rao v. S. Ramani, AIR 1999 SC 1318, this Court considered the meaning of cruelty in the context of the provisions under Section 13 of the Hindu Marriage Act, 1955 and observed that :

> "mental cruelty broadly means, when either party causes mental pain, agony or suffering of such a magnitude that it severs the bond between the wife and husband and as a result of which it becomes impossible for the party who has suffered to live with the other party. In other words, the party who has committed wrong is not expected to live with the other party."

17. In V. Bhagat v. Mrs. D. Bhagat, AIR 1994 SC 710, this court, while dealing with the issue of cruelty in the context of Section 13 of the Hindu Marriage Act, observed as under :

> "17. ....It is not necessary to prove that the mental cruelty is such as to cause injury to the health of the petitioner. While arriving at such conclusion, regard must be had to the social status, educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all

other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively. What is cruelty in one case may not amount to cruelty in another case. It is a matter to be determined in each case having regard to the facts and circumstances of that case. If it is a case of accusations and allegations, regard must also be had to the context in which they were made...........

The context and the set up in which the word `cruelty' has been used in the section seems to us, that intention is not necessary element in cruelty. That word has to be understood in the ordinary sense of the term in matrimonial affairs. If the intention to harm, harass or hurt could be inferred by the nature of the conduct or brutal act complained of, cruelty could be easily established. But the absence of intention should not make any difference in the case, if by ordinary sense in human affairs, the act complained of could otherwise be regarded as cruelty."

18. In Mohd. Hoshan v. State of A.P.; (2002) 7 SCC 414, this Court while dealing with the similar issue held that mental or physical torture should be "continuously" practiced by the accused on the wife. The Court further observed as under :

"Whether one spouse has been guilty of cruelty to the other is essentially a question of fact. The impart of complaints, accusations or taunts on a person amounting to cruelty depends on various factors like the sensitivity of the individual victim concerned, the social background, the environment, education etc. Further, mental cruelty varies from person to person depending on the intensity of sensitivity and the degree of courage or endurance to withstand such mental cruelty. In other words, each case has to be decided on its own facts to decide whether the mental cruelty was established or not."

21. Single Judge of the Bombay High Court in **Sarla Prabhakar Waghmare** v. **State of Maharashtra** reported in 1990 CrLJ 407 has held that it is not every harassment or every type of cruelty that would attract S. 498-A. It must be established that beating and harassment was with a view to force wife to commit suicide or to fulfil illegal demands of husband and in-laws. The Single Judge has held as under:

“3. After incident of burning, the applicant had gone to stay with her parents at Nandura and from there she filed the proceedings under Section 125, Criminal Procedure Code, at Malkapur. The proceedings were withdrawn by her in view of the assurance that was given by her husband that he would take her and keep her with him. It is difficult to appreciate this conduct on the part of the applicant. It is alleged that thereafter again she was subjected to harassment and beating by the non-applicants. It is not every harassment or every type of cruelty that would attract Section 498-A, which reads as under, makes it absolutely clear "498-A. 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, subject 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 purposes 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."

After going through her evidence it does not appear that she has conclusively established that the beating and harassment was with a view to force her to commit suicide or to fulfil the illegal demands of the non-applicants. The trial Court has discussed this aspect at some length and has recorded a finding that offence under Section 498-A, Indian Penal Code, is not established. I do not see any reason to interfere with the same in my revisional jurisdiction at the instance of the complainant, particularly when the State has not challenged the impugned order."

22. A single judge of this Court in **Jiwan Lal** V/s **State of Himachal Pradesh**, reported in Latest HLJ 2012 (HP) Vol. 1. 231 has held that to constitute 'cruelty', under clause (b), there has to be harassment to coerce her or any person related to her to meet any unlawful demand and case has to be made out that there is a failure to meet such demand. The Single Judge has held as under:

"22. "Cruelty" has not been defined in the Indian Penal Code but the above explanations added to the Section spells out the ingredients of the offence of "cruelty" which are cruelty and harassment. The elements of cruelty so far as clause (a) is concerned can be classified as follows:

(i) any 'willful' misconduct which is of such a nature as is likely to drive the woman to commit suicide; or

(ii) any 'willful' conduct which is likely to cause grave injury to the woman; or

(iii) any 'willful' act which islikely to cause danger to life, limb or health, whether physical or mental of the woman.

23. In order to constitute "cruelty" under clause (b), there has to be a harassment of the woman with a view to coerce her or any person related to her to meet any unlawful demand for any property or valuable security or a case is to be made out to the effect that there is a failure by her or any person related to her to meet such demand.

24. In Smt. Raj Rani v. State (Delhi Administration); AIR 2000 SC 3559 the apex Court held that while considering the case of cruelty in the context to the provisions of Section 498-A IPC, the court must examine that allegations/accusations must be of a very grave nature and should be proved beyond reasonable doubt.

25. Further, in another case Girdhar Shankar Tawade v. State of Maharashtra, AIR 2002 SC 2078, the Supreme Court held that "cruelty" has to be understood having a specific statutory meaning provided in Section 498-A I.P.C. and there should be a case of continuous state of affairs of torture by one to another.

26. Taking note of the above judgments amongst others Supreme Court in Manju Ram Kalita v. State of Assam 2009 (2) S.L.J. (S.C.) 1036 observed that "cruelty" for the purpose of Section 498-A Indian Penal Code is to be established in the context of S. 498-A IPC as it may be different from other statutory provisions. It is to be determined/inferred by considering the conduct of the man, weighing the gravity or seriousness of his acts and to find out as to whether it is likely to drive the woman to commit suicide etc. It is to be established that the woman has been subjected to cruelty continuously/persistently or at least in close proximity of time of lodging the complaint. Petty quarrels cannot be termed as 'cruelty' to attract the provisions of Section 498-A IPC. Causing mental torture to the extent that it becomes unbearable may be termed as "cruelty"."

23. After bestowing my thoughtful consideration to the pleadings as well as evidence available on record, I have no hesitation to conclude that both the learned Courts below have erred in holding petitioner guilty of having committed offence punishable under Section 498A IPC, especially when there is/was no evidence adduced on record by the prosecution specifically proving cruelty in terms of Section 498A IPC.

24. Their Lordships of the Hon'ble Supreme Court in case **Shobha Rani v. Madhukar Reddi** reported in **AIR 1988 SC 121** have explained the term "cruelty" as under:

> "4. Section 13(1)(i-a) uses the words "treated the petitioner with cruelty". The word "cruelty" has not been defined. Indeed it could not have been defined. It has been used in elation to human conduct or human behaviour. It is the conduct in relation to or in respect of matrimonial duties and obligations. It is a course of conduct of one which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. If it is physical the court will have no problem to determine it. It is a question of fact and degree. If it is mental the problem presents difficulty. First, the enquiry must begin as to the nature of the cruel treatment. Second, the impact of such treatment in the mind of the spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other. Ultimately, it is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. There may, however, be cases where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or the injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted.
>
> 5. It will be necessary to bear in mind that there has been marked change in the life around us. In matrimonial duties and responsibilities in particular, we find a sea change. They are of varying degrees from house to house or person to person. Therefore, when a spouse makes complaint about the treatment of cruelty by the partner in life or relations, the Court should not search for standard in life. A set of facts stigmatized as cruelty in one case may not be so in another case. The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions. It may also depend upon their culture and human values to which they attach importance. We, the judges and lawyers, therefore, should not import our own notions of life. We may not go in parallel with them. There may be a generation gap between us and the parties. It would be better if we keep aside our customs and manners. It would be also better if we less depend upon precedents. Because as Lord Denning said in Sheldon v. Sheldon, [1966] 2 All E.R. 257 (259) "the categories of cruelty are not closed." Each case may be different. We deal with the conduct of human beings who are not generally similar. Among the human beings there is no limit to the kind of conduct which may constitute cruelty. New type of cruelty may crop up in any case depending upon the human behaviour, capacity or incapability to tolerate the conduct complained of. Such is the wonderful/realm of cruelty."

25. Their Lordships of the Hon'ble Supreme Court in **Samar Ghosh vs. Jaya Ghosh** reported in **(2007) 4 SCC 511**, have enumerated some instances of human behaviour, which may be important in dealing with the cases of mental cruelty, as under:

> "98. On proper analysis and scrutiny of the judgments of this Court and other Courts, we have come to the definite conclusion that there cannot be any comprehensive definition of the concept of 'mental cruelty' within which all kinds of cases of mental cruelty can be covered. No court in our considered view should even attempt to give a comprehensive definition of mental cruelty.

99. Human mind is extremely complex and human behaviour is equally complicated. Similarly human ingenuity has no bound, therefore, to assimilate the entire human behaviour in one definition is almost impossible. What is cruelty in one case may not amount to cruelty in other case. The concept of cruelty differs from person to person depending upon his upbringing, level of sensitivity, educational, family and cultural background, financial position, social status, customs, traditions, religious beliefs, human values and their value system.

100. Apart from this, the concept of mental cruelty cannot remain static; it is bound to change with the passage of time, impact of modern culture through print and electronic media and value system etc. etc. What may be mental cruelty now may not remain a mental cruelty after a passage of time or vice versa. There can never be any strait-jacket formula or fixed parameters for determining mental cruelty in matrimonial matters. The prudent and appropriate way to adjudicate the case would be to evaluate it on its peculiar facts and circumstances while taking aforementioned factors in consideration.

101. No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behaviour which may be relevant in dealing with the cases of 'mental cruelty'. The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive.

(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.

(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.

(iii) Mere coldness or lack of affection cannot amount to cruelty, frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.

(iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.

(vi) Sustained unjustifiable conduct and behaviour of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty.

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day to day life would not be adequate for grant of divorce on the ground of mental cruelty.

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill-conduct must

be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) If a husband submits himself for an operation of sterilization without medical reasons and without the consent or knowledge of his wife and similarly if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty.

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty.

26. Their Lordships of the Hon'ble Supreme Court in **Manisha Tyagi vs. Deepak Kumar** reported in **2010(1) Divorce & Matrimonial Cases 451**, have explained the term 'cruelty' as under:

"24. This is no longer the required standard. Now it would be sufficient to show that the conduct of one of the spouses is so abnormal and below the accepted norm that the other spouse could not reasonable be expected to put up with it. The conduct is no longer required to be so atrociously abominable which would cause a reasonable apprehension that would be harmful or injurious to continue the cohabitation with the other spouse. Therefore, to establish cruelty it is not necessary that physical violence should be used. However, continued ill-treatment cessation of marital intercourse, studied neglect, indifference of one spouse to the other may lead to an inference of cruelty. However, in this case even with aforesaid standard both the Trial Court and the Appellate Court had accepted that the conduct of the wife did not amount to cruelty of such a nature to enable the husband to obtain a decree of divorce."

27. Their Lordships of the Hon'ble Supreme Court in **Ravi Kumar vs. Julumidevi** reported in (2010) 4 SCC 476, have explained the term 'cruelty' as under:

"19. It may be true that there is no definition of cruelty under the said Act. Actually such a definition is not possible. In matrimonial relationship, cruelty would obviously mean absence of mutual respect and understanding between the spouses which embitters the relationship and often leads to various outbursts of behaviour which can be termed as cruelty. Sometime cruelty in a matrimonial relationship may take the form of violence, sometime it may take a different form. At times, it ma be just an attitude or an approach. Silence in some situations may amount to cruelty.

20. Therefore, cruelty in matrimonial behaviour defies any definition and its categories can never be closed. Whether the husband is cruel to his wife or the wife is cruel to her husband has to be ascertained and judged by taking into account the entire facts and circumstances of the given case and not by any predetermined rigid formula. Cruelty in matrimonial case can be of infinite variety – it may be subtle or even brutal and may be by gestures and word. That

possible explains why Lord Denning in Sheldon v. Sheldon held that categories of cruelty in matrimonial case are never closed.

21. This Court is reminded of what was said by Lord Reid in Gollins v. Gollins about judging cruelty in matrimonial cases. The pertinent observations are (AC p.660)

> ".. In matrimonial cases we are not concerned with the reasonable man as we are in cases of negligence. We are dealing with this man and this woman and the fewer a priori assumptions we make about them the better. In cruelty cases one can hardly ever even start with a presumption that the parties are reasonable people, because it is hard to imagine any cruelty case ever arising if both the spouses think and behave as reasonable people."

22. " About the changing perception of cruelty in matrimonial cases, this Court observed in Shobha Rani v. Madhukar Reddi at AIR p. 123, para 5 of the report: (SCC p.108, para 5)

> "5. It will be necessary to bear in mind that there has been (a) marked change in the life around us. In matrimonial duties and responsibilities in particular, we find a sea change. They are of varying degrees from house to house or person to person. Therefore, when a spouse makes complaint about the treatment of cruelty by the partner in life or relations, the court should not search for standard in life. A set of facts stigmatized as cruelty in one case may not be so in another case. The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions. It may also depend upon their culture and human values to which they attach importance. We, the Judges and lawyers, therefore, should not import our own notions of life. We may not go in parallel with them. There may be a generation gap between us and the parties."

28. Consequently, in view of the aforesaid discussion, the impugned judgments of conviction recorded by the Courts below are set aside. Petitioner is acquitted of offence under Section 498A IPC. Bail bonds, if any, furnished by the petitioner are discharged. Fine amount, if any, deposited by the petitioner is also ordered to be refunded to him. Pending applications, if any, are disposed of.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Manish Kumar Aggarwal …….Petitioner.

Versus

Union of India & ors. …….Respondents.

CWP No. 9646 of 2013.
Reserved on: 9.3.2017.
Decided on: 12.4.2017.

Constitution of India, 1950- Article 226- Petitioner has purchased the land from the previous owners who were inducted as non-occupancy tenants and had become the owners on the commencement of H.P. Tenancy and Land Reforms Act- the petitioner constructed a site office and a store after obtaining permission from Municipal Corporation, Nahan- the respondent directed the Jawans to obstruct the passage leading to the land in dispute – demarcation was conducted and the path was found to be owned by M.C., Nahan- army jawans trespassed into the

suit land and demolished the site office, store and retaining wall – FIR was registered – the petitioner restarted the construction but it was also demolished - a civil suit was filed, which was decreed- proceedings for eviction of the petitioner were initiated under Public Premises (Eviction of Unauthorized Occupants) Act, 1971 and an order of eviction was passed – an appeal was filed, which was dismissed- aggrieved from the order, present writ petition has been filed- held that the land was in the ownership of the State Government - proprietary rights could not have been conferred upon the tenants – the plea of the petitioner that he had acquired ownership from the previous owner is not tenable- the petitioner is a trespasser – civil court has already held the Government to be the owner and liberty was granted to initiate proceedings for eviction of the tenants in accordance with law – the appeal was dismissed – hence, the proceedings for eviction under the Act are maintainable – the orders passed by the estate officer and appellate authority are legal – writ petition dismissed. (Para-8 to 18)

Cases referred:

State of Rajasthan vs. Padmavati Devi & ors., 1995 Supp. (2) SCC 290
Government of Andhra Pradesh vs. Thummala Krishna Rao and another, (1982) 2 SCC 134
Metro Studio vs. Canara Bank, 2003(2) RCR 664

For the petitioner: Mr. Bhupinder Gupta, Sr. Advocate with Mr. Ajeet Jaswal, Advocate.
For the respondents: Mr. Ashok Sharma, ASGI with Mr. Ajay Chauhan, Advocate for respondents No. 1 to 3.

The following judgment of the Court was delivered:

Justice Dharam Chand Chaudhary, J.

The subject matter of dispute in this Writ Petition is the land entered in Khewat/Khatauni No. 122 min/174 min, 176 min and 177 min, bearing Kh. Nos. 1241, 1236/4, 1237/1, 1242, 1240/1 and 1243 (6 plots), measuring 0-39-91 hectares, situated at revenue estate Shamsherpur Chhawani (Chiranwali), Nahan, District Sirmaur. The petitioner claims himself to be the owner-in-possession of the land in dispute as according to him, he has purchased the same from its previous owners who were inducted as non-occupancy tenants by the landlords/Government and on conferment of proprietary rights under Section 104 of the H.P. Tenancy and Land Reforms Act, 1972, had become owners thereof. The petitioner, after having obtained the permission from Municipal Council, Nahan for sub division of plots in November, 2007 started development of the land in dispute and constructed a site office as well as store thereon. Besides a retaining wall for levelling the plots was also constructed whereas uneven surface of the land levelled by deploying machines and manual labour after spending huge amount. The respondents, however, with malafide intention to grab the land in dispute directed the Jawans to obstruct the passage leading to the land in dispute who dug pits in the passage with a view to obstruct egress and ingress of the petitioner, the labour and machines etc. to the land in dispute. The petitioner requested them not to violate the law and stop interference in the municipal road but of no avail and as a result thereof, he approached the District Collector, Sirmaur who got the demarcation of the land conducted through Asstt. Collector (Ist Grade), Nahan. On demarcation, the path in question was found to be that of Municipal Council, Nahan. However, to the utter surprise of the petitioner, the Army Jawans trespassed into the suit land and demolished the site office and also the store as well as retaining wall. Besides, the machinery deployed there, was also damaged. This has led in registration of FIR No. 182 on 15.7.2008 under Sections 447, 448, 147, 149 & 427 of the Indian Penal Code against respondent No. 2. After registration of the FIR, the petitioner remained under the impression that better sense would prevail and the respondents may not cause interference in the land in dispute and as such again started the construction work but of no avail as the Army jawans again trespassed into the land in question and pulled down the shed which was reconstructed by the petitioner

during the night intervening 23rd and 24th July, 2008. Again, FIR No. 192 dated 24.7.2008 under Sections 447, 448, 147, 148, 149, 427 and 506 of the Indian Penal Code was registered against the said respondent.

2. Not only this, but the petitioner has filed Civil Suit No. 77/1 of 2008 for the decree of perpetual prohibitory injunction restraining the defendants from interfering or trespassing into the land in dispute in any manner whatsoever. The suit was contested by the first and second respondents who were arrayed as defendants. Learned Civil Judge (Jr. Divn.), Nahan, District Sirmaur vide judgment and decree dated 29.6.2011, Annexure P-1, while decreeing the suit partly, has restrained the defendants from obstructing the petitioner from use of a passage to have egress and ingress to the land in dispute qua which it is the respondents who were declared to be the owners, however, not in possession. Since it is the petitioner who was found to be in possession of the land in dispute, therefore, respondents were directed not to evict him from the suit land while resorting to extra judicial method and rather it was left open to them to evict the petitioner therefrom in accordance with law.

3. The judgment and decree Annexure P-1 was further assailed by the petitioner in appeal registered as civil appeal No. 66-CA/13 of 2011 in the Court of learned District Judge, Sirmaur, District at Nahan, however, unsuccessfully because the appeal was dismissed by learned appellate Court vide judgment and decree dated 4.6.2012, Annexure P-2. The judgment and decree, Annexure P-2 was, however, not assailed any further by the petitioner. On the other hand, since it was left open to the respondents to evict the petitioner from the land in dispute in accordance with law, therefore, the second respondent in the capacity of Estate Officer had served the petitioner with show-cause-notice, Annexure P-3 and thereby he was called upon to show cause why an order of his eviction from the land in dispute is not passed against him. Reply to the show-cause-notice is Annexure P-4. The second respondent after hearing the petitioner and going through the reply Annexure P-4 as well as judgment and decree passed by the Civil Court, has held that the petitioner is in unauthorized occupation of the land in dispute and as such ordered him to vacate the same on or before 20.7.2013, vide order Annexure P-5. The order Annexure P-5 was assailed before the appellate Authority i.e. learned Addl. District Judge, Sirmaur District at Nahan in an appeal under Section 9 of the Public Premises (Eviction of Unauthorized Occupants) Act, 1971 (hereinafter referred to as the Public Premises Act). The memorandum of appeal is Annexure P-6. Learned appellate Authority, however, has dismissed the appeal vide judgment dated 25.11.2013 Annexure P-7, while arriving at a conclusion that the Civil Court has already declared Union of India as owner of the land in dispute.

4. It is in this backdrop, this writ petition came to be filed in this Court with the following prayers:

> "(a) Quashing Annexure P-5 and Annexure P-7 being illegal, arbitrary, unconstitutional and without jurisdiction.
>
> (b) Directing the respondents to produce the entire record.
>
> (c) Awarding cost in favour of the petitioner against the respondents of the proceedings throughout.
>
> (d) Any other such other order, writ or direction that may be found appropriate in the facts and circumstances of the case in favour of the petitioner."

5. Order Annexure P-5 passed by respondent No. 2 in the capacity of Estate Officer and Annexure P-7 by learned Addl. District Judge, Sirmaur District at Nahan have been assailed on the grounds, inter alia, that the proceedings for eviction initiated under the provisions of the Act are without any jurisdiction. Otherwise also, the proceedings initiated against the petitioner by the respondents could have not been decided summarily, particularly when neither the ownership nor title or possession of the respondents in the land in dispute was established. The notice Annexure P-3 was absolutely fallacious as the land in dispute was not public premises and rather purchased by the petitioner from its previous owners and as such the proceedings under

Public Premises Act could not have been initiated against him. Otherwise also, highly disputed questions of law and facts were involved, therefore, the respondents allegedly acted without jurisdiction while holding that the petitioner was in unauthorized occupation thereof. The judgments Annexure P-1 and P-2 passed by learned Civil Court had no bearing on the merits of the proceedings initiated under the Public Premises Act by respondent No. 2 against the petitioner.

6. The State of Himachal Pradesh was not arrayed as party in the suit, therefore, the findings recorded by the Civil Court had no bearing on the merits of the present proceedings, which according to the petitioner were required to be determined and disposed of independently. The petitioner who had acquired right, title and interest in the property in dispute, the same could have not been taken away mechanically and in a summary manner.

7. Respondents No. 1 to 3, when put to notice had contested the petitioner's case as set out in the Writ Petition. According to the respondents, since it is the Union of India, the owner of land in dispute, therefore, respondent No. 2 with the assistance of Army jawans had rightly stopped the construction work which was in progress thereon. Since the Civil Court had reserved liberty in favour of the competent authority to initiate eviction proceedings against the petitioner in accordance with law, therefore, the second respondent having been declared the Estate Officer under the Public Premises Act vide notification dated 21.7.1978 Annexure R-1 has, rightly served the petitioner with show-cause-notice and after taking on record his version declared him in unauthorized occupation of the land in dispute. He, as such, was rightly ordered to be evicted therefrom vide order Annexure P-5. The appeal, he preferred before learned appellate Authority, was also dismissed. As per further stand of the respondents, since the Civil Court had declared the Union of India as owner of the suit land, therefore, there was no occasion to respondent No. 2 to have again entered upon any such question qua the title of the land in dispute and as such it is denied that the eviction order has been passed summarily against the petitioner. Rejoinder to the petition has also been filed.

8. The points, which we have culled out from the rival submissions and need consideration are that the land in dispute is public premises within the meaning of provisions contained under the Public Premises Act or not and that the petitioner is not a trespasser and rather the true owner thereof. Then comes the question of competency of the second respondent to act as an Estate Officer under the Public Premises Act and his competency to initiate eviction proceedings with respect to the land in dispute.

9. In order to decide these points, it is first to be seen as to what constitutes *'public premises'* within the meaning of the Public Premises Act. For the sake of convenience, we reproduce here the definition of *'public premises'* as find mention under Section 2(e) of the Public Premises Act. The same reads as follows:

> "2 [(e) "***public premises***" means— (1) any premises belonging to, or taken on lease or requisitioned by, or on behalf of the Central Government, and includes any such premises which have been placed by that Government, whether before or after the commencement of the Public Premises (Eviction of Unauthorised Occupants) Amendment Act, 1980 (61 of 1980) under the control of the Secretariat of either House of Parliament for providing residential accommodation to any member of the staff of that Secretariat.
>
> ....
> ...."

10. Now, what the word "*premises*" under the Act means, we are reproducing here the provisions contained under Section 2(c) of the Public Premises Act as follows:

> "2(c) "***premises***" means any land or any building or part of a building and includes,— (i) the garden, grounds and outhouses, if any, appertaining to such building or part of a building, and (ii) any fittings affixed to such building or part of a building for the more beneficial enjoyment thereof."

11. Therefore, *'public premises'* includes the building/structure and also includes land belonging to Central Government. In the case in hand, the subject matter of dispute is land. While the petitioner claims the land in dispute belonging to him, at the same time, it is the case of the respondents that it is the Nahan Military Station owner thereof. The petitioner claims his title over the land through the previous owners, who according to him were inducted as non-occupancy tenants by the State Government thereon and on conferment of proprietary rights under the provisions of H.P. Tenancy and Land Reforms Act, 1972 have acquired title therein. He has acquired the land by way of sale deed from its previous owners. Learned Civil Judge (Jr. Divn.), Nahan, while deciding Civil Suit No. 77-1 of 2008 and taking note of the entries in the Jamabandi for the year 1951-52, no doubt has held that it is the State Government which was the owner of the land in question whereas the same was in the possession of the Cantonment (Mehakama Cantonment) and one Najir Khan was recorded as tenant under the Cantonment. The entries qua the tenancy of Najir Khan were carried forward in the Jamabandi for the year 1959-60. This land was shown in the ownership of the State Government, however, in possession of the Municipal Committee and Najir Khan was shown as tenant under the Municipal Committee. Then again in the Jamabandi for the year 1963-64, this land was recorded in the ownership of the State of Himachal Pradesh and shown in possession of Cantonment and in the cultivative possession of said Najir Khan. The same entries were repeated in the Jamabandi for the year 1968-69 and also in 1973-74. On coming into force the H.P. Tenancy and Land Reforms Act, 1972, the proprietary rights over the land in dispute came to be conferred upon Sher Khan etc. who had succeeded Najir Khan aforesaid. However, by way of 1987 amendment, the following proviso was added to Section 104 of the H.P. Tenancy and Land Reforms Act, 1972:

> "Provided that nothing contained in this Section shall apply to such land which is either owned by or is vested in Govt. under any law, whether before or after the commencement of this Act and is leased out to any person."

12. Therefore, when the land continuously remained recorded in the ownership of the State Government, the proprietary rights in respect of the same could have not been conferred upon Sher Khan etc. When the proprietary rights could have not been conferred upon the persons, through whom the petitioner is claiming his right, title and interest in the land in dispute, his claim that he has acquired the same through registered sale deed is highly untenable. The petitioner, therefore, cannot be said to have any right, title or interest in the land in dispute. The entries qua the possession thereof being shown in revenue record in favour of second respondent whereas in the ownership of the State Government, the same for all intents and purposes, is public premises in terms of provisions contained under the Act.

13. Now, if coming to the second limb of arguments addressed on behalf of the petitioner, it would not be improper for us to hold that the petitioner is a trespasser into the land in dispute. As per the **Black's Law Dictionary (10th Edition),** a trespasser is a person who wrongfully enter on the property of others. Since the persons through whom the petitioner has claimed right in the land in dispute were not legally entitled to conferment of proprietary rights under the provisions of H.P. Tenancy and Land Reforms Act, 1972 upon them, therefore, they could have not been termed as owners thereof. They were also not competent to sell the land in question to the petitioner.

14. Interestingly enough, amendment to Section 104 of the H.P. Tenancy and Land Reforms Act, 1972, as noticed supra, is not prospective but retrospective in nature, as has been discussed in detail by learned Civil Judge (Jr. Divn.), Nahan in judgment Annexure P-1. As a matter of fact, this judgment considers, discuss and decide the status of the land in dispute, the question of its ownership and the status of the petitioner as a trespasser being in unauthorized possession thereof, with the help of oral as well as documentary evidence. The Civil Court, as such, has dealt with all these questions after holding full trial between the parties on both sides and affording them due opportunity of being heard. The judgment Annexure P-1 even has been upheld in appeal by learned District Judge Sirmaur District at Nahan vide judgment dated 4.6.2012 Annexure P-2. The petitioner has not opted for challenging the judgment and decree

passed by learned District Judge any further by way of filing second appeal in this Court meaning thereby that the findings recorded by the Civil Court qua the State Government was owner of the land in dispute whereas the second respondent Shamsherpur Chhawani, Nahan in possession thereof have attained finality. True it is that actual possession in view of the judgment and decree passed by the Civil Court was that of the petitioner and it is for this reason the liberty was granted to the respondents to initiate ejectment proceedings against him as per law.

15. It is not the case of either party that the land in dispute is situated in Cantonment area or that Nahan Cantonment area has been set up, however, a military station i.e. headquarter of Ist Batallion Parachute Regiment (SF) is situated at Nahan. The Station Commander thereof is the second respondent. The property, as such, is public premises for all intents and purposes. It lies ill in the mouth of the petitioner to claim that the second respondent had no jurisdiction to initiate eviction proceedings against him for the reason that vide notification Annexure R-1 to the reply filed on behalf of the respondents, the Station Commanders of all Cantonment and military stations were appointed as Estate Officers, hence respondent No. 2 is competent to initiate eviction proceedings against the petitioner. No doubt, show-cause notice Annexure P-3 issued by the second respondent for ejectment of the petitioner from the land in dispute has been contested vide reply Annexure P-4 thereto filed on behalf of the petitioner, however, on such grounds not legally admissible and rather already gone into in detail and adjudicated by the Civil Court with the help of cogent and reliable evidence. As a matter of fact, when the objections raised to the reply to the show-cause-notice were already considered and rejected by the Civil Court, there was no occasion to the Estate Officer i.e. second respondent to have sit over the judgment of the Civil Court and opened the Pandora box by resorting to reconsider such question afresh in the proceedings under Section 4 of the Public Premises Act which to our mind is summary in nature and not otherwise as argued on behalf of the petitioner.

16. The main thrust laid on behalf of the petitioner is that the second respondent irrespective of judgment and decree passed by the Civil Court was required to have independently gone into all questions such as the land in dispute was public premises or not and that the petitioner has no right, title or interest therein and rather is unauthorized occupant thereof, however, in our considered opinion, the Estate Officer could not have sit over the findings recorded by the Civil Court on all these questions which have even been accepted by the petitioner also because it is for this reason, he has not assailed the same any further in this Court by way of filing second appeal. Learned counsel representing the petitioner, therefore, has failed to persuade us to take a view of the matter contrary to the one which has been taken by the second respondent and also by the appellate Authority i.e. Addl. District Judge, Sirmaur District at Nahan who has decided the appeal preferred by the petitioner under Section 9 of the Public Premises Act vide judgment Annexure P-7. It is seen that the judgment Annexure P-7 is well considered and well reasoned, hence calls for no interference in this writ petition.

17. There is no denying to the legal principles that in eviction proceedings where the person in occupation of the government land raises bonafide dispute involving question of title and his right and interest therein, the proceedings cannot be decided summarily as settled by the Apex Court in ***State of Rajasthan vs. Padmavati Devi & ors., 1995 Supp. (2) SCC 290*** and in ***Government of Andhra Pradesh vs. Thummala Krishna Rao and another, (1982) 2 SCC 134.*** However, distinguishable on facts for the reason that in the case in hand, the Civil Court after holding full trial has authoritatively held that the petitioner is not owner of the land in dispute and as such, there is no question of claiming his right, title or interest therein. The findings so recorded have attained finality, therefore, the second respondent while placing reliance on the judgment and decree passed by the Civil Court has rightly concluded that the petitioner is not owner of the land in dispute and rather a trespasser. The only option in such a situation was to have passed an order of his ejectment, therefore, the order Annexure P-3 passed by the second respondent which even has been confirmed by the appellate Authority vide judgment Annexure P-7 cannot be said to be illegal or suffering from any material irregularities.

The ratio of the judgment of Kerala High Court in ***Metro Studio vs. Canara Bank, 2003(2) RCR 664*** is also not attracted in the given facts and circumstances of this case.

18. In view of what has been said hereinabove, this Writ Petition is without any merits and the same is accordingly dismissed. Pending application(s), if any, shall stand dismissed.

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

CWP No. 2322 of 2016 with
CWP No. 2371 of 2016
Reserved on: March 29, 2017
Decided on: April 12, 2017

1. CWP No. 2322 of 2016

M/s P K Construction Co and another ….Petitioners
Versus
The Shimla Municipal Corporation and others .Respondents

2. CWP No. 2371 of 2016

M/s ESS & ESS Joint Venture and another ….Petitioners
Versus
The Shimla Municipal Corporation and others .Respondents

Constitution of India, 1950- Article 226- Respondents invited expression of interest for construction, operation/maintenance and running of parking complexes in Shimla under Public Private Partnership Mode (PPP) – petitioners submitted the expressions of interest which were accepted – sanction for construction of complex was accorded subject to conditions - a dispute arose, which was referred to Arbitrator who commenced proceedings – separate writ petitions were filed by the petitioners – held that the matter was referred to the sole arbitrator in accordance with the request for proposal – the arbitrator was bound to proceed in accordance with law and to pronounce the award within stipulated time – reference was made prior to the amendment in Arbitration and Conciliation Act and will not apply to the pending arbitral proceedings – writ petition is not maintainable and proceedings in accordance with Arbitration and Conciliation Act have to be taken regarding the arbitration matters- the High Court does not have the power to intervene in the proceedings/orders passed by Arbitral Tribunal – petition dismissed.(Para-15 to 51)

Cases referred:

Shailesh Dhairyawan v. Mohan Balkrishna Lulla, (2016) 3 SCC 619
Huawei Technologies Co. Ltd. v. Sterlite Technologies Ltd. (2016) 1 SCC 721.
Shailesh Dhairyawan v. Mohan Balkrishna Lulla, (2016) 3 SCC 619
Ramesh Chandra Sankla v. Vikram Cement, (2008) 14 SCC 58
Estralla Rubber v. Dass Estate (P) Ltd., (2001) 8 SCC 97
Shalini Shyam Shetty v. Rajendra Shankar Patil, (2010) 8 SCC 329
Radhey Shyam v. Chhabi Nath, (2015) 5 SCC 423
Harbanslal Sahnia v. Indian Oil Corpn. Ltd., (2003) 2 SCC 107
Lalitkumar V. Sanghavi v. Dharamdas V. Sanghavi, (2014) 7 SCC 255
SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618
Union of India v. M/s Ambica Construction, AIR 2016 SC 1441

M/s CNG Trading Company Pvt. Ltd. Versus H.P. State Electricity Board Ltd., 2017(1) Him L.R. (DB) 423

For the petitioners	:	Mr. Bharat Thakur, Advocate (in both the petitions).
For the respondents	:	Mr. Hamender Chandel, Advocate, for respondent No.1 (in both the petitions). Mr. Shrawan Dogra, Advocate General with Mr. Anup Rattan and Mr. Romesh Verma, Additional Advocate Generals and Mr. J.K. Verma, Deputy Advocate General, for the respondent-State (in both the petitions).

The following judgment of the Court was delivered:

Per Sandeep Sharma, Judge

Since common questions of law and facts are involved, both the petitions were clubbed and are being disposed of by this common judgment.

2. The writ petitions, though, have been filed by different entities but arise out of same and similar dispute and same reliefs have been sought. The main reliefs, common in both the petitions, are reproduced below:

"1. Record may be called for from respondent No 3.

2. The petition be kindly heard finally & decided in the light of Section 28(3) read with S 29B(3) of the Arbitration & Conciliation Act, the Ground para & the statement of claim including subsequent MAs on record.

3. Exemplary/compensatory cost may be awarded to the petitioners qua respondent No.1.

4. Interest may be kindly allowed in terms of Section 31(7) of the Arbitration & Conciliation Act."

3. Since dispute in both the petitions is same and similar, for the sake of brevity, facts of CWP No. 2322 of 2016 are being discussed.

4. Respondents, i.e. Department of Urban Development and H.P. Infrastructure Development Board (in short, 'HPIDB') invited Expression of Interest (in short, 'EOI') from interested national/international independent legal entities/ joint ventures/ consortia for construction, operation/maintenance and running of parking complexes in Shimla city under Public Private Partnership mode (in short, 'PPP mode') vide Annexure P-1. Procedure was also laid down for submission of EOI therein. Petitioners in CWP No. 2322 of 2016 and CWP No. 2371 of 2016 submitted EOI for construction of parking complexes at Chotta Shimla and near Lift, respectively, as is evident from Annexure P-2 (in both the petitions). The EOI was accepted in both the cases, vide Annexure P-2 itself. Petitioners were required to pay Annual Concession Fee and further were asked to pay Development Fee and Construction Performance Security. Petitioners have also annexed abstract copy of Request for Proposal (in short, 'RFP')/agreement. Art 4, 'Conditions Precedent', whereof provides that, "*Subject to the express terms to the contrary, limited aspects of the Construction Period (when commenced) and any legitimate rights arising in law, the rights and obligations under this Concession Agreement shall take effect only upon fulfillment of all the Conditions Precedent set out in Articles 4.1 and 4.2 on or before the expiry of a period of 90 (ninety) days from the Proposal Acceptance Date. However, the Concessioning Authority may at any time at its discretion and in writing, waive fully or partially any of the Conditions Precedent of the Concessionaire.*"

5. In case of dispute, Art 27.3 of RFP, provides for arbitration or adjudication, which reads as under:

"27.3 Arbitration or Adjudication

a. In the event that the parties are unable to resolve the Dispute through Direct Discussion under Article 27.2, the parties shall submit the Dispute for arbitration in accordance with the Arbitration & Conciliation Act, 1996. The arbitration proceedings shall be conducted by the "Secretary, Law, GoHP" as the Sole Arbitrator (the "Sole Arbitrator").

b. The Sole Arbitrator shall make a reasoned award and any award made pursuant to this Article 27.3 shall be final and binding on the Parties as from the date on which it is made and the Concessionaire and the Concessioning Authority agree to undertake to carry out the award without delay.

d. The cost incurred on the process of Arbitration including inter alia the fees of the arbitral tribunal and the cost of the proceedings shall be borne by the Parties in equal proportions. Each Party shall bear its own legal fees incurred as a result of any Dispute under this Article 27."

6. Sanction for the construction of parking complex was accorded by respondent No.1, vide Annexure P-4, dated 9.12.2011, on various conditions, one of which was that the petitioners shall dump the debris with the permission of respondent No.1. Respondent No.1 also issued compliance certificate indicating fulfillment of conditions by the Concessioning Authority and Concessionaire. On 26.9.2014, issue regarding completion of parking complexes at various places, including one near Lift and another at Chhota Shimla was also taken up in a meeting under the chairmanship of Hon'ble the Chief Minister, wherein petitioners aired the problems being faced by them regarding handing over of site. On 7.10.2014, petitioners submitted drawings of revised proposals. Vide Annexure P-8 dated 28.10.2014, Er. Amar Singh Chauhan (Independent Engineer) was asked to examine the proposal, who submitted his recommendations on 29.10.2014. Vide Annexure P-10, letter dated 5.3.2015, respondent No.1 intimated the petitioners that the construction period was over and petitioners were asked to make the parking operational. Thereafter, petitioners were asked to complete the construction work as per approved drawings and provisions of Concession Agreement dated 11.5.2015.

7. On receipt of above communication, the petitioners invoked dispute redressal process, by sending legal notices to respondent No.1 by alleging misrepresentation, fraud, undue influence, coercion and mistake of law etc. Petitioners raised issues regarding undue charge of fees, revision of project etc. and demanded that construction period be not deemed to have commenced as yet and other various issues were raised.

8. On receipt of notice from the petitioners, respondent No.1, referred the dispute to the Sole Arbitrator i.e. respondent No.3 and requested him to conduct proceedings as per Article 27.3 of the Concession Agreement dated 15.7.2015. Petitioners filed petition before the Arbitrator, to which reply was filed by respondent No. 1. Petitioners filed rejoinder to the same. Petitioners also filed miscellaneous application for completing the arbitration process within specified time schedule.

9. The petitioners approached this Court by way of present petitions, which were clubbed together and listed on various dates, for ascertaining the maintainability of the same and jurisdiction of this Court. Keeping in view the reliefs prayed for in the present petition, learned counsel representing the petitioners was repeatedly asked to justify the maintainability as well as jurisdiction of this Court. At the very outset, it may be noticed that since this Court was prima facie of the view that present petitions are not maintainable, in their present form, suggestion was made to the learned counsel representing the petitioners that in case petitioners agree, direction can be issued to the learned Arbitrator to conclude the arbitration proceedings within a stipulated time. However, the fact remains that the learned counsel representing the petitioners remained adamant on getting the matter decided on merits and insisted that the controversy at hand may be decided by this Court, on the basis of material already adduced on record by the respective parties before the Arbitrator, while exercising powers under Articles 226 and 227 of the

Constitution of India. Apart from making oral submissions, which would be referred to herein below, petitioners also filed written arguments as well as response to the query of this Court, on the point of jurisdiction. But a bare perusal of written submissions, which have been taken on record, suggests that these are mere repetitions of oral submissions having been made by the learned counsel representing the petitioners.

10. The petitioners filed written submissions reiterating that the matter be adjudicated by this Court, as arbitration proceedings have become infructuous since the same were not conducted by the sole Arbitrator within stipulated time, despite request of the petitioners. Learned counsel representing the petitioners, prays that the matter be decided on 'as-is-where-is' stage, since they have lost faith in the Sole Arbitrator.

11. Learned counsel representing petitioners vehemently argued that respondent No.3, i.e. Arbitrator has failed to make final awards pursuant to the references made to him, arbitration proceedings stand automatically terminated in terms of Section 29B(4) of the Arbitration & Conciliation Act, 1996 (hereafter, 'Act') and as such same is required to be decided by this Court in light of Section 28(3) read with Section 29B (3) of the Act.

12. Learned counsel for the petitioners further contended that since pleadings as well as evidence in support thereof were submitted in due course of time, respondent No.3 i.e. Arbitrator was required to make the requisite award within the period as provided under Section 29A. As per the petitioners, reference was made to the Arbitrator on 15.7.2015 and as such he was required to pass award on or before the expiry of twelve months i.e. 20.7.2016. Learned counsel for the petitioners specifically invited the attention of this Court to the communication dated 10.6.2015, whereby petitioners, in terms of Article 27 of the Agreement inter se parties, invoked dispute resolution process. Learned counsel for the petitioners further contended that vide Annexure P-13, i.e. communication dated 15.7.2015, Municipal Commissioner, Shimla, who happened to be second party, in terms of agreement inter se parties, sent a communication to Secretary (Law) to the Government of Himachal Pradesh, who is the named Arbitrator in the agreement as per Article 27.3 of the Agreement, to conduct arbitration proceedings. While referring to the aforesaid communication dated 15.7.2015, learned counsel representing the petitioners, stated that the Arbitrator is deemed to have entered upon reference on 15.7.2015, because, as per explanation provided under Section 29A of the Act, Arbitral Tribunal shall be deemed to have entered upon reference on the date, on which Arbitrator received notice, in writing, of his appointment. Learned counsel for the petitioners also invited attention of this Court to various documents annexed with the petition to demonstrate that the pleadings were filed within stipulated time, but, despite that, no steps, whatsoever, were taken by the learned Arbitrator to pass award within stipulated period, as such, mandate of the Arbitrator stands terminated, because, admittedly, at no point of time, time was either extended as provided under Section 29A (3) of the Act, with the consent of the parties, or, thereafter, by a Court, in terms of Section 29A (4) of the Act. To substantiate aforesaid argument, with regard to repeated requests for completion of arbitration proceedings, on or before the stipulated period i.e. 20.7.2016, attention was invited to Annexure P-21 i.e. Misc. Application having been moved by the petitioners praying therein that the arbitration proceedings may be concluded within specified time schedule. However, it is another matter that the respondent-Municipal Corporation, while filing reply to the aforesaid application, disputed that undue delay is being caused by the Arbitrator in dealing with the matter and claimed that procedure is going on as per law. In the aforesaid background, learned counsel for the petitioners submitted that since Arbitrator has failed to pass award within stipulated period as prescribed under Section 29A of the Act, instant matter is required to be decided by this Court exercising powers under Articles 226 and 227 of the Constitution of India, in light of the provisions contained in Section 28(3) read with Section 29B(3) of the Act, because statement of claim as well as reply /counter claim filed by the opposite party including Misc. Application, moved before Arbitrator from time to time, are on record. While concluding his arguments, learned counsel representing the petitioners, stated that the High Court's power to issue prerogative writs of certiorari, mandamus or prohibition to any person, authority or quasi judicial tribunal under Article 226 falls under its original jurisdiction, whereas

power under Article 227 is both, administrative and of judicial superintendence over all subordinate courts and tribunals, and as such powers under Articles 226 and 227 are discretionary, equitable and are required to be exercised in larger interests of justice. He further contended that the very purpose of empowering High Courts with powers under Articles 226 and 227, is to advance justice and to uproot injustice, rather than thwarting justice itself and no man should be subjected to injustice by violation of law. Learned counsel for the petitioners further contended that under Article 226, High Court can take cognizance of entire facts and circumstances and may pass appropriate orders to do complete and substantial justice to promote equity, honesty and fair play, because, as per the law laid down by the Apex Court, High Court must interfere where subordinate tribunal or authority or officer acts without jurisdiction, acts in excess of jurisdiction, violates natural justice, refuses to exercise jurisdiction as vested by law, where there is error apparent on the face of record, or where such act, omission, error or excess has resulted in manifest injustice. While seeking adjudication of claim, which was originally filed before the Arbitrator, learned counsel representing the petitioners submitted that Sections 11 and 15 of the Act are not applicable in as much as neither the appointment nor substitution of Arbitrator is involved, rather it is a simple case of deemed termination of mandate of the Arbitrator by application of Section 29A of the Act and as such, petitioners are entitled to invoke Constitutional remedy, because, petitioners' fundamental right under Articles 14, 19(g) and right of tangible/intangible property under Article 300A is violated by respondents No. 1 and 2, and respondent No.3 has failed/ refused to make arbitral award. In support of his aforesaid contention, learned counsel representing the petitioners placed reliance upon following case law:

1. **(1996) 5 SCC 54 Shangrila Food Products Ltd.** v. **LIC**
2. **(2001) 8 SCC 97, Estralla Rubber** v. **Dass Estate (P) Ltd.**
3. **(2002) 1 SCC 100, Roshan Deen** v. **Preeti Lal**
4. **(2008) 14 SCC 58, Ramesh Chandra Sankla** v. **Vikram Cement**
5. **(2010) 8 SCC 329, Shalini Shyam Shetty** v. **Rajendra Shankar Patil**
6. **(2015) 5 SCC 423, Radhey Shyam** v. **Chhabi Nath**
7. **(2003) 2 SCC 107, Harbanslal Sahnia** v. **Indian Oil Corpn. Ltd.**
8. **(2011) 5 SCC 697, Union of India** v. **Tantia Construction (P) Ltd.**

13. Mr. Hamender Chandel, learned counsel representing respondent No. 1 (Municipal Corporation), refuted aforesaid contentions having been made by the learned counsel representing the petitioners and stated that present petitions are wholly misconceived and deserve to be rejected. Mr. Chandel, further contended that instant petitions are sheer abuse of process of law by the petitioners, because, by filing the instant petitions, they are trying to get out of the arbitration proceedings, which are still in progress. Mr. Chandel, further contended that if, for the sake of arguments, contentions, with regard to automatic termination of award, in terms of Section 29A of the Act, as projected by the learned counsel representing the petitioners, are accepted, even then, present petitions are not maintainable, because, this Court can not be asked to decide claims and counter-claims, having been filed by the respective parties in arbitration proceedings. Mr. Chandel, further contended that the only fall-out of the non-compliance of Section 29A, wherein time frame has been fixed, would be termination of mandate of Arbitrator but, in that eventuality, remedy available to the petitioners is to approach appropriate court of law under Sections 11 and 15 of the Act, and not this Court under Articles 226 and 227 of the Constitution of India. Mr. Chandel, while concluding his arguments also stated that in no eventuality, dispute inter se parties, pursuant to Concession Agreement, can be resolved /adjudicated by this Court, while exercising powers under Articles 226 and 227 of the Constitution of India and law cited by the learned counsel representing the petitioners, is not applicable to the present petitions, as such, same deserve to be dismissed. In support of his aforesaid claim, he also placed reliance upon judgments passed by Apex Court in **Shailesh Dhairyawan** v. **Mohan Balkrishna Lulla** reported in (2016) 3 SCC 619 and in **Huawei Technologies Co. Ltd.** v. **Sterlite Technologies Ltd.** reported in (2016) 1 SCC 721.

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

15. Perusal of the documents available on record certainly suggests that pursuant to dispute between the parties, matter was referred to the Arbitral Tribunal (Secretary Law to the Government of H.P.), in terms of Article 27.3 of the Agreement inter se parties, on 15.7.2015. Similarly, perusal of agreement placed on record, suggests that as per Article 27.1 of the Agreement, any dispute/difference or controversy of whatever nature regarding the validity, interpretation, implementation of rights and obligations arising out of, or in relation or howsoever under or in relation to Concession Agreement between the parties, shall be subject to dispute resolution procedure, as provided under Article 27. Similarly, Article 27.3.a suggests that, if parties are unable to resolve the dispute, through direct discussion as provided under Article 27.2, they shall submit dispute for arbitration, in accordance with Arbitration & Conciliation Act, 1996, before the Sole Arbitrator i.e. Secretary Law, Government of H.P. It would be profitable to reproduce aforesaid Article:

> "27.1 Dispute Resolution
>
> Any dispute, difference or controversy of whatever nature regarding the validity, interpretation, implementation or the rights and obligations arising out of, or in relation to, or howsoever arising under or in relation to this Concession Agreement between the parties, and so notified by either Party to the other Party (the "Dispute") shall be subject to the dispute resolution procedure set out in Article 27. It is specially clarified that in case of any ambiguity regarding the Works, the practices existing at the time of submission of proposal as per Good Industry Practice would prevail.
>
> *"27.3 Arbitration or Adjudication*
>
> *a. In the event that the parties are unable to resolve the Dispute through Direct Discussion under Article 27.2, the parties shall submit the Dispute for arbitration in accordance with the Arbitration & Conciliation Act, 1996. The arbitration proceedings shall be conducted by the "Secretary, Law, GoHP" as the Sole Arbitrator (the "Sole Arbitrator")."*

16. Bare perusal of dispute resolution process as provided under Article 27, clearly suggests that dispute, if any, between the parties, is to be decided by the Sole Arbitrator namely Secretary Law, but, admittedly, this Court sees no provision/Rule providing therein for filling up the vacancy, if any, caused due to recusal by the Arbitrator or due to termination of mandate of the Arbitrator before passing of final award. Perusal of communication dated 15.7.2015 clearly suggests that respondent No.1 (Municipal Corporation), on the request having been made by the petitioners, referred the matter to the Sole Arbitrator for arbitration under Article 27.3 of the Agreement and requested him to fix suitable date and venue to conduct arbitration proceedings. At this stage, it may be relevant to reproduce Section 29A of the Arbitration & Conciliation Act, 1996:

> "29A. Time Limit for arbitral award.-- (1) The award shall be made within a period of twelve months from the date the arbitral tribunal enters upon the reference.
>
> Explanation.—For the purpose of this sub-section, an arbitral tribunal shall be deemed to have entered upon the reference on the date on which the arbitrator or all the arbitrators, as the case may be, have received notice, in writing, of their appointment.
>
> (2) If the award is made within a period of six months from the date the arbitral tribunal enters upon the reference, the arbitral tribunal shall be entitled to receive such amount of additional fees as the parties may agree.
>
> (3) The parties may, by consent, extend the period specified in sub-section (1) for making award for a further period not exceeding six months.

(4) If the award is not made within the period specified in sub-section (1) or the extended period specified under sub-section (3), the mandate of the arbitrator(s) shall terminate unless the Court has, either prior to or after the expiry of the period so specified, extended the period:

Provided that while extending the period under this sub-section, if the Court finds that the proceedings have been delayed for the reasons attributable to the arbitral tribunal, then, it may order reduction of fees of arbitrator(s) by not exceeding five per cent. for each month of such delay.

(5) The extension of period referred to in sub-section (4) may be on the application of any of the parties and may be granted only for sufficient cause and on such terms and conditions as may be imposed by the Court.

(6) While extending the period referred to in sub-section (4), it shall be open to the Court to substitute one or all of the arbitrators and if one or all of the arbitrators are substituted, the arbitral proceedings shall continue from the stage already reached and on the basis of the evidence and material already on record, and the arbitrator(s) appointed under this section shall be deemed to have received the said evidence and material.

(7) In the event of arbitrator(s) being appointed under this section, the arbitral tribunal thus reconstituted shall be deemed to be in continuation of the previously appointed arbitral tribunal.

(8) It shall be open to the Court to impose actual or exemplary costs upon any of the parties under this section.

(9) An application filed under sub-section (5) shall be disposed of by the Court as expeditiously as possible and endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party."

17. Perusal of explanation to Section 29 A suggests that the arbitral tribunal would be deemed to have entered upon reference, on the date, on which arbitrator or all the arbitrators, as the case may be, receive notice, in writing, of their appointment. Hence, after perusal of communication dated 15.7.2015, it can be inferred that the Sole Arbitrator, in the instant case, entered upon reference on 15.7.2015, and as such, he was required to pass Award within stipulated period i.e. twelve months, as prescribed under Section 29A. However, it is another matter that time, as referred above, could be enlarged, either with the consent of the parties, or with the intervention of the Court, on the request of respective parties. But, in the instant case, there is nothing on record, suggestive of the fact that aforesaid time was ever extended, either with the consent of the parties in terms of Section 29A(3) or by a court of law under Section 29A(4) or Section 29A(5) of the Act.

18. Before adverting to the claim of the petitioners, with regard to determination of their claim by this Court invoking powers under Articles 226 and 227 of the Constitution of India, it may be noticed that aforesaid Sections 29A and 29B of the Act were inserted by Arbitration & Conciliation (Amendment) Act, 2015 (hereafter, 'amending Act, 2015'), which admittedly came into operation on 23.10.2015. It would be profitable to refer to Sections 1 and 2 of the amending Act, 2015:

"THE ARBITRATION AND CONCILIATION (AMENDMENT) ACT, 2015

NO. 3 OF 2016

[31st December, 2015.]

An Act to amend the Arbitration and Conciliation Act, 1996.

BE it enacted by Parliament in the Sixty-sixth Year of the Republic of India as follows:—

1. Short title and commencement. --(1) This Act may be called the Arbitration and Conciliation (Amendment) Act, 2015.

(2) It shall be deemed to have come into force on the 23rd October, 2015.

2. Amendment of Section 2.--In the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the principal Act), in section 2,—

(I) in sub-section (1),—

(A) for clause (e), the following clause shall be substituted, namely:—

'(e) "Court" means—

(i) in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original Short title and commencement. jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes;

(ii) in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court;';

(B) in clause (f), in sub-clause (iii), the words "a company or" shall be omitted;

(II) in sub-section (2), the following proviso shall be inserted, namely:—

"Provided that subject to an agreement to the contrary, the provisions of sections 9, 27 and clause (a) of sub-section (1) and sub-section (3) of section 37 shall also apply to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognised under the provisions of Part II of this Act.""

19. If, claim with regard to automatic termination of mandate of Arbitrator, as is being projected by the learned counsel representing the petitioners, is examined and analyzed, it is revealed that reference to the Arbitrator was made on 15.7.2015 i.e. admittedly before the date of coming into operation newly inserted Sections 29A and 29B, wherein, for the first time, stipulation with regard to passing of award within stipulated time was made. Section 1 (2) of the amending Act, 2015, specifically provides that it shall be deemed to have come into force on 23.10.2015, meaning thereby that provisions as contained under Sections 29A and 29B would come into operation only after 23.10.2015 and time frame, as prescribed in the aforesaid Sections, would not be applicable to a case, where reference was made prior to aforesaid amendment. Since, in the instant case, reference to the Arbitrator was made on 15.7.2015, it seems that newly inserted Sections 29A and 29B have no application qua the dispute pending before Sole Arbitrator, who admittedly, entered upon reference on 15.7.2015.

20. It is well settled law that amendment, if any, is always prospective, unless specifically provided that it shall be effective retrospectively.

21. At this stage, it may be apt to reproduce Section 26 of the amending Act, 2015, as under:

"26. Act not to apply to pending arbitral proceedings. –nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of

> section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act."

22. Careful perusal of aforesaid Section 26 clearly suggests that provisions contained in amending Act, 2015, whereby Sections 29A and 29B, came to be inserted, would not apply to the arbitral proceedings commenced before the date of commencement of the amended Act, save and except, where parties otherwise agree. This Act would apply in relation to arbitration proceedings commenced on or after date of commencement of this Act.

23. Close scrutiny of aforesaid provisions of law as contained in Section 26 of the amending Act, 2015, leaves no doubt in the mind of this Court that newly inserted Sections 29A and 29B are not applicable in the present case, where admittedly, arbitration proceedings had commenced on 15.7.2015 i.e. prior to promulgation of amending Act, 2015. Section 21 of the principal Act, is reproduced herein below:

> "21. Commencement of arbitral proceedings.—Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent."

24. Section 21 specifically provides that arbitral proceedings in respect of a particular dispute commence from the date on which a request for that dispute to be referred to arbitration is received by the respondent. In the instant case, petitioners, vide communication dated 10.6.2015 (Annexure P-12), invoked dispute resolution process in terms of Article 27 of the Concession Agreement inter se parties. On receipt of aforesaid notice, respondent No.1 sent a communication to the sole arbitrator i.e. Secretary Law, Government of H.P., in terms of Article 27.3 of Concession Agreement.

25. Careful examination of Annexure P-13, i.e. communication dated 15.7.2015, suggests that arbitrator entered upon reference on 15.7.2015 i.e. before 23.10.2015, when amending Act, 2015 came into operation.

26. Hence, this Court has no hesitation to conclude that newly inserted Sections 29A and 29B have no application in the present arbitration proceedings, which admittedly commenced on 15.7.2015. Otherwise also, as per Section 21, reproduced herein above, arbitration proceedings in respect of a particular dispute commence from the date on which request is received by the respondent from the claimant for referring the same to arbitration. In this case, request for referring the dispute to the arbitrator was received on 10.6.2015 i.e. approximately four months prior to the date of coming into operation of the amending Act, 2015.

27. Section 26 of the amending Act, 2015 clearly suggests that no provision of the amended Act would apply to those arbitral proceedings, which had commenced in accordance with provisions of Section 21 of principal Act, before commencement of amending Act, unless otherwise agreed upon by the parties.

28. In the instant case, neither letter dated 10.6.2015 nor letter dated 15.7.2015, whereby dispute was raised and thereafter request was sent to the arbitrator for adjudication, respectively, suggests that parties had agreed to be governed by the provisions of amending Act, 2015, meaning thereby arbitral proceedings, in the instant case, were to be governed by the provisions of principal Act, without looking into the amendments made in the amending Act, 2015. Hence, in view of discussion made herein above, this Court is of view that newly inserted Sections 29A and 29B, have no application and as such it can not be said that since Arbitrator failed to pass award within specified time of twelve months, mandate of Arbitrator stands terminated automatically.

29. This Court examined the matter from yet another angle. If it is presumed that arbitral proceedings were to be governed in terms of provisions contained in the amending Act, 2015, even then, present petitions do not appear to be maintainable, for the reasons stated herein below.

30. True it is, that Section 29A prescribes time limit of twelve months for the arbitral tribunal to decide and pass award after entering into reference, but careful perusal of Section 29A(3) suggests that parties may, by consent, extend period specified under sub-section (1) for making award for further period, not exceeding six months. Sections 29A(4) and 29A(5) suggest that if award is not made within period specified under sub-section (1) or extended period as per sub-section (3), mandate of arbitrator shall terminate unless court extends period on the application of any of the parties. Section 29A(5) clearly suggests that competent court may, on the application having been filed by any of the parties, extend period, subject to certain terms and conditions, as may be imposed by the Court. Similarly, Section 29A (6) suggests that, while extending period referred to in sub-section (4), it shall be open to the court to substitute one or all of the Arbitrators and in the event of substitution, arbitral proceedings shall continue from stage already reached and on the basis of the evidence and material already on record. Section 29A, if is read in its entirety, it contains complete mechanism to deal with situation, which may arise after termination of mandate of Arbitrator, on account of delay in passing award. At the first instance, time can be extended by Arbitrator himself, not exceeding six months, with the consent of the parties and, and thereafter, any party can move application for extension of time to the competent court of law, which may, while considering prayer for extension of time, substitute Arbitrator. Interestingly, in the instant case, there is nothing on record suggestive of the fact that either of the parties ever consented for enlargement of time in terms of Section 29A(3). Similarly, there is nothing on record that any of the parties moved appropriate application before competent court for enlargement of time as well as substitution of Arbitrator, whose mandate allegedly stood terminated because of non-compliance of Section 29A, whereby he was supposed to pass award within a period of twelve months from the date of entering upon reference.

31. After carefully examining Section 29A, as has been discussed herein above, this Court sees no force in the arguments having been made by the learned counsel representing the parties that since mandate of Arbitrator has terminated due to violation of Section 29A, dispute, as was pending before the Arbitrator, is required to be adjudicated by this Court, while exercising powers under Articles 226 and 227 of the Constitution of India, in light of Section 28(3) read with Section 29B(3) of the Act. Careful perusal of Sections 28 and 29 of the Act clearly suggests that these provisions relate to rules applicable to substance of dispute as well as decision making by the panel of arbitrators. Sections 28 and 29B are reproduced herein below:

> "28. Rules applicable to substance of dispute.—(1) Where the place of arbitration is situate in India,—
>
> > (a) in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;
> >
> > (b) in international commercial arbitration,—
> >
> > > (i) the arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute;
> > >
> > > (ii) any designation by the parties of the law or legal system of a given country shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country and not to its conflict of laws rules;
> > >
> > > (iii) failing any designation of the law under clause (a) by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.
>
> (2) The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorised it to do so.

[(3) While deciding and making an award, the arbitral tribunal shall, in all cases, take into account the terms of the contract and trade usages applicable to the transaction.]

29B. Fast track procedure.—(1) Notwithstanding anything contained in this Act, the parties to an arbitration agreement, may, at any stage either before or at the time of appointment of the arbitral tribunal, agree in writing to have their dispute resolved by fast track procedure specified in sub-section (3).

(2) The parties to the arbitration agreement, while agreeing for resolution of dispute by fast track procedure, may agree that the arbitral tribunal shall consist of a sole arbitrator who shall be chosen by the parties.

(3) The arbitral tribunal shall follow the following procedure while conducting arbitration proceedings under sub-section (1):—

(a) the arbitral tribunal shall decide the dispute on the basis of written pleadings, documents and submissions filed by the parties without any oral hearing;

(b) the arbitral tribunal shall have power to call for any further information or clarification from the parties in addition to the pleadings and documents filed by them;

(c) an oral hearing may be held only, if, all the parties make a request or if the arbitral tribunal considers it necessary to have oral hearing for clarifying certain issues;

(d) the arbitral tribunal may dispense with any technical formalities, if an oral hearing is held, and adopt such procedure as deemed appropriate for expeditious disposal of the case.

(4) The award under this section shall be made within a period of six months from the date the arbitral tribunal enters upon the reference.

(5) If the award is not made within the period specified in sub- section (4), the provisions of sub-sections (3) to (9) of section 29A shall apply to the proceedings.

(6) The fees payable to the arbitrator and the manner of payment of the fees shall be such as may be agreed between the arbitrator and the parties.]"

32. Aforesaid provisions of law, nowhere provide that High Court, while exercising powers under Articles 226 and 227 of the Constitution of India can decide the dispute, which has been subject matter of arbitration proceedings under Section 28(3) and 29B(3) of the Act, because provisions contained in sections referred herein above, are with regard to procedure to be followed by arbitral tribunal, while conducting arbitration proceedings.

33. Though, this Court, in view of detailed discussion made herein above, is of the view that mandate of Arbitrator has not been terminated as claimed by the petitioners in the present petitions, because arbitral proceedings, in the instant case, were to be covered by unamended Act/principal Act and not by amending Act, 2015. Otherwise also, as emerges from close scrutiny of Sections 29A and 29B of the Act, remedy, if any, after termination of mandate of arbitrator, is/was under Arbitration and Conciliation Act, 1996, and not by way of instant petitions under Articles 226 and 227.

34. At the cost of repetition, it may be stated that even if plea of petitioners is accepted that mandate of arbitrator had expired automatically in terms of Section 29A (4) since he failed to pass award within a period of twelve months, from the date of entering upon reference, petitioners herein were required to move appropriate application in the competent court of law, as prescribed under sub-sections 29A (4), 29A(5) and 29A(6) of the Act, seeking therein enlargement of time as well as substitution of sole Arbitrator as named in the concession agreement. Apart from Section 29A, as discussed above, petitioners, in the event of termination of

mandate of Arbitrator, could resort to Section 15 of the Arbitration and Conciliation Act, 1996. Section 15 of the Act reads as under:

> "15. Termination of mandate and substitution of arbitrator.—(1) In addition to the circumstances referred to in section 13 or section 14, the mandate of an arbitrator shall terminate—
>
> (a) where he withdraws from office for any reason; or
>
> (b) by or pursuant to agreement of the parties.
>
> (2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.
>
> (3) Unless otherwise agreed by the parties, where an arbitrator is replaced under sub-section (2), any hearings previously held may be repeated at the discretion of the arbitral tribunal.
>
> (4) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal."

35. Aforesaid provision of law clearly suggests that where mandate of Arbitrator terminates, a substitute Arbitrator is be appointed according to Rules, which are applicable to the appointment of Arbitrator being replaced. Since, in the instant case, as clearly emerges from the Agreement, there is no provision with regard to filling up of vacancy caused due to termination of mandate of Arbitrator appointed pursuant to agreement, petitioners could always resort to provisions contained in Section 11 of the Arbitration and Conciliation Act, which is reproduced herein below:

> "11 Appointment of arbitrators. —
>
> (1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.
>
> (2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.
>
> (3) Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.
>
> (4) If the appointment procedure in sub-section (3) applies and—
>
> (a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or
>
> (b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.
>
> (5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.
>
> (6) Where, under an appointment procedure agreed upon by the parties,—
>
> (a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(6A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.

(6B) The designation of any person or institution by the Supreme Court or, as the case may be, the High Court, for the purposes of this section shall not be regarded as a delegation of judicial power by the Supreme Court or the High Court.

(7) A decision on a matter entrusted by sub-section (4) or sub-section (5) or sub-section (6) to the Chief Justice or the person or institution designated by him is final.

(8) The Chief Justice or the person or institution designated by him, in appointing an arbitrator, shall have due regard to—

(a) any qualifications required of the arbitrator by the agreement of the parties; and

(b) other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

(9) In the case of appointment of sole or third arbitrator in an international commercial arbitration, the Chief Justice of India or the person or institution designated by him may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities.

(10) The Chief Justice may make such scheme as he may deem appropriate for dealing with matters entrusted by sub-section (4) or sub-section (5) or sub-section (6) to him.

(11) Where more than one request has been made under sub-section (4) or sub-section (5) or sub-section (6) to the Chief Justices of different High Courts or their designates, the Chief Justice or his designate to whom the request has been first made under the relevant sub-section shall alone be competent to decide on the request.

(12) (a) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in an international commercial arbitration, the reference to "Chief Justice'' in those sub-sections shall be construed as a reference to the "Chief Justice of India''.

(b) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in any other arbitration, the reference to "Chief Justice" in those sub-sections shall be construed as a reference to the Chief Justice of the High Court within whose local limits the principal Civil Court referred to in clause (e) of sub-section (1) of section 2 is situate and, where the High Court itself is the Court referred to in that clause, to the Chief Justice of that High Court.

(13) An application made under this section for appointment of an arbitrator or arbitrators shall be disposed of by the Supreme Court or the High Court or the person or institution designated by such Court, as the case may be, as expeditiously as possible and an endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party.

(14) For the purpose of determination of the fees of the arbitral tribunal and the manner of its payment to the arbitral tribunal, the High Court may frame such rules as may be necessary, after taking into consideration the rates specified in the Fourth Schedule.

Explanation.—For the removal of doubts, it is hereby clarified that this sub-section shall not apply to international commercial arbitration and in arbitration (other than international commercial arbitration) in case where parties have agreed for determination of fees as per the rules of an arbitral institution.)"

36. Provisions contained in aforesaid section clearly suggest that parties are free to agree to a procedure for appointment of Arbitrator or Arbitrators and in case parties fail to appoint an Arbitrator in terms of agreement, entered between them, request can be made by either of parties, to competent court of law, be it Supreme Court or High Court, for appointing Arbitrator. Section 11 (5) specifically deals with appointment of sole Arbitrator named in the agreement. It suggests that if parties fail to appoint sole Arbitrator as named in the agreement, within stipulated time, request can be made by either of the parties, to competent court of law for appointment of Arbitrator.

37. At this stage, it would be relevant to refer to law laid down by Apex Court, in **Shailesh Dhairyawan** v. **Mohan Balkrishna Lulla** reported in (2016) 3 SCC 619, as under:

"19. The scheme of Section 8 of the 1940 Act and the scheme of Section 15(2) of the 1996 Act now needs to be appreciated. Under Section 8(1)(b) read with Section 8(2) if a situation arises in which an arbitrator refuses to act, any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in a fresh appointment, and if such appointment is not made within 15 clear days after service of notice, the Court steps in to appoint such fresh arbitrator who, by a deeming fiction, is to act as if he has been appointed by the consent of all parties. This can only be done where the arbitration agreement does not show that it was intended that the vacancy caused be not supplied. However, under Section 15(2), where the mandate of an arbitrator terminates, a substitute arbitrator "shall" be appointed. Had Section 15(2) ended there, it would be clear that in accordance with the object sought to be achieved by the Arbitration and Conciliation Act, 1996 in all cases and for whatever reason the mandate of an arbitrator terminates, a substitute arbitrator is mandatorily to be appointed. This Court, however, in the judgments noticed above, has interpreted the latter part of the Section as including a reference to the arbitration agreement or arbitration clause which would then be "the rules" applicable to the appointment of the arbitrator being replaced. It is in this manner that the scheme of the repealed Section 8 is resurrected while construing Section 15(2). The arbitration agreement between the parties has now to be seen, and it is for this reason that unless it is clear that an arbitration agreement on the facts of a particular case excludes either expressly or by necessary implication the substitution of an arbitrator, whether named or otherwise, such a substitution must take place. In fact, sub-sections (3) and (4) of Section 15 also throw considerable light on the correct construction of sub- section (2). Under sub-section (3), when an arbitrator is replaced, any hearings previously held by the replaced arbitrator may or may not be repeated at the discretion of the newly

> appointed Tribunal, unless parties have agreed otherwise. Equally, orders or rulings of the earlier arbitral Tribunal are not to be invalid only because there has been a change in the composition of the earlier Tribunal, subject, of course, to a contrary agreement by parties. This also indicates that the object of speedy resolution of disputes by arbitration would best be sub-served by a substitute arbitrator continuing at the point at which the earlier arbitrator has left off."

38. Aforesaid exposition of law, as laid down by Apex Court clearly suggests that, if a situation arises in which Arbitrator refuses to act, any party may serve the other parties or the Arbitrators, as the case may be, with a written notice to concur in a fresh appointment, and if such appointment is not made within 15 days after service of notice, the Court steps in to appoint such fresh Arbitrator who, by a deeming fiction, is to act as if he has been appointed by the consent of all parties. This can only be done where the arbitration agreement does not show that it was intended that the vacancy caused be not supplied. Apex Court has further concluded that Section 15(2) specifically provides for substitution of arbitrator, whether named or otherwise, meaning thereby substitution must take place in the event of termination of mandate of award but, definitely, that can be attained within frame work of provisions contained under the Act and, certainly, not by resorting to powers as contained under Articles 226 and 227 of the Constitution of India.

39. This Court, after bestowing thoughtful consideration to the material available on record as well as provisions contained in the Arbitration and Conciliation Act, 1996, is of the view that the petitioners have a specific remedy under the Act to get Sole Arbitrator substituted, after termination of his mandate. Learned counsel appearing for the petitioners, during arguments, pressed into service law as referred to herein above, to substantiate his plea, that this Court has power under Articles 226 and 227 of the Constitution of India to decide the controversy at hand in these proceedings, after looking into claims and counter-claims of the parties. But after careful examination of law cited by the learned counsel for the parties, we are afraid that the same can be made applicable to the facts and circumstances of the present case. Needless to say that, High Court, while exercising powers under Article 226, has a prerogative of issuing writs to any person, authority or quasi-judicial authority, under its original jurisdiction, whereas power under Article 227 is more of administrative and judicial superintendence over all subordinate courts and tribunals. True it is that constitutional powers vested in High Courts under Articles 226 and 227 can not be fettered by any alternative remedy, as has been laid down by Apex Court, in the judgments in cases referred herein above by the learned counsel for the petitioners. But in the facts and circumstances, where petitioners have already subjected themselves to arbitration proceedings, in terms of agreement, and which are still pending before the arbitral tribunal, as has been discussed in detail, this Court has no power to interfere in the same, while exercising powers under Articles 226 and 227 of the Constitution of India.

40. No doubt, High Court, while exercising powers under Articles 226 and 227 of the Constitution of India, having regard to entire facts and circumstances and, keeping in mind, principles of equity, may pass appropriate orders to do complete and substantial justice and to promote honesty and fair play, but, certainly, can not use this power to thwart proceedings, which are underway, that too under statute i.e. Arbitration & Conciliation Act.

41. Similarly, this Court sees no dispute with the principles of law that arbitration clause is not a bar to invoke writ jurisdiction when injustice is caused and rule of law is violated. But, in the instant case, as has been stated above, petitioners have already availed alternative remedy available to them in terms of agreement, as such, present petitions filed under Articles 226 and 227, can not be allowed to be used to undo proceedings already underway before the Arbitrator under Arbitration and Conciliation Act. Apex Court, while discussing scope of Articles 226 and 227, has repeatedly held that powers under Articles 226 and 227 are to advance justice and not to thwart it. Apex Court has specifically laid down that, even where justice is by-product of erroneous interpretation of law, High Court ought not to wipe out such justice in the name of

correcting the error of law. (**Ramesh Chandra Sankla** v. **Vikram Cement** reported in (2008) 14 SCC 58)

42. Similarly, Apex Court in **Estralla Rubber** v. **Dass Estate (P) Ltd.** reported in (2001) 8 SCC 97 has held that power under Articles 226 and 227 of the Constitution of India does not confer an unlimited prerogative upon High Court to correct all wrong decisions or to prevent hardships caused thereby. Power under Article 227 can be exercised to interfere with orders of lower courts and tribunals only in cases of serious dereliction of duty and flagrant violation of fundamental principles of law or justice, where, in the absence of intervention by the High Court, grave injustice would remain unchecked and uncorrected.

43. Apex Court in **Shalini Shyam Shetty** v. **Rajendra Shankar Patil**, reported in (2010) 8 SCC 329, has held that High Court, while exercising powers under Article 226 can interfere if there is violation of statutory duty on the part of some statutory authority or any infraction of statute or it can be shown that a private individual is acting in collusion with a statutory authority.

44. But, in the facts and circumstances of the present case, neither there is any document available on record, suggestive of the fact that learned Arbitrator violated some statutory duties, nor the learned counsel representing the petitioners was able to point out any infraction of statute. Moreover, since, this Court has come to conclusion that provisions contained in Sections 29A and 29B(3)can not be made applicable to the arbitral proceedings commenced before promulgation of amending Act, 2015, there was no time limit to be adhered to by the arbitrator and as such, this Court, sees no violation of statutory duties cast upon the arbitrator under the Arbitration and Conciliation Act.

45. Apex Court in **Radhey Shyam** v. **Chhabi Nath** reported in (2015) 5 SCC 423, has also held that orders of civil court stand on different footing from the orders of authorities or tribunals or courts other than judicial/ civil courts. There are no precedents in India for the High Courts to issue writs to the subordinate courts, thus, judicial orders of civil courts are not amenable to a writ of certiorari under Article 226. Apex Court has held as under:

> "27. Thus, we are of the view that judicial orders of civil courts are not amenable to a writ of certiorari under Article 226. We are also in agreement with the view of the referring Bench that a writ of mandamus does not lie against a private person not discharging any public duty. Scope of Article 227 is different from Article 226.
>
> 28. We may also deal with the submission made on behalf of the respondent that the view in Surya Dev Rai stands approved by larger Benches in Shail, Mahendra Saree Emporium and Salem Advocate Bar Assn and on that ground correctness of the said view cannot be gone into by this Bench. In Shail, though reference has been made to Surya Dev Rai, the same is only for the purpose of scope of power under Article 227 as is clear from para 3 of the said judgment. There is no discussion on the issue of maintainability of a petition under Article 226. In Mahendra Saree Emporium, reference to Surya Dev Rai is made in para 9 of the judgment only for the proposition that no subordinate legislation can whittle down the jurisdiction conferred by the Constitution. Similarly, in Salem Bar Assn. in para 40, reference to Surya Dev Rai is for the same purpose. We are, thus, unable to accept the submission of learned counsel for the respondent."

46. Learned counsel for the petitioners specifically laid emphasis on judgment passed by Apex Court in **Harbanslal Sahnia** v. **Indian Oil Corpn. Ltd.** reported in (2003) 2 SCC 107, to suggest that present petitions are maintainable, because inspite of availability of alternative remedy, High Court can still exercise its jurisdiction, but we are not in agreement with the aforesaid submissions of the learned counsel representing the petitioners, because, Apex Court while holding that, in appropriate case, inspite of availability of alternative remedy, High Court may exercise its jurisdiction has also laid down three contingencies, where court can interfere: (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where

there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged. Apex Court has held as under:

> "7. So far as the view taken by the High Court that the remedy by way of recourse to arbitration clause was available to the appellants and therefore the writ petition filed by the appellants was liable to be dismissed, suffice it to observe that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: (i) where the writ petition seeks enforcement of any of the Fundamental Rights; (ii) where there is failure of principles of natural justice or, (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act and is challenged [See Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and Ors., (1998) 8 SCC 11. The present case attracts applicability of first two contingencies. Moreover, as noted, the petitioners' dealership, which is their bread and butter came to be terminated for an irrelevant and non-existent cause. In such circumstances, we feel that the appellants should have been allowed relief by the High Court itself instead of driving them to the need of initiating arbitration proceedings."

47. In the instant case, none of the contingencies, as have been pointed out by the Apex Court, has arisen, because, neither there is any violation of fundamental right nor there is any violation of principles of natural justice.

48. Similarly, no orders/proceedings, which can be termed without jurisdiction or ultra vires the Act, are challenged before this Court. Apex Court, in case **Lalitkumar V. Sanghavi** v. **Dharamdas V. Sanghavi** reported in (2014) 7 SCC 255 has specifically dealt with issue with regard to powers of High Courts to intervene in the proceedings/orders passed by Arbitral Tribunal. Apex Court, in the aforesaid case, while placing reliance upon law laid down in **SBP & Co.** v. **Patel Engg. Ltd.,** (2005) 8 SCC 618, has held that intervention by High Courts in the proceedings under Articles 226 and 227, with the orders of arbitral tribunal, is not permissible. Apex Court has held as under:

> "8. Within a couple of weeks thereafter, the original applicant died on 7.10.2012. The question is whether the High Court is right in dismissing the application as not maintainable. By the judgment under appeal, the Bombay High Court opined that the remedy of the appellant lies in invoking the jurisdiction of the High Court under Article 226 of the Constitution. In our view, such a view is not in accordance with the law declared by this Court in S.B.P. & Co. v. Patel Engineering Ltd., (2005) 8 SCC 618. The relevant portion of the judgment reads as under:
>
> > "45. It is seen that some High Courts have proceeded on the basis that any order passed by an arbitral tribunal during arbitration, would be capable of being challenged under Article 226 or 227 of the Constitution of India. We see no warrant for such an approach. Section 37 makes certain orders of the arbitral tribunal appealable. Under Section 34, the aggrieved party has an avenue for ventilating his grievances against the award including any in-between orders that might have been passed by the arbitral tribunal acting under Section 16 of the Act. The party aggrieved by any order of the arbitral tribunal, unless has a right of appeal under Section 37 of the Act, has to wait until the award is passed by the Tribunal. This appears to be the scheme of the Act. The arbitral tribunal is after all, the creature of a contract between the parties, the arbitration agreement, even though if the occasion arises, the Chief Justice may constitute it based on the contract between the parties. But that would not alter the status of the arbitral tribunal. It will still be a forum chosen by the parties by agreement. We, therefore, disapprove of

> the stand adopted by some of the High Courts that any order passed by the arbitral tribunal is capable of being corrected by the High Court under Article 226 or 227 of the Constitution of India. Such an intervention by the High Courts is not permissible."

That need not, however, necessarily mean that the application such as the one on hand is maintainable under Section 11 of the Act.

9. Learned senior counsel for the appellants, Shri Shyam Divan, submitted that if application under Section 11 is also held not maintainable, the appellants would be left remediless while their grievance subsists. On the other hand, learned senior counsel for the respondents Shri C.U. Singh submitted that the appellant's only remedy is to approach the arbitral tribunal seeking a recall of its decision to terminate the arbitration proceedings.

10. Chapter III of the Act deals with the appointment, challenge to the appointment and termination of the mandate and substitution of the arbitrator etc.

10.1 Section 11 provides for the various modes of appointment of an arbitrator for the adjudication of the disputes which the parties agree to have resolved by arbitration. Broadly speaking, arbitrators could be appointed either by the agreement between the parties or by making an application to the Chief Justice of the High Court or the Chief Justice of India, as the case may be, as specified under Section 11 of the Act.

10.2 Section 12(3) provides for a challenge to the appointment of an arbitrator on two grounds. They are –

> (a) "that circumstances exist" which "give rise to justifiable doubts as to" the "independence or impartiality" of the arbitrator;
>
> (b) that the arbitrator does not "possess the qualification agreed to by the parties".

10.3 Section 14 declares that "the mandate of an arbitrator shall terminate" in the circumstances specified therein. They are-

> "14. Failure or impossibility to act.—(1) The mandate of an arbitrator shall terminate if—
>
> > (a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and
> >
> > (b) he withdraws from his office or the parties agree to the termination of the mandate."
> >
> > (2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate."

Section 14(2) provides that if there is any controversy regarding the termination of the mandate of the arbitrator on any of the grounds referred to in the clause (a) then an application may be made to the Court – "to decide on the termination of the mandate".

11. Section 32 of the Act on the other hand deals with the termination of arbitral proceedings.[1] From the language of Section 32, it can be seen that arbitral proceedings get terminated either in the making of the final arbitral award or by an order of the arbitral tribunal under sub-Section 2. Sub-section (2) provides that the arbitral tribunal shall issue an order for the termination of the

arbitral proceedings in the three contingencies mentioned in sub-clauses (a) to (c) thereof.

12. On the facts of the present case, the applicability of sub-clauses (a) and (b) of Section 32(2) is clearly ruled out and we are of the opinion that the order dated 29th October, 2007 by which the Tribunal terminated the arbitral proceedings could only fall within the scope of Section 32, sub-Section (2), sub-clause (c) i.e. the continuation of the proceedings has become impossible. By virtue of Section 32(3), on the termination of the arbitral proceedings, the mandate of the arbitral tribunal also comes to an end. Having regard to the scheme of the Act and more particularly on a cumulative reading of Section 32 and Section 14, the question whether the mandate of the arbitrator stood legally terminated or not can be examined by the court "as provided under Section 14(2)".

13. The expression "Court" is a defined expression under Section 2(1)(e) which reads as follows:-

> "2. Section 2(1)(e) "Court" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject- matter of the arbitration if the same had been the subject- matter of a suit, but does not- include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes;"

14. Therefore, we are of the opinion, the apprehension of the appellant that they would be left remediless is without basis in law."

49. Recently, Apex Court, in case **Union of India** v. **M/s Ambica Construction** reported in AIR 2016 SC 1441, has specifically held that Arbitrator is not a Court, but outcome of an agreement. It is held as under:

> "6. "Court" has been defined in section 2(c) of the Act to mean a civil court having jurisdiction to decide the questions forming the subject- matter of the reference. Section 41 of the Act is extracted hereunder:
>
> "41. Procedure and powers of Court. – Subject to the provisions of this Act and of rules made thereunder :
>
> (a) The provisions of the Code of Civil Procedure, 1908 (5 of 1908), shall apply to all proceedings before the Court, and to all appeals, under this Act, and
>
> (b) The Court shall have, for the purpose of, and in relation to arbitration proceedings, the same power of making orders in respect of any of the matters set out in the Second Schedule as it has for the purpose of, and in relation to any proceedings before the Court:
>
> Provided that nothing in CI. (b) shall be taken to prejudice any power which may be vested in an Arbitrator or umpire for making orders with respect to any of such matters."
>
> The court can exercise the power specified in Second Schedule of the Act. However, Arbitrator is not a court. Arbitrator is the outcome of agreement. He decides the disputes as per the agreement entered into between the parties. Arbitration is an alternative forum for resolution of disputes but an Arbitrator ipso facto does not enjoy or possess all the powers conferred on the courts of law."

50. Division Bench of this Court relying upon judgment having been passed by Apex Court has also held in case **M/s CNG Trading Company Pvt. Ltd.** Versus **H.P. State Electricity Board Ltd.** reported in 2017(1) Him L.R. (DB) 423, that intervention of High Court in the proceedings under Articles 226 and 227, with the orders made by the arbitral tribunal is not permissible.

51. Consequently, in view of detailed discussion as well as law discussed herein above, this Court sees no occasion to interfere in the matter, while exercising powers under Articles 226 and 227 of the Constitution of India. Though, this Court is of the view, for the reasons stated above, that Sections 29A and 29B of the amending Act, 2015, are not applicable to the present arbitral proceedings since the proceedings had commenced before promulgation of the amending Act, 2015. But, even otherwise, there is self contained mechanism under Sections 29A and 29B to deal with the situation, which may arise after termination of the mandate of the arbitrator. Section 15 of the Act, 1996 also provides procedure to deal with a situation, which may arise after termination of mandate of the arbitrator and, as such, this Court sees no reason to interfere in the matter or to decide the dispute in the present petitions, as prayed for by the petitioners.

52. The writ petitions are dismissed being devoid of merits. Pending applications, if any, are also disposed of.

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

Sauju and ors. ……Petitioners.

Versus

Gulab Singh & ors. ……Respondents.

Rev. Petition No. 110 of 2016.
Decided on: 12.4.2017.

Code of Civil Procedure, 1908- Section 114- An application for seeking permission to produce evidence was filed which escaped the notice of the Court- it was contended that additional evidence was necessary for adjudication of the dispute pending between the parties – the appeal could not have been decided without deciding the application – hence, it was prayed that order be reviewed and the appeal be decided afresh- held that jurisdiction to review an order or judgment should be exercised sparingly - a party cannot seek review of judgment on merits- review is permissible on the discovery of new evidence or when there is some error or mistake apparent on record – the dismissal of appeal without considering the application under Order 41 Rule 27 is an error apparent on the face of record – petition allowed – the judgment recalled and matter posted for hearing on merits.(Para-4 to 7)

For the petitioners:	Mr. J.L.Kashyap, Advocate.
For the respondents:	Mr. Ramakant Sharma, Sr. Advocate with Mr. Basant Thakur, Advocate for respondents No. 1, 3 and 5.

The following judgment of the Court was delivered:

Justice Dharam Chand Chaudhary, J (Oral).

Heard.

2. This petition has been filed with a prayer to review the judgment dated 5.6.2015 passed by this Court in RSA No. 181 of 2002 whereby the appeal filed by the review petitioner has been dismissed.

3. The grounds, on which the judgment in question has been sought to be reviewed, in a nut shell, are that an application under Order 41 Rule 27 CPC filed by the review petitioner (appellants in the main appeal) for seeking permission to produce in evidence certain documents has escaped the notice of this Court while hearing arguments in the appeal and deciding the same vide judgment sought to be reviewed. Also that the additional evidence sought to be produced by the review petitioner is essentially required to prove that the entries in revenue records showing deceased Matha, the predecessor-in-interest of the respondents-defendants in the suit in joint possession of the suit land are without any basis being not made on the basis of order of competent authority. The appeal, according to the review petitioner could have not been decided without taking into consideration the said application.

4. It is well settled at this stage that the jurisdiction to review an order or judgment should be exercised cautiously and sparingly. It should be exercised when substantial cause of miscarriage of justice is made out. A party cannot seek review of a judgment on merits or on the plea that the judgment is dehors to the pleadings and evidence available on record. Review is permissible firstly when there is discovery of new evidence, secondly there is some mistake or error apparent on the face of the record and thirdly for any other sufficient reason having nexus with other grounds enumerated under the rules. A review is by no means an appeal in disguise whereby an erroneous decision is re-heard and corrected but lies only for patent error. The power to review cannot be exercised on the ground that the decision is erroneous on merits. An error apparent on the face of the record must be such an error which strike one on mere perusal of the record and would not require any long drawn process of reasoning on points where there may be conceivably two possible opinions. An order, procedural or substantive, if reviewed, the party in whose favour the same is decided is entitled to a hearing in the main matter.

5. Now, if the controversy is seen in the light of the above legal principles, the present is a case where an error is apparent on the face of the record because while considering the main matter i.e. RSA No. 181 of 2002, an application under Order 41 Rule 27 CPC registered as CMP No. 193 of 2012 had escaped the notice of this Court and could not be taken up for consideration therewith. However, the fault did not lie with the Court and rather attributed to the review petitioners because on the day of hearing of the appeal, neither they nor learned counsel representing them opted for putting appearance. The appeal as such was considered in their absence and decided on merits. Anyhow, the dismissal of the appeal without taking into consideration an application under Order 41 Rule 27 CPC filed by the review petitioners certainly tantamount to an error apparent on the face of the record. The present, as such, is a fit case where on acceptance of this petition, the judgment passed in RSA No. 181 of 2002 on 5.6.2015 deserves to be recalled and the appeal heard on merits along with the application as aforesaid.

This petition, as such, is allowed. Consequently, the judgment dated 5.6.2015 passed by this Court in RSA No. 181 of 2002 is recalled. The appeal shall stand revived for fresh hearing along with the application under Order 41 Rule 27 CPC on merits. This petition is accordingly disposed of.

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

Singho Ram and others ....Petitioners

Versus

Balbir Singh and others ....Respondents.

CMPMO No. 125 of 2017
Decided on: 12th April, 2017

Code of Civil Procedure, 1908- Section 151- The evidence of the defendants was ordered to be closed but certified copies of judgment and decree passed in previous suit were received in evidence – it was contended that the document could not have been received without recalling the

order- held that the certified copies of the judgment and decree are per se admissible- permission was sought to produce the documents, which was granted – therefore, no illegality was committed by the exhibition of the documents- petition dismissed. (Para-3 to 5)

For the petitioners: Mr. Ajay Sharma, Advocate.
For the respondents: Nemo.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)

Heard.

2. Order dated 7.03.2017 passed in an application under Section 151 of the Code of Civil Procedure (Civil Suit No. 164/2006) by learned Civil Judge(Junior Division), Jawali, District Kangra, H.P., is under challenge in this petition.

3. The legality and validity of the impugned order has been questioned on the grounds *inter-alia* that when the evidence of the defendants-respondents was ordered to be closed, the documents i.e. certified copy of judgment and decree Ext. D-1 and Ext. D-2 could have not been received in evidence without recalling the order, whereby the evidence of the respondents-defendants was ordered to be closed.

4. This Court is not in agreement with the submissions so made for the reasons firstly, that the documents viz. certified copies of the judgment and decree passed by the Civil Court in the previously instituted suit between the same parties are otherwise per-se admissible in evidence and in terms of Section 79 of the Indian Evidence Act, the presumption of truth is attached thereto and secondly that the same being under challenge in this Court in a Regular Second Appeal, no prejudice of serious nature, is likely to be caused to the petitioners-plaintiffs.

5. The provisions contained under Rule 1A(3) of Order VIII C.P.C. extends a right in favour of the defendants to produce a document which ought to have been produced along with the written statement at a later stage, subject to the permission of the Court ceased of the matter. Such permission was sought by the respondents-defendants by filing an application, of course, under Section 151 of the Code of Civil Procedure and not under Rule 1A(3) of Order VIII. Permission so sought by them has been granted by the trial Court after affording the petitioners-plaintiffs an opportunity of being heard. Merely that the application has not been filed under the correct provision of law i.e. Rule 1A(3) of Order VIII cannot be taken to defeat the right of the respondents-defendants to produce the documents in question in evidence at a later stage. Being so, there is no merit in this petition and the same as such is dismissed. Pending application(s), if any, shall also stand disposed of.

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

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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
Gorkha alias Vijay Kumar … Respondent

Cr. Appeal No. 200 of 2015
Reserved on: 28.02.2017
Date of decision: 12.04.2017

Indian Penal Code, 1860- Section 363, 366, 376(2) and 506(1)- **Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989-** Section 3(2)(v)-**Protection of Children from Sexual Offences Act,, 2012**- Section 6-Prosecutrix belongs to scheduled caste- accused used to harass her on the way to school- one day the accused took her to the upper storey of his sweet shop and raped her under threat – the accused took one photograph of her and used to abuse her by threatening to show the photograph – the accused and another boy came to the house of the prosecutrix and threatened the prosecutrix and her sister - they raised alarm on which people gathered- the accused was tried and convicted by the Trial Court for the commission of offence punishable under Section 363- the accused was acquitted of the commission of remaining offences- aggrieved from the acquittal, the State filed the present appeal- held that there are inconsistencies in the statement of the prosecutrix and her mother regarding the incident, which were not explained – the prosecution case became suspect due to these discrepancies – no explanation was provided for the delay in lodging the FIR – sister of the prosecutrix was not examined and no explanation was provided for the same – the Trial Court had taken a reasonable view while acquitting the accused – appeal dismissed.(Para-8 to 20)

For the appellant: Mr. V.S. Chauhan, Addl. Advocate General, Mr.Vikram Thakur and Mr. Puneet Rajta, Deputy Advocate Generals.

For the respondent: Mr. Devender K. Sharma, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.:

By way of this appeal, State has challenged the judgment passed by the Court of learned Special Court Una, in SCST Case No. 6-VII/2013 decided on 07.01.2015, vide which, learned Court below while convicting the respondent/accused for commission of offence punishable under Section 363 of Indian Penal Code, has acquitted him for commission of offences punishable under Section 6 of Protection of Children from Sexual Offences Act, Sections 366, 376(2), 506(I) of Indian Penal Code and Section 3(2) (v) of SCST Act.

2. The case of the prosecution in brief was that on 18.10.2013, victim (PW-1), whose age was 14 years, lodged a complaint Ext. PW1/A at Police Station, Haroli, in which it was mentioned that she belongs to Scheduled Caste community and was a student of 9th class in Government G.S.S.S. Bathu, District Una, Himachal Pradesh. As per the victim, accused Ajay Kumar used to harass her on her way to School. According to the prosecutrix, on 24.07.2013, at around 1:00 p.m., when she was going to her house from the Bazaar, accused took her to the upper storey of a sweet shop under threat and he raped her. She raised hue and cry, but accused gave her beatings and threatened that in case she disclosed the incident to anyone, then he would kill her and her brother as well as her father. She further stated that accused had clicked one photograph of her. Further, as per the victim, whenever she went to the school, the accused used to make her sit with him and he used to physically abuse her. On 03.10.2013, accused came to her house and when he found her alone in the house, he took her to the same room at Tahliwal and raped her twice and threatened her that she would have to come whenever he call her, otherwise he would show her photograph as well as recordings to the boys. It was further the case of the victim that the accused used to threaten her by proclaiming that she being Harijan by caste, cannot cause any harm to him. Further, according to the victim, on 15.10.2013 at around 4.00 P.M., when she and her sister were alone at their house, accused alongwith one boy, namely, Sham Lal came there and threatened her, upon which she and her sister raised alarm. On this, public gathered there. However, in the meanwhile Sham Lal fled away, whereas accused was apprehended by the villagers. She also reported to the police that she apprehended danger to her life from the accused as the accused had threatened her and blackmailed her on the phone. Victim had narrated all these facts to her mother and she had gone to Police Station alongwith her parents and Pradhan Kanwar Krishan Rana. Further, as

per the prosecution on the basis of the said complaint FIR Ext. PW18/A was registered at Police Station Haroli and victim was got medically examined. Investigation was carried out and accused was arrested and was also got medically examined. Statement of the victim was also recorded under Section 164 Cr. P.C. before learned JMIC(1), Una. The mobile phone as well as motorcycle was also taken in possession. Investigation revealed that the accused had destroyed the recordings of the voice of the victim. Birth certificate of the victim Ext. PW9/A demonstrates that her date of birth was 22.06.2000.

3. After completion of the investigation, challan was presented in the Court and as a prima facie case was found against the accused, accordingly, he was charged for commission of offences punishable under Section 6 of Protection of Children from Sexual Offences Act, 2012, hereinafter referred to as POCSO Act and Sections 366, 376(2), 506(I) of Indian Penal Code and Section 3(2) of SCST Act , to which he pleaded not guilty and claimed trial.

4. Learned trial Court on the basis of evidence produced on record by the prosecution, convicted the accused for commission of offence punishable under Section 363 of Indian Penal Code. However, insofar as the remaining charges framed against the accused were concerned, learned trial Court concluded that the guilt of the accused was not proved for commission of offences punishable under Section 6 of Protection of Children from Sexual Offences Act, Sections 366, 376(2), 506(I) of Indian Penal Code and Section 3(2) of SCST Act. Accordingly, learned trial Court acquitted the accused as far as the commission of said offences was concerned.

5. Feeling aggrieved by the acquittal of the accused for commission of offences punishable under Section 6 of Protection of Children from Sexual Offences Act, Sections 366, 376(2), 506(I) of Indian Penal Code and Section 3(2) of SCST Act, State has filed this appeal.

6. We have heard learned counsel for the parties and have also gone through the records of the case as well as judgment passed by learned trial Court.

7. In order to prove its case, the prosecution in all examined 20 witnesses.

8. We will refer to the statements of relevant witnesses in order to examine as to whether the findings of acquittal returned by learned trial Court in favour of the accused are borne out from the records or the same are perverse.

9. Prosecutrix entered the witness box as PW-1 and she deposed that her date of birth was 22.06.2000 and on 8th April, 2013, she had taken admission in 9th class in G.S.S. School, Bathu. This witness further deposed that the accused used to meet her on her way to the School. She further stated that the accused compelled her to have friendship with him and on 24.07.2013, while she was returning from Gurplah Bazaar at around 1:00 p.m., he asked her to accompany him and threatened her that in case she does not accompany him, then he will kill her father and brother. She further deposed that she accompanied the accused to Tahliwal on motorcycle, where accused took her to a sweet shop and thereafter raped her. Prosecutrix further deposed that accused gave her beatings and threatened her not to disclose the incident to anyone. She further stated that on 03.10.2013 also, while she was alone in her house, accused came there and under threats, she again accompanied him to the same shop, where the accused again raped her. She also stated that accused had gifted her a cell phone and she used to talk with the accused on the said cell phone, which was later on taken back from her by the accused. Prosecutrix further deposed that on 15.10.2013 at about 4 p.m., accused came with a friend Sham Lal to her house, when her parents were working in the field and she was alone in her house with her elder sister Nisha Devi. She further deposed that the accused started molesting her, whereas Sham Lal started fondling her sister. She further deposed that she and her sister raised hue and cry, on which villagers gathered on the spot. Though friend of the accused absconded from the spot, however, accused was caught by the villagers and thereafter her parents also came to the house. She further stated that the accused was let off in the evening by the villagers. She further stated that on 18.10.2013, she narrated the entire incident to her mother and she did not disclose it earlier out of fear of the accused. She further stated that her

mother disclosed the said incident on the same day to her father and thereafter her parents and Ex-Pradhan took her and her sister to Police Station, Haroli, where she scribed an application, which was handed over to the SHO concerned. In her cross-exaination, she was confronted with her application Ex. PW1/A, wherein it was not mentioned by her that the accused had given her a cell phone. She was also confronted with her statement Ex. PW1/C, wherein it was not mentioned that on 24.07.2013, Gorkha had taken her on a bike to Tahliwal. She was again confronted with her statement Ex. PW1/A and Ex. PW1/C, in neither of which it was mentioned that on 15.10.2013, accused Gorkha had teased her. She admitted it to be correct that on 15.10.2013, Ex-Pradhan K.K. Rana and many other villagers had gathered at their house. She stated that her grand father was also present there. She admitted it to be correct that police reached their house and had directed both the parties to come to the Police Station on 16.10.2013. She further deposed that they did not go to the Police Station on 16.10.2013 and that police again visited their house on 16.10.2013 and 17.10.2013. She admitted it to be correct that she had not disclosed about the incident of accused having committed bad act with her to the police up to 17.10.2013. She stated that she had got recorded in Ex. PW1/C that she had told her mother about the incident on 18.10.2013. She was again confronted with her statement Ex. PW1/C, wherein it was not so recorded. She also admitted it to be correct that before 18.10.2013, she had not disclosed the incident to anyone including her sister Nisha Devi. She also admitted it to be correct that before reaching Police Station on 18.10.2013, they had not disclosed anything regarding the bad act to K.K. Rana. She further stated in her cross-examination that averments made qua Raj in Ex. PW1/A were wrongly written by her and she denied the suggestion she had friendship with Raj Kumar and at the instance of her father and K.K., she had let off Raj Kumar and substituted the accused. In her cross-examination, she further admitted it to be correct that she had not disclosed the alleged incidents on 24th July and 3rd October, 2013 to her mother, as was recorded in her statement under Section 164 of the Code of Criminal Procedure before the Magistrate.

10. Mother of the prosecutrix Nirmla Devi entered the witness box as PW-2 and she deposed that on 15.10.2013, she and her husband were working in the fields and her daughters were at the house. Neighbours raised hue and cry and when they reached their house, one Sham Lal ran away when he saw them but accused Ajay alias Gorkha remained in house. She further deposed that accused told her that accused told her that he was having relations with her daughter. She further stated that on 18.10.2013, prosecutrix told her that in the month of July, Gorakha had taken her to a shop in Tahliwal and committed wrong act with her. She also stated that prosecutrix told her that accused did wrong act with her at the same place even in the month of October. She further stated that she narrated these facts to her husband and thereafter they went to Pradhan K.K. Thereafter, her daughters were taken to Police Station, Haroli and they lodged the complaints. In her cross-examination, she stated that on 15.10.2013, K.K. and Kukki Pradhan had come to their house in the evening and she admitted it to be correct that police officials from Police Post Bathri had also come to their house. She also deposed that her daughters had attended their schools normally till October, 2013. She also admitted it to be correct that till 15th October, no such incident was narrated to her by her daughters nor she had lodged any complaint either to the Police or Pradhan of Gram Panchayat. She denied the suggestion that her husband and his companions were thrashed by the accused alongwith Sham Lal and other persons.

11. Father of the prosecutrix, Surjit Singh entered the witness box as PW-3 and he stated that on 15.10.2013 he alongwith his wife were in the fields and at around 04.15 P.M., they heard some noise from their house and they found accused Sham Lal and Gorakh in their house and thereafter accused Sham Lal ran away. He also stated that there was a motorcycle parked outside his house. He also stated that on inquiry, it was revealed that accused Gorakh was known to his daughters. He further stated that his daughters Nisha and Meena did not disclose to him anything on that day. He further deposed that on 18.10.2013, Meena divulged about the bad act committed with her by Gorakh. He further stated that then he went to K.K. Rana Ex-Pradhan and thereafter to Haroli Police Station alongwith his daughters. In his cross-

examination, he deposed that only 2-3 persons of his village had gathered at his house before they reached there from the field. He further stated that no police official had visited their house on 15th. He admitted it to be correct that K.K. Rana, Kukku Pradhan and 5-7 persons of their village had come to their house on that day. He stated that Sham Lal had run away in his presence. He also deposed that after making certain inquiries and calling the police, they let off Gorakh. He further stated that the police and villagers remained at the house for about 20 minutes. He also stated that accused Sham Lal was running a clinic in their village. He also admitted it to be correct that police visited their house on 16.10.2013 and 17.10.2013 and that no complaint was made to the police during those days. He also admitted it to be correct that whatever he was deposing was on the basis of information disclosed to him by his wife and he had not verified the facts from his daughter Nisha.

12. Kanwar Krishan Rana entered the witness box as PW-6 and he deposed that on 18.10.2013, Surjit Singh came to his house and told him that accused Sham Lal had committed rape with his daughter Meena after threatening her. He further deposed that thereafter he alongwith Surjit Singh and his wife and their daughters went to Police Station Haroli, where daughters of Surjit Singh lodged complaint with the police. In his cross-examination, he admitted it to be correct that on 15.10.2013, he went to the house of Surjit where members and Pradhan of Gram Panchayat Bathu were already there. He also stated that police was called on that day by the Pradhan. He admitted it to be correct that after making inquiries from Ajay Kumar alias Gorakh, he was let off by the police. He also admitted it to be correct that from 15th to 18th October he had no talk with Meena regarding the incident.

13. Shri Avtar Chand entered the witness box as PW-7 and he stated that he was running a sweet shop at Tahliwal. However, he denied that accused had ever visited his shop alongwith any girl. He was declared as a hostile witness. In his cross-examination by the learned Public Prosecutor, he denied that accused Gorakh had come to his shop with a girl on 3-4 occasions. He also denied that police had come to the shop on 19.10.2013 and that the victim had identified the room of upper storey of the shop. He stated that accused was his co-villager and belonged to his caste, but he also stated that the accused was not related to him.

14. PW-8 Rajinder Singh deposed that on 15.10.2013, he heard some noise at around 04.00 P.M. coming from the house of Surjit Singh. When he went there, he found accused Gorakh present in the house and Sham Lal ran away in his presence. In his cross-examination, he deposed that Surjit and his wife were at their house when he went there. He admitted it to be correct that K.K. Rana, Kukki and his wife had also reached at the spot and Gorakh was let off after verifying the facts by Surjit Singh and police.

15. Even without referring to the other prosecution witnesses, the testimonies of the above stated six witnesses raise a few pertinent questions which the prosecution has not been able to answer. There are glaring inconsistencies in the statements of prosecutrix PW-1 and her mother PW-2 about the occurrence of the alleged incident which have not been satisfactorily explained by the prosecution. Whereas, PW-1 has deposed in the Court that on 15.10.2013, accused had come to her house at 04.00 P.M. with Sham Lal and had started teasing her and molested her and thereafter when she and her sister started crying and raised hue and cry, people assembled on the spot and Sham Lal absconded, whereas Gorakh was nabbed, however, when we peruse the testimony of PW-2, she has deposed in the Court that when on hearing certain noise in their house, she and her husband rushed to their house from the field and when Sham Lal saw them, he ran away, however, accused Gorakha stayed in their house itself. This contradiction in the statement of the prosecutrix and her mother has not been satisfactorily explained by the State. In fact, in our considered view, this contradiction creates a grave suspicion on the veracity of the case of the prosecution per se especially keeping in view the fact that it has categorically come in the testimony of the prosecutrix that before 15.10.2013, she had not disclosed the factum of her being allegedly sexually abused by the accused to her mother. Besides this, despite the fact that the alleged incident took place on 15.10.2013, there is no cogent explanation given by the prosecution as to why no complaint was lodged with the police

from 15.10.2013 to 18.10.2013. It is also a matter of record that Gorakh who was apprehended at the spot was let off by the father of the prosecutrix after making some inquiries. It has also come on record that on 15th itself police had visited the house of the prosecutrix and left after 15-20 minutes. It is also a matter of record as is evident from the statement of PW-3 Surjit Singh that the police had visited their house on 16.10.2013 as well as on 17.10.2013. PW-2 and PW-3 have admitted that no complaints were lodged between 15.10.2013 to 18.10.2013. Why was accused Gorakh let off by the father of the prosecutrix on 15.10.2013, has not been cogently explained by the prosecution. Why no complaint was lodged between 15.10.2013 to 18.10.2013 despite the police having visited the house of the prosecutrix on 15.10.2013 as well as 16.10.2013 and 17.10.2013, has also not been cogently explained by the prosecution. Why Nisha, sister of the prosecutrix has not been examined, has not been satisfactorily explained by the prosecutrix. Why the prosecutrix has given a contrary version in Court as compared to her mother, has not been satisfactorily explained by the prosecution. As per the prosecution, the prosecutrix was sexually assaulted by the accused initially in the month of July, 2013 and thereafter in the month of October, 2013, but the said incidents were not disclosed by her allegedly because of trauma.

16. In our considered view, trauma and threats are to be gathered from the facts of the case and prosecution has not been able to demonstrate as to what was the trauma that the proseuctrix was suffering in her house, which prevented her from disclosing all these facts to her mother because it is not the case of the prosecution that the prosecutrix was not putting up her with her parents either in the either in the month of July, 2013 or October, 2013. The case of the accused teasing the prosecutrix is also falsified from the fact that the alleged incident of teasing is not so recorded in Ex. PW1/A and Ex. PW1/C. This demonstrates that the prosecutrix has made improvements in her statement. Cross-examination of the prosecutrix further demonstrates that there are lot of contradictions in her statement recorded under Section 164 Cr.P.C. and her statement recorded as PW-1. Besides this, there are major contradictions in the statements of the mother and father of the prosecutrix also. PW-2 mother of the prosecutrix has stated that K.K. and Kukki Pradhan had not come to their house on the evening of 15.06.2013, whereas PW-3 father of the prosecutrix has deposed that they had come to their house on the evening of 15.06.2013. PW-2 has admitted the suggestion that police officials from Bathri Police Post had come to their house on 15.06.2013, whereas PW-3 has stated that no police had come to their house on 15.06.2013. However, PW-3 in the same breath thereafter stated that one accused Gorakh was let off after sometime after certain inquiries were made and police was called. These are also major contradictions in the testimonies of material prosecution witnesses which contradictions have not been satisfactorily explained by the State.

17. Therefore, in our considered view, the acused cannot be convicted for commission of offence punishable under Section 6 of Protection of Children from Sexual Offences Act on the basis of the said uncogent, unreliable and untrustworthy evidence led by the prosecution. Learned trial Court has in detail gone into all these aspects of the matter and thereafter has concluded that the prosecution as not able to prove its case beyond reasonable doubt against the accused under Section 6 of Protection of Children from Sexual Offences Act. In our considered view, the findings so returned by learned trial Court are duly borne out from the records of the case and the same do not call for any interference.

18. Similarly, the findings returned by learned trial Court while acquitted the accused for commission of offence under Section 3(2)(V) of SC & ST (Prevention of Atrocities) Act, also do not warrant any interference as the prosecution has not been able to demonstrate commission of said offence by the accused and learned trial Court after appreciating the material placed on record by the prosecution has rightly acquitted the accused for commission of offence under Section 3(2)(V) of SC & ST (Prevention of Atrocities) Act.

19. In our considered view, the testimony of prosecutrix as well as that of her mother and father do not inspire confidence. These statements are not trustworthy so as to be

made the basis to convict the accused. No material is available on record from which it can be inferred that the accused has committed an offence punishable under Section 3(2)(v) of SC & ST (Prevention of Atrocities) Act or Section 6 of Protection of Children from Sexual Offences Act.

20. Besides this, a perusal of the judgment of learned trial Court demonstrates that the view formed by it on the basis of the material on record is a possible and plausible view. It cannot be said that the conclusion arrived at by learned trial Court is either not borne out from the records of the same or the same is perverse. Learned trial Court has discussed the entire evidence on record and after a minute scrutiny of the same, it has returned the findings of acquittal in favour of the accused. In our considered view also, the prosecution has not been able to prove its case against the accused. The story putforth by the prosecution apparently is false and does not inspire any confidence. The statement of the prosecutrix also does not inspire any confidence. Therefore, while concurring with the findings returned by learned trial Court, we dismiss this appeal being devoid of any merit. Bail bonds, if any, furnished by the accused are discharged.

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

State of Himachal Pradesh .....Petitioner
Versus
Roop Lal ....Respondent.

Cr. Appeal No. 696 of 2008
Decided on : 12/04/2017

Indian Penal Code, 1860- Section 279, 337 and 338-Accused was driving a truck in a rash and negligent manner and hit the car causing hurt to the occupants of the car- the accused was tried and acquitted by the Trial Court- held in appeal that the injured has supported the prosecution version – his testimony was not shaken in cross-examination- no mechanical defect was found in the vehicle- the Trial Court had not properly appreciated the evidence- appeal allowed and judgment of Trial Court set aside- accused convicted of the commission of offences punishable under Sections 279, 337 and 338 of I.P.C. (Para-9 to 12)

For the petitioner: Mr. R.S.Thakur, Addl. Advocate General.
Mr. T.S.Chauhan, counsel, for the complainant.
For the Respondent: Mr. Naresh 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 Judicial Magistrate 1st Class, Court No. VI, Shimla, H.P. whereby he pronounced an order of acquittal upon the accused qua the offences allegedly committed by him.

2. The brief facts of the case are that on 21.10.2004 at about 3.00 p.m near Nauti Khad, Mashobra, accused Roop Lal was driving a Truck bearing No. PB-08A-6675 on public highway in a rash or negligent manner so as to endanger to the human life and personal safety of the others, due to which accused dashed the said truck against Alto Car bearing No. HP-62-0960 and also due to his rash or negligent act of driving caused simple as well as grievous hurt to the informant/Rajinder Chauhan as well as B.C.Chauhan and Bimla Chauhan. In this regard, the informant had intimated the police on which the police went to the spot and prepared the spot map and recorded the statement of witnesses under Section 161 Cr.P.C. 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 notice of accusation stood put to the accused by the learned trial Court for his committing offences punishable under Sections 279, 337 & 338 of the IPC to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 14 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 defence evidence.

5. On an appraisal of the evidence on record, the learned trial Court returned findings of acquittal upon 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 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. It stands espoused by the prosecution qua in sequel to the offending truck standing negligently driven by the accused/respondent, negligence whereof stands canvassed by it, to stand aroused by the factum of the accused/respondent proceeding to negotiate a curve from the inappropriate portion of the road, the ill-fated collision occurring inter se car bearing No. HP-62-0960 vis-à-vis truck bearing No. PB-08A-6675. In sequel to the collision which occurred inter se the truck driven by the accused bearing No. PB-08A-6675 vis.a.vis car bearing No. HP-62-0960, the informant Rajinder Chauhan besides B.S.Chauhan and Vimla Chauhan, suffered injuries on their respective persons injuries whereof stand depicted in the respective MLS prepared vis.a.vis them, MLCs whereof stand comprised in Ext.PW-12/A, Ext.PW-12/B and Ext.PW-12/C.

10. The injured/victims in their respective depositions comprised in their respective examinations in chief, echoed versions qua the ill-fated collision, in befitting corroboration qua the unfoldments in respect thereto embodied in the apposite F.I.R, borne on Ext. PW-14/B, besides they deposed with consistency vis-à-vis their respective previous statements recorded in writing. Consequently, their respective testifications are bereft of any stain of any inter se contradictions occurring in their respective examinations in chief vis.a.vis their respective cross-examinations, whereupon credibility qua their respective testified versions qua the occurrence stood enjoined to be imputed by the learned trial Court also with their deposing a version qua the occurrence with utmost intra se corroboration besides their respective testifications qua the occurrence remaining un-shattered during the exacting ordeal of a rigorous cross-examination, whereto they subjected to, by the learned defence counsel also thereupon their respective testifications acquire an enhanced virtue of credibility. However, the learned trial Court proceeded to dis-impute credence vis-à-vis their respective testifications despite theirs being injured/victims in the relevant collision, collision whereof occurred inter se the offending truck and the relevant car whereon they stood borne. The reason(s) as propounded by the learned trial Court to disimpute credence qua the testifications of the aforesaid injured/victims, ensued from the factum qua the spot map brone on Ext.PW-14/A, at mark 'A" thereof, echoing qua broken

pieces of glass(es) of both the vehicles standing scattered thereat, whereas theirs remaining uncollected by the Investigating Officer despite theirs constituting the best link evidence, qua the site of occurrence, hence warranting erection of an inference qua thereupon the charge framed upon the accused standing jettisoned. However, the aforesaid reason propounded by the learned trial Court for pronouncing an order of acquittal upon the accused, is extremely shaky, significantly when PW-14 who prepared site plan embodied in Ext.PW-14/A has in his testification made visible underscorings therein qua its preparation occurring at the site of occurrence besides thereat the posture/position of the relevant vehicle remaining undisturbed, thereupon implicit reliance was imputable thereon, unless suggestions stood purveyed qua him, marking the factum qua his contriving its preparation. However, the aforesaid suggestion(s) remained unpurveyed to him by the learned defence counsel while holding him to cross-examination, wherefrom an inference stands engendered, qua the reflection(s) occurring therein being bereft of any vice of doctoring, hence warranting imputation of credence thereon. The learned counsel for the appellant contends qua the vigour of the depictions occurring in site plan, suffering enfeeblement, arising from the factum of PW-2 Munish Kumar though deposing in his examination in chief qua its preparation occurring in his presence yet his while standing subjected to cross-examination, contradicting the aforesaid factum, thereupon an inference ensuing, qua the preparation of site plan borne in Ext.PW-14/A being amenable to a derivative qua its standing fabricated also thereupon the depictions held therewithin not warranting any imputation of credence thereon. However, the aforesaid contention reared before this Court by the learned counsel for the accused, is wholly unworthwhile, as the Investigating Officer concerned, while standing subjected to cross-examination by the learned defence counsel, has denied suggestions put to him thereat, qua his preparing site plan in the house of Munish Kumar besides has denied suggestion(s) put to him qua both Munish Kumar and Dharam Dass recording their presence at the time contemporaneous qua the ill fated collision occurring thereat, thereupon with no apposite suggestions standing put to him for corroborating the testification occurring in the cross-examination of PW-2 qua site plan held in Ext.PW-14/A standing fabricated by the Investigating Officer concerned, fabrication whereof stands ascribed qua him qua his not proceeding to take the appropriate measurement(s) at the relevant sight of occurrence rather his contriving its preparation at the house of the nephew of Munish Kumar, thereupon omission of the aforesaid suggestion to the Investigating Officer concerned rather constrains an inference qua the echoings made by PW-2 in his cross-examination qua site plan standing prepared in the house of his nephew hence not acquiring any tenacity, conspicuously, also when the apposite suggestion put to the Investigating Officer by the learned defence counsel, marks, the factum qua the latter preparing the site plan at the house of PW-2 and not at the house of the nephew of PW-2, thereupon also it appears qua the aforesaid communication occurring in the cross-examination of PW-2 wherein he belies his earlier deposition existing in his cross-examination qua site plan standing prepared in his presence, not in its entirety holding any vigour, its articulation by him being perfunctory. Contrarily, the effect of the aforesaid contradistinct suggestions put to PW-2 and PW-14 qua the place whereat Ext.PW-14/A stood prepared, is per se theirs marking the factum qua the defence contriving the aforereferred espousal, rendering hence the echoings held therewithin to concomitantly hold no tenacity.

11. The testimony of the complainant besides of the victim(s) qua the relevant occurrence when warrants imputation of credence thereupon, also thereupon the factum of non-collection of broken pieces of glass(es) by the Investigating Officer from the relevant sight of occurrence is construable to be insignificant, importantly when the reflections occurring in site plan stand concluded hereinabove, to hold vigour, whereupon the testification(s) of PW-1 and PW-2 even if they make bespeakings therein, at purported variance vis.a.vis. the deposition(s) of the complainant/injured/victims are hence also unworthwhile, significantly when the prosecution did not lead them into the witness box to render an eye witness account qua the relevant occurrence rather it led them into the witness box, in proof of the relevant memos, theirs being signatories thereof.

12. Be that as it may, with both the vehicles, standing concluded by the mechanical expert concerned to be road worthy besides pliable whereupon hence with both the vehicles driven by the accused and by the complainant, not suffering from any mechanical defect, hence enjoined the accused to manoeuvre the offending truck on its appropriate portion of the curve, rather than for reasons aforesaid, his negligently manoeuvring it, to the inappropriate side of the road. Consequently, this court is constrained to conclude qua the learned trial Magistrate omitting to appreciate the aforesaid best pieces of evidence, emphatically pronouncing upon the guilt of the accused/respondent. In aftermath, reinforcingly, it can be formidably concluded, qua the findings returned by the learned trial Court meriting interference. In summa, the verdict recorded by the learned trial Magistrate suffers from a gross infirmity as well as a perversity of non appraisal of the relevant and germane evidence whereupon this Court is constrained to reverse the findings of acquittal pronounced upon the accused. The appeal is accepted. The impugned judgement is quashed and set-aside. The accused is convicted for offences punishable under Sections 279, 337 & 338 of the IPC. The accused be produced before this Court on 26th April, 2017 for his thereon being heard on the quantum of sentence.

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

Surjit Singh .....Petitioner.

Versus

Harmohinder Singh & others. ....Respondents.

Civil Revision No. 107 of 2012
Judgment reserved on 29.3.2017
Decided on : 12.4.2017

Code of Civil Procedure, 1908- Order 6 Rule 17- An application for amendment of the objection petition was filed, which was dismissed- subsequently, the objection petition was also dismissed by the Trial Court- aggrieved from the order, present revision has been filed- held thatthe order passed in the application had merged in the final order- if the order on application was wrong, it would affect the final order as well–revision allowed. (Para-3 to 7)

For the Petitioner: Mr. Neeraj Gupta, Advocate.
For the Respondents: Mr. Shyam Singh Chauhan vice counsel.

The following judgment of the Court was delivered:

Sureshwar Thakur, J

The instant petition stands directed against the impugned order, recorded by the learned Civil Judge (Senior Division) Una, District Una, H.P. upon the objections constituted therebefore by the JD, whereupon he resisted the execution of the conclusively recorded decree of mandatory injunction whereupon the projections raised by the JD upon khasra No. 4464/2903/1, projections whereof stands denoted by letters shown in red and yellow circles in the site plan stood hence ordered to be demolished, whereupon he hence dismissed the apposite objections reared therebefore. Initially, the judgment debtor resisted the execution, by the learned executing Court, of the apposite decree put to execution therebefore by his rearing objections therebefore, objections, whereof, however thereat did not hold therewithin any unfoldment qua the judgment debtor suo motu voluntarily begetting compliance with the decree of mandatory injunction aforesaid, comprised in his removing the unauthorisedly raised projection/construction upon khasra No. 4464/2903/1. However, the aforesaid compliance made by the JD with the decree put to execution before the learned executing Court, stood

subsequently espoused by him, espousal whereof stood embedded in an application constituted therebefore under the provisions of Order 6 Rule 17 CPC, whereon also the learned executing Court pronounced an order dismissing it. The order rendered by the learned Executing Court upon the application constituted therebefore by the JD under the provisions of Order 6 Rule 17 CPC, stood pronounced thereon, on 1.5.2012, whereas the learned Executing Court proceeded to subsequently on 18.8.2012 dismiss the objections constituted therebefore by the judgment debtor.

2. The learned counsel appearing for the petitioner herein, has hereat constituted an onslaught qua the legality of the orders pronounced by the learned Executing Court upon the application constituted therebefore by the judgment debtor under the provisions of Order 6 Rule 17 CPC, however, he in prompt sequel to the orders standing pronounced thereupon, by the learned Executing Court, visibly omitted to make an apposite motion herebefore for hence seeking their reversal. Obviously, he waited for the pronouncement of a verdict by the learned Executing Court, upon his earlier therewith instituted objections qua the executability of the execution petition, objections whereof did not hold therewithin any averment qua the judgment debtor suo moto meteing compliance with the mandate of the conclusively recorded concurrent decree(s) of mandatory injunction, pronounced upon him, by the civil courts concerned, whereupon the failure or omission of the judgment debtor, to promptly, on rendition of an apposite verdict upon his application constituted under the provisions of Order 6 Rule 17 CPC before the learned Executing Court, hence may estop him to assail it herebefore nor he nowat stand vested with any leverage, to while assailing the orders recorded subsequent thereto upon his objections by the learned Executing Court, to also assail the verdict recorded, by it, upon his application constituted therebefore under the provisions of order 6 Rule 17 CPC. Though, an apposite facilitation or statutory leverage stands bestowed upon a party to the lis, aggrieved, by any pronouncement made by the learned trial Court or the learned first Appellate Court upon any motion constituted therebefore during the pendency of a civil suit before it or during the pendency of an appeal before the learned First Appellate Court, to dehors his not making a prompt challenge thereto herebefore, to within the grounds of appeal held in a Regular Second Appeal constituted herebefore against the verdicts recorded by the courts below to also assail the pronouncements respectively recorded by the learned trial Court and by the learned first Appellate Court upon application(s) respectively constituted therebefore during the pendency of the apposite civil suit or during the pendency of an appeal thereat, ensual whereof, of the aforesaid statutory leverage(s) vis-à-vis the aggrieved litigant, significantly accrues from the mandate held in the provisions of Section 105 of the Code of Civil Procedure, provisions whereof stand extracted hereinafter.

> "105. Other orders.- (1) Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of the original or appellate jurisdiction, but, where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.
>
> (2) Notwithstanding anything contained in sub-section (1), where any party aggrieved by an order of remand [***] from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness."

3. The bestowing of the aforesaid statutory leverage upon an aggrieved from an adverse pronouncement recorded upon him qua application(s) instituted before the civil Court concerned or upon applications constituted before the appellate Court, hence visibly ensue qua him on his preferring a second appeal before this Court, whereas with the petitioner herein, invoking the revisional jurisdiction of this Court, thereupon he may stand estopped to assail the decision recorded by the learned executing Court upon his application constituted therebefore under the provisions of Order 6 Rule 17 CPC. However, the baulking of the aforesaid endeavour of the revisionist, would be unjust besides would be for the reason(s) ascribed hereinafter hence judicially inexpedient.

4. The doctrine of merger holds its sway besides clout inter se the orders recorded by the learned executing Court upon the apposite objections of the JD constituted therebefore, objections whereof stood instituted therebefore earlier qua his constituting therebefore an application under the provisions of Order 6 Rule 17 CPC, sway whereof remains intact, despite the learned executing Court making its apposite pronouncement upon the application constituted therebefore under Order 6 Rule 17 CPC prior to its making its pronouncement upon the earlier therebefore therewith with reared objections by the JD qua the executability of the decree put to the execution therebefore, by the decree holder, command of doctrine whereof hereat, stands aroused by the factum qua the apposite endeavour or the assay of JD/petitioner stemming from his aspiration, to thereupon facilitate the learned executing Court to hence proceed to order for the appointment of a local commissioner, for discerning, the truthfulness of the objections strived by the JD to hence with the leave of the Court hence reared therein, significantly when they therewithin hold echoings qua the JD hence suo moto begetting compliance vis-à-vis the mandate of the concurrent conclusive decree(s) of mandatory injunction pronounced upon him, whereas the learned executing Court, has apparently blunted the aforesaid endeavour, though ensuring success thereof, may have enabled the learned executing Court, to, proceed to record an order qua hence the decree of mandatory injunction standing hence satisfactorily executed besides would forestall issuance of coercive process upon the JD/petitioner herein for enforcement of the apposite decree, issuance whereof would prejudice the rights of the JD also may prove to be an unyielding exercise. Consequently, for forestalling eruption of the eventualities aforesaid, it was rather befitting for the learned executing Court to record an affirmative pronouncement upon the application constituted therebefore by the JD under the provisions of Order 6 Rule 17 CPC.

5. In summa, the ouster by the learned executing Court, of the aforesaid endeavour of the JD, for hence facilitating it, to pronounce an order vis-à-vis him qua his thereupon suo motu satisfactorily begetting full satisfaction of the decree put therebefore to execution, rather its proceeding to without the aforesaid apposite averment in respect thereto standing permitted to be incorporated in the objections initially put forth by the JD before the learned executing Court, hence dismiss the apposite objections, has unfailingly prejudiced the rights of the judgment debtor/petitioner herein, whereupon, he, despite his not prior to his nowat challenging along with the order pronounced upon his initial objections, make a prompt challenge upon the verdict recorded upon his application constituted before the learned executing Court under the provisions of Order 6 Rule 17 CPC, hence holds a leverage to assail, it, alongwith his assailing the orders rendered upon his objections, conspicuously, when both the orders aforesaid are closely blended also when the orders previously recorded by the learned trial Court upon the application constituted therebefore under the provisions of Order 6 Rule 17 CPC impinge upon the validity of the subsequently recorded orders by it upon his objections reared therebefore. Tritely also with theirs standing inextricably entwined thereupon with the doctrine of merger holding its fullest sway upon both the orders aforerstated, thereupon, despite no communication(s) occurring within the provisions of Section 115 of the CPC qua the petitioner holding the apposite statutory leverage, to, along with the orders pronounced by the learned executing Court upon his objections also assail the previous order recorded by it upon his application constituted therebefore under the provisions of Order 6 Rule 17 CPC, yet he hence holds a right to cast a composite challenge qua it under the extant civil revision. Moreover, he also holds a right to hereat make a composite challenge with respect to the validity of both the orders, significantly when the aspiration of the JD to incorporate with the leave of the Court, the apposite objections holding unveilings qua his suo moto begetting compliance with the concurrent conclusive decree(s) of mandatory injunction, decree whereof stood put to execution before the learned Executing court, ouster of assays whereof, when impinge upon hence the learned executing Court precluding itself to record an order qua the apposite decree put to execution therebefore standing satisfactorily executed, for recording of an order whereof, it stood constrained to prior thereto order for appointment of a local commissioner for discerning truths thereof, whereupon the issuance of an unwanted coercive process for enforcing the apposite decree, would stand rendered unnecessary. In aftermath with both the orders standing closely blended also when the invalidity of the earlier order may ultimately render the subsequent order to also suffer

invalidation, thereupon the JD holds the right, to, along with his assailing the subsequently recorded pronouncement made by the learned executing Court upon his objections, to, also constitute an apposite challenge qua the previous order recorded, by it, upon his application constituted therebefore under the provisions of Order 6 Rule 17 CPC, dehors no explicit statutory right qua it occurring within the domain of Section 115 of the CPC. The conferment of the aforesaid leverage vis-à-vis the petitioner herein, emanates on this court expanding, in coagulation with the play hereat of the doctrine of merger, for thereupon achieving judicial expediency, the connotation borne by the coinage "case decided" occurring in Section 115 of the CPC, doctrine whereof for reasons aforestated holds its fullest sway hereat, qua its holding a signification in 'plurality' than in 'singularity', whereupon both orders are amenable to a challenge herebefore under a composite petition.

6. Nowat, with this Court holding qua the petitioner holding the apposite just and tenable right to assail both the orders recorded by the learned Executing Court, one upon his application constituted therebefore under the provisions of Order 6 Rule 17 CPC, holding therewithin his objection other than the objections reared earlier thereat therebefore, thereafter the tenacity of the espousal reared herebefore of the learned counsel for the petitioner herein qua the orders recorded therein, by the learned Executing Court suffering from a vice of illegality stands enjoined to be determined. The learned executing Court had declined relief to the JD upon the aforestated application constituted therebefore under provisions of Order 6 Rule 17 CPC, merely on anvil qua thereupon the JD merely for prejudicing the rights of the decree holder hence introducing new cause(s) of action. However, the aforesaid reason(s) propounded by learned Executing Court for hence declining relief to him upon his application constituted therebefore under the provisions of Order 6 Rule 17 CPC is per-se flimsy, significantly when he had neither introduced nor contrived, to change or alter the structure of his pleadings held in his written statement, endeavor whereof of the JD would tantamount to his entailing the learned Executing Court to impermissibly go behind the decree nor obviously when he did not concert for any de-novo fresh trial of the suit rather apparently was facilitating the learned executing Court, to, without its ordering for issuance of coercive process, for enforcement of the decree of mandatory injunction pronounced upon him, to by appointing of a Local Commissioner hence discern the veracity of the relevant factum probandum, whereas, the learned executing Court by dismissing the aforesaid application, has frustrated the aforesaid compliant endeavour of the JD qua hence apposite decree standing satisfied, whereupon injustice stands perpetuated upon him. Consequently, the orders recorded upon the application constituted therebefore by the JD under the provisions of Order 6 Rule 17 CPC are quashed thereupon the revision petition stands allowed.

7. Be that as it may, the ground as espoused in the instant petition qua the apposite execution petition instituted before the learned Executing Court, by the decree holder, standing instituted therebefore, beyond the period prescribed for its preferment therebefore, hence its standing barred by limitation, grounds whereof stands canvassed to arouse from the factum qua whereas, the learned trial Court pronouncing its apposite verdict on 21.3.1994 whereas, the execution petition standing preferred belatedly on 30.11.2011 before the learned executing Court, hence, its preferment therefore occurring beyond the statutorily prescribed period of three years, thereupon, it stood barred by limitation. However, the aforesaid espousal is meritless. A perusal of order(s) recorded by the learned First Appellate Court on 22.4.1994 unveil qua it staying the execution and operation of the decree impugned thereat. Also this Court on 28.8.1998, while standing seized of a RSA preferred herebefore by the aggrieved defendants likewise stayed the execution of the concurrently recorded decrees of mandatory injunction by both the learned courts below, thereupon with the fiat of the judicial verdicts aforesaid standing suspended, thereupon the decree of the learned trial Court stood hence rendered unexecutable, whereas with the decree holder instituting the apposite petition for execution of the apposite decree within three years since this Court deciding RSA No. 388 of 1998 thereupon, its preferment was within the statutorily prescribed period of limitation. Consequently, the aforesaid espousal stands discountenanced.

In view of the above, the instant petition is accepted. The impugned order recorded by the learned Executing Court upon the application of the JD constituted under the provisions of Order 6 Rule 17 CPC is quashed and set aside as also the orders pronounced upon his objections are also quashed and set aside. The parties are directed to appear before the learned Executing Court on 11.5.2017 whereafter the learned Executing Court shall proceed to decide the aforesaid amended objections of the JD Record be sent back forthwith.

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

CWP No. 169 of 2003 alongwith
CWPs No. 319 and 336 of 2003
Reserved on: 30.03.2017
Date of decision: 12.04.2017

<u>1. CWP No. 169 of 2003</u>
Union of India … Petitioner
Versus
M/S Krishna Coal Company …Respondent

<u>2. CWP No. 319 of 2003</u>
Union of India …. Petitioner
Versus
M/S Graphite Coal Co. … Respondent

<u>3. CWP No. 336 of 2003</u>
Union of India … Petitioner
Versus
M/S Punjab Coal Company … Respondent

Public Premises (Eviction of Unauthorized Occupants) Act, 1971- Section 4 and 9- Various eviction petitionswere filed by Union of India seeking eviction and recovery of damages on account of unauthorized use and occupation of railway land situated in Shimla- the petitions were partially allowed and the appeals were dismissed- aggrieved from the order, writ petitions were filed- held that the respondents are in possession prior to the commencement of the Public Premises Act –the provision of the Act cannot be made applicable to them – the eviction petition were not maintainable – liberty granted to the petitioners to proceed against the respondents in accordance with the law.(Para-15 to 22)

Case referred:
Suhas H. Pophale Vs. Oriental Insurance Company Ltd. and its Estate Officer (2014) 4 Supreme Court Cases 657

CWP No. 169 of 2003 alongwith
<u>CWP Nos. 319 and 336 of 2003</u>

For the petitioner(s): Mr. J.L. Kahsyap, Advocate, (in all the petitions).
For the respondent(s): Mr. B.C. Negi, Senior Advocate with Mr. Pranay Partap Singh, Advocate and Mr. Suneet Goel, Ms. Meera Devi and Mr. Angrez Kapoor, Advocates, for the respective respondents.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J. :

These three writ petitions are being disposed of by a common judgment as legal issue involved in all of them is the same, that is, maintainability of a eviction petition filed under the provisions of Public Premises Act qua those occupants who are in occupation of premises prior to 16.09.1958 i.e. prior to the Public Premises Act becoming applicable.

2. All these writ petitions have been filed by Union of India against the judgments passed by Appellate Authority in appeals under Section 9 of the Public Premises (Eviction of Unauthorized Occupants) Act, 1971, vide which, Appellate Court has dismissed the appeals filed by the present petitioners against the judgments/orders of Estate Officer, who had closed the proceedings initiated under Section 4 of the said Act, for eviction on the basis of statement as was made before it by the present petitioners.

3. In CWP No. 169 of 2003 titled Union of India Vs. M/S Krishna Coal Company, in an application filed under Sections 4 and 7 of the Public Premises (Eviction of Unauthorized Occupants) Act, 1971, on behalf of Union of India, for eviction and recovery of damages on account of unauthorized use and occupation of Railway land situated in Shimla, Estate Officer, Northern Railway, Ambala Cantt., in Case No. 31-W/PPEA/UMB, directed the respondent therein i.e. M/S Krishna Coal Company, to pay Rs.35678.50 as arrears of licence fee including 10% as token damages for the period from 01/03/1986 to 31/12/1991 and thereafter pay Rs.5563.49 per annum as licence fee and it also directed the respondent to execute a fresh agreement to this effect which was to be renewed every three years.

4. In appeal, this order was sustained by the Appellate Authority vide decision dated 06.09.2002.

5. In CWP No. 319 of 2003 titled Union of India Vs. M/S Graphite Coal Company, in an application filed under Sections 4 and 7 of the Public Premises (Eviction of Unauthorized Occupants) Act, 1971, on behalf of Union of India, for eviction and recovery of damages on account of unauthorized use and occupation of Railway land situated in Shimla, Estate Officer, Northern Railway, Ambala Cantt., in Case No. 29-W/PPEA/UMB, directed the respondent therein i.e. M/S Graphite Coal Company, to pay Rs.34533.27 as arrears of licence fee including 10% as token damages for the period from 01/03/1986 to 31/12/1991 and thereafter pay Rs.5385.51 per annum as licence fee and it also directed the respondent to execute a fresh agreement to this effect which was to be renewed every three years.

6. In appeal, this order was sustained by the Appellate Authority vide decision dated 06.09.2002.

7. In CWP No. 336 of 2003 titled Union of India Vs. M/S Punjab Coal Company, in an application filed under Sections 4 and 7 of the Public Premises (Eviction of Unauthorized Occupants) Act, 1971, on behalf of Union of India, for eviction and recovery of damages on account of unauthorized use and occupation of Railway land situated in Shimla, Estate Officer, Northern Railway, Ambala Cantt., in Case No. 26-W/PPEA/UMB, directed the respondent therein i.e. M/S Punjab Coal Company, to pay Rs.26979/- as arrears of licence fee including 10% as token damages for the period from 01/08/1986 to 31/12/1991 and thereafter pay Rs.4530.77 per annum as licence fee and it also directed the respondent to execute a fresh agreement to this effect which was to be renewed every three years.

8. In appeal, this order was sustained by the Appellate Authority vide decision dated 06.09.2002.

9. When these cases were taken up for hearing on 17.03.2017, Mr. B.C. Negi, learned Senior Cousnel appearing for respondent No. 1 in CWP No. 319 of 2003, submitted that before this Court ventures to adjudicate on the merits of the matter, there is another issue which has to be decided by this Court which pertains not only to maintainability of present writ

petitions but also with regard to maintainability of the proceedings initiated against the respondents under the Public Premises Act from which these writ petitions arise. The contention of Mr. Negi is that as admittedly all the private respondents in these cases were in possession of the properties subject matter of the writ petitions, before the Public Premises Act came into force/became applicable w.e.f. 16.09.1958, no proceedings against them could have been initiated under the 1971 Act. In support of his contention, learned counsel for the respondent has relied upon the following judgment:-

***SUHAS H. POPHALE Vs. ORIENTAL INSURANCE COMPANY LIMITED AND ITS ESTATE OFFICER*, *(2014) 4 SUPREME COURT CASES 657*.**

10. On the basis of above submissions of Mr. Negi, on 17.03.2017, this Court passed the following order:-

> "When these cases were taken up for arguments today, Mr. B.C. Negi learned Senior Counsel appearing for respondent No.1 has drawn the attention of this Court towards the judgment of Hon'ble Supreme Court in **Suhas H. Pophale Vs. Oriental Insurance Company Ltd. and its Estate Officer** (2014) 4 Supreme Court Cases 657, and **M/s Band Box Private Limited Vs. Estate Officer, Punjab and Sind Bank and another**, 2014 (2) Shim. LC 1097, in which the Hon'ble Supreme Court has held that in cases where an occupant was in possession of premises before coming into force of Public Premises Act, the provisions of the Act shall not be applicable. Learned counsel for the respondents submitted that taking into consideration the fact that in the present cases licences were created in favour of the respondents well before coming into force of the Public Premises Act, therefore, the proceedings initiated against them under the Public Premises Act *per se* were illegal and thus not maintainable. Faced with this situation, Mr. Kashyap learned counsel for the petitioner prays that he may be granted some time to have appropriate instructions in these cases. List on **30.3.2017**, as prayed for."

11. Arguments were heard on 30.03.2017 and after hearing learned counsel for the parties, judgment was reserved on the issue of maintainability of the proceedings as well as writ petitions in view of the judgment of the Hon'ble Supreme Court in *Suhas H. Pophale* (supra).

12. Learned counsel for the respondents have submitted that in these three writ petitions private respondents in fact are in possession of the premises in their capacities as licencees much before the Public Premises Act (Eviction of Unauthorized Occupants) Act, 1971, hereinafter referred to as the 1971 Act, came into force in the year 1971 and rather are in possession of the said land even before the above mentioned Act became applicable w.e.f. 16.09.1958. Mr. B.C. Negi, learned Senior Counsel, who has made leading arguments on behalf of the private respondents, has submitted that as the private respondents in all these three cases were in possession of the land, subject matter of the applications filed under the Public Premises Act, much before 16.09.1958 in their capacities as licencees, no eviction proceedings could have been initiated against them under the provisions of the 1971 Act. Mr. Negi has argued that as the 1971 Act was applicable w.e.f. 16.09.1958, this Act can be applied prospectively to these premises which were public premises as on 16.09.1958 and eviction petitions can be filed only against those persons who entered into occupation of the said public premises after 16.09.1958. In other words, Mr. Negi submitted that 1971 Act has no retrospective effect and the provisions of the same cannot be invoked to effect those occupants who were in occupation of the said premises prior to 16.09.1958.

13. On the other hand, Mr. J.L. Kashyap, learned counsel appearing for Union of India had submitted that the private respondents cannot be allowed to raise this objection about the maintainability of the eviction petitions filed under the Public Premises Act, 1971 at this stage. Accordingly, Mr. Kashyap argued that the proceedings under the Public Premises Act were initiated against the private respondents more than 30 years ago and at this belated stage, private respondents cannot be permitted to come up with this plea to frustrate the claim

of the petitioners. It has further been argued by Mr. Kashyap that even otherwise this Court cannot go into this issue as all these three petitions stand remanded back by the Hon'ble Division Bench in LPA No. 43 of 2008 and other connected matters and as now there is a "Reference" to be answered by this Court as has been sent by the Division Bench in LPA, therefore, this Court has to answer that Reference only and it cannot adjudicate on any other issue. Mr. Kashyap has further argued that the judgment referred above has no applicability in the facts of this case and he reiterated that in fact this Court is precluded from considering this issue as the matter has been remanded back to it by way of Reference by the Hon'ble Division Bench in LPA No. 43 of 2008 and other connected matters.

14. I have heard learned counsel for the parties.

15. The factum of the private respondents being in occupation of the land subject matter of the writ petitions much before coming into force of the 1971 Act and even before 16.09.1958 i.e. the day from which the said Act was deemed to have come into force is not disputed, therefore, the moot issue which is to be answered by this Court as to whether the eviction petition under the 1971 Act could have been filed against the private respondents?

16. The Public Premises Act (Eviction of Unauthorized Occupants) Act, 1971 was enacted by the Parliament to provide for the eviction of unauthorized occupants from public premises and for certain incidental matters. As per sub-section (3) of Section 1, the said Act was deemed to have come into force on 16.09.1958, except Sections 11, 19 and 20, which came into force i.e. w.e.f. 23.08.1971. Public premises have been defined in Section 2(e) of the Act. This Act in fact repealed after the Public Premises (Eviction of Unauthorized Occupants) Act, 1958.

17. In ***Suhas H. Pophale Vs. Oriental Insurance Company Ltd.*** (supra), Hon'ble Supreme Court has, inter alia, held that for any premises to become public premises, the relevant day will be 16.09.1958 or which ever is later date on which day the premises concerned become public premises. Hon'ble Supreme Court has further held in this case that as far as the eviction of unauthorized occupation from public premises is concerned undoubtedly it is covered under the Public Premises Act but it is so covered from 16.09.1958 or from the later date when premises concerned become public premises.

18. In my considered view, it is evident from the said decision of the Hon'ble Supreme Court that an occupant of a public premises who occupies the same before 16.09.1958 is not covered under the Public Premises Act. In other words, the provisions of Public Premises Act cannot be invoked to evict such occupant who is in occupation of premises before 16.09.1958. This Court is not oblivious to the fact that in the above mentioned case the Hon'ble Supreme Court was dealing with the applicability of Public Premises Act vis-a-vis the State Rent Act but the fact still remains that the law as has been declared by the Hon'ble Supreme Court in the said judgment is to the effect that an occupant of public premises before 16.09.1958 cannot be evicted for unauthorized occupation of public premises under the Public Premises Act.

19. In this background, when we come to the facts of the present three writ petitions, it has not been disputed that the private respondents therein were in possession of the public premises before 16.09.1958, therefore, in my considered view, as per the law declared by the Hon'ble Supreme Court in *Suhas H. Pophale's case* supra, the eviction proceedings against the said private respondents could not have been initiated under the provisions of the 1971 Act. Thus, the proceedings so initiated against them are *non est* and adjudication upon the same by the Estate Officer as well as by the Appellate Authority are also, therefore, without jurisdiction. Held accordingly. However, it is clarified that it is not as if the petitioner - Union of India has no remedy to evict private respondents. The petitioner is at liberty to proceed against them in accordance with law by availing those remedies which otherwise are available to it for eviction of the said private respondents.

20. As far as other contentions raised by Mr. Kashyap are concerned, a perusal of the judgment passed by Hon'ble Division Bench of this Court in LPA No. 43 of 2008 and other

connected matters, decided on 26.11.2014, demonstrates that vide said judgment Hon'ble Division Bench was pleased to allow the appeals so filed and while setting aside the judgment passed by learned Single Judge, the cases were remanded back to the writ Court for decision afresh. The judgment passed by the Hon'ble Division Bench in LPA No. 43 of 2008 and other connected matters, has no where sent back any "Reference" to be decided by the writ Court. The contention of Mr. Kashyap that the judgment of the Hon'ble Supreme Court referred to above has no applicability in the facts of this case, is also without merit because I have already discussed that the said judgment lays down very clearly and categorically that eviction proceedings under the 1971 Act cannot be filed against the occupants of public premises who were in possession of the same before 16.09.1958. As far as the submission of Mr. Kashyap that this Court should not go into the said issue at such a belated stage as the private respondents have not raised this issue earlier, in my considered view, this plea also sans merit because there cannot be any estoppel against illegality and as the eviction proceedings which were initiated by the present petitioners against the private respondents under the provisions of the 1971 Act were *non est* being not maintainable at all, this Court cannot be precluded from going into this issue at this stage on the pretext that the private respondents are estopped from raising this plea. This Court reiterates that there cannot be any estoppel against illegality.

21. Accordingly, these writ petitions are disposed of by holding that as the private respondents are in occupation of the public premises before coming into force of the Public Premises Act, which is deemed to have come into force w.e.f. 16.09.1958, therefore, proceedings could not have been initiated against them under the Public Premises Act, 1971 for the purpose of their evictions and the orders on the said eviction petitions passed both by the Estate Officer as well as Appellate Officer are without jurisdiction and *non est*. The orders so passed by both the said authorities are neither binding on the petitioners nor on the private respondents. The petitioners are at liberty to otherwise proceed against the private respondents for possession of their land in accordance with law.

22. With said directions, these writ petitions are disposed of. No order as to costs. Miscellaneous Applications pending, if any, also stand disposed of.

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

Yangain Singh ....Petitioner.
Versus
Vijay Kumar ... Respondent.

Cr.R. No. 341 of 2016.
Reserved on: 30.03.2017.
Decided on: 12.04.2017.

Negotiable Instruments Act, 1881- Section 138- Accused and his mother approached the complainant offering to sell their land- an agreement was executed and an amount of Rs.1 lac was paid as earnest money – it was found subsequently that there was some litigation pertaining to the land and the agreement was cancelled – the accused subsequently obtained an amount of Rs.10,000/- as loan and issued a cheque for Rs.1,10,000/- - the cheque was dishonoured- the amount was not paid despite notice – hence, the complaint was filed before the Magistrate who convicted and sentenced the accused – an appeal was preferred, which was allowed on the ground that the accused was unrepresented on the date of examination and the proceedings were not proper – the matter was remanded to the Trial Court for fresh adjudication- held in revision that no application was filed for deferring the cross examination of the complainant and his witnesses- no grievance was raised that accused was prejudiced by the absence of his counsel –

no prayer was made to appoint a counsel as amicus curiae, which means that accused was satisfied with the proceedings– revision allowed and order of Appellate Court set aside.

(Para-9 to 23)

For the petitioner : Mr. P.S Goverdhan, Advocate.
For the respondents : Mr. Anirudh Sharma, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge

By way this revision petition, the petitioner has challenged the judgment passed by the Court learned Sessions Judge, Solan, in Criminal Appeal No. 4-S/10 of 2016, dated 01.10.2016, vide which learned Appellate Court while allowing the appeal filed by the present respondent has remitted the case back to learned trial Court for decision afresh after setting aside the judgment passed by the Court of learned Judicial Magistrate 1st Class, Kandaghat, in case number 234 of 2015, dated 30.12.2015, whereby learned trial Court in a complaint filed under Section 138 of the Negotiable Instruments Act (hereinafter referred to as 'NI Act') by the present petitioner had convicted the present respondent for commission of offence punishable under Section 138 of the NI Act and had sentenced him to undergo simple imprisonment for one month and also to pay compensation to the tune of Rs. 2,20,000/- to the complainant.

2. Brief facts necessary for the adjudication of the present case are that a complaint under Section 138 of the NI Act was filed by the present petitioner (hereinafter referred to as 'complainant) against the present respondent (hereinafter referred to as 'accused') on the allegations that accused and his mother had approached the complainant to sell their land situated in mauza Nagar Sihauna and an agreement to sell the said land was entered into between the parties, in lieu of which, the accused and his mother received an amount of Rs. 1,00,000/- from the complainant as earnest money. Further as per the complainant, as subsequently the land was not found suitable by the complainant as it was discovered that there was dispute with regard to the said land with other co-sharers and litigations were also going on between the parties, the said agreement to sell was cancelled by both the parties with their mutual consent. As the earnest money was not readily available with the accused, accordingly, he promised to repay the earnest money to the complainant within six months. Further as per the complainant on 05.05.2012, accused approached him and requested him to advance him Rs. 10,000/- more on the pretext to discharge some debt and promised to repay the whole amount including Rs. 1,00,000/- received earlier as well as Rs. 10,000/- whenever the complainant demanded. As per the complainant he paid Rs. 10,000/- also to the accused on 05.05.2012 and thereafter, in order to repay the said debt/liability, accused issued a post dated cheque bearing No. 048242, dated 29.10.2012 for an amount of Rs. 1,10,000/- in favour of the complainant drawn at Baghat Urban Co-operative Bank Ltd. Solan, HP. As per complainant when said cheque was presented for valuable encashment, the same was returned by the bank concerned vide memo No. 6976, dated 18.12.2012 with endorsement "Insufficient Funds". As per complainant, on 09.01.2013, he served a legal notice of demand upon the accused through his counsel by way of Registered AD, which was duly served upon the accused on 10.01.2013. However, even after the service of said notice, the accused failed to pay the cheque amount to him. In these circumstances the complainant approached the Court by filing a complaint under Section 138 of the NI Act against the accused.

3. As the learned trial Court found a prima facie case against the accused, notice of accusation was accordingly put to him, to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the complainant entered the witness box himself and also examined four other witnesses. Thereafter statement of accused was recorded under Section 313 of Code of Criminal Procedure (hereinafter referred to as 'Cr.P.C').

5. On the basis of evidence led by the parties, learned trial Court held that it stood established on record that accused had issued cheque bearing No. 048242, dated 29.10.2012, for an amount of Rs. 1,10,000/- in lieu of earnest money he had received from the complainant regarding sale of land and also in lieu of Rs. 10,000/- which he had borrowed from the complainant, which on presentation in the bank for encashment was dishonoured due to "Insufficient Funds" in the account of accused. Learned trial Court held that it was not disputed by the accused in his statement recorded under Section 313 of Cr.P.C that he had issued a cheque to the complainant which was dishonoured on its being presented to the bank concerned. On these bases, it was concluded by learned trial Court that accused had committed an offence punishable under Section 138 of the NI Act and accordingly, it convicted the accused for commission of said offence and imposed sentence upon him.

6. In appeal, the judgment so passed by learned trial Court has been set aside by the learned Appellate Court on the grounds that the statements of complainant and other complainant's witnesses were recorded by learned trial Court on 17.09.2013 and records demonstrate that on that date only the accused appeared in person in the Court and he was not accompanied by his Counsel and on these bases, learned Appellate Court observed as under.

> *"Though the aforesaid witnesses have been cross-examined but it appears that such cross-examination in the absence of the learned defence counsel have been conducted by the court itself on behalf of the accused. Accordingly on the basis of the record of the learned Court below it is clear that no opportunity whatsoever to cross-examine the complainant and other witnesses examined by him was afforded to the accused as his counsel was not present in the Court at that time and as such the statements of the complainant and his witnesses are proved to have been recorded in the absence of learned defence counsel. Thus by examination of the complainant and his witnesses by the learned court below in the absence of learned defence counsel, great prejudice has been caused to the accused."*

Learned Appellate Court further held that as defence counsel was not present in the Court at the time of examination of complainant and other complainant witnesses it was the mandatory duty of learned trial Court to either adjourn the case for cross examination or have had appointed some other counsel to cross examine the witnesses. Learned Appellate Court further held that it cannot possibly be denied that cross examination of a witness in a criminal case is very vital, important and valuable right of an accused, and therefore, great prejudice has been caused to the accused by not affording him an opportunity to cross-examine the complainant and other witnesses. Learned Appellate Court also held that record demonstrates that it is not as if the statements of complainant and other witnesses were recorded by learned trial Court in the absence of learned defence counsel but even statement of accused under Section 313 of Cr.P.C was also recorded in the absence of learned defence counsel, however, the proper course for the learned Court below was to adjourn the case and by not doing so, a serious prejudice has been caused to the accused. Learned Appellate Court further held that in this background, the statement of accused recorded under Section 313 of Cr.P.C should not have been made basis for recording conviction and imposing sentence upon the accused. Learned Appellate Court thus allowed the appeal so filed by the accused and remitted the case back by setting aside the judgment passed by the learned trial Court for adjudication afresh.

7. Feeling aggrieved by the judgment so passed by the learned Appellate Court, the complainant has filed the present revision petition.

8. I have heard the learned counsel for the parties and also gone through the records of the case as well as the judgments passed by the learned Courts below.

9. Learned Appellate Court has primarily set aside the judgment passed by the learned trial Court on two counts which are (a) that learned trial Court erred in not adjourning the case while recording the statement of complainant and other complainant witnesses as

defence counsel was not present and (b) that learned trial Court erred in not adjourning the case while recording the statement of accused under Section 313 of Cr.P.C as learned defence counsel was not present.

10. Records of learned trial Court demonstrate that when the case was listed on 16.05.2013, on the said date, complainant was present in the Court in person whereas accused was present with Mr. Naresh Kumar, Advocate. On the said date, notice of accusation was put to the accused to which he pleaded not guilty and claimed trial. Learned trial Court fixed the matter for the examination of complainant's witnesses on 09.07.2013.

11. On 09.07.2013, the complainant as well as the accused were present with their respective counsel and on the said date, the accused had in fact prayed before learned trial Court that he may be granted some time to make good the payment of cheque amount and his prayer was accepted by learned trial Court and case was fixed for 12.08.2013 to enable the parties to arrive at some out of Court settlement.

12. On 12.08.2013, following order was passed by learned trial Court.

> *"C.W. Bahadur Singh is present. But at the request of the accused ad his learned counsel they seeks time to amicably settled the matter with the complainant. List on 17.09.2013. If settlement is not arrived between the parties, the complainant will adduce his entire evidence on the next date of hearing."*

13. On 17.09.2013, learned counsel for the complainant was present and the accused was present in person. On the said date, statements of CW1 Puran Dutt, CW2 Y.S. Thakur, CW3 Bhagwan Dass, CW4 Ashok Thakur and CW5 Bahadur Singh were recorded. Records further demonstrate that all these five witnesses were cross examined by the accused. It is relevant to take note of the fact that statements of these five witnesses were recorded on 17.09.2013 and the case was finally decided by learned trial Court on 30.09.2015 and there is no application etc. on record filed by the accused to the effect that on 17.09.2013 either he had made any request that the cross examination of complainant's witnesses be deferred as his counsel was not present or that in fact cross examination of complainant witnesses was not conducted by him but it was conducted by the Presiding Officer of learned trial Court. In other words, no grievance whatsoever was raised by the accused before any forum that he had been prejudiced on account of his counsel not being present in the Court on 17.09.2013 when C.Ws were recorded.

14. Now incidentally, on 17.09.2013, learned trial Court fixed the case for recording the statement of accused under Section 313 of Cr.P.C for 17.10.2013. Records demonstrates that on 17.10.2013 though the complainant was present with his counsel, the accused was not present in the Court and in these circumstances, learned trial Court passed the following order.

> *"The case is listed for statement of accused under Section 313 Cr.P.C. but neither the accused nor his Ld. Counsel has appeared. Hence, the bail bonds furnished by the accused are cancelled and forfeited to the State of H.P. Let the accused be summoned by way of N.B.W. returnable for 26.11.2013 on filing of P.F within 10 days. Proceedings under Section 446 of Cr.P.C be initiated against the accused and his surety."*

15. Thereafter on 26.11.2013, learned trial Court passed the following order.

> *"NBW issued against the accused has been received back unserved with the report that the accused had gone to Halwara. Therefore, let the accused be summoned by way of non-bailable warrants returnable for 17.01.2014 on filing PF within ten days. The bail bonds furnished by the accused are cancelled and forfeited to the State of H.P. Let proceedings under Section 446 Cr.P.C. be also initiated the accused and his surety. Notice be also issued to the surety of the accused on the aforesaid date."*

16. Records demonstrate that non-bailable warrants issued to the accused were ultimately served upon him on 08.09.2015, on which date, learned trial Court passed the following order.

> *"Today accused produced before this Court as NBW were issued against him. Applicant/accused has moved application under Section 437 of Cr.P.C. for releasing him on bail stating therein that applicant/accused could not appear before the Court due to his ill health. It is further averred that non-appearance of accused person was neither intentional not deliberate and he is ready to furnish surety and personal bonds.*
>
> *Heard. Record perused.*
>
> *Since the accused is ready to furnish personal and surety bonds, mere suspicion that he can jump bail against is not sufficient for curtailing personal liberty of the accused when he is resident of Distt. Solan, no useful purpose would be served by curtailing the personal liberty of the applicant/accused. Moreover, he is ready and willing to abide by the terms imposed by this Court while releasing him on bail. No doubt accused had not filed any documentary evidence to support his case but it is generally accepted that bail is the Rule and jail is an exception and considering this, I am of the opinion that at this stage, there is no sufficient ground for curtailing the personal liberty of the accused, hence, bail application of the accused is allowed subject to the conditions:*
>
> *(1) That he will furnish personal bond in the sum of Rs. 50,000/- alongwith one surety in the like amount to the satisfaction of this court.*
>
> *(2) That the accused shall attend the court on each and ever date of hearing.*
>
> *Requisite bonds furnished, attested and accepted by me. The present application stands disposed off. It be registered. Papers after due completion be tagged with main case file for record. List the case for recording of statement of accused under Section 313 of Cr.P.C for 10.09.2015."*

17. On the said date i.e. on 08.09.2015, accused was being represented by Mr. Bharat Sharma, Advocate. This fact is mentioned because earlier, one Mr. Naresh Kumar, Advocate used to appear on behalf of the accused. Be that as it may, on 08.09.2015, the case was ordered to be listed for recording the statement of accused under Section 313 of Cr.P.C on 10.09.2015. On 10.09.2015, also the accused was present in person only and records demonstrate that on the said date, his statement under Section 313 of Cr.P.C was recorded. There is no material on record from which it can be inferred that the accused in any manner was aggrieved by the factum of his counsel not being alongwith him on 10.09.2015 when his statement under Section 313 of Cr.P.C was recorded or that on 10.09.2015 he made any such request to the effect that recording of his statement under Section 313 of Cr.P.C be deferred as his counsel was not present but his request was turned down by learned trial Court.

18. Another important fact which requires consideration at this stage is that Presiding Officers who were holding the Court on 17.09.2013 when C.Ws were examined and cross-examined by the accused in person and on 10.09.2015, when the statement of accused was recorded under Section 313 of Cr.P.C, on which date, accused was present in the Court in person, were not the same.

19. Records further demonstrate that on 09.10.2015, Proxy counsel were present both for complainant as well as for accused. On 11.12.2015, accused appeared in the Court alongwith Mr. Bharat Sharma, Advocate and thereafter on 23.12.2015 he appeared alongwith Mr. Jagdish Chand Advocate. On 23.12.2015 on a request on behalf of the accused, time was granted for hearing by treating the case to be part heard, as a request was made on behalf of the accused that original counsel was not present as his wife was undergoing treatment and was admitted in the Hospital.

20. The above narrated facts clearly and categorically demonstrate that neither on 17.09.2013 nor on 10.09.2015, any request was made by the accused that either the recording of statements of complainant's witnesses or recording of his statement under Section 313 of Cr.P.C be deferred as defence counsel was not available. Records further demonstrate that accused voluntarily cross examined complainant witnesses on 07.09.2013, which otherwise was his right because no Court can force the accused not to pursue his case himself before the Court and to represent himself through a counsel only.

21. As I have already mentioned above that there is nothing on record from which it can be inferred that any grievance was raised by the accused of any prejudice having been caused to him either on 17.09.2013 or on 10.09.2015 on the count that on the said dates, defence counsel was not present with him. The proceedings further demonstrate that the accused has often changed counsel and on most of the dates he appeared before the Court in person and further he in between failed to appear before the Court and his presence was obtained only by way of issuance of non-bailable warrants.

22. In this background, in my considered view, learned Appellate Court has erred in setting aside the judgment passed by the learned trial Court by holding that the accused was materially prejudiced on account of his not being accompanied by a defence counsel on 17.09.2013 when complainant's witnesses were examined and thereafter on 10.09.2015 when his statement under Section 313 of Cr.P.C was recorded. While arriving at the said conclusion, learned Appellate Court has erred in not appreciating that neither on the said dates, there was any request made on behalf of accused for adjournment of the case on the ground that his counsel was not present or otherwise, nor any request was made for appointment of any legal aid counsel. The finding returned by learned Appellate Court that cross examination of witnesses in fact was conducted by Presiding Officer, in my considered view, is perverse as the same is not borne out from the records of the case. Records demonstrate that complainant witnesses were cross examined by the accused and presumption of truth is attached to records. Inference to the contrary drawn by learned Appellate Court in the absence of any cogent material on record, in my considered view, is not sustainable in the eyes of law. The findings returned by learned Appellate Court that it was the duty of learned trial Court either to have had adjourned the case or to have had appointed some amicus curiae also has no merit. This is for the reason that in the absence of any prayer having been made on behalf of the accused for the adjournment of the case, it is not the duty of any Court, leave aside learned trial Court in the present case, to have had adjourned the case on its own. Similarly, as I have already observed that no Court can stop any individual from pursuing his case before the Court himself. An amicus can not be forced upon a litigant by the Court. An amicus can be appointed to assist the Court and for a litigant if either the litigant makes a prayer in this regard or the Court comes to the conclusion that in the facts and circumstance of the case, it will be in the interest of justice to appoint an amicus curiae to assist the Court. Further keeping in view the fact that accused was of and on either appearing with counsel or appearing in person it was not even otherwise a case where the accused was to be accorded legal assistance by the Court. All these important aspects of the matter, in my considered view, have not been appreciated by learned Appellate Court while setting aside the judgment passed by the learned trial Court whereby learned trial Court had convicted the accused for commission of offence punishable under Section 138 of the NI Act.

23. Accordingly, in view of findings returned above, this revision petition is allowed and the judgment passed by learned Appellate is set aside and the case is remanded back to the learned Appellate Court to adjudicate the appeal on merit. Parties through their counsel are directed to appear before the learned trial Court on 24th April, 2017. It is made clear that this Court has not expressed any opinion on the merits of the case and learned Appellate 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. 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 AJAY MOHAN GOEL, J.

Chandermani ... Appellant
Versus
Mia Ditta and others ... Respondents

RSA No. 286 of 2008
Reserved on: 15.03.2017
Date of decision: 13.04.2017

Specific Relief Act, 1963- Section 34- Plaintiff filed a civil suit pleading that suit land is ancestral and coparcenary property of the parties – sale deeds executed in respect of the same are illegal, null and void and not binding on the rights of the parties – the suit was decreed by the Trial Court- an appeal was filed, which was partly allowed- aggrieved from the judgment, present appeal has been filed – held that the suit land was proved to be ancestral – the land was alienated without any legal necessity – the Courts had rightly appreciated the evidence- appeal dismissed. (Para- 14 to 19)

Cases referred:

Gajjan Ram Vs. Hira Singh and others, 1991 SLJ 994
Rani and another Vs. Smt. Santa Bala Debnath and others, 1970 (3) Supreme Court Cases 722

For the appellant: Mr. Sanjeev Kuthiala, Advocate.
For the respondents: Mr. G.R. Palsra, Advocate, for respondents No. 1 to 3.
None for respondents No. 4 to 7.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.:

By way of this appeal, the appellant has challenged the judgment and decree passed by the Court of learned District Judge, Mandi, in Civil Appeal No. 53 of 2005 dated 01.06.2006, vide which, learned Appellate Court partially modified the judgment and decree passed by the Court of learned Civil Judge (Junior Division), Chachiot at Gohar, District Mandi, in Civil Suit No. 312 of 2000 dated 31.03.2005, whereby learned trial Court had decreed the suit of the plaintiffs to the extent that the suit land was held to be joint Hindu family and coparcenary property of the plaintiffs and the sale deeds dated 22.08.2000 qua the suit land by Sawaru in favour of defendants No. 1 and 2 were held to be wrong, null and void and the plaintiffs alongwith defendant No. 4 were held to be joint owner in possession of the suit land.

2. Brief facts necessary for adjudication of the present appeal are that respondents/plaintiffs, hereinafter referred to as the plaintiffs, filed a suit for declaration with confirmation of joint possession as well as for injunction on the ground that the land comprised in Khewat/Khatauni No. 87/132, bearing Khasra Nos. 585, 601, 605, 615, 645, 647, 651, Kitas 7, measuring 11-18-17 bighas and ½ share of land comprised in Khewat/Khatauni No. 88/133, Khasra Nos. 592, 674, Kitas 2, measuring 0-10-19 bigha, situated at Mouja Kandi, Tehsil Chachiot, District Mandi, H.P., was recorded in the ownership and possession of defendant No. 3 as per revenue record for the year 1996-97 and said entry which reflected defendant No. 3 as exclusive owner in possession of the suit land was wrong, null and void. As per the plaintiffs, land comprised in Khewat/Khatauni No. 56min/107, bearing Khasra Nos. 1107 and 1112, measuring 2-19-5 bighas and ½ share of the land comprised in Khewat/ Khatauni No. 115/228, bearing Khasra Nos. 1110 and 1117 measuring 0-14-19 bighas, situated at Mouja Sarua, Tehsil Chachiot, District Mandi, H.P., was also recorded in the ownership and possession of defendant No. 2 as per jamabandi for the year 1989-90 and the said entries were also wrong,

null and void. As per the plaintiffs, parties to the suit were Hindu by religion and the suit property as mentioned in Para-1(a) of the plaint was joint Hindu coparcenary property of plaintiffs, defendants No. 3 and 4. Plaintiffs and defendant No. 4 were real brothers, whereas defendant No. 3 was their father. The suit land was joint Hindu family coparcenary property of plaintiffs and defendants No. 3 and 4 as the same had been inherited from common ancestor late Dayalu and all the coparceners had acquired right in this property by virtue of their birth. It was further the case of the plaintiffs that the land described in Para-1(b) of the plaint was also joint Hindu family coparcenary property as previously it was in the tenancy of late Dayalu, father of Sawaru, defendant No. 3 and later on it came in the hands of defendant No. 3 as well as other members of the family but Sawaru never exercised his independent dominion over the same and the same was thrown in joint nucleus of the coparceners and the land was enjoyed by all the coparceners commonly by treating it as joint Hindu family property. It was further the case of the plaintiffs that Sawaru (defendant No. 3) was 90 years old, rustic villager, who on account of his old age could not analyze his good and bad and defendants No. 1 and 2, who were sons of defendant No. 4, in connivance with defendant No. 4 and one Sobha Ram got manipulated sale deeds qua Khasra Nos. 585, 601, 615 and 651 measuring 7-11-12 bighas out of the land described in Para-1(a) of the plaint and ½ share of Khasra Nos. 1107 and 1112 measuring 2-19-5 bighas as described in Para-1(b) of the plaint from defendant No. 3 by taking the benefit of wrong revenue entries, on 22.08.2000 which sale deeds were wrong, null and void and not binding on the plaintiffs. As per the plaintiffs, sale deeds were also wrong, null and void on the ground that defendant No. 3 was having no right, title and interest to sell this property nor there was any legal necessity for which the alleged sale deeds were executed. It was on these basis that the suit was filed by the plaintiffs praying for the following reliefs:-

> "(i) It be declared that the land described in paras No. 1a and 1b of the plaint is Joint Hindu Family coparcenery property of the plaintiffs, and defendant Nos. 3 and 4;
>
> (ii) The sale deeds executed by Shri Swaru defendant No. 3 in favour of the defendant Nos. 1 and 2 on 22.8.2000 qua the joint suit land as described above, be also declared wrong, null and void, and joint possession of the plaintiffs and defendant Nos. 3 and 4 be confirmed over the same.
>
> (iii) As a consequential relief, the defendants be restrained from dispossessing the plaintiffs from the suit land in any manner whatsoever.
>
> (iv) Any other relief to which the plaintiffs are found entitled to, the same may kindly be granted to the plaintiffs against the defendants and justice be done.
>
> (v) Cost of the suit be also awarded."

3. The suit was contested by the defendants, who in their written statement denied the factum of the suit property being joint Hindu family coparcanary property of the plaintiffs. According to the defendants, plaintiffs did not constitute joint Hindu family with the defendants. The case put up by the defendants was that the property was not inherited from common ancestor, Dayalu as alleged and the plaintiffs had not acquired any interest in the suit land by virtue of birth. As per defendants, suit land described in Para-1(a) of the plaint was self acquired property of defendant No. 3 who had acquired the same with his own money and the suit property as described in Para-1(b) of the plaint was in possession of defendant No. 3 as tenant and later on, he was conferred the proprietary rights over the same. It was further mentioned in the written statement that the sale deeds were not manipulated by the defendants in connivance with Sobha Ram as alleged. It was also mentioned in the written statement that the plaintiffs in fact never considered defendant No. 3 as their father and they never looked after him and they had refused to manage day-to-day living of defendant No. 3 and said defendant was residing separately from the plaintiffs for the last many years and in order to meet his bonafide requirements he had incurred debts from different persons and amount was required by defendant No. 3 for his day-to-day expenses in order to keep him alive.

4. On the basis of the pleadings of the parties, learned trial Court framed the following issues:-

1. Whether the suit land (described in para no. 1a and ib of the plaint) is joint Hindu family, Coparcenary property of the plaintiffs and defendant no. 3 and 4 as alleged? ... OPP

2. Whether the sale deed executed by Sh. Sawaroo defendant no. 3 in favour of defendant no. 1 and 2 on 22.8.2000 qua the joint suit land is wrong, null and void? ... OPP

3. Whether the suit of the plaintiff is bad for non-joinder of necessary parties? ... OPD

4. Whether the suit of the plaintiff is bad for the purpose of court fee and jurisdiction as alleged? ... OPD

5. Whether the plaintiff has no cause of action to file the present suit? ... OPD

6. Whether the defendant no. 1 and 2 are bonafide purchaser for the consideration of the suit property as alleged? ... OPD (1 and 2)

7. Whether the defendant no. 3 has sold the suit land to defendant no. 1 and 2 for legal necessity as alleged? ... OPD

8. Relief.

5. On the basis of the evidence which was led by the respective parties before learned trial Court, the following findings were returned to the issues so framed by it:-

Issue No. 1: Yes.

Issue No. 2: Yes.

Issue No. 3: No.

Issue No. 4: No.

Issue No. 5: No.

Issue No. 6: No.

Issue No. 7: No.

Issue No. 8: The suit is decreed as per operative part of the judgment.

6. Accordingly, learned trial Court decreed the suit so filed by the plaintiffs by holding that the suit land was joint Hindu family and coparcenary property of the plaintiffs and defendants and sale deeds dated 22.08.2000 executed qua the suit land by defendant No. 3 in favour of defendants No. 1 and 2 were wrong, null and void and plaintiffs alongwith defendant No. 4 were joint owner in possession over the suit land. While arriving at the said findings, it was held by learned trial Court that it stood proved that the suit land described in Para-1(a) and Para-1(b) of the plaint was joint Hindu coparcenary property of the plaintiffs, defendant No. 4 and Sawaru (Defendant No. 3). Learned trial Court held that Ext. PA jamabandi for the year 1996-97 reflected that the suit land mentioned in Para-1(a) of the plaint was ancestral land as the same was inherited by the father of the plaintiffs and defendant No. 4 from Dayalu and Dayalu had inherited the same from Chhabar. Learned trial Court thus held that this demonstrated that the plaintiffs had inherited the land mentioned in Para-1(a) from their great grand father Chhabar. It further held that jamabandi for the year 1989-90 Ext. PF reflected that the suit land mentioned in Para-1(b) of the plaint was coming in the ownership and possession of Sawaru qua half share from his father Dayalu and Dayalu had inherited the same from Chhabar which fact also established that the suit land mentioned in Para-1(b) of the plaint was joint Hindu family property. Learned trial Court after discussing oral as well as documentary evidence led by the parties, held that DW-5 Khaku Ram had admitted that he alongwith his brothers and sisters was brought up by his father Sawaru, they lived together and their marriages were also solemnized by their father Sawaru. Learned trial Court also held that DW-5

admitted that the marriage of his elder brother was solemnized by his father and they used to cultivate the suit land jointly. On these basis it was held by learned trial Court that statement of DW-5 demonstrated that the plaintiffs alongwith defendant No. 4 were members of joint Hindu family consisting of plaintiffs, defendant No. 4 and their father Sawaru. Learned trial Court further held that in fact defendant No. 4 who entered the witness box as DW-5 had admitted that he alongwith his brothers and sisters were brought up together and further there was nothing in his statement from which it could be inferred that the suit land was in fact self acquired property of Swaru. On these basis, it was held by learned trial Court that from the statements of defendant No. 1 Khem Chand, who entered the witness box as DW-3 and defendant No. 4 who entered the witness box as DW-5, it could not be established that the plaintiffs were not members of joint Hindu family or that the suit land was self acquired property of Sawaru. Thus, on the basis of documentary evidence Ext. PA jamabandi for the year 1996-97 and Ext. PF jamabandi for the year 1989-90, it was concluded by learned trial Court that the suit land in fact was ancestral and was inherited by Sawaru from his predecessor-in-interest. Learned trial Court accordingly held that the evidence oral as well as documentary produced on record by the plaintiffs demonstrated that the suit land was joint Hindu coparcneary property of the plaintiffs, defendants and Sawaru. Learned trial Court also concluded that defendants No. 1 and 2 were not bonafide purchasers for consideration of the suit land and Sawaru had sold the suit land to defendants No. 1 and 2 without legal necessity and, therefore, the sale deeds were held wrong, null and void.

7. The judgment and decree so passed by learned trial Court was challenged by defendants Khem Chand and Chandermani.

8. In appeal, learned Appellate Court held that whether the suit property as mentioned in Para-1(a) and 1(b) of the plaint was ancestral or coparcenary in nature being inherited by defendant No. 3 from his father or ancestors, the onus to prove the same was heavily upon the plaintiffs. Learned Appellate Court further held that Misal Haqiat for the year 1996-97 Ext. PA clearly demonstrated that Sawaru was owner in possession of Khasra Nos. 585 (469 old), 601 (465 old), 605 (462 old), 615 (507 and 508 old), 645 (522 min old), 647 (521 old) and 651 (504 old), kitas 7 measuring 11-18-17 bighas. It further held that jamabandi for the year 1990-91 Ext. PB which was a pre consolidation jamabandi demonstrated that defendant No. 3 was having joint khata with other tenure holders and in the said jamabandi old Khasra Nos. 469, 465, 462, 507, 508, 522 min, 521 and 504 alongwith other Khasra Nos. were mentioned and the suit land was recorded in the name of Sawaru, Dahlu sons of Dayalu. Learned Appellate Court further held that mutation No. 60 Ext. PD demonstrated that after the death of Dayalu, common ancestor of the parties, his estate was inherited by Daya Ram, Sawaru and Dahlu in equal shares. Learned Appellate Court further held that Daya Ram was grandson of late Dayalu and his father Bhagu pre deceased Dayalu. Learned Appellate Court further held that the land mentioned in Ext. PD pertained to the estate of Dayalu in Muhal Jaggas, new name of which was Muhal Kandi and mutation Ext. PE pertained to Muhal Jugas and vide mutation No. 62 dated 21.03.1955 the estate of Dayalu was shown to be inherited by his grandson Daya Ram son of Bhagu and his son Sawaru and Dahlu in equal shares and Dayalu died on 20.09.1953 before the enforcement of Hindu Succession Act. Learned Appellate Court also held that defendant Khaku while appearing as DW-5 admitted in his cross-examination that after the death of Dayalu his entire estate was inherited by his sons in equal shares. On these basis it was held by learned Appellate Court that it stood duly proved that the suit land in Muhal Kandi (old Juggas) was inherited by the sons of Dayalu in equal shares and learned Appellate Court thus held that the suit land mentioned in Para-1(a) of the plaint was ancestral in nature as was evident from the documentary evidence on record as well as the admission of the defendant.

9. Learned Appellate Court further held in Para-39 of the judgment as under:-

> "The law is very clear, any property which is inherited by a person from his father, grandfather and great grandfather is ancestral/ coparcenary

property in the hand of his son, grand sons and great grandson. Resultantly, the suit land mentioned in para 1-a of the plaint is ancestral or coparcenary property in the hand of defendant No. 3 Sawaru who inherited the same from his father Dayalu."

10. It was further held by learned Appellate Court that there was no specific evidence on record to suggest that defendant No. 3 had any bonafide need to effect sale deeds Ext. DA and Ext. DB in favour of his grandsons defendants No. 1 and 2. Learned Appellate Court also held that recitals of sale deeds Ext. PA and Ext. DB demonstrated that it was mentioned therein that Swaru was to discharge debts as a result of which the sale deeds were required to be made. Learned Appellate Court held that there was no legal necessity requiring the execution of sale deeds. Learned Appellate Court in fact held that broadly speaking the term, legal necessity, includes all those acts which are necessary for the members of the family and the same did not mean actual compulsion but it meant pressure on the estate which in law may be regarded as serious and sufficient. It was thus concluded by learned Appellate Court that it had come in evidence that during life time of Dayalu his sons used to remain jointly with him and even at the time of his death, there was a joint family and simply because presently plaintiffs were living separately or were having their separate houses, the same would not put an end to the joint nature of the suit land. On these basis, it was held by learned Appellate Court that the findings rendered by learned trial Judge to the effect that there was no legal necessity to effect the sale deed did not call for any interference. Learned Appellate Court thus held that the defendants had failed to prove that the sale deeds Exts. DA and DB were effected for legal necessity. As far as suit land described in Para-1(b) of the paint is concerned, it was held by learned Appellate Court that the same was not strictly speaking ancestral or coparcenary property. While arriving at the said conclusion it was held by learned Appellate Court that there was ample evidence on record to suggest that the said parcel of land was under the tenancy of Dayalu previously and later on the tenancy rights were inherited by his sons including defendant No. 3, who became owner of portion of land. Learned Appellate Court held that plaintiffs in Para-3 of the plaint had specifically stated that the said parcel of land was previously under the tenancy of late Dayalu, father of defendant No. 3 Sawaru and subsequently, it came in the hands of defendant No. 3 and other family members. Learned Appellate Court held by relying upon a judgment of this Court in ***Gajjan Ram Vs. Hira Singh and others***, ***1991 SLJ 994***, that the tenant who has become owner of the land under the tenancy law is absolute owner of such property and the same shall be deemed to be his self acquired property and not ancestral property. Learned Appellate Court thus held that after the conferment of proprietary rights the property ceases to be ancestral and same would be presumed to be self acquired property of such tenant who has become owner now. Learned Appellate Court thus went on to hold that the said land mentioned in Para-1(b) of the plaint was self acquired property of Sawaru and alienation of the same cannot not be impeached under the Hindu law.

11. Accordingly, the appeal was partially allowed by learned Appellate Court in the following terms:-

"As a sequel to my findings on point No. 1 above, the appeal filed by the appellants is party accepted. The judgment and decree under appeal are modified. Consequently a declaratory decree to the effect that the suit land described in para 1-a of the plaint is joint Hindu family property/ancestral property is passed in favour of the plaintiffs and the sale deed Ext. DA dated 22.8.2000 qua the said suit land by defendant No. 3 in favour of defendants No. 1 and 2 is held to be legally null and void and not binding on the plaintiffs. However, as discussed above, the suit land mentioned in para 1-b of the plaint is held to be self acquired property of defendant No. 3 Sawaru and as such, the sale deed Ex. DB in respect of the suit land is held to be legally valid and the findings of the trial Court in respect of this parcel of the suit land is hereby set aside."

12. Though the findings returned by learned Appellate Court qua the suit land described in Para-1(b) of the plaint have not been assailed by the plaintiffs, however, the findings returned by learned Appellate Court qua the suit land described in Para-1(a) of the plaint have been challenged by defendant No. 2 Chandermani by way of this appeal.

13. This appeal was admitted on 09.07.2008 on the following substantial questions of law:

> "1. Whether the courts below have misread and mis-appreciated oral and documentary evidence, especially Ex. PA to Ex. PJ, Ex. DA and statements of PW1, DW2 to DW5 and findings as such on this count are bad in law?
>
> 2. Whether discharge of debt and medical treatment by the Karta and Manager of the joint HUF property can be construed to be legal necessity for said Karta to sell the coparcenary property and whether such sale on account of legal necessity is a valid sale?
>
> 3. Whether recitals in the registered sale deed regarding discharge of debt and to meet medical treatment expenses is sufficient to prove legal necessity and are admissible in evidence to be used for corroborative purpose along with other evidence to raise the inference against the party seeking to set aside the registered sale deed?"

14. As all the substantial questions of law are interlinked, therefore, I will be dealing with them together. There are concurrent findings returned by both the learned Courts below to the effect that the suit property described in Para-1(a) of the plaint was ancestral and coparcenary property of the plaintiffs and defendant No. 4 alongiwth their father.

15. Ext. PB is jamabandi for the year 1990-91, a perusal of which demonstrates that in the said jamabandi against the suit land described in Para-1(a) of the plaint Sawaru alongwith Dahlu son of Dayalu are reflected as co-sharers alongwith other co-sharers. While arriving at the conclusion that the property mentioned in Para-1(a) of the plaint is ancestral property, learned Courts below had taken into consideration the fact that mutation No. 60 Ext. PD demonstrated that after the death of Dayalu, his estate was inherited by Daya Ram, Sawaru and Dahlu in equal shares. Learned Courts below also held that Daya Ram was grandson of late Dayalu and his father Bhagu had in fact pre deceased Dayalu. Learned Courts below also held that pedigree table on mutation No. 60 Ext. PD demonstrated that Dayalu son of Chhabar had three sons i.e. Dahlu, Sawaru and Bhagu. There is a specific finding returned by learned Appellate that land mentioned in Ext. PD pertained to the estate of Dayalu in Muhal Jaggas and the new name of the said Muhal was Muhal Kandi and that land entered in mutation Ext. PD pertained to Khata No. 9 and as per jamabandi for the year 1954-55 Ext. PC, this land was the same which was shown to be mutated in the name of legal heirs of Dayalu. Learned Appellate Court also specifically held that mutation Ext. PE which pertained to Muhal Jaggas demonstrated that vide mutation No. 62 dated 21.03.1955, the estate of Dayalu was shown to be inherited by his grandson Daya Ram son of Bhagu and his sons Sawaru and Dahalu in equal shares. In my considered view, the above findings are duly borne out from the records of the case and the same cannot be said to be a result of either misappreciation or misreading of the documentary evidence. The findings returned by learned Courts below to the effect that in his cross-examination it was admitted by defendant Khaku that after the death of Dayalu his entire estate was inherited by his three sons in equal shares, also duly borne out from the records especially the statement of Khaku, who deposed in the Court as DW-5.

16. Ext. DA is a copy of sale deed dated 22.08.2000. A perusal of the same demonstrates that it was mentioned the therein that the vendor was selling the land to the vendees because of his "Gharelu Jarurat". Now what was the bonafide need for defendant No. 3 in fact to have had executed the sale deed Ext. DA or for that matter Ext. DB in favour of defendants No. 1 and 2, has not been satisfactorily explained by the defendants. While disbelieving that Sawaru had any legal necessity to do away with the said ancestral property,

learned Courts below have returned specific findings that there was no mention of any legal necessity requiring the execution of sale deed in the said exhibits. These findings arrived at by learned Courts below in my considered view also cannot be said to be a result of misreading and misappreciation of evidence on record including the two sale deeds. There is no mention in these sale deeds as to what was the legal necessity which was so compelling in nature that the same necessitated defendant No. 3 Sawaru Karta of the HUF to alienate the coparcenary property. Not only this, this Court also cannot lose sight of the fact that vendees in the present sale deeds are none else but the grand sons of Sawaru.

17. The Hon'ble Supreme Court in ***Smt. Rani and another Vs. Smt. Santa Bala Debnath and others***, ***1970 (3) Supreme Court Cases 722***, has held that recitals in a deed of legal necessity do not by themselves prove legal necessity and though the recitals are admissible in evidence their value varies according to the circumstances in which the transaction was entered into.

18. Even otherwise it is settled proposition of law that the fact that the sale supported by legal necessity is not by itself sufficient to hold that the sale was valid and it is necessary to prove that it was also a prudent transaction.

19. Coming to the facts of this case, defendant No. 3 has miserably failed to prove that the sales were effected by way of legal necessity. In fact, it is borne out from the records of the case itself that the sale deeds were executed by defendant No. 3 in favour of none else but his own grandsons. This strengthens the case of the plaintiffs that this entire exercise was taken by defendant No. 3 to defeat the cause of plaintiffs and other co-sharers. Not only this, there is no material on record from which it can be inferred that defendant No. 3 had in fact besides there being a legal necessity to effectuate sale deeds Exts. DA and DB also undertook these sale transactions in a prudent manner. Nothing has been placed on record by the defendants to demonstrate that defendant No. 3 Sawaru had either incurred debt so as to pay his medical expenses or that he was actually admitted in any hospital and had undergone medical treatment and in the said process he had incurred debt. Incidentally, a perusal of the sale deeds also demonstrate that there is no such recital in them in this regard nor the defendants have been able to establish this fact by placing any cogent evidence on record. Therefore, I reiterate, as has been held by both learned Courts below, that the defendants miserably failed to prove that defendant No. 3 had executed sale deeds in favour of defendants No. 1 and 2 by way of legal necessity. Substantial questions of law are answered accordingly.

20. In view of my discussion held above, I do not find any infirmity with the findings returned by both learned Courts below to the effect that the suit land described in Para-1(a) of the plaint was ancestral and coparcenary property of the plaintiff alongwith defendant No. 4 and their father. Thus, as there is no merit in the present appeal, the same is accordingly dismissed. No order as to costs. Miscellaneous applications pending, if any, also stand disposed of. Interim order, if any, also stands disposed of.

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

Karam Chand ....Petitioner.
Versus
The State of Himachal Pradesh ... Respondent.

Cr.R. No. 03 of 2008.
Reserved on: 05.04.2017.
Decided on: 13.04.2017.

Indian Penal Code, 1860- Section 279 and 304-A- Accused was driving a Maruti van in a rash and negligent manner and hit P who died at the spot – the accused was tried and convicted by the Trial Court- an appeal was filed which was also dismissed – held in appeal that the prosecution version was proved by PW-1 - PW-4 and PW-5 did not support the prosecution version – however, none of the witnesses had identified the accused – owners said that he had employed three persons as drivers and the possibility of some other person driving the vehicle at the time of accident cannot be ruled out- it was not proved that rashness and negligence of the accused had caused the accident- revision allowed- accused acquitted.(Para-9 to 16)

Case referred:
Sanjaysinh Ramrao Chavan Versus Dattatray Gulabrao Phalke and Others, (2015) 3 Supreme Court Cases 123

For the petitioner. : Mr. Anoop Chitkara, Advocate.
For the respondent : Ms. Parul Negi, Dy. A.G.

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, Presiding Officer, Fast Track Court, Kangra at Dharamshala, in Criminal Appeal No. 46-P/05/03, dated 18.08.2007, 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, Court No. (II), Palampur, in Criminal Case RBT No. 101-II/2000, dated 11.06.2003 whereby learned trial Court had convicted the present petitioner for commission of offences punishable under Sections 279 and 304-A of Indian Penal Code (hereinafter referred to as 'IPC') and sentenced him to undergo simple imprisonment for 6 months and to pay a fine of Rs. 1000/- under Section 279 of IPC and to undergo simple imprisonment for two years and to pay fine of Rs. 2,000/- under Section 304-A of IPC. All the sentences were ordered to run concurrently.

2. The case of the prosecution in brief was that on 20.11.1999, at about 1:00 p.m., accused Karam Chand was driving Maruti Van bearing registration No. HP-02-4231 on a public way which vehicle was being driven by him in a rash and negligent manner, as a result of which, said vehicle struck against Premi Devi (deceased) near Bari, who was using the road as a pedestrian. As a result Smt. Premi Devi died on the spot. On information so provided by Shri Gandhi Ram at Police Post Bhavarna, Rapat No. 12, dated 20.11.1999 was entered in daily diary. Thereafter Head Constable Baldev Singh visited the spot and recorded the statement of Shri Sarwan Kumar i.e. son of the deceased under Section 154 of Cr.P.C. On the basis of statement of Sarwan Kumar, FIR was registered. During the course of investigation, site plan was prepared and Maruti Van involved in the accident was taken into possession alongwith documents and driving licence of accused. Postmortem of dead body of Premi Devi was got conducted at Civil Hospital, Palampur. Photographs of the site were taken. Vehicle in question was got mechanically examined and report of mechanic was also obtained by the Investigating Officer. Statements of witnesses were also recorded in the course of investigation by the Investigating Officer. After the completion of investigation, challan was filed in the court and notice of accusation was put to the accused for commission of offences punishable under Sections 279 and 304-A of IPC, to which he pleaded not guilty and claimed trial.

3. Learned trial Court vide its judgment dated 11.06.2003 held that the prosecution evidence on record proved beyond all reasonable doubt that accused was driving the Maruti Van bearing registration No. HP-02-4231 in a rash and negligent manner on 20.11.1999 on a public highway and the same hit pedestrian Premi Devi who died on account said accident when the vehicle reached near Bari on the fateful day. Learned trial Court convicted the accused for

commission of offences punishable under Sections 279 and 304-A of IPC. While arriving at the said conclusion, it was held by the learned trial Court that the accident was witnessed by PW1 Sarwan Kumar who was walking alongwith Premi Devi at the relevant time, who specifically disclosed the number of the vehicle as HP-02-4231 which was coming from the side of Daroh in excessive speed and hit his mother and caused her death. Learned trial Court however took note of the fact that this witness had deposed that Van was being driven by its driver in a negligent manner but he did not recognize driver of the same as driver had fled away from the spot and he later on came to know that driver of the offending Van was Karam Chand. Learned trial Court held that the deposition of PW1 was natural and reliable and his version was further corroborated by information which was received in the Police Station, which was duly incorporated in the daily diary after the occurrence of the accident on 20.11.1999 Ext. PA. Learned trial Court also held that factum of accident having occurred with the offending Van whereby death of Premi Devi was caused was not disputed on the date of occurrence. Learned trial Court further held that in fact defence of the accused was that he was not driving the Van in question on the relevant day whereas owner of the offending Van PW6 Balkrishan had proved the factum of driving of offending Van by the accused on the relevant date and that the accident thus stood proved to have taken place with the same Van and there was no circumstance to implicate the accused falsely. Learned trial Court held that factum of PW6 having deposed that he had deployed three drivers, namely, Ram Swaroop, Karam Chand and Prittam Chand was of no assistance to accused as PW6 had categorically stated that it was the accused who was driving the offending Van on the relevant day. Learned trial Court also held that PW3 Mehar Singh had also clearly deposed that when owner of the offending Van PW6 Bal Krishan reached the spot, he disclosed that driver of the vehicle was the accused. Learned trial Court took note of the fact that this narration of PW3 was not controverted in the course of his cross examination. On these bases, it was held by the learned trial Court that the statements of PW3 and PW6 categorically proved that the Van in issue with which the accident was caused was being driven at the relevant time and place by the accused. It further held that conduct of the accused of absconding from the spot after stopping the offending vehicle further proved the factum of his being rash and negligent while driving the offending vehicle which hit deceased Premi Devi and caused her death. On these bases, learned trial Court held that prosecution had proved its case against the accused beyond reasonable doubt and convicted and sentenced the accused for commission of offences punishable under Sections 279 and 304-A of IPC.

4. In appeal, the findings so returned by the learned trial Court were upheld by the learned Appellate Court. While upholding the judgment of conviction passed by the learned trial Court it was held by learned Appellate Court that as far as identity of the driver was concerned, as per the prosecution, the vehicle in issue was being plied by the accused, however, the defence of the accused was that it was not being driven by him but by someone else. Learned Appellate Court held that statement of PW6 Bal Krishan demonstrated that accused was the driver of the offending vehicle on 20.11.1999 who had taken a passenger to Thural. Learned Appellate Court also held that no doubt PW6 had stated that he had deployed three drivers but it was not suggested to him by the defence that at the time of accident accused was not the driver and someone else was driving the vehicle. Learned Appellate Court also held that in fact no suggestion was given to PW6 by the defence that on that particular day accused was not the driver on the offending vehicle neither accused had taken the passenger to Thural. Learned Appellate Court also held that PW3 had stated that after the occurrence of accident when PW6 reached the spot, he disclosed that driver of the vehicle was accused Karam Chand. Learned Appellate Court held that no suggestion was put to this witness that owner had not disclosed to the police that it was the accused, who was driving the offending vehicle on the day of occurrence. On these bases, it was held by learned Appellate Court that the prosecution had duly established the identity of the accused as the person who was driving the offending vehicle on the fateful day. Learned Appellate Court affirmed the findings returned by learned trial Court to the effect that accident was in fact caused by rash and negligent driving on the part of the accused.

5. Feeling aggrieved by the judgment so passed by the learned Courts below, the petitioner filed this revision petition.

6. Mr. Anoop Chitkara, learned Counsel appearing for the petitioner has argued that the judgments of conviction passed against the present petitioner by both the learned Courts below convicting the accused for commission of offences punishable under Sections 279 and 304-A of IPC are perverse as both the learned Courts below have erred in not appreciating that the prosecution was not able to link the accused as driver of the vehicle with which the accident had taken place. Mr. Chitkara strenuously argued that judgments of conviction passed by both the learned Courts below are based on conjectures and surmises and both the learned Courts below erred in not appreciating that prosecution was not able to establish beyond reasonable doubt that in fact it was the accused who was driving the vehicle on the fateful day at the fateful time when the unfortunate accident took place. On these counts alone, Mr. Chitkara submitted that judgments of conviction passed by the learned Courts below against the accused are liable to be set aside.

7. Ms. Parul Negi, learned Deputy Advocate General, on the other hand, argued that there is no merit in the contentions of learned counsel for the petitioner because both the learned Courts below have returned findings to the effect that the prosecution had established on record that it was the accused who was driving the offending vehicle at the time when the unfortunate accident took place and immediately after the occurrence of the accident, the accused ran away from the spot. Learned Deputy Advocate General further argued that the factum of offending vehicle being driven by the accused at the relevant date, time and place stood proved from the testimony of PW6 i.e. owner of the vehicle in issue and there was no reason to disbelieve testimony of this witness and of PW3. Accordingly, she urged that as both the learned Courts below had held that it stood proved on record that it was the accused who was driving the offending vehicle at the relevant date time and place, the findings so returned by learned Courts below did not warrant any interference. On these bases, it was urged by Ms. Negi that as there was no merit in the revision petitioner, the same be dismissed.

8. I have heard the 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.

9. 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 Hon'ble Supreme Court in ***Sanjaysinh Ramrao Chavan Versus 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.

10. Keeping in view the arguments raised in the present petition by the learned counsel for the petitioner, the sole point of adjudication in this revision petition is to ascertain as to whether it stood established by the prosecution from the evidence which was placed on record that it was the accused who was driving the offending vehicle when the unfortunate accident took place or not.

11. A perusal of record of the case demonstrate that PW1 Sarwan Kumar, son of the deceased has deposed in the Court that on 20.11.1999 at around 1:00 p.m., he and his mother were walking on the road when one Van bearing registration No. HP-02-4231 came in a very fast speed from behind and hit his mother and dragged her and his mother died on account of said impact. This witness deposed that the accident took place on account of rash and negligent

driving of the driver of the vehicle. This witness deposed that he did not know that the name of person who was driving the said Van was Karam Chand. In his cross examination, he admitted that he did not know the driver but self stated that in fact driver had ran away from the spot. PW3 Mehar Singh deposed in the Court that on 20.11.1999 he had gone to the house of Ravi Kant and there he came to know that mother of Sarwan was injured in an accident and thereafter when he went to the spot, he saw Premi Devi lying dead on the road and one Van was there on the road. He further deposed that Sarwan and many other persons were there at the spot whereas the driver of the Van had ran away from the spot. He further deposed that owner of the Van came on the spot and he disclosed that name of driver of the Van was Karam Chand. In his cross examination, he admitted that he did not know Karam Chand and that he had reached the spot after 15 minutes of the accident.

12. PW4 Gandhi who was an eye-witness to the accident, as per prosecution, did not support the case of the prosecution. Similarly PW5 Susheel Kumar who as per prosecution was another eyewitness turned hostile and did not support the case of prosecution.

13. PW6 Bal Krishan, owner of the Van in question deposed in the Court that he was the owner of the Maruti Van bearing registration No. HP-02-4231 and he had deployed Karam Chand as driver on the said vehicle. He further deposed that he had gone to the spot after the accident took place but the driver had run away from the spot. In his cross examination, he stated that he was not aware as to how many drivers he had deployed, however, he stated that Ram Swaroop, Karam Chand and Prittam Chand were deployed by him as drivers on Van in issue. He denied that at the time of occurrence of the accident, the accused was not the driver of offending Van.

14. Now, a close scrutiny of the testimony of PW1, PW3 and PW6 demonstrates that none of them have either seen or stated that it was accused and the accused only who was driving the offending vehicle at the time when accident took place. The eye witnesses have not supported the case of the prosecution. The conclusion qua accused being driver of the offending vehicle at the time when accident took place has been arrived at by learned trial Court on the basis of testimony of the owner of the vehicle i.e. PW6 Bal Krishan, who deposed that accused was engaged by him as driver of the Van in issue on the day when the unfortunate accident took place and PW3 who deposed that after the unfortunate accident had taken place, when owner of the vehicle reached the spot, he (owner) disclosed that the driver engaged on the said vehicle was the accused. However the fact of the matter still remains that neither PW1 deposed in the Court that it was the accused who was driving the offending vehicle when the unfortunate accident took place nor the testimony of PW3 or PW6 proves this vital fact that at the time when the accident took place, it was the accused who was at the wheels of the offending vehicle. Simply because accused was engaged as the driver of the offending vehicle, this fact ipso facto cannot be the substitute for express proof of the fact that vehicle in fact was being driven by the accused at the time when the accident took place. In my considered view, this very important aspect of the matter has been ignored by both the learned Courts below. Learned trial Court as well as learned Appellate Court erred in not appreciating that engagement of accused by the owner of the offending vehicle as its driver was not itself a proof of the fact that it was the accused and accused only who was driving the vehicle at the time when the accident took place. It is settled law of the land that more serious a crime, more stringent the punishment, more stringent is the onus on the prosecution to prove its case. In my considered view, in the present case, the prosecution was not able to prove beyond reasonable doubt that at the time of unfortunate accident in which one precious human life was lost, it was the accused, who was on the wheels of the offending vehicle. It has come in the statement of owner of the offending vehicle that accused was engaged as a driver on the said vehicle and he was taking one passenger to Thural but the prosecution did not examine the passenger who could have been the best witness to prove the fact that it was the accused or someone else who was driving the vehicle on the fateful day. In fact, there is nothing on record placed by the prosecution from which it can be deciphered that when the unfortunate accident took place, it was the accused who was driving the vehicle. Prosecution has miserably failed to prove this fact beyond reasonable doubt. No doubt, PW6 has

stated that it was the accused who was engaged by him on the fateful day to drive the offending vehicle but fact of the matter remains that no one has deposed in the Court that it was the accused who was driving the vehicle when the accident took place. In this background, when the defence of the accused was that he was not driving the vehicle at the time when the accident took place, onus was heavily upon the prosecution to have had proved this point beyond reasonable doubt, which prosecution has failed to prove.

15. Therefore, in view of discussion held above, in my considered opinion, the findings returned by both the learned Courts below to the effect that prosecution was able to prove beyond reasonable doubt that it was accused on the wheels of the offending vehicle when the unfortunate accident took place, are perverse findings. Said findings are not borne out from the records of the case. There is not even an iota of evidence on record from which it can be inferred that it was the accused who was driving the vehicle when the unfortunate accident took place.

16. Accordingly, in view of the above discussion, this revision petition is allowed and the judgment of conviction passed by the Court of learned Judicial Magistrate 1st Class, Court No. 2, Palampur, in Criminal Case RBT No. 101-II/2000, dated 11.06.2003 as well as judgment passed by learned Additional Sessions Judge, Fast Track Court, Kangra at Dharamshala, in Criminal Appeal No. 46-P/05/03, dated 18.08.2007 are set aside and the petitioner is acquitted of offences punishable under Sections 279 and 304-A of IPC. Fine amount, if any, deposited by the petitioner be returned to him in accordance with law. The criminal 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 SANJAY KAROL, J. AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Smt. Roma Sharma ….Appellant.
Versus
Sameer Beg and another ….Respondents.

Cr. Appeal No.: 237 of 2015.
Reserved On : 28.03.2017.
Decided on: 13.04.2017.

Indian Penal Code, 1860- Section 376- Prosecutrix left the house at 9:30 A.M. on the pretext that her result was to be declared on internet – she returned at 1:30- P.M. but did not disclose the reason for late arrival – Subsequently, she told that accused had taken her to hotel during day time and had raped her – the accused was tried and acquitted by the Trial Court- held in appeal that prosecutrix did not support the prosecution version – the testimonies of the parents were not satisfactory – the prosecutrix was more than 16 years of age at the time of incident – Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed.

(Para-8 to 17)

For the appellant : Mr. P.S. Chandel, Advocate.
For the respondents : None for respondent No. 1.
Mr. Punit Rajta, Dy. Advocate General for respondent No. 2.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge

By way of this appeal, complainant has challenged the judgment passed by the Court of learned Sessions Judge, Bilaspur, in Sessions Trial No. 7 of 2012, dated 05.04.2013,

vide which, learned Trial Court acquitted the present respondent No. 1 (hereinafter referred to as 'accused') for commission of offence punishable under Section 376 of Indian Penal Code (in short 'IPC').

2. The case of the prosecution in brief was that on 07.06.2012, complainant Smt. Roma Sharma (PW1), who is the mother of the prosecutrix (name withheld), lodged a complaint in Police Station Sadar, Bilaspur Ext. PW1/A to the effect that on 05.06.2012, her elder daughter (prosecutrix), who was a student of class (X) in Government Senior Secondary School, Bilaspur left their house at 9:30 a.m. on the pretext that her result was to be declared on internet and when she (prosecutrix) returned home at around 1:30 p.m., PW1 asked her as to why she had come so late, but the prosecutrix did not answer anything and went straightway in her room. Further as per prosecution, on 07.06.2012, prosecutrix told PW1 her that she had friendship with one Sameer Beg, who had taken her to Dholra Hotel on 05.06.2012 during day time and had raped her.

3. On the basis of said complaint, FIR Ext. PW10/A was registered against the accused. In the course of investigation, prosecutrix was got medically examined, accused was arrested and he was also medically examined. Father of the prosecutrix produced photocopy of middle standard examination of the prosecutrix Ext. PW12/A which was taken into possession vide memo Ext. PW4/A. Prosecutrix lead the police to Dholra Hotel and she identified the room where accused raped her. Investigating Officer prepared site plan of the same. Further as per prosecution, during his custody accused made a statement Ext. PW5/A, on the basis of which he got identified the place where he had taken the prosecutrix on 05.06.2012. Birth certificate of the prosecutrix Ext. PW7/A was also obtained alongwith a copy of parivar register Ext. PW7/B. Report of SFSL alongwith opinion of the Doctor was also obtained.

4. After the completion of the investigation, challan was filed in the Court and as a prima-facie case was found against the accused, he was charged for commission of offence punishable under Sections 376 of IPC, to which he pleaded not guilty and claimed trial.

5. Learned trial Court on the basis of evidence produced before it by the prosecution acquitted the accused by giving him benefit of doubt. While arriving at the said conclusion it was held by learned trial Court that prosecution had failed to prove its case against the accused beyond reasonable doubt. It was held by learned trial Court that the material witness of the prosecution i.e. the prosecutrix had turned hostile and had not supported the case of the prosecution. Learned trial Court took note of the fact that it is not as if the evidence of the hostile witness is liable to be rejected in totality and part of the statement which favours the prosecution can be relied upon. However, it went on to hold that a scrutiny of statement of the prosecutrix demonstrated that she had not supported the case of the prosecution and nothing favourable could be extracted by the prosecution during her lengthy cross examination. Learned trial Court held that in her examination-in-chief, the prosecutrix had categorically deposed that accused had not met her on 05.06.2012 at Champa Park and had not done anything wrong with her. Learned trial Court held that prosecutrix had categorically denied that accused had forcibly raped her and she also denied that she had narrated any such incident to her mother and that Doctor had taken her consent before taking her signatures on the MLC. Learned trial Court held that rather the prosecutrix had stated that she was having friendship with the accused for the last two and half years and both of them used to talk with each other on telephone quite often. Learned trial Court thus held that in view of the categorical stand taken by the prosecutrix that accused never committed rape with her on 05.06.2012, it could not be said that accused had physically molested/raped the prosecutrix on 05.06.2012. Learned trial Court also took note of the fact that PW3, owner of the Dholra Guest House had also not supported the case of the prosecution. It further held that even the testimony of complainant PW1 i.e. the mother of the prosecutrix did not inspire confidence and moreover the statement of PW1 (mother of the prosecutrix) as well as of PW4 i.e. father of the prosecutrix were based on hear say evidence and as such, same was not admissible in law. On these bases, learned trial Court held that from the perusal of entire material placed on record by the prosecution it could not be said that accused Sameer Beg had

committed rape on prosecutrix on 05.06.2012 and by giving the benefit of doubt it acquitted the accused.

6. Feeling aggrieved by the judgment so passed by learned trial Court, the complainant has filed this appeal.

7. We have heard the learned counsel for the complainant as well as learned Deputy Advocate General appearing for respondent No. 2. We have also gone through the records of the case as well as the judgment passed by learned trial Court.

8. Before proceeding further, it is relevant to mention that against the judgment of acquittal so passed by the learned trial Court in favour of accused, no appeal has been preferred by the State.

9. In order to appreciate as to whether the findings of acquittal returned in favour of accused by learned trial Court are based on evidence adduced on record or are perverse, we have minutely gone through the records of the case.

10. Learned trial Court has primarily returned the finding of acquittal in favour of accused by holding that prosecutrix had not supported the case of the prosecution and she had denied that she was raped by the accused on 05.06.2012 as was the case against the accused put forth by the prosecution. A perusal of the statement of the prosecutrix, who entered the witness box as PW2, demonstrates that she stated on oath that she knew the accused since August, 2010 and that accused used to drive Van of Radhey Govind School, Bilaspur and used to collect children from village Chandpur and adjoining areas and said Van used to pass through the house of the prosecutrix. Prosecutrix further deposed on oath that she used to take lift in the aforesaid Van at times for coming to School and accused used to drop her at her school. She further stated that they used to talk with each other on mobile phone. She further deposed that on 05.06.2012, her father had left her at school as her result was to be declared on the internet. She further deposed that she left her house at 9:30 a.m. for going to Bilaspur and alighted from bus at Champa Park and enquired about the result from a nearby shop and came to know that her result was not declared. She further deposed that thereafter she went to Laxmi Narayan Mandir and from there she went to Gurdwara market where she purchased some articles and thereafter she came back to her house and reached there at 1:30 p.m. She further deposed that on reaching her house, her mother enquired her about the result and she told that her result was not declared as yet. She further deposed that except this, she had not disclosed anything else to her mother. She further deposed that she had not met the accused at Champa Park on 05.06.2012 and accused had not done anything wrong with her. As she was declared hostile, she was subjected to lengthy cross examination by learned Public Prosecutor. In her cross examination, she denied that during the course of investigation any statement of her was recorded by the police. She also denied that on the fateful day when she reached home, she straightway went to her room and locked herself and at about 4:00 p.m. “Mama” of her mother came to their house and asked her to open the door and only thereafter she opened the door. Though in her cross examination she did not deny that fact that she accompanied her parents to the police station for the purpose of lodging FIR and that she was subjected to medical examination but she stated that she was forcibly taken to police station by her father and was also forced to undergo medical examination. She denied that her medical examination was conducted by Doctor with her consent. In her cross examination by learned defence counsel, she admitted that on 05.06.2012 accused never met her nor he committed rape on her. She also stated that her date of birth was 11.11.1996 and in the school records it was wrongly recorded as 11.03.1997. She also stated that her parents had planted a false case against the accused in connivance with the police.

11. Now in this background, when we examine statements of complainant PW1 Smt. Roma Sharma and PW4 Shri Krishan Kumar, mother and father of the prosecutrix respectively, we find that their testimonies do not inspire confidence. As per PW1, on 05.06.2012, at around 9:30 a.m. prosecutrix had left home for Bilaspur on the pretext that her result was to be declared on the internet and when she came back home at 1:30 p.m. she was perplexed and under fear

and when she asked the reason of her coming late, the prosecutrix without disclosing anything to her straightway went to her room and bolted the door from inside and did not open the door for about 6-7 hours despite her repeated requests. This witness thereafter deposed that she called her “Mama” Shri Mast Ram telephonically and on his pursuation, the prosecutrix opened the door. This witness further deposed that prosecutrix did not disclose anything to her on that day and it was on 07.06.2012 that prosecutrix disclosed to her that she was having friendship with accused and on 05.06.2012 accused had met her at Champa Park and took her to a Hotel at Dholra where after taking lunch accused took her in a room of the hotel and committed rape with her (prosecutrix). This witness thereafter deposed that she narrated the entire incident to her husband and she alongwith her husband and prosecutrix went to police station Sadar, Bilaspur and filed the complaint. In her cross examination, she stated that her husband had reached their house at 3:30 p.m. on 05.06.2012 and requested the prosecutrix to open the door but she did not open the door even at his request. She further deposed in her cross examination that she had disclosed to the police that prosecutrix had told her that accused met her at Champa Park and took her to Dhaulra Hotel in an Auto Three Wheeler for lunch and after taking lunch accused took prosecutrix in a room of said Hotel, but she was confronted with complaint Ext. PW1/A wherein it was not so recorded. She also stated in her cross examination that result of the prosecutrix was declared on 06.06.2012 and they came to know about result on 07.06.2012 in which prosecutrix had failed. She denied the suggestion that as a result of the prosecutrix failing in the examination they got infuriated and had lodged a false complaint against the accused. She further stated that FIR was not signed by her and it was her husband who lodged the FIR.

12. PW4 Shri Krishan Kumar, father of the prosecutrix, deposed that on 05.06.2012 when he reached their house at 3:30 p.m., his wife told him that prosecutrix had returned home at 1:30 p.m. and had bolted herself in a room and was not opening the same. This witness further deposed that thereafter his wife rang her “Mama” Shri Mast Ram and informed him that prosecutrix had bolted the room from inside and was not opening the door despite repeated requests, pursuant to which, “Mama” of his wife reached their house at about 4:30 p.m. and on pursuation of “Mama” of his wife, prosecutrix opened the door. It has further come in the testimony of this witness that on 07.06.2012 when he was present in the school, his wife telephonically informed him that prosecutrix had disclosed to her that she was having friendship with accused and on 05.06.2012, accused had taken prosecutrix to Dholra Hotel where he sexually molested her.

13. In our considered view, both mother and father of the prosecutrix are interested witnesses and the statement of prosecutrix is very categoric to the effect that a false case was lodged against the accused on the behest of her parents. In these circumstances, especially keeping in view the fact that prosecutrix herself did not support the case of the prosecution, statements of PW1 and PW4 cannot solely be made basis for convicting the accused. Incidentally, in the present case, as has also been taken note of by learned trial Court, PW3 Shri Dharmender Singh has also not supported the case of the prosecution. He has denied that prosecutrix had visited said Guest House/Hotel alongwith the accused on 05.06.2012 as is the very case put forth by the prosecution.

14. From what has been discussed above by us it is apparent and evident that the prosecutrix in the present case has not supported the case of the prosecution at all. It has come in the cross examination of the prosecutrix that her date of birth was 11.11.1996 and not 11.03.1997 and as such, on the date of occurrence, she was more than 16 years. Be that as it may, the fact of the matter still remains that the prosecutrix has denied the factum of accused having met her on 05.06.2012 or having had sexually molested her on that date. As we have already held above that the statements of PW1 and PW4, mother and father of the prosecutrix respectively are neither trustworthy nor inspire confidence. It has come on record that prosecutrix and accused were known to each other and factum of her friendship with accused has in fact been categorically stated by the prosecutrix in her deposition in the Court. She admitted the suggestion of the defence that a false case was put up by her parents against the accused in connivance with the police. In this background when the prosecutrix herself has

denied that any offence, as was alleged against accused, was committed against her by the accused and the statements of PW1 and PW4 are not worth inspiring any confidence, it cannot be said that the judgment of acquittal passed by learned trial Court in favour of accused either suffers from any illegality or perversity.

15. We also concur with the finding of the learned trial Court that the material on record is not sufficient to show that prosecution had proved its case against the beyond reasonable doubt. Medical evidence on record also does not further the case of the prosecution especially in view of the fact that prosecution has failed to prove that on 05.06.2012 accused had taken the prosecutrix to Dholra Hotel and had committed rape on her there.

16. Besides this, we have also carefully gone through the judgment passed by the learned trial Court and a perusal of the judgment passed by learned trial Court demonstrates that the entire evidence produced on record by the prosecution had been minutely taken into consideration by the learned trial Court and after a careful consideration of the same, learned trial Court had returned the finding of acquittal in favour of accused.

17. Therefore, while concurring with the findings of acquittal returned by learned trial Court, we dismiss the present appeal being devoid of any merit, so also pending miscellaneous application(s), if any.

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

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

Cr. Revision No. 380 of 2015
Decided on: April 17, 2017

Indian Forest Act, 1927- Section 52-A- The vehicle of the respondent was seized for transporting the forest produce – an application for release of vehicle was filed before Authorized Officer-cum-Divisional Forest Officer, which was rejected- a revision was filed before Additional Sessions Judge, which was converted into an appeal and the order of Authorized Officer was set aside – aggrieved from the order, present revision has been filed- held that no report of seizure was made to the Authorized Officer – a challan was filed before the Magistrate who had jurisdiction to release the vehicle – order of release can be passed by a Court which had taken cognizance of the charge sheet- however, in the peculiar facts and circumstances of the case, the order of Authorized Officer upheld.(Para- 8 to 12)

Case referred:

State of Kerala versus Puttumana Illath Jathavedan Namboodiri (1999)2 Supreme Court Cases 452

For the petitioner: Mr. P.M. Negi, Additional Advocate General with Mr. Ramesh Thakur, Deputy Advocate General.
For the respondent: Mr. Divya Raj Singh, Proxy Counsel for Mr. Maan Singh, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Instant criminal revision petition filed under Sections 397 and 401 read with Section 482 CrPC is directed against judgment dated 1.4.2015 passed by learned Additional

Sessions Judge, Kullu, HP in Criminal Revision No. 33 of 2014, whereby order dated 6.8.2014 passed by the Authorized Officer-cum-Divisional Forest Officer, Kullu in Case No. 7/2014 titled Prakash Chand versus State of Himachal Pradesh, has been set aside and vehicle in question i.e. Jeep No. HP-66-3614 alongwith documents and keys has been ordered to be released in favour of the respondent-owner.

2. Briefly stated facts as emerge from record are that respondent-owner vide application dated 1.8.2014, made a prayer before Authorized Officer-cum-Divisional Forest Officer, Kullu for release of vehicle /Jeep No. HP-66-3614 on *Sapurdari* bond, which was impounded by the police in FIR No. 157/2014 dated 18.5.2014 under Sections 41 and 42 of the Indian Forest Act, 1927 and under Section 379 IPC. However, the fact remains that the Authorized Officer-cum-Divisional Forest Officer, Kullu rejected aforesaid application having been preferred by the respondent namely Prakash Chand. Learned Authorized Officer, while dismissing application for release having been made on behalf of the respondent-owner concluded that in the instant case, vehicle in question was seized by the police on 185.2014 in FIR No. 157/2014 and no report of seizure has been made to him under Section 52(3) of the Indian Forest Act nor seized property has been produced before him under the Act, as such, he is not empowered to exercise jurisdiction as conferred upon him under Section 52A of the Indian Forest Act.

3. Respondent, being aggrieved and dissatisfied with the order dated 6.8.2014, passed by the learned Authorized Officer-cum-Divisional Forest Officer, Kullu preferred a criminal revision before Additional Sessions Judge, Kullu, which came to be registered as Cr. Revision No. 33/2014. Subsequently, aforesaid criminal revision having been filed by the respondent was treated as criminal appeal, as emerges from the judgment passed by the learned Additional Sessions Judge. Learned Additional Sessions Judge, Kullu, while accepting the aforesaid appeal having been filed by the respondent quashed order dated 6.8.2014 passed by Authorized Officer-cum-Divisional Forest Officer, Kullu in case No. 7/2014 and ordered release of vehicle in question alongwith documents and keys, in favour of the respondent namely Prakash Chand, being registered owner of the vehicle in question, on furnishing *Sapurdari* bond to the tune of `5.00 Lakh, with one guarantee in the like amount, to the satisfaction of the learned Chief Judicial Magistrate, Kullu.

4. Being aggrieved and dissatisfied with the impugned judgment having been passed by the learned Additional Sessions Judge, Kullu, petitioner-State preferred instant petition under Sections 397/401 read with Section 482 CrPC, praying therein for quashing and setting aside impugned judgment dated 1.4.2015 passed by the learned Additional Sessions Judge.

5. Mr. P.M. Negi, Additional Advocate General, duly assisted by Mr. Ramesh Thakur, Deputy Advocate General, vehemently argued that impugned judgment dated 1.4.2015 passed by the learned Additional Sessions Judge, Kullu is not sustainable in the eye of law and as such deserves to be set aside. Mr. Negi, while referring to the impugned judgment passed by Additional Sessions Judge, Kullu, strenuously argued that the appellate Court has exceeded its jurisdiction because it had no occasion whatsoever, to give interim custody of vehicle in question in favour of respondent/owner because learned Additional Sessions Judge had no power /jurisdiction to pass any order of release of vehicle under the Indian Forest Act, rather, power, if any, was with the Authorized Officer-cum-Divisional Forest Officer, Kullu, who could release vehicle in terms of Section 52A of the Indian Forest Act. Mr. Negi, while referring to the order dated 6.8.2014, passed by Authorized Officer-cum-Divisional Forest Officer, Kullu, contended that there is no illegality or infirmity in the order passed by the learned Authorized Officer because since vehicle involved in the incident was never produced before the said Authorized Officer as required under Section 52A of the Indian Forest Act and as such there was no occasion for him to release vehicle as prayed for by the respondent/owner. Mr. Negi further contended that otherwise also, proper remedy for the respondent was to move an application for release of vehicle before Judicial Magistrate, before whom police had filed challan in FIR No. 157/2014 dated

18.5.2014 and by no stretch of imagination, Additional Sessions Judge had power to order release of vehicle in favour of the respondent/owner of the vehicle.

6. Mr. Divya Raj Singh, learned counsel representing the respondent, supported the judgment passed by Additional Sessions Judge. Learned counsel representing the respondent vehemently argued that there is no illegality or infirmity in the judgment passed by the learned Additional Sessions Judge and as such revision petition filed by the State deserves to be dismissed.

7. Mr. Divya Raj Singh, also reminded this Court of its limited jurisdiction under Section 397 as far as re-appreciation of evidence is concerned. Learned counsel has placed reliance upon the judgment passed by Hon'ble Apex Court in case **State of Kerala versus 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."

I have heard learned counsel representing the parties and have carefully gone through the record made available.

8. Perusal of order dated 6.8.2014 suggests that vehicle bearing registration No. HP-66-3614 was impounded by the Police in FIR No. 157/2014 dated 18.5.2014, under Sections 41 and 42 of the Indian Forest Act and Section 379 IPC. Respondent-owner moved an application bearing No. 7/2014 under Section 52A of the Indian Forest Act, before the Authorized Officer-cum-Divisional Forest Officer, Kullu, Forest Division Kullu, for interim release of the vehicle in question on *Sapurdari* bond. However, aforesaid application was rejected by the Authorized Officer-cum-Divisional Forest Officer on the ground that since neither the report of seizure was made to him under Section 52 (3) of the Indian Forest Act nor seized property was produced before him under the Act ibid, as such, he was not empowered to exercise jurisdiction as conferred upon him under Section 52A of the Act ibid.

9. This Court, after perusing order passed by the Authorized Officer-cum-Divisional Forest Officer, sees no illegality or infirmity in the order passed by the Authorized Officer-cum-Divisional Forest Officer on the application having been filed by the respondent-owner for interim release because, admittedly, at the time of moving of application, no report of seizure was made to him as envisaged under Section 52(3) of the Act ibid, by the police, which registered FIR No. 157/2014 dated 18.5.2014 under Sections 41 and 42 of the Act ibid.

10. In the instant case, as emerges from record, police registered aforesaid case against respondent-owner of the vehicle under Sections 41 and 42 of the Indian Forest Act and after completion of investigation, presented challan in the competent court of law and as such application, if any, for interim release of the vehicle on *Sapurdari* could be made by the respondent before judicial magistrate, before whom *Challan* was presented by the police after registration of FIR. Had the Department registered case, if any, against respondent under Section 52A, owner was expected to move an application for release of vehicle before that authority under Section 52A of the Act but since no vehicle was ever produced before Authorized Officer under Section 52(3) of the Act, no order for interim release could be passed by Authorized Officer-cum-

Divisional Forest Officer, exercising powers under Section 52A of the Act ibid. Hence, in view of above, this Court sees no illegality or infirmity in the order passed by the Authorized Officer-cum-Divisional Forest Officer on the application having been filed by the respondent-owner. However, after carefully examining order having been passed by the Authorized Officer-cum-Divisional Forest Officer, as well as pleadings available on record, this Court is of the view that at the time of dismissing application having been filed by the respondent-owner of vehicle, Authorized Officer-cum-Divisional Forest Officer could direct applicant to move application for interim release of vehicle before judicial magistrate, before whom, *Challan* was presented by the police, after registration of the case. But, interestingly, in the instant case, respondent-owner being aggrieved and dissatisfied with rejection of his application, preferred a criminal appeal/revision before the Additional Sessions Judge, who, ultimately accepted the appeal/revision and ordered release of vehicle in favour of the owner. This Court sees substantial force in the arguments having been made by Mr. P.M. Negi, Additional Advocate General, that there is no jurisdiction vested in Sessions Judge/ Additional Sessions Judge to order interim release of vehicle involved in a case, because order, if any, could be passed only by court, which had taken cognizance of the chargesheet filed by the police pursuant to FIR registered. But, in the instant case, since application filed under Section 52A of the Act ibid was rejected by Authorized Officer-cum-Divisional Forest Officer, remedy, if any, against dismissal of same was to file criminal appeal before Sessions Judge, and as such, respondent/owner rightly approached the Sessions Judge/Additional Sessions Judge, against rejection of his application. But, as has been observed above, application, if any for release of vehicle could have been made by the respondent/owner before in the Court, before whom, police had presented *Challan* in the case.

11. In normal circumstances, taking note of the averments contained in the application as well as order having been passed by Authorized Officer-cum-Divisional Forest Officer, under the Indian Forest Act, learned Sessions Judge, ought to have sent this case to judicial magistrate before whom, *Challan* was presented but in the instant case, learned Sessions Judge, proceeded to decide the application for interim release of vehicle in question.

12. Though, this Court is in agreement with the submissions having been made by Mr. P.M. Negi, Additional Advocate General, that learned Additional Sessions Judge, had no power to order release of vehicle but in the peculiar facts and circumstances of the case, wherein learned Additional Sessions Judge while adjudicating legality of order dated 6.8.2014 passed by Authorized Officer-cum-Divisional Forest Officer, Kullu ordered release of vehicle on *Sapurdari*, sees no reason to interfere at this stage.

13. However, it is made clear that observations, if any, made in the judgment passed by the learned Additional Sessions Judge while allowing application for release of vehicle in question, shall have no bearing on the merits of the case, which is admittedly pending before Judicial Magistrate. It is further clarified that impugned judgment/order passed by the learned Additional Sessions Judge, shall not be considered to be a precedent, as the same has been passed in peculiar facts and circumstances of the case.

14. In view of the above, the present petition is disposed of along with pending applications, if any.

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

Tara Chand and others ………Appellants

Versus

Madan Lal ……….Respondent

RSA No. 155 of 2005

Reserved on: April 3, 2017

Decided on: April 17, 2017

Specific Relief Act, 1963- Section 20- Plaintiff entered into an agreement with the defendant for the sale of land for a total consideration of Rs.44,000/- - an amount of Rs.30,000/- was paid as part payment- the defendant failed to execute the sale deed in favour of the plaintiff – the suit was decreed by the Trial Court- an appeal was filed, which was dismissed – held in second appeal that there was no requirement of obtaining prior permission from TCP – plaintiff had presented himself before sub-registrar and had issued a legal notice for the execution of the sale deed – sub-registrar had directed the parties to appear before him on the next day and the plaintiff failed to appear before the sub-registrar - the Courts had wrongly held that plaintiff was ready and willing to perform his part of the agreement – appeal allowed- judgments and decree passed by the Court set aside and suit of the plaintiff dismissed. (Para-14 to 33)

Cases referred:

Rahul Bhargava v. Vinod Kohli reported in 2008 (1) Shim. LC 385

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 appellants — Mr. Ajay Sharma, Advocate.
For the respondent: — Mr. Neeraj Gupta, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:

Instant Regular Second Appeal under Section 100 of the Civil Procedure Code has been filed against judgment and decree dated 28.1.2005, passed by the learned Additional District Judge, Fast Track Court, Una in Civil Appeal No. 220/2K RBT No. 194/94/00, affirming judgment and decree dated 9.11.2000 passed in Civil Suit No. 224/1994 by Sub Judge(II), Una, whereby suit filed by respondent-plaintiff (hereafter, 'plaintiff') for possession by specific performance of agreement came to be decreed.

2. Briefly stated facts as emerge from record are that the plaintiff filed a suit for specific performance of agreements dated 31.5.1993 and 31.4.1994, seeking therein direction to the appellants-defendants (hereafter, 'defendants'), to execute and get the sale deed registered, of land measuring 0-00-73 hectares comprised in Khewat No. 169 min, Khatauni No. 246 min, bearing Khasra Nos. 881/2 (0-00-20), 882/2 (0-00-20) and 885/1 (0-00-33), as per Aks *Tatima* attached with the plaint, entered in Bandobast for the year 1987-88, situate in Village Jhalera, Tehsil and District Una, Himachal Pradesh on receipt of remaining sale consideration of Rs.14,000/-. Apart from aforesaid prayer, plaintiff, in the alternative, also prayed for recovery of Rs.44,000/-. Plaintiff averred in the plaint that on 31.5.1993, original defendant namely Atra entered into an agreement with him for the sale of land as detailed herein above (hereafter, 'suit land') for total consideration of Rs.44,000/-. As per the plaintiff, parties executed agreement to sell on 31.5.1993 and on the same day a sum of Rs.30,000/- was paid to the defendant by the plaintiff as part payment qua sale consideration. Plaintiff further claimed that steps for sale by way of *Tatima* and permission from Town and Country Planning, Una were to be taken by the defendant. However, defendant expressed his inability to execute and get the sale deed registered on 30.4.1994, since he failed to get necessary permission from the Town and Country Planning Department, accordingly, on 30.4.1994, defendant extended date of performance of agreement till 31.8.1994 and the same was reduced into writing on the back of the agreement, whereby defendant agreed to execute registered sale deed in favour of the plaintiff on or before 31.8.1994. Plaintiff further alleged that he was ready and willing to perform his part of agreement to execute sale deed for consideration of Rs.14,000/- and in this regard, he requested defendant time and again to perform his part of agreement and also got issued a legal notice dated 2.9.1994, requesting him to execute sale deed in his favour. But since defendant

failed to do the needful, he was compelled to file the suit seeking direction to the defendant to get sale deed registered in terms of agreements dated 31.5.1993 and 30.4.1994.

3. Defendant, by way of written statement admitted execution of agreement dated 31.5.1993 as well as receipt of amount of Rs.30,000/- as part payment of sale consideration. However, defendant stated that he had agreed to execute sale deed on 30.4.1994, after receipt of remaining amount of Rs. 14,000/-, however defendant alleged that though he was always ready and willing to execute the sale deed in terms of agreement but denied that he could not complete codal formalities as required under agreement and further denied that date of execution of sale deed was extended till 31.8.1994 at his instance, rather, he alleged that time was extended at the instance of plaintiff as he had no money to pay balance sale price. However, the written statement suggests that defendant admitted the writing as contained on the backside of the agreement. Defendant further alleged that codal formality of obtaining permission from Department was to be completed by the plaintiff and since he failed to complete the codal formalities, sale deed could not be executed within stipulated time. Defendant also admitted factum of receipt of notice allegedly got issued by the plaintiff and claimed that he was ready and willing to get sale deed registered in his favour and as such both the parties approached court of Sub Registrar, Una, wherein plaintiff showed his reluctance for the execution of sale deed. Defendant further claimed that Sub Registrar refused to extend the date further. At the instance of plaintiff, Sub Registrar gave time till 17.9.1994 for making balance payment and to get the sale deed executed but on 17.9.1994, plaintiff never turned up in the office of Sub Registrar for the aforesaid purpose. In the aforesaid background, defendant prayed for dismissal of the suit of the plaintiff. Plaintiff, by way of replication, reasserted his claim as set up in the plaint and denied the contents of written statement, contrary to the plaint.

4. Learned trial Court, on the basis of pleadings of the parties, framed following issues:

> "1. Whether the plaintiff is entitled for decree of specific performance , on the basis of alleged agreements? OPP
>
> 2. Whether the plaintiff is entitled for recovery of Rs.44,000/-, if issue No.1 is proved against the plaintiff? OPP
>
> 3. Relief."

5. Subsequently, learned trial Court, vide judgment and decree dated 9.11.2000, decreed the suit of the plaintiff for specific performance of contract with direction to the plaintiff to deposit balance amount of Rs.14,000/- within two months from the date of judgment, failing which suit of the plaintiff shall stand dismissed. Learned trial Court further held that in case plaintiff deposits aforesaid amount within two months, on or before 8.1.2000, defendant shall execute sale deed within two months i.e. on or before 8.3.2001, in terms of agreement Ext. P1, qua the suit land. Learned trial Court, further ordered that in case, defendant failed to execute sale deed on 8.3.2001, plaintiff shall be at liberty to approach the Court and Reader of the Court shall get sale deed registered and cost of registration and stamp papers, etc. shall be borne by the plaintiff.

6. Defendant, feeling aggrieved by the aforesaid judgment and decree, preferred an appeal under Section 96 CPC before the Additional District Judge, Fast Track Court, Una, which came to be registered as Civil Appeal No. 220/2K RBT No. 194/04/00. However, the fact remains that the aforesaid appeal was dismissed by the first appellate Court vide judgment and decree dated 28.1.2005. Hence, this Regular Second Appeal.

7. The Regular Second Appeal was admitted by this Court on 3.8.2004 on the following substantial question of law:

> "Whether without there being permission from the Town & Country Planning Authorities, the decree for specific performance of agreement could not have been passed by the two courts below?

8. Before adverting to the merits of the case, it may be noticed that during proceedings of the case, wherein learned counsel representing the defendant while inviting attention of this Court to the evidence be it ocular or documentary, adduced on record by the parties, more particularly, Ext. D1, DW-1/A, DW-1/B and DW-1/C, stated that the defendant was ready and willing to perform his part of agreement in terms of Ext. P1 and Ext. P3, whereby parties had agreed to get the sale deed executed in terms of Ext. P1, as such, findings contrary to the same returned by the learned Courts below are wrong, perverse and deserve to be set aside. Further, the perusal of Page-6 of the instant appeal, clearly suggests that defendants had specifically proposed, substantial question of law No.2, "whether courts below misread and misappreciated oral and documentary evidence of defendants more especially documents Ex.DW-1/A, DW-1/B and Ex. DW-1/C thereby vitiating the impugned judgments and decrees?" However, the fact remains that this Court admitted the present appeal on some other substantial question of law, reproduced herein above.

9. After hearing the submissions having been made by the learned counsel representing the plaintiff, which would be taken note of herein below, as well as evidence available on record, this Court is of the view that additional substantial question of law, which otherwise was proposed by the defendant at the time of filing of the appeal, is required to be framed, for the proper adjudication of the matter at hand. It would be relevant to reproduce herein below provisions of Section 100 CPC:

> "100. Second Appeal.-- (1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.
>
> (2) An appeal may lie under this section from an appellate decree passed ex parte.
>
> (3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.
>
> (4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.
>
> (5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question : Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question.]
>
> [100A. No further appeal in certain cases? Notwithstanding anything contained in any Letters Patent for any High Court or in any other instrument having the force of law or in any other law for the time being in force, where any appeal from an appellate decree or order is heard and decided by a single Judge of a High Court, no further appeal shall lie from the judgment, decision or order or such single Judge in such appeal or from any decree passed in such appeal.]"

10. Section 101 CPC specifically bars second appeal except on the ground mentioned in Section 100 CPC. Hence, this Court, after careful examination of submissions having been made by the learned counsel representing the plaintiff, deems it fit to frame following additional substantial question of law, with the consent of the parties:

> "Whether courts below misread and misappreciated oral and documentary evidence of defendants more especially documents Ex.DW-1/A, DW-1/B and Ex. DW-1/C thereby vitiating the impugned judgments and decrees?"

11. Mr. Ajay Sharma, learned counsel representing the defendants vehemently argued that the impugned judgments passed by the learned Courts below are not sustainable, as

the same are not based upon correct appreciation of evidence adduced on record by the respective parties and as such deserve to be set aside. Mr. Sharma, while referring to the impugned judgments passed by courts below strenuously argued that both the Courts below have erred in appreciating provisions of law applicable as well as pleadings of parties and especially evidence adduced by them on record in its right perspective, as a result of which erroneous findings have come on record to the detriment of the defendants/original defendant, who successfully proved on record that he was ready and willing to perform his part for execution of agreement Ext. P1. Mr. Sharma, further contended that both the courts below have fallen in grave error while passing judgments and decrees because execution of sale deed, in law is prohibited without there being permission from Town and Country Planning authorities. He further stated that since permission from TCP was to be procured by the plaintiff himself, there was no occasion for the defendant to get the sale deed executed till the receipt of permission from TCP Department. Mr. Sharma, while specifically inviting attention of this Court to Exts. DW-1/A, DW-1/B and DW-1/C strenuously argued that defendant successfully proved on record that despite there being extension of time for execution of sale deed, plaintiff could not arrange for the balance sale consideration. In this regard, he specifically invited attention of this Court to the statement of DW-1 Sohan Lal, registration clerk of the Sub Registrar, Una, who stated that parties were present on 16.9.1994, but they were called upon to come on 17.9.1994, with the remaining sale consideration payable to the defendant, but since plaintiff failed to turn up, no sale deed could be registered. Mr. Sharma further contended that the courts below failed to appreciate the original record brought by Sohan Lal from the office of Sub Registrar, who successfully proved on record Exts. DW-1/A and DW-1/B. But, interestingly, courts below brushed aside aforesaid documents without giving any reason and wrongly came to the conclusion that documents as referred above could not be seen in evidence and as such judgment being totally contrary to the documentary evidence available on record deserves to be set aside. While concluding his arguments, Mr. Sharma contended that it is well settled law that in a suit for specific performance, court is required to see the readiness and willingness of the party to execute his/her part qua the agreement, if any, entered into between the parties. Mr. Sharma, while referring to the document Ext. DW-1/A forcefully contended that the defendant successfully proved on record that he was ever ready and willing to perform his part, because he came present before the Sub Registrar, Una, pursuant to notice dated 2.9.1994, Ext. P4, whereby plaintiff had called upon defendant to execute sale deed on 16.9.1994 by presenting himself before Sub Registrar, Una at 10.00 AM.

12. Mr. Neeraj Gupta, learned counsel representing the plaintiff supported the judgments and decrees passed by the Courts below. While referring to the impugned judgments and decrees passed by the Courts below, Mr. Gupta strenuously argued that there is no illegality or infirmity in the same, rather they are based upon correct appreciation of evidence adduced on record by the respective parties and as such there is no occasion, whatsoever for this Court to interfere in the findings of fact and law recorded by the Courts below. While refuting aforesaid contentions having been made by the learned counsel for the defendant, Mr. Gupta, vehemently argued that the learned Courts below rightly concluded after perusing Exts. DW-1/A, DW-1/B and DW-1/C, that nothing could be inferred from these documents that defendant was ready and willing to get the sale deed executed in terms of agreement to sell, Ext. P1 and as such there is no illegality or infirmity in the impugned judgments passed by the learned Courts below and same deserve to be upheld. Mr. Gupta, while specifically placing reliance upon judgment passed by this Court in **Rahul Bhargava v. Vinod Kohli** reported in 2008 (1) Shim. LC 385 and judgment passed by Coordinate Bench in Civil Suit No. 27 of 2001 titled **Lt. Col. S.J. Chaudhri** v. **Mr. Raj Kumar Brijendra Singh (deceased) through his Legal Representatives** decided on 26.9.2008, contended that condition, if any, with regard to obtaining permission from TCP before execution of sale deed pursuant to agreement to sell entered into between the parties, can not be held to be impediment, if any, in the execution of sale deed. Mr. Gupta further contended that for filing suit for specific performance, on the basis of agreement, no permission, if any, is/was required from TCP, rather, it is only after suit is decreed, such permission may be required at the time of registration of sale deed, on the basis of specific performance of decree. While concluding his arguments, Mr. Gupta forcefully contended that there is no misappreciation and misconstruction

of documentary evidence adduced on record by the defendant, rather both the courts below have dealt with each and every aspect of the matter meticulously and there is no scope of interference, especially in view of concurrent findings of fact recorded by the learned Courts below. Mr. Gupta further contended that this Court has a very limited jurisdiction to re-appreciate evidence while exercising powers under Section 100 CPC when both the learned Courts below have returned concurrent findings of fact and law. He placed reliance upon judgment passed by Hon'ble Apex Court in ***Laxmidevamma and Others vs. Ranganath and Others,*** **(2015)4 SCC 264**

13. I have heard the learned counsel representing the parties and gone through the record carefully.

14. 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 led on record by respective parties, perusal whereof certainly suggests that the learned Courts below failed to appreciate the evidence, be it ocular or documentary, led on record by the defendant in right perspective, as a result of which, great prejudice has been caused to the defendant, who, while placing reliance upon Ext. DW-1/A, successfully proved on record that pursuant to receipt of legal notice, Ext. P4, he had come present before Sub Registrar on 16.9.1994 for getting sale deed executed in terms of Ext. P1. Pleadings as well as evidence available on record clearly suggest that vide Ext. P1, parties had entered into agreement to sell the suit land for a total consideration of Rs.44,000/-. It is also not disputed that an amount of Rs.30,000/- was received by the defendant at the time of execution of agreement, Ext. P1 dated 31.5.1993, whereas remaining amount of Rs.14,000/- was to be received by the defendant at the time of execution of sale deed. Similarly, there is no dispute with regard to extension of time with the consent of parties till 31.8.1994 as emerges from perusal of document Ext. P1 as well as Ext. P3.

15. True, it is, that perusal of Ext. P3 i.e. endorsement made on the backside of agreement to sell i.e. Ext. P1, suggests that sale deed could not be executed strictly in terms of time as stipulated in agreement to sell dated 31.5.1993, for want of permission from TCP. Though there is mention with regard to permission to be taken prior to execution of sale deed but admittedly there is nothing to suggest that permission as referred above was required to be specifically obtained by the defendant and not by the plaintiff as claimed by the learned counsel representing the plaintiff. This Court carefully perused Ext. P1 i.e. agreement to sell entered into between the parties, which nowhere suggests that condition, if any, with regard to permission to be obtained by defendant before execution of sale deed was incorporated in the agreement, rather there was condition that defendant shall be liable and bound to get the sale deed executed on or before 30.4.1994, failing which, he shall be liable to refund Rs.60,000/- i.e. double the amount as already received by him at the time of execution of agreement Ext. P1. Perusal of Ext. P3 i.e. so called supplementary agreement entered into between the parties after expiry of period as contained in original agreement dated 31.5.1993, though suggests that prior permission of TCP was condition precedent for execution of sale deed on or before 31.8.1994, in terms of agreement Ext. P1 but original agreement Ext. P1 did not contain such condition.

16. Record further reveals that the defendant while getting time extended admitted that he was bound to get the sale deed executed before 30.4.1994 but since there was no permission from TCP, he was unable to do the needful. However, while agreeing to get sale deed executed in terms of Ext. P1, on or before 31.8.1994, defendant nowhere agreed that he shall be responsible for getting prior permission of TCP prior to execution of sale deed as referred herein above. Plaintiff filed the suit for possession by specific performance of agreements dated 31.5.1993 and 30.4.1994 seeking direction to the defendant to get the sale deed executed of the suit land on receipt of remaining sale consideration or, in the alternative, for refund of Rs.44,000/-. Aforesaid suit was strictly based upon agreements dated 31.5.1993 and 30.4.1994, Ext. P1 and Ext. P3, perusal whereof nowhere suggests that prior permission of TCP was condition precedent for executing sale deed in terms of Ext. P1 dated 31.5.1993, as such, this Court sees no force in the contentions raised by the learned counsel representing the defendant that no sale deed could be executed within stipulated period for want of prior permission from

TCP department. Bare perusal of the contents/averments contained in agreement dated 31.5.1993 Ext. P1 and agreement dated 30.4.1994 Ext. P3, clearly suggest that defendant was under obligation to get the sale deed executed on or before 30.4.1994 and thereafter on or before 31.8.1994. Otherwise also, question of obtaining permission, if any, would have arisen at the time of execution of sale deed on the basis of decree for specific performance because, admittedly, there is no bar to file suit for specific performance on the ground of prior permission, if any, to be obtained by either of the parties.

17. Hence, this Court is fully in agreement with the arguments having been advanced by learned counsel representing the plaintiff that plaintiff was entitled to file suit for execution of agreement Ext. P1 merely on the basis of agreement to sell and mandate of same could not be allowed to be defeated on the ground of non-availability of prior permission of TCP, which is/was nowhere condition precedent for execution of sale deed Ext. P1.

18. If a party seeking specific performance of agreement successfully proves on record that he is/was ready and willing to perform his part of agreement, he/she would be entitled to decree of specific performance and plea of not having the required permission of TCP can not be termed to be a bar in a sale transaction, which admittedly flows from agreement to sell entered into between the parties. In this regard, reliance is placed on **Rahul Bhargava v. Vinod Kohli** reported in 2008 (1) Shim. LC 385, wherein it is held as under:

> "14. There is another aspect of the case, for filing a suit for specific performance on the basis of agreement, no permission is required, under Section 118 of the Act. It is only if the suit is decreed such permission may be required at the time of registration of the sale deed on the basis of specific performance decree. In Manzoor Ahmed Magray vs. Ghulam Hassan Aram and others (1999) 7 SCC 703, the Hon'ble Apex Court has held as follows:-
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> > "It is to be stated that the appellant has neither raised the said contention in the written statement nor during the trial. However, in the appeal, the appellant sought to raise the contention that the specific performance qua the suit land cannot be granted as the transfer or alienation of the suit property is prohibited under the provisions of the J&K Agrarian Reforms Act, 1972, the J&K Agrarian Reforms Act, 1976 and the J&K Prohibition on Conservation of Lands and Alienation of Orchards Act, 1975. The Court declined to entertain the plea on the ground that it was raised almost 24 years after the filing of the suit by the plaintiff and the same, if permitted to be raised, would prejudice the rights of the plaintiff. Even considering that the said plea is a pure question of law, in our view, it is without any substance. The definition under Section 2(4) of the J&K Agrarian Reforms Act, 1972 specifically excludes "land" which was an orchard on the first day of September 1971. Sub-section (5) of Section 2 defines "orchard" to mean a compact area of land having fruit trees grown thereon or devoted to cultivation of fruit trees in such number that the main use to which the land is put is growing of fruits or fruit trees. In the present case, agreement to sell was executed on 14.7.1971 in respect of an orchard land. Therefore, the said Act was not applicable to the land in dispute. Similar provisions are there in the Agrarian Reforms Act, 1976 which gives the definition of the word "land" under Section 2(9) and definition ofthe word "orchard" under Section 2(10). From the said definition, it is apparent that orchard is excluded from the operation of the Agrarian Reforms Act.
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> Learned counsel for the appellant, however, further referred to Section 3 of the J&K Prohibition on Conversion of Land and Alienation of Orchards Act, 1975 which is as under:-

‘3. Prohibition on conversion of land and alienation of orchards.- (1) Notwithstanding anything contained in any other law for the time being in force----

(a) no person shall alienate an orchard except with the previous permission of the Revenue Minister or such officer as may be authorized by him in this behalf;

Provided that alienation of orchards to the extent of four kanals only in favour of one or more persons for residential purposes shall not need any permission.

(b) …. …. ….

Considering the aforesaid section, it is apparent that prohibition on transfer of orchards is not absolute and the question of obtaining previous permission as contemplated under Section 3(1)(a) would arise at the time of execution of the sale deed on the basis of decree for specific performance. Section 3 does not bar the maintainability of the suit and permission can be obtained by filing proper application after the decree is passed. Therefore, it cannot be stated that decree for specific performance is not required to be passed. Further, under Section 3 of the J&K Prohibition on Conservation of Land and Alienation of Orchards Act, 1975, prohibition on transfer is limited. Firstly, the proviso makes it clear that alienation of orchards to the extent of four kanals only in favour of one or more persons for residential purposes will not require any permission. Secondly, for more than four kanals of land, previous permission of the Revenue Minister or such officer as may be authorized by him in this behalf is required to be obtained.Dealing with similar contention, this Court in Bai Dosabai v. Mathurdas Govinddas [1980 (3) SCC 545] observed that even if the Act prohibits alienation of land, if the decree is passed in favour of the plaintiff, it is required to be moulded suitably.”

15. On the point of alienation/ transfer of land after permission Section 3 of J&K Act noticed above and Section 118 of the Act in substance are similar. There is no absolute prohibition, under Section 118 of the Act on transfer of land to non-agriculturist and transfer can be made in favour of non-agriculturist with permission of Government under Section 118 of the Act. This question at the most will arise at the time of execution of sale deed on the basis of decree for specific performance. Section 118 of the Act does not bar the maintainability of the suit for specific performance and injunction on the basis of agreement. The respondent No.1 had earlier obtained permission from the State Government for purchasing the property vide permission Ex. PW 3/A.

19. Reliance is also placed upon judgment passed by Coordinate Bench in Civil Suit No. 27 of 2001 titled **Lt. Col. S.J. Chaudhri** v. **Mr. Raj Kumar Brijendra Singh (deceased) through his Legal Representatives** decided on 26.9.2008, wherein it has been held as under:

“I cannot agree with this submission made by learned counsel for the defendant. Clause 3 of

Ex. Ex.PW-1/A reads:

“ The Buyer on receipt of the acknowledgment of the balance amount will be put in physical possession of the entire land under reference which has been defined in the Aks Tatima attached along with the Jamabandi. The Seller will simultaneously execute the sale deed and all other documents in favour of the Buyer or unto his order and submit the sale deed for registration and transfer of the said property to the buyer’s name by 30th October, 1993. The seller shall get

all clearances and approvals required for the sale and transfer of the said property by that date from relevant authorities."

This clause specifically requires the seller to get all clearances and approvals qua the sale and transfer of the property from the relevant authorities. This submission, therefore, cannot be accepted. Even otherwise in law, passing of a decree for specific performance is not prohibited.

In Mrs. Chandnee Widya Vati Madden v. Dr.C.L.Katial and others, AIR 1964 SC 978, the Supreme Court held:

> " 4. The main ground of attack on this appeal is that the contract is not enforceable being of a contingent nature and the contingency not having been fulfilled. In our opinion, there is no substance in this contention. So far as the parties to the contract are concerned, they had agreed to bind themselves by the terms of the document executed between them. Under that document it was for the defendant-vendor to make the necessary application for the permission to the Chief Commissioner. She had as a matter of fact made such an application but for reasons of her own decided to withdraw the same. On the findings that the plaintiffs have always been ready and willing to perform their part of the contract, and that it was the defendant who willfully refused to perform her part of the contract, and that time was not of the essence of the contract, the Court has got to enforce the terms of the contract and to enjoin upon the defendant-appellant to make the necessary application to the Chief Commissioner. It will be for the Chief Commissioner to decide whether or not to grant the necessary sanction."

In Ajit Prashad Jain v. N.K.Widhani and others , AIR 1990 Delhi 42, the High Court of Delhi dealing with the question as to whether in the absence of permission under Urban Land (Ceiling & Regulation) Act, a decree for specific performance could be passed. The Court held:

> " The permission from Land and Development Office is not a condition precedent for grant of decree for specific performance. In Mrs. Chandnee Widya Vati Madden v. Dr. C.L.Katial, (1964) 2 SCR 495: (AIR 1965 SC 978) the Supreme Court confirmed the decision of the Punjab High Court holding that if the Chief Commissioner ultimately refused to grant the sanction to the sale the plaintiff may not be able to enforce the decree for specific performance of the contract but that was no bar to the court passing a decree for that relief. The same is the position in the present case. If after grant of the decree of specific performance of the contract the Land and Development Office refuses to grant permission for sale the decree holder may not be in a position to enforce the decree but it cannot be held that such a permission is a condition precedent for passing a decree for specific performance of the contract...."

In Anjali Das v. Bidyut Sarkar , AIR 1992 Calcutta 47, the High Court of Calcutta on a similar objection to the grant of relief ruled:

> "40. On behalf of the respondent No.1 the decision of the Privy Council reported in AIR 1947 PC 182 : 52 Cal. WN 472 (Dalsukh Versus Guarantee Life Employment Insurance Company) has been referred to. In that case when the plaintiff entered into contract for sale with the defendant subject to approval of the Court and when the approval of the Court was not granted the Privy Council has held that it was a contingent contract and the approval not having been obtained the specific performance of the contract cannot be granted by the Court.

41. We are of the view that facts of that case are different. In this case the Cooperative Society has not yet refused the permission and the contract has not been unenforceable.

42. On the contrary the Supreme Court in Nathumal v. Phulchand, AIR 1970 SC 546, has relied upon the Privy Council decision of (Motilal v. Nanhelal) reported in AIR 1930 PC 287. In that case the contract for transfer of rip land was subject to approval of the Revenue Officer under the provision of Control Provinces Tenancy Act, 1920. The Privy Council has held that there was an implied covenant on the part of the vendor to do all things necessary to effect the transfer which would include an application to the Revenue Officer for such permission and when no such permission was obtained the Court can direct the defendant to obtain such permission and execute a conveyance on receipt of such sanction.

43. On behalf of the appellant the Delhi High Court decision in AIR 1990 Delhi 224 has been referred to in which on the approval being given by Co-operative Society the Court granted decree for specific performance of contract for sale of a number of Co-operative Society. This has been referred to in order to demonstrate that the contract for sale of a flat of a Co-operative Society can be transferred subject to Society's approval.

44. In view of the above legal position we are of the view that the contract in this case is enforceable and when the appellant has already applied for such approval and also filed an application for membership we can grant the decree and direct the respondent No.1 and respondent No.2 to execute sale deed in respect of the flat in suit on the respondent No.2 considering the application for membership of the appellant and the prayer for transfer of the flat in accordance with law and in terms of the bye-laws."

In K.Raheja Construction Ltd. v. Alliance Ministries and others , AIR 1995 SC 1768, holding that a decree for specific performance will be subject to grant of permission as contemplated by law, the Court held:

> "4. It is seen that the permission for alienation is not a condition precedent to file the suit for specific performance. The decree of specific performance will always be subject to the condition to the grant of the permission by the competent authority. The petitioners having expressly admitted that the respondents have refused to abide by the terms of the contract, they should have asked for the relief for specific performance in the original suit itself. Having allowed the period of seven years elapsed from the date of filing of the suit, and the period of limitation being three years under Article 54 of the Schedule to the Limitation Act, 1963, any amendment on the grounds set out, would defeat the valuable right of limitation accrued to the respondent."

In Raghunath Rai and another v. Jageshwar Prashad Sharma and another , AIR 1999 Delhi 383, the Court held that merely because permission from the authorities is not obtained does not deprive the plaintiff of his right to pray for a decree of specific performance. The precedent on the point need not be multiplied any further.

In these circumstances, the objection raised by learned counsel for the defendant needs to be rejected. This issue is therefore, decided in favour of the plaintiff and against the defendant."

20. In view of the discussion made herein above as well as law discussed, this Court has no hesitation to conclude that decree for specific performance of agreement could have been passed by the Courts below without there being any permission from TCP, especially when permission from TCP was not a condition precedent for getting sale deed executed in terms of Ext. P-1. The substantial question of law is answered accordingly.

21. This Court, solely with a view to explore answer to additional substantial question of law framed at the time of hearing, carefully examined, Ext. P4, Ext. D1, Ext. DW-1/A and Ext. DW-1/C as well as Ext. P1. Perusal of Ext. P4 clearly suggests that the plaintiff by way of legal notice called upon the defendant to get the sale deed executed in terms of agreement to sell Ext. PA, on or before 16.9.1994 by presenting himself before the Sub Registrar, Una, failing which, he reserved liberty to himself to file suit for specific performance of agreement for execution of sale deed. Perusal of Ext. P1 also suggests that plaintiff namely Madan Lal presented himself before the Sub Registrar, Una, on 16.9.1994 and submitted written application stating therein that he got legal notice dated 2.9.1994 served upon the defendant advising him to come present before Sub Registrar on 16.9.1994 for execution of sale deed in terms of agreements dated 31.5.1993 and 30.4.1994. Similarly, perusal of Ext. DW-1/A, clearly suggests that on 16.9.1994, defendant had come present before the Sub Registrar and moved an application for marking his presence. Careful perusal of application Ext. DW-1/A, clearly suggests that defendant after having received legal notice dated 2.9.1994, from the counsel of the plaintiff, had come present in the court of Sub Registrar, Una for execution of sale deed in terms of agreement dated 31.5.1993 and 30.4.1994. Careful perusal of Ext. DW-1/C proves on record that the parties to the lis presented themselves before the Sub Registrar Una on 16.9.1994, on which date, they were directed to remain present on 17.9.1994. Order dated 17.9.1994 passed by Sub Registrar suggests that while adjourning case to 17.9.1994, parties were directed to complete the transaction. However, it emerges from the perusal of order dated 17.9.1994 that the plaintiff failed to turn up on 17.9.1994, despite there being order from Sub Registrar, Una.

22. This Court carefully examined the findings returned by the court below juxtaposing the same with the documentary evidence as discussed herein above. DW-1 Sohan Lal, Registration Clerk, specifically stated before the learned trial Court that photocopies of applications dated 16.9.1994 and 17.9.1994 are correct as per record brought on that day and same are Exts. DW-1/A and DW-1/B, respectively. It has also come in his statement that on 16.9.1994, on the backside of the application, order was passed by Sub Registrar that, *"..Both are directed to come tomorrow i.e. 17.9.94 for executing a General Power of Attorney."* In his cross-examination, he also admitted that the plaintiff namely Madan Lal also moved an application dated 16.9.1994, Ext. PA. He also stated that copies of notice Ext. P4 as well as agreement Ext. P1 were also tagged with the application. He also stated that defendant was not present when application was moved by Madan Lal on 16.9.1994, however, he feigned ignorance about the fact whether Power of Attorney was executed by Attra or not. After careful examination of the documents referred herein above, as well as statement of DW-1 Sohan Lal, this Court sees substantial force in the arguments having been advanced by Mr. Ajay Sharma, learned counsel representing the defendants that the courts below misappreciated and misconstrued the evidence led on record by the defendant suggestive of the fact that on 16.9.1994, he was ready and willing to perform his part in terms of agreements dated 31.5.1993 and 30.4.1994.

23. Perusal of Exts. DW-1/A and DW-1/C clearly proves on record that the defendant pursuant to legal notice dated 30.4.1994, Ext. P4, had come present before Sub Registrar to get the sale deed executed in terms of agreement to sell dated 31.5.1993 and 30.4.1994. It clearly emerges from Ext. DW-1/C that both the parties had come present on 16.9.1994 but since the payment of balance sale consideration was to be made, parties were directed to come present on 17.9.1994. Order recorded by the Sub Registrar on 17.9.1994 Ext. DW-1/C clearly proves on record that plaintiff failed to appear on 17.9.1994 meaning thereby, he failed to perform his part pursuant to agreement Ext. P1, whereby he was under obligation to pay remaining amount of Rs.14,000/- to the defendant as balance sale consideration.

24. Impugned judgment passed by the first appellate Court appears to be totally based upon misappreciation of evidence as discussed hereinabove. Defendant, while placing reliance upon documentary evidence as analyzed hereinabove, successfully proved that he was ready and willing to get the sale deed executed but, admittedly, on 17.9.1994, plaintiff failed to turn up before the Sub Registrar.

25. It is not understood how first appellate Court could observe that Sub Registrar directed parties to get Power of Attorney executed by Attar Chand. Similarly, it is not understood, on what basis first appellate Court came to the conclusion that Ext. DW-1/C i.e. order passed by Sub Registrar is nonest and could not be relied upon because, this was not the certified copy of original. Once, learned trial Court below had an occasion to peruse the original record admittedly brought by DW-1 Sohan Lal, Registration Clerk, office of Deputy Commissioner, Una, findings returned by the Courts below can not be accepted that no reliance could be placed upon order dated 17.9.1994, Ext. DW-1/C. This Court, finds it really difficult to accept the findings returned by the Courts below that since there is no mention, if any, with regard to applications Ext. DW-1/A and Ext. PA, having been moved by the defendant and plaintiff in the order Ext. DW-1/C, no reliance can be placed upon same because admittedly original record was produced before the Court below.

26. True it is, that there is no specific mention with regard to filing of aforesaid applications having been made by the parties before Sub Registrar but, order Ext. DW-1/C clearly suggests that parties had come present before Sub Registrar on 16.9.1994 and they were directed to come present on 17.9.1994, for making balance payment. Order, admittedly made on the back side of the Ext. DW-1/A, i.e. application having been made by the defendant, was required to be construed/appreciated by the Court below in the context of averments made in the application, Ext. DW-1/A, especially prayer made in the same. As has been held above that there was no requirement, if any, of prior permission of TCP, as far as execution of sale deed in terms of Ext. P1 is concerned and as such finding returned by the trial Court that application Ext. DW-1/A moved by the defendant Attar Chand, before Tehsildar-Sub Registrar, Una on 16.9.1994 did not disclose whether he was equipped with permission of TCP is/was totally uncalled for and that aspect of the matter was not required to be looked into by the Court below, while examining prayer of the plaintiff for specific performance of agreements admittedly entered into between the parties on 31.5.1993 and 30.4.1994, respectively.

27. This Court, after carefully examining the documents as referred above, sees no reason to differ with the submissions having been made by the learned counsel representing the defendant that the defendant successfully proved on record that he was ready and willing to perform his part in terms of agreement entered inter se parties, Ext. P1. It clearly emerges from the record that defendant, sequel to legal notice issued by plaintiff presented himself before the Sub Registrar, Una, for execution of sale deed in terms of Ext. P1 but plaintiff, who was also present before Sub Registrar on 16.9.1994 failed to turn up on 17.9.1994 with balance payment, meaning thereby that it was plaintiff, who failed to perform his part in terms of agreement as referred above.

28. Hence, this Court has no hesitation to conclude that the learned Courts below misconstrued and mis-appreciated the evidence led on record by the defendant and as such findings contrary to the documentary evidence as discussed above, are liable to be set aside.

29. Additional substantial question of law, framed above, is answered accordingly.

30. Hon'ble Apex Court in ***Laxmidevamma and Others vs. Ranganath and Others,*** **(2015)4 SCC 264,** has held as under:

> "16. Based on oral and documentary evidence, both the courts below have recorded concurrent findings of fact that the plaintiffs have established their right in A schedule property. In the light of the concurrent findings of fact, no substantial questions of law arose in the High Court and there was no substantial ground for reappreciation of evidence. While so, the High Court proceeded to observe that the first plaintiff has earmarked the A schedule property for road and that she could not have full-fledged right and on that premise proceeded to hold that declaration to the plaintiffs' right cannot be granted. In exercise of jurisdiction under Section 100 CPC, concurrent findings of fact cannot be upset by the High Court unless the findings so recorded are

> shown to be perverse. In our considered view, the High Court did not keep in view that the concurrent findings recorded by the courts below, are based on oral and documentary evidence and the judgment of the High Court cannot be sustained." (p.269)

31. 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.

32. 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)***

33. In the case at hand, learned Courts below have ignored/ mis-appreciated the evidence led on record by the defendant and have also drawn wrong inferences from the proven facts, as has been discussed in the earlier part of this judgment. Hence, this Court sees reason to interfere in the matter and set aside the judgments and decrees, which are apparently perverse.

34. Accordingly, the present appeal is allowed. Judgments and decrees passed by both the Courts below are set aside. Suit of the plaintiff is dismissed. Pending applications, if any, are disposed of. Interim orders, if any, are vacated.

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

Jog Raj …Appellant
Versus
State of Himachal Pradesh …Respondent

Criminal Appeal No. 490 of 2016
Judgment reserved on : 27.03.2017.
Date of Decision : April 18 , 2017

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 3 kg 600 grams charas- the accused was tried and convicted by the Trial Court- held in appeal that testimonies of eye witnesses are corroborating each other –the prosecution version cannot be doubted due to the fact that witnesses have turned hostile – the accused has to establish his innocence under Section 35 of N.D.P.S. Act, which he hasfailed to do- link evidence is complete- the prosecution has proved the guilt of the accused beyond reasonable doubt and the accused was rightly convicted- appeal dismissed. (Para- 5 to 15)

Case referred:

Ramesh Harijan vs. State of Uttar Pradesh, (2012) 5 SCC

For the appellant	:	Mr. Anoop Chitkara, Advocate, for the appellant.
For the respondent	:	Mr. V. S. Chauhan, Additional Advocate General with Mr. Vikram Thakur, Deputy Advocate General for the respondent/State.

The following judgment of the Court was delivered:

Sanjay Karol, J.

Trial Court found the prosecution case of recovery of 3 k.g. & 600 grams of charas, from the conscious and exclusive possession of accused Jog Raj, to have been proven through the testimonies of police officials namely HC Soni Ram (PW-3), HC Ashok Kumar (PW-6) and SI Arjun Singh (PW-8), despite independent witnesses Sumit Kumar (PW-1) and Sandeep Vyas (PW-2) not having supported its case.

2. In relation to FIR No. 34/2013, dated 29.10.2013, registered at Police Station State CID Bharari, Shimla, accused was charged for having committed an offence punishable under the provisions of Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the Act). In terms of the impugned judgment, he stands convicted and sentenced to serve imprisonment as also pay fine.

3. The incident relates back to 29.10.2013, when police received a secret information about the accused carrying the contraband substance. Such information, so received by PW-8, was communicated to the superior officer, through PW-3. By associating independent witnesses PW-1 and PW-2, the Investigating Officer PW-8, in the presence of PW-6, intercepted the accused at *Ghughar-Tanda Pakhdandi,* Tehsil Palampur, District Kangra and recovered the contraband substance. Ruka (Ext. PW-8/C), so carried by PW-6, led to the registration of F.I.R. (Ext.PW-9/A) by Inspector Varinder Chauhan (PW-9). With the completion of proceedings on the spot, the contraband substance was kept in the *maalkhana* and sent through HC Sahi Ram (PW-7) for chemical analysis. Report of the chemical analyst (Ext.PW-8/H) was obtained and taken on record. Also information was sent to the superior officer, through HHC Manoj Kumar (PW-4) so received by HHC Ravinder Kumar (PW-5). This, in effect, is the prosecution case.

4. Having heard learned counsel for the parties as also perused the record, this Court is in full agreement with the decision of conviction and sentence so passed by the trial Court.

5. SI Arjun Singh (PW-8), the Investigating Officer, has testified in Court that on 29.10.2013, during the course of his patrol duty at bus stand Palampur, at about 5.00 p.m., he received a secret information that one Jog Raj resident of Paddar, District Mandi, who is wearing a pink shirt and blue jeans is proceeding towards *Ghughar-Tanda Pakhdandi* from bye-pass road Palampur. In the black coloured bag so carried by him there may be charas. Such information (Ext. PW-5/B) was immediately sent to the Deputy Superintendent of Police, North Zone Dharamshala through HC Soni Kumar (PW-3). A raiding party was constituted and Sumit Kumar (PW-1) and Sandeep Vyas (PW-2) were associated as independent witnesses. Upon reaching the *Ghughar-Tanda* Road, police apprehended the accused, who was walking on foot. The particulars so disclosed of the suspect, matched with the information received by the police. Hence he was informed of his statutory rights. The accused offered to be searched by the police party on the spot. Accordingly, memo (Ext. PW-8/A) was prepared. From the bag, so carried by him, charas in the shape of sticks was recovered, which, when weighed, was found to be 3 k.g. and 600 grams. The contraband substance so recovered was kept inside the bag itself, which was sealed with six seal impressions of seal-E, impression whereof was also taken on a separate piece of cloth. NCB form (Ext. PW-8/J), in triplicate, was filled up and ruka (Ext. PW-8/C) sent through PW-6, who sent it by FAX, receipt whereof is Ext.PW-6/A. With the completion of proceedings on the spot, accused was arrested and the contraband substance sent through PW-6 itself to be deposited with the S.H.O., Police Station Bharari, Shimla. Special report (Ext. PW-5/C) was prepared and sent to the Dy. Superintendent of Police, CID Northern Range Dharamshala and report (Ext.PW-8/H) of the State Forensic Science Laboratory, Junga also obtained and taken on record.

6. Now when one peruses the cross examination part of his testimony, one finds him to have fully withstood the same and his deposition to be clear and consistent without any contradiction. The witness is totally trustworthy and his version fully inspiring in confidence. His credit remains unimpeachable. Simply because he did not record the statement of SHO, Police Station CID Bharari, under Section 161 Cr.PC, itself would not vitiate the trial. What is required to be seen is as to whether genesis of the prosecution case, of recovery of the contraband substance from the conscious possession of the accused is inspiring in confidence or not. On the question of prior information, the accused having been searched and recovery of the contraband substance at *Ghughar-Tanda* road, is concerned, this witness is clear. Significantly his version to the effect that he constituted a raiding party by associating independent witnesses goes unrebutted. It is in this context, we examine the testimonies of these persons, who admit their signatures on document i.e. recovery memo (Ext. PW-1/A).

7. In *Ramesh Harijan vs. State of Uttar Pradesh,* (2012) 5 SCC 777 the Court held that seizure/recovery witnesses though turning hostile, but admitting their signatures/thumb impressions on recovery memo, could be relied upon by prosecution and that:

> "23. It is a settled legal proposition that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as

hostile and cross examine him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent that their version is found to be dependable on a careful scrutiny thereof. (Vide: Bhagwan Singh v. The State of Haryana, AIR 1976 SC 202; Rabindra Kumar Dey v. State of Orissa, AIR 1977 SC 170; Syad Akbar v. State of Karnataka, AIR 1979 SC 1848; and Khujji @ Surendra Tiwari v. State of Madhya Pradesh, AIR 1991 SC 1853).

24. In State of U.P. v. Ramesh Prasad Misra & Anr., AIR 1996 SC 2766, this Court held that evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. A similar view has been reiterated by this Court in Balu Sonba Shinde v. State of Maharashtra, (2002) 7 SCC 543; Gagan Kanojia & Anr. v. State of Punjab, (2006) 13 SCC 516; Radha Mohan Singh @ Lal Saheb & Ors. v. State of U.P., AIR 2006 SC 951; Sarvesh Narain Shukla v. Daroga Singh & Ors., AIR 2008 SC 320; and Subbu Singh v. State by Public Prosecutor, (2009) 6 SCC 462. Thus, the law can be summarised to the effect that the evidence of a hostile witness cannot be discarded as a whole, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence. (See also: C. Muniappan & Ors. v. State of Tamil Nadu, AIR 2010 SC 3718; and Himanshu @ Chintu v. State (NCT of Delhi), (2011) 2 SCC 36)" **[Emphasis supplied]**

8. Now in the instant case, independent witnesses Sumit Kumar (PW-1) and Sandeep Vyas (PW-2) admit their signatures on the memos and the parcel of charas. For the same, the only explanation forthcoming is that they were asked to do so by the police, which they did at the police station. But then why would they do so? They were not under threat, coercion or intimidation. In fact, that they signed the document on the spot, at the time of recovery of the contraband substance, stands fully established not only by SI Arjun Singh (PW-8) but as is evident from the testimony of PW-6, it is clear that even he alongwith these persons was member of the raiding party. All proceedings took place in their presence. Report (Ext. PW-5/B), so prepared under Section 42(2) of the Act, does record the factum of formation of a raiding party comprising of these independent witnesses. Thus notwithstanding the fact that they did try not to support the prosecution, it cannot be said that through their testimonies, two views, entitling the accused to a benefit of doubt, with regard to recovery have emerged. Even otherwise, independently, this Court is of the considered view that prosecution case of recovery of the contraband substance from the conscious possession of the accused stands fully established through the testimonies of police officials.

9. In this backdrop, the onus, statutory in nature, so contained in Section 35 of the Act, heavily lied upon the accused to establish his innocence, as is so claimed by him in his statement so recorded under the provisions of Section 313 Cr. P.C. At this juncture, it be also observed that though initially accused had expressed his desire to lead evidence but subsequently, for reasons best known to him, chose not to do so.

10. From the report (Ext. PW-8/H) it is evidently clear that the contraband substance is charas. In any case, there is no serious dispute about the recovered stuff to be a contraband substance.

11. What further needs to be examined is as to whether it remained in safe custody and was tampered with or not. On this issue also there is no doubt in the mind of the Court. SI Arjun Singh (PW-8) sent the case property through HC Ashok Kumar (PW-6), who deposited it with MHC Parkash Chand (PW-10). Proper entry in the maalkhana register (Ext. PW-10/A) was made and on 31.10.2013, HC Sahi Ram (PW-7) took the same and deposited it at State Forensic Science Laboratory, Junga. Now all these witnesses, in no uncertain terms, have clearly deposed that till and so long the case property remained with them, it was not tampered with. Proper

entry indicating the movement thereof, was made in the relevant registers and all other relevant documents prepared. Even by way of corroborative evidence, one finds the information to have been furnished to the appropriate authority, both prior and subsequent to the recovery of the contraband substance, which fact, is evident from the testimonies of HC Soni Ram (PW-3), HHC Manoj Kumar (PW-4), HHC Ravinder Kumar (PW-5), HC Ashok Kumar (PW-6) and SI Arjun Singh (PW-8).

12. Hence cumulatively examined, it cannot be said that the Court below erred in completely and correctly appreciating the testimonies of the prosecution witnesses and holding the accused guilty of the charged offence. Even on the question of sentence, also it cannot be said that Court below erred or that it failed to judiciously exercise the discretion so vested in it.

The ocular version as also the documentary evidence clearly establishes complicity of the convict in the alleged crime. The testimonies of prosecution witnesses are totally reliable and their depositions believable. There are no major contradictions rendering their version to be unbelievable**.**

13. Hence, in our considered view, prosecution has been able to discharge the burden of proving the recovery of the contraband substance from the conscious possession of the accused, beyond reasonable doubt. It cannot be said that the trial Court erred in correctly and completely appreciating the testimonies of the prosecution witnesses.

14. For all the aforesaid reasons, we find no reason to interfere with the judgment passed by the trial Court. The Court has fully appreciated the evidence placed on record by the parties. There is no illegality, irregularity, perversity in correct and complete appreciation of the material so placed on record by the parties. Findings cannot be said to be erroneous in any manner. Hence, the appeal is dismissed. Records of the Court below be immediately sent back.

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

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

Cr. Revision No. 228 of 2011
Date of Decision: 18.04.2017

Indian Penal Code, 1860- Section 279- Accused was driving a tanker with a high speed in a rash and negligent manner – the accused was tried and acquitted by the Trial Court – an appeal was filed, which was dismissed- held in revision that there are contradictions regarding the vehicle being driven by the witnesses – this fact was ignored by the Courts – revision allowed – orders of the Courts set aside. (Para-9 to 13)

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. S.D Gill, Advocate.
For the respondent: Mr. Ramesh Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(oral)*

The instant criminal revision petition filed under Sections 397 and 401 of the Cr.PC, is directed against the judgment dated 3.11.2011, passed by the learned Sessions Judge,

Shimla in Cr. Appeal No. 99-S/10 of 2011, affirming the judgment dated 24.9.2011, passed by the learned Judicial Magistrate, Ist Class, Court No. (1), Shimla, in case No. 86/2 of 2009, whereby the present petitioner accused has been convicted and sentenced under Section 279 IPC to undergo simple imprisonment for fifteen days and to pay fine of Rs. 1,000/- and in default of payment of fine, the accused to further undergo imprisonment of seven days.

2. Briefly stated facts as emerge from the record are that complainant namely Ravi Chauhan (PW4) in his statement recorded under Section 154 of the Cr.PC stated that on 28.10.2009, when he was on his way from Kachi Ghati to Dhali via bye pass, in his car bearing No. HP-10-9800, a Tanker bearing No. HR-37C-1195, came from the opposite side in high speed. The complainant further stated that at that relevant time, accused had been driving the tanker in question in rash and negligent manner, as a result of which the tanker struck against the Car being driven by the complainant. The Complainant further reported to the police that, he with a view to save himself took his vehicle to the extreme left/upper side of the high way, as a result of which, vehicle turned upside down. On the basis of aforesaid statement Ext. PW3/B, police registered formal FIR against the petitioner accused under Section 279 IPC. After completion of the investigation, SHO Police Station Shimla, presented the challan/report under Section 173 Cr.PC before the competent Court of law.

3. Learned Judicial Magistrate, Ist Class, Shimla, taking cognizance of the aforesaid report having been filed by the police put notice of accusation to the accused to which he pleaded not guilty and claimed trial. However, fact remains that learned trial Court on the basis of material adduced on record by the prosecution held the petitioner guilty of having committed offence punishable under Section 279 of the IPC and accordingly, sentenced him as per description already given supra.

4. Being aggrieved and dis-satisfied with the aforesaid judgment of conviction recorded by the learned trial Court, present petitioner preferred an appeal under Section 374(3) of the Cr.PC in the Court of learned Sessions Judge, Shimla. However, fact remains that the learned Sessions Judge, dismissed the aforesaid appeal, as a result of which, judgment of conviction recorded by the court below came to be upheld. In the aforesaid background, present petitioner approached this Court by way of instant proceedings seeking his acquittal after setting aside the judgment of conviction recorded by the court below.

5. Mr. S.D. Gill, Advocate, representing the petitioner vehemently argued that the impugned judgments of conviction recorded by the courts below are not sustainable in the eye of law as the same are not based upon the correct appreciation of material made 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. Gill strenuously argued that the evidence led on record by the prosecution has been not read in its right perspective by the courts below, as a result of which erroneous findings have come on record to the detriment of the petitioner accused, who is admittedly an innocent person. With a view to substantiate his aforesaid argument, Mr. Gill, invited attention of this Court to the statement of PW4 (complainant) to demonstrate that both the courts below have erred in concluding that at that relevant time, vehicle in question was being driven rashly and negligently by the petitioner-accused. Mr. Gill specifically invited attention of this Court to the deposition made by PW4 i.e. the complainant before the Court below, wherein he stated that at that relevant time, he was driving Maruti Van bearing No. HP-10-9800, whereas perusal of record, especially, photographs Ext.PW-6/A to G/D, placed on record by the prosecution suggests that accident, if any, occurred at that relevant time was of Santro Car bearing No. HP 10-9800. Mr. Gill while placing reliance upon the aforesaid statement of the complainant forcefully contended that since very identity of the vehicle involved in the accident is/was in dispute, there was no occasion for the courts below to record conviction against the petitioner accused. In the aforesaid, background, Mr. Gill prayed that the present petitioner be acquitted after setting aside the judgment of conviction recorded by the courts below.

6. Per contra, Mr. Ramesh Thakur, learned Deputy Advocate General, representing the respondent-State supported the impugned judgment passed by the courts below. He vehemently argued that bare perusal of the impugned judgment suggests that entire evidence led on record by the prosecution has been read in its right perspective by the courts below and there is no scope of interference, whatsoever, of this Court, especially, in view of the concurrent findings of fact and law recorded by the courts below. However, the learned Deputy Advocate General was unable to refute the aforesaid contention having been made by Mr. Gill, learned counsel for the petitioner that no conviction could be recorded by the court below on the basis of statement of the complainant, who categorically stated that he was driving Maruti Van at that relevant time.

7. Mr. Thakur, further contended that this Court has very 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, he placed reliance upon 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:-

8. I have heard learned counsel for the parties as well carefully gone through the 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 solely with a view to ascertain the genuineness and correctness of the arguments having been advanced by Mr. S.D. Gill, learned counsel for the petitioner carefully perused the statement of the complainant PW4, perusal whereof clearly suggests that he stated before the Court that at that relevant time, he was driving Maruti Van bearing No. HP-10-9800. Though in his statement made before the Court below, he stated that at around 11:30 when he was driving towards Dhalli from Kachi Ghati, one local bus was standing on the turn. He further stated that as he turned the vehicle on the curve, a tanker came from opposite side and struck against his vehicle, as a result of which, vehicle turned turtled. Similarly, though PW4 has stated that at that relevant time, accident occurred due to rash driving of the driver of Tanker but interestingly, there is no mention, if any, with regard to the particulars of tanker with whom alleged accident occurred. Careful perusal of cross examination conducted on this material witness i.e. complainant, clearly suggests that at that relevant time, the complainant was driving a Maruti van not Santro Car. It has specifically come in his cross-examination that after 45

minutes of accident, police had come on the spot and he had handed over papers of Maruti Van to the police. It has also come in his statement that his vehicle struck against the wall as a result of which, the vehicle turned turtled. The complainant specifically admitted in his cross examination that he had given correct particulars of his vehicle to the police.

11. If the statement given by PW4 is read in its entirety, it clearly suggests that at that relevant time, the complainant was driving Marti Van and not Santro Car, as has been projected by the prosecution. True, it is that there is ample material adduced on record by the prosecution suggestive of the fact that on 28.10.2009, accident took place involving vehicle bearing No. HP-10-9800 as well as tanker bearing No. HR-37-C-1195. Perusal of photographs (Ext.PW6/A to Ext.PW6/D) further corroborates the version put forth by the prosecution that the accident occurred on 28.10.2009, wherein two vehicles referred above were involved. But this Court sees substantial force in the argument having been made by the learned counsel representing the petitioner-accused that no reliance, if any, could be placed by the courts below on the other evidence be it ocular or documentary led on record by the prosecution, especially, in the teeth of specific statement given by the complainant that at that relevant time, he was driving Maruti Van. Prosecution, by way of ample evidence adduced on record made an endeavor to prove on record that on 28.10.2009, a tanker bearing No. HR-37C-1195, struck against the Santro Car bearing No. HP 10-9800 being driven by the complainant (PW4) but version put forth by the prosecution is in total contradiction of statement of (PW4) the complainant, who at that relevant time was driving the ill-fated vehicle. Perusal of cross examination conducted on PW4 clearly suggests that defence was able to prove on record that Santro Car bearing No. HP-10-9800 was not being driven at that relevant time by the complainant and same was not involved in the accident. Since the complainant himself has stated before the Court below that he was driving Maruti Van bearing HP-10-9800, no reliance, if any, could be placed by the courts below while holding petitioner-accused guilty of having committed offence under Section 279 of the IPC, on the evidence led on record by the prosecution suggestive of the fact that the Tanker in question struck against the Santro Car. Otherwise, entire evidence adduced on record by the prosecution is with regard to accident of Santro Car not Maruti Van. When complainant has stated that Tanker struck against his Car i.e. Maruti Van, how reliance could be placed on photographs, which suggest that tanker struck against Santro Car. Both the Courts below without analyzing categorical statement of PW4 i.e. the complainant, brushed aside the argument of learned counsel representing the petitioner accused that there is material contradiction in the statement of material PWs 1 and 4 and moreover, their versions cannot be accepted since they are related to each other. Careful perusal of statement of PW1 and PW4 certainly suggest that there is contradiction in the statement of both the witnesses, which by no stretch of imagination can be termed to be minor contradictions, rather if statement of PW4 is read in its entirety, it changes the entire complexion of the entire prosecution case.

12. This Court after carefully examining the record especially the statement of PW4 sees substantial force in the argument of learned counsel representing the petitioner accused that when very identity of vehicle involved in the accident was in dispute/under suspicion, no conviction, if any, could be recorded against the petitioner accused. It appears that both the courts have failed to appreciate the evidence of material prosecution witness PW4, who was allegedly involved in the accident at that relevant time because he nowhere stated that at the time of accident, he was driving Santro Car and as such, this Court deems it fit to quash and set aside the impugned judgment of conviction recorded by the courts below which are admittedly perverse.

13. Consequently, in view of the detailed discussed made herein above impugned judgment of conviction recorded by the courts below is quashed and set-aside and the present petitioner-accused is acquitted of the charge framed against him under Section 279 of the IPC. Bail bonds are discharged. Interim order, if any, vacated. Pending application(s), if any, also stands disposed of.

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

Reeta Devi …Petitioner

Versus

State of Himachal Pradesh & others …Respondents

CWP No. 1878 of 2015
Judgment Reserved on :14.03.2017
Date of Decision: 18.04.2017

Constitution of India, 1950- Article 226- Petitioner applied for an appointment as anganwari worker – petitioner was declared selected while respondent No.4 was kept in the waiting list – respondent No.4 preferred objection before Competent Authority – a writ petition was filed, in which a direction was issued to decide the representation of respondent No.4 within two months – Deputy Commissioner set aside the appointment of the petitioner on the ground that marks were not awarded properly – aggrieved from the order, present writ petition has been filed- held that the reasoning of the Deputy Commissioner on the basis of broad guidelines is not sustainable as no guidelines were brought to the notice of the Court – there is no practice or law to bind interview committee to award certain minimum percentage of marks in an interview- the Court will not sit in appeal over the assessment of an individual candidate- writ petition allowed- order of the Deputy Commissioner set aside.(Para-19 to 24)

Cases referred:

Durga Devi and another versus State of H.P. and others, (1997) 4 SCC 575
Pawan Kumar Thakur Versus Dr. Y.S. Parmar University and others, (2011) 2 SLC 124
Ajay Hasia and others Versus Khalid Mujib Sehravardi and others, (1981) 1 SCC 722
Mehmood Alam Tariq and others Versus State of Rajasthan and others, (1988) 3 SCC 241
Lila Dhar Versus State of Rajasthan and others, (1981) 4 SCC 159

For the petitioner	:	Ms. B.S. Chauhan, Senior Advocate, with Mr. Munish Thakur, Advocate.
For the respondents	:	Mr. Pankaj Negi, Deputy Advocate. General, for respondents No. 1 to 3.
	:	Mr. Ashwani K. Sharma-II, Advocate, for respondent No. 4.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge

In the instant petition, order dated 26.02.2015, (Annexure P-3) passed by Deputy Commissioner, Hamirpur is under challenge vide which appointment of petitioner as Anganwari worker at Anganwari Centre Himmer, District Hamirpur (here-in-after referred to as the 'Centre') has been set aside in appeal, filed by respondent No. 4, under Scheme/Guidelines for Engagement of Anganwari Workers/Helpers (here-in-after referred to as 'the Scheme').

2. In the Scheme notified on 05.10.2009, (Annexure-PA), minimum qualification for appointment of Anganwari worker was Matric or equivalent and distribution of marks under Rule 7 was also provided on the basis of said qualification. However, vide Notification dated 19th June, 2010 (placed on record during hearing), eligibility criteria and distribution of marks was amended by respondent-State. By substituting Rule 4 of the Scheme, 10+2 or equivalent was made as minimum educational qualification for Anganwari workers and substituted Rule 7 provided distribution of marks as under:

"7. Marks

Selection shall be based on merit out of the total marks of 25. Marks will be awarded as follows:-

1. Anganwari Workers

A) Maximum 13 Marks for educational qualification will be given in the following manner

i) Percentage of Marks in 10+2 divided by 10 subject to the maximum of 10 marks.

ii) Candidates who possess higher educational qualification will be given 3 additional marks as follow:-

Graduates=Additional Two marks for Graduation.

Post Graduates & above =Additional 3 marks (2+1) Two for, Graduation and one additional mark for post graduation and above.

B) Maximum 2 marks for experience to be given as under:-

C) 2 marks for disabled women having 40% and above disability subject to the condition that the type of disability is not such as to hamper the discharge of her job responsibility.

D) 2 marks for SC/ST/OBC candidates.

E) 2 marks for State Home/Balika Ashram Inmates/Orphans/ Widows/Destitues and Divorcees.

F) 4 marks for personal interview.

Total 25 marks

3. Petitioner and respondent No. 4 alongwith others, applied for appointment as Anganwari worker in the Centre, appeared in interview held on 28.02.2011 conducted by Selection Committee constituted under Rule-3 of the Scheme.

4. Out of four candidates, one Ranjna Kumari did not appear in the interview whereas another Neelma Kumari was found ineligible for want of requisite academic qualifications. Petitioner was declared selected securing 6.97 marks aggregate after interview whereas respondent No. 4 was kept in waiting list with 6.7 marks as evident from result sheet Annexure P-1 to the petition.

5. On 14.03.2011, respondent No. 4, preferring an appeal/objection before the competent authority under the Scheme challenged appointment of petitioner. In the said appeal, Sub Divisional Officer (Civil) Bhoranj made an inquiry through CDPO, Tauni Devi who found that respondent No. 4 was aggrieved by awarding lesser marks to her in the interview, whereas, as per Committee marks were awarded as per performance of the individual and guidelines and rules framed by the Department. Thereafter, respondent No. 4 preferred CWP No. 6178/2014 in this Court which was disposed of with direction to Deputy Commissioner, Hamirpur (respondent No. 2) to consider and decide representation of respondent No. 4 within two months of receipt of certified copy, in accordance with law by affording due opportunity of hearing/representation to her by assigning reasons in its decision and communicating the said decision to her. It was also clarified that decision in writ petition was not in favour of respondent No. 4 and respondent No. 4 was also granted liberty to place additional material if any, on record.

6. Deputy Commissioner, Hamirpur vide impugned order (Annexure P-3) set aside appointment of petitioner on the ground that out of four marks, respondent No. 4 was awarded only 1 mark which came to be 25% of total 4 marks provided for interview in the Scheme, whereas petitioner was awarded 3 marks (75%) in the said interview despite the fact that respondent No. 4 was having 18% higher marks than petitioner in 10+2 examination. Deputy Commissioner further observed as under:-

"Interestingly, there are broad guidelines that no candidate is to be given less than 40% or more than 80% in an interview until unless there are exceptional circumstances. Thus, it appears that the petitioner who has the best academic record had worst the possible interview. If we go by norms of her having got 1.6 marks (40%), she would still appear as the overall topper. The academic achievement gap of the petitioner and respondent is too big to reconcile the difference in interview marks. This is further corroborated by the fact that even a person who was unqualified was felt to be good enough for 50% interview marks".

7. On the basis of aforesaid observations, Deputy Commissioner held that there appeared a deliberate attempt to tilt the advantage in favour of petitioner and, thus, set aside selection of petitioner with direction to conduct fresh interview to the post and liberty, to all eligible candidates including petitioner and respondent No. 4 or any other persons who had appeared in the interview for the post of Anganwari worker, was also granted to participate in process. Hence present petition.

8. Respondents No. 1 to 3 filed joint reply to the petition in which they reiterated the events, quoted reasons preferred by Deputy Commissioner to set aside the appointment of petitioner but without commenting upon justification of impugned decision and without placing on record any material in support of the same. With rejoinder filed by petitioner to the reply of respondents No. 1 to 3, copy of unamended Scheme notified vide Notification dated 05.10.2009 was also placed on record. During hearing of the case, learned Deputy Advocate General placed a copy of Notification dated 19th June, 2010 on record vide which amended provision of the Scheme were substituted as referred supra. Respondent No. 4 has not preferred to file any reply.

9. Learned counsel for petitioner submits that impugned order is based on surmises, conjectures and without any legitimate basis as there are no broad guidelines either on record or otherwise, as referred by Deputy Commissioner in impugned decision quoting that no candidate is to be given less than 40% or more than 80% marks in an interview except for exceptional circumstances. It is also contended that Deputy Commissioner, while hearing the appeal as provided in the Scheme, exceeded his jurisdiction by sitting over evaluation carried out in interview by Selection Committee and has reassessed the merit on the basis of academic qualification despite the fact that performance of a candidate in an interview may not always be proportionately equally good as to marks obtained in academic qualification. It is urged that there is no illegality, irregularity and perversity committed by the Selection Committee in awarding marks to petitioner in interview and that selection of petitioner to the post of Anganwari worker on the basis of overall merit is in accordance with law.

10. Learned counsel for petitioner has relied upon pronouncement of Hon'ble Supreme Court in case 'Durga Devi and another versus State of H.P. and others, reported in **(1997) 4 SCC 575** in which it has been held as under:-

"3. It is needless to emphasise that it is not the function of the Court to hear appeals over the decisions of the Selection Committees and to scrutinize the relative merits of the candidates. Whether a candidate is fit for a particular post or not has to be decided by the duly constituted Selection Committee which has the expertise on the subject. The court has no such expertise. The decision of the Selection Committee can be interfered with only on limited grounds, such as illegality or patent material irregularity in the Constitution of the Committee or its procedure vitiating the selection, or proved mala fides, affecting the selection etc. It is not disputed that in the present case the University had constituted the Committee in due compliance with the relevant status. The Committee consisted of experts and it selected the candidates after going through all the relevant material before it. In sitting in appeal over the selection so made and in setting it aside on the ground of the so called comparative merits of the candidates as assessed by the Court, the High Court went wrong and exceeded its jurisdiction.

4. In the instant case, as would be seen from the perusal of the impugned order, the selection of the appellants has been quashed by the Tribunal by itself scrutinizing the comparative merits of the candidates and fitness for the post as if the Tribunal was sitting as an appellate authority over the Selection Committee. The selection of the candidates was not quashed on any other ground. The Tribunal fell in error in arrogating to itself the power to judge the comparative merits of the candidates and consider the fitness and suitability for appointment. That was the function of Selection Committee. The observations of this Court in Dalpat Abasaheb Solunke case are squarely attracted to the facts of the present case. The order of the Tribunal under the circumstances cannot be sustained. The appeal succeeds and is allowed. The impugned order dated 10-12-1992 is quashed and the matter is remitted to the Tribunal for a fresh disposal on other points in accordance with the law after hearing the parties".

11. Learned counsel for petitioner has also relied upon judgment passed by this Court in case Pawan Kumar Thakur Versus Dr. Y.S. Parmar University and others, reported in **(2011) 2 SLC 124** in which marks awarded in interview were also questioned. As per ratio of this judgment marks can be questioned by alleging malafide against the Selection Committee, but for that Selection Committee is, necessarily, to be added as party whereas in present case in its appeal before Deputy Commissioner, respondent No. 1 had neither alleged malafide nor arrayed Selection Committee or its members as respondent.

12. Relying upon another judgment of this Court passed in Amar Nath Rana Versus State of Himachal Pradesh and connected matter, reported in **(2012) 3 Him. L.R. 1557**, it is submitted on behalf of petitioner that selection only on the basis of marks of viva-voce is also permissible under law whereas in present case only 4 marks out of 25 marks have been awarded which are 16% of total marks, available with the Selection Committee to be awarded in interview.

13. Learned Deputy Advocate General has reiterated its stand taken in reply and has justified impugned order. However, despite numerous adjournments, neither Deputy Advocate General nor respondent No. 4 was able to place on record any document/guidelines as referred by Deputy Commissioner in impugned order, providing that no candidate is to be given less than 40% and more than 80% in an interview except in exceptional circumstances.

14. Learned counsel for respondent submits that 4 marks provided for viva voce in the Scheme are unconstitutional and impermissible under law as it comes to be 16% which is higher than 15% of total marks and in numerous pronouncement of the Courts, 15% of total marks is the maximum limit which can be provided to the Selection Committee for interview. In support of his contention learned counsel has relied upon pronouncement of Constitutional Bench of Hon'ble Supreme Court in case Ajay Hasia and others Versus Khalid Mujib Sehravardi and others, reported in **(1981) 1 SCC 722**. It was a case pertaining to admission in Regional Engineering College to the first semester of the B.E. course in which it was held as under:

"We are of the view that, under the existing circumstances, allocation of more than 15 per cent of the total marks for the oral interview would be arbitrary and unseasonable and would be liable to be struck down as constitutionally invalid".

15. It is contended on behalf of respondent No. 4 that in view of ratio of Law laid down by the Apex Court in Ajay Hasia's case supra, provision of 4 marks in viva voce out of total 25 marks is arbitrary and illegal being contrary to law of Land. He further submitted that even if it is considered to be permissible under law then also, awarding 1 mark only to respondent No. 4 is an illegal act of Selection Committee as prescribed minimum pass marks in all examinations are 33% and 1 mark out of 4 marks comes to be 25% whereas minimum pass marks must be awarded in an interview to a candidate, more particularly for the reason that petitioner who was having lesser merit in 10+2 examination was awarded 3 marks which comes to be 75% of maximum marks of interview. He also submitted that Selection Committee awarded 1 mark only to respondent No.4 but 2 marks to one Neelam Kumari who was even not having

requisite qualifications and was not eligible for the post. As per him all these facts reflect malafide and arbitrariness on the part of Selection Committee.

16. Learned counsel for respondent has submitted that challenge of respondent is also against abuse of power by Selection Committee which has vitiated its power to select and thus selection of petitioner has rightly been set aside by Deputy Commissioner. Reliance has been placed upon case titled as Mehmood Alam Tariq and others Versus State of Rajasthan and others, reported in **(1988) 3 SCC 241** in which it has been held as under:-

> *"24. It is important to keep in mind that in his case the results of the viva-voce examination are not assailed on grounds of mala fides or bias etc. The challenge to the results of the viva-voce is purely as a consequence and incident of the challenge to the vires of the rule. It is also necessary to reiterate that a mere possibility of abuse of a provision, does not, by itself, justify its invalidation. The validity of a provision must be tested with reference to its operation and efficacy in the generality of cases and not by the freaks or exceptions that its application might in some rare cases possibly produce. The affairs of Government cannot be conducted on principles of distrust. If the selectors had acted mala fide or with oblique motives, there are, administrative law remedies to secure reliefs against such abuse of powers. Abuse vitiates any power".*

17. In rebuttal, leaned counsel for petitioner has relied upon pronouncement of the Apex Court in case Lila Dhar Versus State of Rajasthan and others, reported in **(1981) 4 SCC 159** in which Hon'ble SCC has held as under:-

> *"6. Thus, the written examination assesses the man's intellect and the interview test the man himself and "the twain shall meet" for a proper selection. If both written examination and interview test are to be essential features of proper selection, the question may arise as to the weight to be attached respectively to them. In the case of admission to a college, for instance, where the candidate's personality is yet to develop and it is too early to identify the personal qualities for which greater importance may have to be attached in later life, greater weight has per force to be given to performance in the written examination. The importance to be attached to the interview test must be minimal. That was what was decided by this Court in Periakaruppan v. State of Tamil Nadu, Ajay Hasia etc. v. Khalid Mujib Sehravardi & ors. etc., (supra) and other cases. On the other hand, in the case of services to which recruitment has necessarily to be made from persons of mature personality, interview test may be the only way, subject to basic and essential academic and professional requirements being satisfied. To subject such persons to a written examination may yield unfruitful and negative results, apart from its being an act or cruelty to those persons. There are, of course, many services to which recruitment is made from younger candidates whose personalities are on the threshold of development and who show signs of great promise, and the discerning may in an interview test, catch a glimpse of the future personality. In the case of such services, where sound selection must combine academic ability with personality promise, some weight has to be given, though not much too great weight, to the interview test. There cannot be any rule of thumb regarding the precise weight to be given. It must vary from service to service according to the requirements of the service. the minimum qualifications prescribed, the age group from which the selection is to be made, the body to which the task of holding the interview test is proposed to be entrusted and a host of other factors. It is a matter for determination by experts. It is a matter for research. It is not for Courts to pronounce upon it unless exaggerated weight has been given with proven or obvious oblique motives. The Kothari Committee also suggested that in view of the obvious importance of the subject, it may be examined in detail by the Research Unit of the Union of Public Service Commission.*

> *9…….Both the cases cited before us Periakaruppan's case and Ajay Hasia's case were cases of admission to colleges. We have already pointed out that the provision for marks for interview test need not and cannot be the same for admission to colleges and entry into public services………….*
>
> *……Nor do we think that the Court intended any wide construction of their observation. As already observed by us the weight to be given to the interview test should depend on the requirement of the service to which recruitment is made, the source material available for recruitment, the composition of the interview Board and several like factors……………".*

18. Though, in arguments, learned counsel for respondent No. 4 has argued malafide and arbitrariness against Selection Committee but from perusal of material on record, including impugned order, it does not appear that such grounds were ever taken by respondent No. 4 challenging the appointment of petitioner. On confronting with such a situation, learned counsel for respondent No. 4 submitted that these grounds were taken in appeal preferred by respondent No. 4 before Deputy Commissioner, however, copy of the said appeal was never placed on record by respondent No. 4 and he has even not chosen to file a separate reply placing its independent stand on the record. There is no material available on record indicating that malafide was ever urged against Selection Committee. Even it is presumed that it was a ground in appeal before Deputy Commissioner, the same is of no consequence for, so evident from memo of parties of impugned order, failure of respondent No.4 in arraying Selection Committee as its members respondents in his appeal.

19. Reasoning of Deputy Commissioner on the basis of broad guidelines is also not sustainable as no such broad guidelines referred in impugned order, were brought in the notice of Court providing that no interview Committee had to award less than 40% or more than 80% marks to a candidate in an interview except in exceptional circumstances.

20. Ratio of law laid down in cases for Admission to Educational Institutions cannot be made applicable to the cases of employment. Concept of awarding passing marks i.e. 33% marks to a candidate, urged on behalf of respondent No. 4, is also without basis because no such bench mark for qualifying in interview was prescribed in present case. Also 33% marks are not always passing marks in examination(s). In some cases passing marks are even 50%. There is no practice or law, so as to binding interview committee, to award certain minimum percentage of marks in an interview. Therefore, contention raised by learned counsel for respondent No. 4 that respondent No. 4 was entitled for atleast 1.6 marks in interview is not tenable.

21. So far as grant of 2 marks to the candidate not having requisite academic qualification is concerned, the same cannot be basis to conclude that marks in interview were awarded arbitrarily as marks in interview are awarded on the basis of performance in the interview and not on the basis of academic marks/qualifications. Normally, a person having higher academic marks/qualification may perform better in interview than a candidate having lesser academic qualifications but vice versa is also not impossible. There is no law or presumption that performance in an interview will always be proportionate to academic marks or qualification. Allegations of nepotism and favouritism against Selection Committee in their absence are not permissible under law. In the present case Rule-7 provides various heads of distribution of marks to the candidates in which Selection Committee is not having any discretion. Out of 25% only 4 marks are in the hands of Selection Committee which cannot be considered as excessive as claimed by respondent No. 4.

22. Learned counsel for respondent No. 4 has also relied upon judgment of Coordinate Bench of this country passed in CWP No. 1796 of 2015 titled as Santosh Versus State of Himachal Pradesh and others wherein appointment of a candidate was set aside on the ground that despite having better academic record lesser marks in interview were awarded to a candidate. What weighed to the court, in this case, is evident from following paras of the judgment:-

> *"10. I observe so because not only is the petitioner well-qualified and may be even more qualified than the members of the Selection Committee itself, but that apart the marks in favour of respondent No.6 have been increased from 7 to 9 in the individual marking conducted by the President, SMC and, on the other hand, as regards the petitioner, her marks have arbitrarily been reduced from 4 to 2.*
>
> *11. Similarly, the Headmaster, the head of the Institution-cum-Member Secretary of the SMC had initially awarded 9 marks to respondent No.6 which have thereafter been scored of to make it 9½ and as regards the petitioner, she has been awarded "zero marks" .*
>
> *12. The S.D.M., on the other hand, has awarded 9.5 marks out of 10 marks to respondent No.6, whereas, the petitioner has only been granted 0.5 marks. Evidently, even after awarding such high marks, the difference of marks between the petitioner and respondent No.6 is only 0.47 marks and the petitioner has been awarded ridiculously low marks 0.83 out of 30 marks in the viva voce".*

23. In my opinion, judgment mentioned supra, is not applicable to the facts and circumstances of the present case. In the said case, there was over writing, cutting in record for increasing and decreasing marks already awarded to candidates in order to favour a particular candidate. Even in the said judgment it has been observed as under:-

> *"9. Normally, this Court would not sit in appeal over the assessment of an individual candidate made by the respondents and would also not adopt a role of supervisory authority and revaluate the performance of a Candidate at the viva voce/interview merely because of a whisper of favouritism has been levelled. But then can the Court ignore a selection which is an a malgam of favouritism and nepotism and uphold the same".*

24. Writ Court is not a supervisory authority for reevaluating performance of candidate in viva voce/interview. Mere allegations of favourtism and nepotism in absence of any substantive material on record and also for want of pleadings in this regard, are not sustainable.

25. Thus, in my considered view, the stand taken by the respondent No. 4 is not tenable in the eyes of law whereas the petitioner has made out a case for interference by this Court. In view of above discussion petition is allowed and impugned order dated 26.02.2015 (Annexure P-3) is quashed and set aside. Pending application(s), if any, also stand disposed of. No order as to costs.

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

Umed Singh …Appellant.
Versus
State of H.P. …Respondent.

Cr. Appeal No. 499 of 2016
Judgment reserved on: 27.03.2017
Date of Decision: April 18 , 2017

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 1.460 kg. of charas- the accused was tried and convicted by the Trial Court- held in appeal that police officials supported the prosecution version – the fact that independent witness had turned hostile is not sufficient to doubt the prosecution version- minor contradictions will also not make the prosecution case

suspect – the plea of alibi was not established –link evidence was proved – the Trial Court had rightly appreciated the evidence – appeal dismissed. (Para-4 to 14)

For the Appellant: Mr. Anoop Chitkara, Advocate, for the appellant.
For the Respondent: Mr. V.S. Chauhan, Addl. AG., with Mr.Vikram Thakur, Dy. AG., for the respondent-State.

The following judgment of the Court was delivered:

Sanjay Karol, J.

In relation to FIR No.96/2015, dated 17.04.2015, registered at Police Station Sadar, District Kullu, H.P., accused stands convicted for having committed an offence punishable under the provisions of Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the Act). He is to undergo rigorous imprisonment for a period of ten years and pay fine of ` 1 lac and in default thereof further undergo rigorous imprisonment for a period of two years.

2. Trial Court found the prosecution to have established its case of having recovered 1 kg 460 grams of charas from the conscious possession of the accused. It was on 17.04.2015, that the police party recovered it from a place known as Bhurji (Malana road), Kullu, District Kullu, H.P.

3. Through the testimonies of C. Nitish Kumar (PW.1), Ashok Kumar (PW.2) and HC Deepak Kumar (PW-12), prosecution establishes recovery of the contraband substance. Through the testimonies of Nitish Kumar and SI Jitender Kumar (PW.8), prosecution wants to establish that Rukka (PW.1/D) was carried to the Police Station and same day FIR (Ex.PW.8/A) was registered. Through the testimonies of SI Jitender Kumar and HC Gajender Pal (PW.3), prosecution wants to establish that the case property so recovered was resealed at the Police Station and deposited in the Malkhana. Further C. Sunil Mahant (PW.6), carried the same to the Forensic Science Laboratory, Junga, where it was examined and report (Ex.PX) brought back. Through the testimonies of C. Ajay Sharma (PW.11) and HC Deepak Kumar, prosecution wants to establish that information about the incident came to be passed on to the superior officer.

4. Significantly, in the instant case, prosecution did associate an independent person as a witness while carrying out search and seizure operations. In this regard, the said person, namely, Ashok Kumar (PW.2) has fully supported the prosecution.

5. Trial Court has succinctly dealt with the issue of minor contradictions and inconsistencies in the testimonies of the aforesaid witnesses, they being trivial in nature. Before this Court, much emphasis is laid on the fact that Ashok Kumar stands introduced by the police, only to falsely implicate the accused. Also no endeavour was made by the police to associate any respectable person of the locality, while carrying out search and seizure operations.

6. At this juncture, one may only observe the defence and the *alibi* taken by the accused, which in his own words is reproduced as under:-

"Q.35:- Why this case is made against you?

Ans:- False case has been made against me. Police party has recovered the charas from one Bal Krishan and said Bal Krishan has not been interrogated by the police.

Q.36:- Why the witnesses have deposed against you?

Ans:- All the witnesses were influenced by the police, so they have deposed against me.

Q.37:- Do you want to say anything else?

Ans:- I am innocent. I have been falsely implicated in this case. On that day, I was coming back from Malana with my family after Mandir Darshan."

7. Noticeably no evidence in defence was led by the accused. Who is this Bal Krishan has also not been disclosed by him. Also neither he nor his family members protested against his illegal detention at any point in time. As required by law, accused was produced before the Magistrate, when also no such grievance was made. Why would police influence the witnesses or falsely implicate the accused, remains undisclosed. The defence remains improbablized.

8. Be that as it may, independent of the defence taken by the accused, this Court is obliged in law, to appreciate the evidence led by the prosecution, leading to his conviction and ascertain as to whether the findings returned are borne out from the record or not.

9. HC Deepak Kumar (PW.12), who also conducted the investigation, states that on 17.04.2015, while on duty, at a place near Bhurji (Malana road) they saw the accused come from Malana. Noticing the police party, accused got perplexed and as such, he was asked to disclose his particulars, which he did. Suspecting that he may be carrying some illegal article in his bag, he was asked to wait, for the reason that police wanted to search him in the presence of an independent witness. Since the place was secluded being a jungle and there was no possibility of associating anyone nearby, police waited, when, in the meanwhile, one taxi bearing No.HP-01K-2460, came from Malana side. On signal, the driver stopped and disclosed his identity as Ashok Kumar (PW.2). By associating him, police searched the bag from which one parcel wrapped in a Khakhee coloured cello-tape was recovered. When opened, police found soft sticky stuff, which appeared to be cannabis. Accordingly police took the same into possession vide Memo (PW.1/B), after it was sealed with six seals of impression 'D'. Sample seal was handed over to Ashok Kumar. Also photographs (Ex.PW.12/A-1 to Ex.PW.12/A-20) were taken recording the search and seizure operations. He categorically records presence of other police officials, including C. Nitish Kumar (PW.1), who took the Rukka (Ex.PW.1/D) to the Police Station, which led to the registration of FIR (Ex.PW.8/A). NCB forms (Ex.PW.3/A) were also filled up on the spot. The accused was arrested and at the Police Station, case property entrusted to SI Jitender Kumar (PW.8) for the purposes of resealing. Also special report (Ex.PW.11/A) sent to the superior authority. This person has also testified the case property produced in the Court to be the one which was sent for chemical analysis and report thereof, taken on record. This witness has totally withstood the test of cross-examination. Accused has failed to impeach his credit or in any manner render his testimony to be doubtful. He has explained the reason for not associating the driver of the vehicle, in which the police party had travelled. He is categorical that proceedings were almost complete. Significantly, the issue of presence of police party and the accused on the spot; accused having been searched; contraband substance recovered from him; and conduct of the proceedings on the spot, remain established on record, beyond reasonable doubt, through his testimony, thus making the statutory presumption so contained under Section 35 of the Act applicable in the instant case.

10. Not only that, on material facts, we find testimonies of C. Nitish Kumar (PW.1) and Ashok Kumar (PW.2) to be fully corroborating the version of the Investigating Officer. Even they have withstood the test of cross-examination and their testimonies remain un-shattered. Significantly, Ashok Kumar is an independent witness. Very rarely one finds an independent witness to have supported the prosecution and that too in a case of recovery of a psychotropic substance. This witness is categorical that the contraband substance came to be recovered from the conscious possession of the accused in his presence. He is certain that seals were affixed on the spot and that papers were prepared in his presence, to which he himself is a signatory. He has no reason to falsely implicate the accused. His presence on the spot stands reasonably explained. He is a taxi driver and was passing through the area at the relevant point in time.

11. SI Jitender Kumar (PW.8) is categorical of having received the case property from the Investigating Officer HC Deepak Kumar (PW.12), which he resealed and entrusted to MHC Gajender Pal (PW.3). He also registered the FIR. Factum of resealing remains uncontroverted on

record. He does admit that NCB form was not in a sealed parcel, but then it would not make any difference. It is not that it was tampered with.

12. One finds MHC Gajender Pal (PW.3) to have entrusted the case property to C. Sunil Mahant (PW.6), who deposited it at the concerned Laboratory. All the witnesses have affirmatively deposed that till and so long the case property remained with them, it was not tampered with. Report of the FSL (Ex.PX) evidences the factum of recovered stuff to be a psychotropic substance i.e. charas. Also police took adequate precaution of notifying the superior officer which fact is evident from the testimonies of C. Ajay Sharma (PW.11) and C. Deepak Kumar (PW.12).

13. Hence, cumulatively affirmed, it cannot be said that the Court below erred in completely and correctly appreciating the testimonies of the prosecution witnesses and holding the accused guilty of the charged offence. Even on the question of sentence, also it cannot be said that Court below erred or that it failed to judiciously exercise the discretion so vested in it.

14. The ocular version as also the documentary evidence clearly establishes complicity of the convict in the alleged crime. The testimonies of prosecution witnesses are totally reliable and their depositions believable. There are no major contradictions rendering their version to be unbelievable**.**

15. Hence in our considered view, prosecution has been able to discharge burden of proving the recovery of the contraband substance from the conscious possession of the accused, beyond reasonable doubt. It cannot be said that, while delivering judgment dated 08.09.2016 by Special Judge-II, Kullu, H.P., in Sessions Trial No.39 of 2015, titled as *State of Himachal Pradesh Versus Umed Singh,* the Court erred in correctly and completely appreciating the testimonies of the prosecution witnesses.

16. For all the aforesaid reasons, we find no reason to interfere with the judgment passed by the trial Court. The Court has fully appreciated the evidence placed on record by the parties. There is no illegality, irregularity, perversity in correct and complete appreciation of the material so placed on record by the parties. Findings cannot be said to be erroneous in any manner. Hence, the appeal is dismissed.

Records of the Court below be immediately sent back.

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

Commissioner of Income Tax, Shimla …Appellant
Versus
M/s H.P. State Co-operative Bank Ltd., Shimla …Respondent

ITA No. 14 of 2012
Reserved on: April 6, 2017
Decided on: April 19, 2017

Income Tax Act, 1961- Section 260-A- Respondent is an assessee and a credit institution within the meaning of Section 2(5A) of the Interest Tax Act, 1974- assessee failed to furnish the return within the stipulated period- a notice was issued on which return was filed – an assessment order was passed raising tax demand – Commissioner of Income Tax set aside the assessment - an appeal was filed which was dismissed as infructuous – however, penalty was imposed upon the assessee by the Deputy Commissioner of Income Tax – an appeal was filed and the penalty was modified – separate appeals were filed against this order- the Appellate Authority cancelled the order of penalty – aggrieved from the order, an appeal was filed before the High Court – the matter

was remanded to Assessing Authority, who imposed the fresh penalty- appeal was preferred against this order, which was dismissed – further appeal was allowed – aggrieved from the order of Appellate Authority, the present appeal has been filed- held that penalty can be imposed against assessee in case the Assessing Officer comes to a definite conclusion that assessee had concealed particulars of chargeable interest or had furnished inaccurate particulars of such interest- the return was accepted in its entirety – advance tax was paid by the assessee before the closure of Financial year – return was delayed on account of non-availability of return form - there was no concealment on the part of the assesse- assesse had furnished complete particulars of income in the profit and loss account – the Tribunal had passed the order rightly- appeal dismissed.(Para-15 to 24)

Cases referred:

Commr. of Inc.-Tax v. Angidi Chettiar, (1962) 44 I.T.R. 739
K.C. Builders v. Asstt. C.I.T. (S.C.), (2004) 265 I.T.R. 562
CIT v. Bacardi Martini India Ltd. (Delhi), (2007) 288 ITR 585 (Delhi)

For the appellant **:** Ms. Vandana Kuthiala, Advocate.
For the respondent **:** Mr. Vishal Mohan and Mr. Sanjay Prashar, Advocates.

The following judgment of the Court was delivered:

Per Sandeep Sharma, Judge

This appeal under Section 260-A of the Income-Tax Act, 1961 has been filed thereby laying challenge to order dated 21.6.2011, passed by the Income Tax Appellate Tribunal Chandigarh Bench 'A', Chandigarh (in short, 'Tribunal'), in setting aside order of Commissioner Income Tax (Appeals).

2. Briefly stated the facts necessary for the adjudication of the present appeal are that the H.P. State Co-operative Bank Ltd. (hereafter, 'assessee') is a credit institution within the meaning of Section 2(5A) of the Interest-Tax Act, 1974 and as such it was under obligation to furnish the return of chargeable interest for the relevant year under Section 7(1) of the Interest-Tax Act, 1974, before 31.12.1992. Under sub-section (3) of Section 7, the assessee could furnish its return of chargeable interest before the expiry of one year from the end of the relevant assessment year or before the completion of the assessment, whichever is earlier. However, the fact remains that assessee failed to furnish return within stipulated period as prescribed under Section 7 of the Act ibid. Assessing Officer issued notice under Section 10 of the Interest-Tax Act, 1974, upon the assessee on 12.9.1995. Assessee, in response to notice as referred above, filed return of interest tax on 19.2.1996 declaring therein chargeable interest of Rs.7,18,86,395/-. Assessing Officer passed assessment order under Section 8 (2) on 26.2.1998 determining therein chargeable interest amounting to Rs. 15,21,18,010/- and raised tax demand of Rs. 93,89,057/-. Vide rectification order under Section 17, he further demanded Rs.1,54,162. Perusal of Annexure P-3 placed on record by the appellant suggests that the Commissioner Income Tax, Shimla, vide order dated 1.3.2000 passed under Section 19 of the Interest-Tax Act, 1974, set aside aforesaid order of assessment having been passed by the Assessing Officer under Section 8 (2) of the Interest-Tax Act, 1974, holding same to be erroneous and prejudicial to the interests of revenue and, accordingly, directed him to make fresh assessment after affording opportunity of hearing to the assessee.

3. Being aggrieved and dissatisfied with the aforesaid order, Assessee preferred an appeal before Commissioner Income Tax (Appeals), Shimla: Panchkula, which came to be registered as Appeal No. IT/4/97-98/SML. However, the same was dismissed as infructuous, by the Commissioner Income Tax (Appeals), vide order dated 2.8.2000, on the ground that Commissioner Income Tax, Shimla has already set aside assessment directing the Assessing Officer to complete fresh assessment, points of objection as raised in the appeal, no longer

survive. It further emerges from the record that the assessee Bank did not contest the chargeable interest assessed by the Assessing Officer. Perusal of Annexure P-6 suggests that during the pendency of the aforesaid assessment proceedings, proceedings under Section 13 of the Interest-Tax Act, 1974, were also initiated by the Department for levying penalty upon the assessee Bank and, accordingly, vide order dated 29.8.2002, penalty of Rs. 1,49,67,486/- i.e. penalty equal to three times the interest sought to be evaded, was imposed by the Dy. Commissioner of Income Tax, Circle Shimla.

4. Being aggrieved with the penalty having been imposed by the Assessing Officer under Section 13 of the Interest-Tax Act, 1974, assessee Bank preferred an appeal before Commissioner Income Tax (Appeals), Shimla. However, the fact remains that the learned Commissioner Income Tax (Appeals) upheld the penalty imposed by the authority concerned but held that the penalty of 300% is harsh upon the assessee, accordingly, modified penalty to 100% of tax evaded.

5. Being further aggrieved and dissatisfied with the aforesaid order passed by the learned Commissioner Income Tax (Appeals), both the parties filed appeals bearing Intt. Tax Apl. No. 3/Chandi/2003 (A.Y. 1992-93) and Intt. Tax Apl. No. 4/Chandi/2003 (A.Y. 1992-93), before the Tribunal below. Perusal of Annexure P-8, placed on record, suggests that both the appeals were heard together by the Tribunal and Tribunal, while allowing appeal of the assessee, held as under:

> "*When we compare the provisions of Section 13 of the Interest-Tax Act, 1974 and Explanation 3 to Section 271(1)(c), it is observed that there is no such provision under the Interest-Tax Act, 1974 corresponding to Explanation 3 to Section 271(1)(c).*"

6. It is seen that there is no such provision under the Interest-Tax Act, 1974 corresponding to Explanation 3 to 271(1)(c) of the Income-Tax Act, 1961 and as such basis adopted for imposition of penalty by revenue authority is not in accordance with provisions of Interest-Tax Act, 1974 and, accordingly, cancelled the same.

7. Appellant being aggrieved and dissatisfied with the aforesaid order having been passed by the Tribunal, preferred an appeal under Section 260-A of the Income-Tax Act, 1961 before this Court, wherein following question of law was formulated:

> "Whether absence of proviso in section 13 of the Interest tax Act, 1974 corresponding to explanation 3 to section 271(1)(c) of the Income-Tax Act, 1961, could render the case ineligible for penalty u/s 13 of the Interest tax Act even on the differential amount of tax sought to evaded i.e. the difference of tax sought to evaded on chargeable interest assessed by the A.O. and chargeable returned by the assessee?"

8. This Court taking note of the fact that the Tribunal only took into consideration Section 271 (1)(c) while holding that there is no basis for imposition of penalty under Section 13, and ignored other grounds, which were taken into consideration by the Assessing Officer, remanded matter to the Assessing Officer to determine the question as to whether assessee was liable to pay penalty and if so, to what extent, strictly in consonance with the provisions of Section 13 of the Interest-Tax Act, 1974, totally being uninfluenced by the provisions of Section 271(1)(c) of the Income-Tax Act, 1961.

9. Subsequent to passing of aforesaid order by this Court, Assessing Officer passed fresh penalty order (Annexure P-9 dated 28.5.2010) under Section 13 of the Interest-Tax Act, 1974, levying therein 100% penalty of the amount of Rs. 49,89,162, i.e. tax sought to be evaded.

10. Assessee being aggrieved with the aforesaid imposition of penalty vide order dated 28.5.2010, preferred an appeal before Commissioner Income Tax (Appeals), who vide order dated 30.11.2010 in Appeal No. IT/119/2010-11/Sml, dismissed the appeal of the assessee and as such assessee was compelled to prefer an appeal before the Tribunal below. Learned Tribunal

below, while allowing appeal of the assessee held that penalty under Section 13 of the Interest-Tax Act, 1974 is/was leviable, where assessee had concealed its interest chargeable to tax or furnished inaccurate particulars of tax chargeable. Learned Tribunal below, taking note of the fact that interest became chargeable only pursuant to Board's Instructions No. 1923 dated 14.3.1995, that too for the period from October, 1991 to 31.3.1992 and that the assessee had declared total interest levied by it in its profit and loss account, held that there was no merit in the levying of penalty under Interest-Tax Act, 1974 and accordingly set aside the order of Assessing Officer, levying penalty. In the aforesaid background, appellant has approached this Court, by way of instant appeal.

11. The appeal was admitted on following substantial question of law, on 21.5.2012:

"i) Whether the finding of the Ld. ITAT to the effect that the assessee has neither concealed the particulars of interest nor furnished inaccurate particulars of interest is perverse even though the assessee had not disclosed or furnished such interest until escapement of the interest was detected by the department?

ii) Whether on the facts and circumstances of the case the ITAT is correct in deleting penalty on the grounds that the interest become chargeable to tax only after Board's inst. No. 1923 dated 14.3.1995 and hence non disclosure of such interest in assessment years prior to this date could not be termed as concealment or furnishing inaccurate particulars, even though the assessee had filed his return after the date?"

12. Ms. Vandana Kuthiala, learned counsel representing the appellant vehemently argued that impugned order dated 21.6.2011 (Annexure P-A) having been passed by the Tribunal below is not sustainable as the same is not based upon correct appreciation of evidence adduced on record by the respective parties as well as provisions of law applicable in the instant case. Ms. Kuthiala, strenuously argued that the Tribunal while holding that there is no merit in levying of penalty under Section 13 of the Interest-Tax Act, 1974, has failed to consider the fact that the interest on securities, interest on head office investment account and interest on loan to primary agriculture cooperative societies was chargeable interest under Interest-Tax Act, 1974. She further stated that Board's Instructions No. 1923 dated 14.3.1995 were clarificatory in nature and no benefit, if any, could be available pursuant to aforesaid instructions to the assessee before he filed return of interest tax, that too pursuant to the notice under Section 10 of the Interest-Tax Act, 1974. Learned counsel representing the appellant forcefully contended that the learned Tribunal below failed to take note of the fact that return of chargeable interest was not filed voluntarily but was filed in response to notice under Section 10 of the Interest-Tax Act, 1974 and there was difference in the chargeable interest of the assessee and interest as assessed by the Assessing Officer. To substantiate her aforesaid arguments, learned counsel representing the appellant invited attention of this Court to assessment order (Annexure P-9) having been passed by the Assessing Officer under Section 13 of the Interest-Tax Act, 1974, to demonstrate that the assessee had concealed interest chargeable to tax and had furnished inaccurate particulars to the tune of Rs. 16,63,05,388/- and as such penalty was rightly imposed upon the assessee at the rate of 100% of the interest sought to be evaded.

13. Mr. Vishal Mohan, learned counsel representing the respondent, supported the impugned order passed by the learned Tribunal and stated that there is no illegality or infirmity in the same, as such, there is no scope of interference. While specifically referring to the questions of law referred to herein above, Mr. Mohan strenuously argued that the learned Tribunal below has returned specific findings of fact that assessee neither concealed particulars of interest nor furnished inaccurate particulars of interest, that too on the basis of record made available to it by the Department, during the proceedings of the appeal, as such, same can not be gone into by this Court especially in the present proceedings. Mr. Mohan, further contended that bare perusal of orders passed by Assessing Officer clearly suggests that penalty has been levied on entire amount of interest assessed to tax as 16.63 Crore, ignoring the fact that advance tax amounting to Rs. 23,50,000/- was paid by the assessee, prior to initiation of aforesaid

proceedings. While specifically inviting attention of this Court to the impugned order passed by the learned Tribunal below, Mr. Mohan, contended that it is undisputed before the authority concerned that since no return form was available, return was delayed but the fact remains that advance tax as referred to above, was paid by the assessee. Learned counsel representing the respondent further contended that bare perusal of order passed by the Assessing Officer clearly suggests that initially interest on securities totaling to Rs. 3.74 Crores was not subjected to tax but the same was included lateron pursuant to order passed under Section 19 of the Interest-Tax Act, 1974. Learned counsel representing the respondent strenuously argued that penalty, if any, under Section 13 of the Act could be levied against the assessee, had he concealed particulars of chargeable interest or furnished inaccurate particulars of such interest. Mr. Vishal Mohan, further contended that provisions of Section 271 (1)(c) of the Income Tax Act, 1961, could also not be made applicable in the case of assessee, which lays down presumption against the assessee, in case of non-filing of return within particular time. In this regard, he invited attention of this Court to para-10 of the impugned order, to demonstrate that provisions of Section 271(1)(c) of Income-Tax Act, 1961, which lay down presumption against assessee in non-filing of return within particular time, are not applicable to the interest tax proceedings. While concluding his arguments, learned counsel representing the respondent contended that there is nothing on record suggestive of the fact that assessee concealed particulars of interest or furnished inaccurate particulars of interests, rather record clearly suggests that assessee had declared total interest received by it in its profit and loss account. Learned counsel representing the respondent further contended that assessee had furnished return of chargeable interest for the financial year 1991-92 relating to assessment year 1992-93 and had declared chargeable interest of Rs. 7.18 Crores. In the aforesaid background, he prayed for dismissal of the appeal.

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

15. While exploring answer to the questions of law reproduced herein above, as well as submissions made by the learned counsel representing the parties, this Court had an occasion to peruse material adduced on record by the appellant- department as well as impugned order having been passed by the learned Tribunal below, perusal whereof certainly suggest that there is no dispute, if any, with regard to chargeable interest assessed by the Assessing Officer, which was determined by Assessing Officer on 5.2.2002 by way of revised assessment order (Annexure P-5), whereby assessee was held liable to pay chargeable interest at Rs. 16,63,05,388/- as against interest of Rs. 7,18,86,385/-. Dispute, if any, inter se parties is with regard to imposition of penalty under Section 13 of Interest-Tax Act, 1974, whereby, initially penalty of Rs. 1,49,67,486 i.e. three times of the interest tax sought to be evaded, came to be imposed by the Assessing Officer, however, quantum of same was reduced to Rs. 49,89,162/- i.e. 100% of tax, sought to be evaded, by the Commissioner Income Tax (Appeals), vide order dated 20.8.2003.

16. This Court, while allowing ITA No. 33 of 2006, having been preferred by appellant department, has already held that Section 271 (1)(c) of the Income-Tax Act, 1961 can not be taken into consideration while imposing penalty under Section 13 of the Interest-Tax Act, 1974. This Court has further held that though Section 21 of the Interest-Tax Act, 1974 makes certain provisions of Income-Tax Act, 1961 applicable to proceedings under Interest-Tax Act, 1974 but Section 271 is not included therein, as such, this Court came to conclusion that provisions contained in Section 271(1)(c) were wrongly invoked by the Assessing Officer and Commissioner Income Tax while imposing penalty under Section 13 of the Interest-Tax Act, 1974 against respondent Bank. However, the fact remains that this Court in the aforesaid appeal, while holding that provisions contained in Section 271 (1)(c) of Income-Tax Act, 1961 are not applicable to proceedings under Interest-Tax Act, 1974, categorically held that Section 13 of the Act provides for imposition of penalty in case assessee conceals particulars of chargeable interests or furnishes inaccurate particulars of such interest. After careful examination of judgment passed by this Court in ITA No. 33 of 2006, dated 28.10.2009, there can not be any dispute that penalty, if any, under Section 13 of the Interest-Tax Act, 1974 could be imposed against assessee in case

Assessing Officer comes to definite conclusion that assessee concealed particulars of chargeable interest or furnished inaccurate particulars of such interest.

17. Careful perusal of impugned order having been passed clearly suggests that learned Tribunal below had an occasion to go through the complete record pertaining to the proceedings of the imposition of penalty under Section 13 of the Interest-Tax Act, 1974, against the respondent. Paras 16 and 17 of the impugned order passed by learned Tribunal below clearly suggest that before passing impugned order, it carefully examined/ analyzed order passed by Assessing Officer imposing therein penalty under Section 13 of the Interest-Tax Act, 1974. It clearly emerges from the impugned order, which is admittedly based upon record of the appellant that assessee had furnished return of chargeable interest for the financial year 1991-92 relating to assessment year 1992-93 and declared chargeable interest at Rs. 7.18 Crores, which was accepted in its entirety. It is also not disputed that assessee had paid advance tax of Rs. 23,50,000/- against aforesaid income before closure of financial year i.e. Rs. 1,10,000/- on 7.2.1992 and Rs. 12,50,000/- on 16.3.1992. Similarly, there is no dispute that return of chargeable interest as referred above was not filed within stipulated time by assessee, rather same was filed pursuant to issuance of notice of re-assessment issued by Assessing Officer under Section 10 of the Interest-Tax Act, 1974. Similarly, it clearly emerges from record that further additional amount of tax on securities and head office investment account was ordered by the Commissioner Income Tax, while exercising powers under Section 19 of the Interest-Tax Act, 1974, pursuant to Board's instructions No. 1923 dated 14.3.1995

18. Similarly, it emerges from the order of Assessing Officer itself that assessee in its profit and loss account had declared interest received as Rs. 39.98 Crores, which was duly considered by the Assessing Officer and details relating to interest on approved securities i.e. chargeable for the period of six months i.e. from 1.10.1991 to 31.3.1992 was duly assessed as income of the assessee. At this stage, it would be profitable to refer to Section 13 of the Interest-Tax Act, 1974, which is reproduced below:

> "Penalty for concealment of chargeable interest
>
> 13. If the Assessing Officer or the Commissioner (Appeals) in the course of any proceeding under this Act, is satisfied that any person has concealed the particulars of chargeable interest or has furnished inaccurate particulars of such interest, he may direct that such person shall pay by way of penalty, in addition to any interest-tax payable by him, a sum which shall not be less than, but shall not exceed three times, the amount of interest-tax sought to be evaded by reason of the concealment of particulars of his chargeable interest or the furnishing of inaccurate particulars of such chargeable interest."

19. True it is that provisions contained in Section 13 of Interest-Tax Act, 1974 clearly suggest that penalty is leviable on the assessee where he/she has concealed its interest chargeable to tax or furnished inaccurate particulars of interest chargeable to income tax. It clearly emerges from the record that assessee had furnished return of chargeable interest for the financial year 1991-92 relating to assessment year 1992-93. At the cost of repetition, it may be taken note at this stage that assessee had also paid advance tax of Rs. 23,50,000/-, against aforesaid income before closure of the financial year. It also emerges from the record that return was delayed on account of non-availability of return form. Averments with regard to non-availability of return form with the department at relevant time, has been nowhere disputed by the representative of the department, who conducted case before learned Tribunal below.

20. Their lordships of the Supreme Court in **Commr. of Inc.-Tax** v. **Angidi Chettiar** reported in (1962) 44 I.T.R. 739 have held as under:

> "The penalty provisions under section 28 would therefore in the event of the default contemplated by clause (a), (b) or (c) be applicable in the course of assessment of a registered firm. If a registered firm is exposed to liability of paying penalty, by committing any of the defaults contemplated by clause (a), (b)

or (c) by virtue of section 44, notwithstanding the dissolution of the firm the assessment proceedings are liable to be continued against the registered firm, as if it has not been dissolved.

Counsel contended that in any event, penalty for the assessment year 1949-50 could not be imposed upon the assessee firm because there was no evidence that the Income-Tax Officer was satisfied in the court of any assessment proceedings under the Income-Tax Act that the firm had concealed the particulars of its income or had deliberately furnished inaccurate particulars of the income. The power to impose penalty under section 28 depends upon the satisfaction of the Income-Tax Officer in the course of proceedings under the Act; it cannot be exercised if he is not satisfied about the existence of conditions specified in clauses (a), (b) or (c) before the proceedings are concluded. The proceeding to levy penalty has, however, not to be commenced by the Income-Tax Officer before the completion of the assessment proceedings by the Income-Tax Officer. Satisfaction before conclusion of the proceeding under the Act, and not the issue of a notice or initiation of any step for imposing penalty is a condition for the exercise of the jurisdiction. There is no evidence on the record that the Income-Tax Officer was not satisfied in the course of the assessment proceedings that the firm had concealed its income. The assessment order is dated the 10th November, 1951, and there is an endorsement at the foot of the assessment order by the Income-Tax Officer that action under S. 28 had been taken for concealment of income indicating clearly that the Income-Tax Officer was satisfied in the course of the assessment proceedings that the firm had concealed its income.

In our view, the High Court was in error in holding that penalty could not be imposed under section 28 (1) (c) upon the firm Messrs. S. V. Veerappan Chettiar & Co. after its dissolution."

21. Their lordships of Supreme Court in **K.C. Builders** v. **Asstt. C.I.T. (S.C.)** reported in (2004) 265 I.T.R. 562 have held as under:

"Section 147 of the Act deals with income escaping assessment. Section 148 deals with issue of notice where income has escaped assessment. Section 254 deals with orders of Appellate Tribunal. Section 256 deals with statement of case to the High Court (reference). Section 271 (1)(c) reads as follows:- "Section 271. Failure to furnish returns, comply with notices, concealment of income, etc. (1) If the Assessing Officer or the Commissioner(Appeals) in the course of any proceedings under this Act, is satisfied that any person

(a) ..

(b) .

(c) has concealed the particulars of his income or furnished inaccurate particulars of such income, he may direct that such person shall pay by way of penalty, -

(i) .

(ii)

(iii) in the cases referred to in clause (c), in addition to any tax payable by him, a sum which shall not be less than, but which shall not exceed three times, the amount of tax sought to be evaded by reason of the concealment of particulars of his income or the furnishing of inaccurate particulars of such income."

One of the amendments made to the abovementioned provisions is the omission of the word "deliberately" from the expression "deliberately furnished inaccurate particulars of such income". It is implicit in the word "concealed" that there has been a deliberate act on the part of the assessee. The meaning of the word "concealment" as found in Shorter Oxford English Dictionary, 3rd Edition,

Volume I, is as follows:- "In law, the intentional suppression of truth or fact known, to the injury or prejudice of another."

The word "concealment" inherently carried with it the element of mens rea. Therefore, the mere fact that some figure or some particulars have been disclosed by itself, even if takes out the case from the purview of non-disclosure, it cannot by itself take out the case from the purview of furnishing inaccurate particulars. Mere omission from the return of an item of receipt does neither amount to concealment nor deliberate furnishing of inaccurate particulars of income unless and until there is some evidence to show or some circumstances found from which it can be gathered that the omission was attributable to an intention or desire on the part of the assessee to hide or conceal the income so as to avoid the imposition of tax thereon. In order that a penalty under Section 271(1) (iii) may be imposed, it has to be proved that the assessee has consciously made the concealment or furnished inaccurate particulars of his income. Where the additions made in the assessment order, on the basis of which penalty for concealment was levied, are deleted, there remains no basis at all for levying the penalty for concealment and, therefore, in such a case no such penalty can survive and the same is liable to be cancelled as in the instant case. Ordinarily, penalty cannot stand if the assessment itself is set aside. Where an order of assessment or reassessment on the basis of which penalty has been levied on the assessee has itself been finally set aside or cancelled by the Tribunal or otherwise, the penalty cannot stand by itself and the same is liable to be cancelled as in the instant case ordered by the Tribunal and later cancellation of penalty by the authorities."

22. Similarly, Division Bench of Delhi High Court in **CIT** v. **Bacardi Martini India Ltd. (Delhi)** reported in (2007) 288 ITR 585 (Delhi) have held as under:

"14. We have heard the counsel for the parties and perused the record. It has been observed by the Supreme Court in K.C. Builders and Anr v. Assistant Commissioner of Income Tax- 2004 ITR Vol. 265 page 562, that concealment inherently carries with it the element of means ria. It is implied in the word 'concealment' that there has been a deliberate act on the part of the assessed. The meaning of word 'concealment' as found in Shorter Oxford Dictionary III Edition, Vol-I is "in law the intentional suppression of truth or fact known, to the injury or prejudice of another". Supreme Court further observed that mere omission from the return of an item of receipt does neither amount to concealment nor deliberate furnishing of inaccurate particulars of income, unless and until there is some evidence to show or some circumstances found from which it can be gathered that the omission was attributable to an intention or desire on the part of the assess to hide or conceal the income so as to avoid imposition of tax thereon. In order that a penalty under Section 271(1)(iii) may be imposed, it has to be proved that assessed has consciously made the concealment or furnished inaccurate particulars of his income.

15. It is clear from the law laid down by the Supreme court that concealment must be accompanied with the intention of the assessed to evade his tax liability. The assessed in this case had uniformly claimed expenditure against four heads in three assessment years. When the appeal against the order of Assessing Officer before CIT (A) in respect of assessment order 1998-1999 failed the assessed instead of preferring appeal considered it proper not to litigate further as it was running into heavy losses and even if the appeal had been allowed, the assessed would not have paid any tax. The assessed in any case would have remained in heavy losses. The assessed therefore thought it proper not to prefer an appeal and after receipt of order, assessed made an application on 4.2.2003 to correct the income returns of subsequent years in accordance with order of CIT

for the year 1998-1999. The assessed, therefore, filed revised returns deleting the expenses which were disallowed by the CIT (A). In the relevant year assessed had also claimed expenses of Rs. 2 crores paid by the assessed in terms of the agreement entered into by the assessed with the leasing Lesser. The assessed claimed the entire amount of Rs. 2 crores as deduction since the assessed had paid this amount of Rs. 2 Crores to the Lesser. There is no dispute that the assessed had disclosed all particulars. It was only difference of opinion between the assessed and the Assessing Officer and the assessed accepted the opinion of the Assessing Officer instead of preferring an appeal.

16. It is not a case where assessed had not been able to explain any expenditure or had failed to give any details and the Assessing Officer had added the same into the income. In Durga Timber v. CIT 197 ITR Page 63, relied upon by the appellant, during the course of the assessment proceedings the Income Tax Officer had noticed cash credits and investments shown in the books of account and asked the assessed to give explanation. The assessed could not give explanation of entires nor could explain the source of income and admitted that the two amounts be treated as his concealment. Under these circumstances court observed that there was concealment of income and penalty was justified. In the present case assessed had explained all the expenditure and had actually incurred the expenditure but the expenditures were disallowed because of difference of opinion between the assessed and the Assessing Officer. This is not a case where revised return was filed as a result of discovery of some facts by the Assessing Officer or inability of the assessed to explain the expenditure. The revised return was filed because some of the expenditure were disallowed by the CIT (A) appeal for year 1998-99 although the expenditure were not doubted. There are cases where an expenditure is disallowed by the Assessing Officer and it is allowed by the CIT (A). It is again disallowed by the ITAT and in appeal allowed by the High Court and may be disallowed by the Supreme Court. Merely because there is difference of opinion for allowing or disallowing the expenditure between the assessed and Assessing Officer, it cannot be said that assessed had intention to conceal the income. The filing of the revised return excluding some of the disallowed expenditure and claiming expenditure of Rs. 2 crores which was actually spent by the assessed in the relevant assessment year as deduction, does not amount to concealment or furnishing inaccurate particulars. The assessed had given all particulars of expenditure and income and had disclosed all facts to the Assessing Officer. It is not the case of the Assessing Officer or the appellant that in reply to the questionnaire of the Assessing Officer, some new facts were discovered or Assessing Officer had dug out some information which was not furnished by the assessed.

17. We find that appellant's contention of concealment of income by the assessed or furnishing of false particulars by the assessed has no basis. There is no force in the appeal and the appeal deserves to be dismissed and is hereby dismissed. No order as to costs."

23. Similarly, this Court sees substantial force in the arguments having been made by the learned counsel representing the respondent that there was no occasion for the respondent Bank to show interest on securities and interest on head office investment account, because same was made chargeable pursuant to Board's instructions No. 1923 dated 14.3.1995 and that too for the period October, 1991 to 31.3.1992 and as such there is no concealment, if any, on the part of assessee. Learned counsel representing the appellant was unable to dispute that interest on securities and interest on head office investment account was made chargeable pursuant to Board's instructions No. 1923 dated 14.3.1995 and as such, this Court sees no occasion for assessee Bank to declare same in its profit and loss account, wherein it had declared interest of Rs. 39.98 Crores, on approved securities for the period 1.10.1991 to 31.3.1992. Otherwise also,

penalty order dated 28.5.2010 passed under Section 13 of the Interest-Tax Act, 1974, nowhere suggests that appellant was able to prove on record that assessee concealed particulars of interest or furnished inaccurate particulars of interest, rather, careful examination of material available on record clearly suggests that assessee had furnished complete particulars of its income in the profit and loss account and as such, there is no illegality or infirmity in the order passed by learned Tribunal below, whereby it has held that there is no merit in holding assessee liable to pay penalty under Section 13 of the Interest-Tax Act, 1974.

24. Thus, this Court sees no illegality or infirmity in the order passed by learned Tribunal below, whereby it has deleted penalty on the ground that interest became chargeable to tax only after Board's instructions No. 1923 dated 14.3.1995, because, admittedly, interest on securities and interest on head office investment account was made chargeable pursuant to Board's instructions, which could certainly be not made applicable to the assessment made for the period October, 1991 to 31.3.1992.

25. In these circumstances, we answer both the substantial questions of law in favour of the respondent and against the appellant.

26. Accordingly, impugned order is upheld and appeal is dismissed. Pending applications, if any, are also disposed of.

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

Gurbax Singh ...Appellant.
Versus
Kaushalya Devi & Ors. ....Respondents.

RSA No.322 of 2006.
Reserved on : 29.3.2017.
Decided on : 19th April, 2017.

Indian Succession Act, 1925- Section 63- Plaintiffs filed a civil suit pleading that plaintiffs and proforma defendants are owners in possession of the suit land – the Will set up by defendant No.1 is a fake document- the suit was decreed by the Trial Court- an appeal was filed, which was dismissed – held in second appeal that the Will was executed on 3.2.1986 and was registered on 5.2.1986 – the witnesses appeared before the Court in the year 2000 after more than 14 years – human memory can fade with the passage of time and due allowance has to be given to this fact – however, the Will was not produced at the time of attestation of mutation – the reason for disinheriting natural heir was not given - beneficiary had taken an active participation in the execution of the Will – scribe of the Will was not examined – attesting witness has not stated that the testator had put his signatures in his presence- the Courts had rightly appreciated the evidence- appeal dismissed.(Para-9 to 12)

For the appellant Mr. Amrinder Singh Rana, Mr. H.S. Rana, and Ms. Ritika, Advocates.
For the respondents : Mr. Rajiv Jiwan and Mr. Prashant Sharma, Advocates, for respondents No.1 & 2.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present Regular Second Appeal under Section 100 of the Code of Civil Procedure is maintained by the appellant against the judgment and decree, dated 17.4.2006,

passed by the learned District Judge, Bilaspur, District Bilaspur, H.P, in Civil Appeal No.16 of 2001, whereby the learned Appellate Court below has affirmed the judgment and decree passed by learned Sub Judge 1st Class, Bilaspur, District Bilaspur, in Civil Suit No.169/1 of 1997, dated 31.10.2000.

2. Briefly stating facts giving rise to the present appeal are that respondents/plaintiffs (hereinafter referred to as 'plaintiffs') filed a suit for declaration against the appellant/defendant (hereinafter referred to as 'defendant') alleging that plaintiffs and proforma defendants are owner-in-possession of the land comprised in Khasra Nos.328, 342, 364, 409 and 500, Khewat No.160, Khatauni No.183, measuring 14-19 bighas (hereinafter referred to as 'the suit land') situated in Village Behal, Pargana Fatehpur, Sub Tehsil Shri Naina Devi Ji, District Bilaspur, H.P, to the extent of one share each being legal heirs of deceased Ganga Ram. Defendant No.1 has no right, title or interest over the suit land. Plaintiffs and proforma defendants are daughters of Ganga Ram, all are married and residing at the house of their in-laws. Ganga Ram expired on 4.3.1994 and his daughters being Class-I heirs, have succeeded to his entire estate, vide mutation No.1771, dated 5.5.1994. Defendant No.1 being son-in-law of Ganga Ram (deceased), proclaiming that a Will was executed in his favour by his father-in-law and on the basis of said Will, he is interfering in the ownership and possession of the plaintiffs and proforma defendants. Smt. Geeta Devi wife of Ganga Ram, had already expired on 10.5.1991, plaintiffs and proforma defendants No.3 & 4 being daughters, are the legal heirs of Ganga Ram. It is averred that an appeal was preferred against mutation No.1771, before the learned Collector, alleging that a Will has been executed by Ganga Ram in favour of defendant No.1 and Prittam Singh husband of proforma defendant No.1, who had already expired on 30.10.1989, but the learned Collector ordered that Prittam Singh, had inherited one half share of the property of Ganga Ram and his share is to be inherited by his widow, which is wrong and illegal. Ganga Ram had only four daughters and they were taking care and serving Ganga Ram, during his life time. There was no occasion for Ganga Ram, to execute any Will in favour of Pritam Singh and Gurbax Singh and the alleged Will, which was presented before Revenue Officer, after the death of Ganga Ram, is fake document. Ganga Ram during his life time never disclosed the factum of Will to his daughters nor he had any intention to execute any Will and Ganga Ram had all love and affection for his daughters till his death. There was no occasion for him to disinherit the natural heirs. After decision of the learned Collector, defendants are threatening to dispossess the plaintiffs from the suit land.

3. The suit was resisted and contested by defendants by filing their joint written statement alleging that two daughters of Ganga Ram, namely, Sikander Kaur and Sagar Kaur, were married to Prittam Singh and Gurbax Singh and their husbands were looking after Ganga Ram during his life time. The plaintiffs and their husbands never rendered any services or take care of Ganga Ram during his life time. Ganga Ram died on 4.3.1993, during his life time, he had executed a registered Will No.13 dated 5.2.1986 and the mutation of inheritance of Ganga Ram vide mutation No.1771 dated 5.5.1994 was sanctioned and attested by Assistant Collector 1st Grade, Swarghat, ignoring the registered Will. The said mutation was challenged before the learned Collector and the learned Collector, vide its order dated 4.2.1997, accepted the appeal qua share of appellant Gurbax Singh (defendant No.1). The share of Prittam Singh, who had pre-deceased Ganga Ram was given to the plaintiff and defendants No.2 and 3 in equal share, which order was challenged by the plaintiffs before the learned Divisional Commissioner. Ganga Ram, during his life time has executed a valid Will in presence of the witnesses. The learned Collector has wrongly sanctioned the mutation qua share of Pritam Singh in favour of the plaintiffs and proforma defendant No.2. After the marriage of daughters of Ganga Ram, Gurbax Singh and his brother Pritam Singh, was looking after Ganga Ram and his wife and he was happy with their service and executed a Will of his entire property in the name of Gurbax Singh and Prittam Singh (deceased). The plaintiffs have rightly been ignored since they have never served their father during his life time and were not taking care of him and the property in dispute is stated to be in possession of defendant No.1, during life time of Ganga Ram.

4. The learned trial Court framed following issues:

"1. Whether the plaintiffs and proforma defendants are owners-in-possession of the suit land, as alleged ? OPP.

2. Whether the order passed by SDO, Sadar, dated 5.5.1994 and 4.2.1997 are wrong, void and liable to be set aside, as alleged ? OPP.

3. Whether the Will alleged to have been executed by Ganga Ram, is the result of fraud ? If so its effect ? OPP.

4. Whether the plaintiffs are entitled to the relief of possession of the suit land in the alternative, as alleged ? OPP.

5. Whether the suit is not maintainable in the present form ? OPD.

6. Whether this Court has no jurisdiction to entertain the present suit ? OPD.

7. Whether the act and conduct of the plaintiffs are bars them to file the present suit, as alleged ? OPD

8. Whether the suit is bad for non-joinder and mis-joinder of necessary parties, as alleged ? OPD.

9. Whether the plaintiffs have no cause of action and locus standi to file the present suit ? OPD.

10. Whether the suit has not been properly valued for the purpose of Court fee and jurisdiction ? OPD.

11. Whether deceased Ganga Ram had executed a registered Will on 5.2.1986 voluntarily and his property is liable to be succeed on the basis of Will, as alleged ? OPD.

12. Whether the defendant No.1 is in possession of the entire suit land on the basis of Will ? If so its effect ? OPD.

13. Relief."

5. The learned trial Court after deciding Issue Nos.1 to 4 in favour of the plaintiffs, Issue Nos.5 to 12 against the defendants, decreed the suit.

6. Feeling aggrieved thereby the plaintiff maintained first appeal before the learned District Judge, Bilaspur, assailing the findings of learned Court below being against the law and without appreciating the evidence and pleading of the parties to its true perspective. However, the learned Appellate Court below affirmed the findings of the learned trial Court and dismissed the appeal. Now, the appellant has maintained the present Regular Second Appeal, which was admitted on the following questions of law :

"1. Whether the judgment/decree passed by the learned Courts below are the result of mis-reading as well as misinterpretation of oral as well as documentary evidence placed on record especially Ex.D-1, Ex.D-2 and Ex.D-3 ?

2. Whether the learned Courts below are right in rejecting the registered Will No.13 dated 5.2.1986 Ex.DW1/A, which is duly executed by deceased Ganga Ram during his life time ?

3. Whether the learned Courts below are right in passing the judgment and decree of permanent prohibitory injunction in favour of the plaintiffs since there is no issue of permanent prohibitory injunction has been framed ?"

7. Learned counsel appearing on behalf of the appellant has argued that the Will was duly registered and executant died after eight years of the execution of Will. He has further argued that learned lower Appellate Court below has not applied the law correctly with regard to proving of the Will and learned lower Appellate Court below has come to the wrong conclusion, so

in the interest of justice appeal may be allowed. On the other hand, learned counsel appearing on behalf of the respondent has argued that the Will was not proved by the plaintiff, in accordance with law, as the Will was forged document, so the impugned judgment and decree passed by the learned lower Appellate Court below needs no interference.

8. In rebuttal, learned counsel appearing on behalf of the appellant has argued that the Will was registered document and it was duly registered at Swarghat. He has further argued that attesting witnesses and the scribe has duly proved the execution of the Will and there was no suspicious circumstances surrounding the Will.

9. To appreciate the arguments of learned counsel appearing on behalf of the parties, I have gone through the entire record in detail.

10. At the very outset, the pedigree table of Ganga Ram, is as under :

PEDIGREE TABLE

Bahadur

|

Pohloo

|

Ganga Ram Geetto (wife)

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(Daughters of Ganga Ram)

Kaushlya Devi , plaintiff No.1 w/o Joginder Singh	Surti, plaintiff No.2 w/o Chet Ram	Sikander Kaur, proforma defendant No.2 w/o Gurbaksh Singh	Sagar Kaur, proforma defendant No.3 w/o Preetam Singh died on 30.10.1989.

Meaning thereby Ganga Ram was having only four daughters and no son. He executed a Will in favour of the husbands of his two daughters. These two son-in-laws in favour of whom the alleged Will is executed by Ganga Ram are real brothers. Thus, it is clear that one of the requirement of due execution of the Will is its attestation by two witnesses. Section 68 of Indian Evidence Act speaks as to how a document required by law to be attested can be proved. On combined reading of Section 63 of the Succession At, 1925 with Section 68 of the Evidence Act, it appears that a person propounding the Will has to prove that the Will was duly executed and that can not be done by simply proving the signature of the testator on the Will but must also prove that signature were also made properly as required by clause (c) of Section 63 of the Indian Succession Act. The onus of proving the Will is on the propounder and in the absence of suspicion circumstance surrounding to the execution of Will, proof of testamentary capacity and the signature of testator as required by law is sufficient to discharge the onus. However, when there are suspicious circumstances, the onus is always on the propounder to explain them to the satisfaction of the Court before the Court accept the Will as genuine. Where circumstance given rise to doubt, it is for the propounder to satisfy the conscious of the Court. These suspicious circumstances may be as to the genuineness of the signatures of the testator, condition of the testator's mind depositions made in the Will may appear to be un-natural, improvable or unfair in the light of relevant circumstances or there might be every indication in the Will to show or the Will may otherwise indicate that the said deposition may not be the result of testator's free will and mind. In such a case, the Courts would naturally expect that all legitimate suspicious should be completely removed before the document is accepted is the last Will of the testator. The presence of beneficiary is also one of suspicious circumstances. It is well settled law the Will cannot be set aside only because the beneficiary has taken active part of the execution of Will.

The Will Ex.DW1/A was executed on 3.2.1986 and registered on 5.2.1986 and Ganga Ram died on 4.3.1994. Gurbax Singh (defendant No.1) while appearing as DW-2 on 25.9.2000. Similarly, his two other attesting witnesses Ram Singh and Hussan Singh had appeared as DW-3 and DW-4 on 5.10.2000 i.e. after more than 14 years from the execution of Will Ex.DW1/A. DW-1 Onkar Chand Joshi, Registration Clerk, was also examined after 14 years. In such circumstances, it was not expected out of these witnesses that they would have remembered each and every detail in respect of date, time and manner about the execution and registration of Will in question. Their statements have to be appreciated in the light of the fact that human memory can reasonably fail after such a long period. The Will Ex.DW1/A Ganga Ram bequeathed his movable and immovable property in favour of Gurbax Singh (defendant No.1) and Prittam Singh. Smt. Geeto Devi wife of Ganga Ram testator shall be entitled to her maintenance during her life time. Therefore, according to the Will, Gurbax Singh and Prittam Singh were entitled to succeed said Ganga Ram on his death in exclusion of his daughters and wife. But on the death of Ganga Ram in the year 1994, all four daughters of Ganga Ram i.e. plaintiffs and proforma defendants No.2 and 3, have also inherited Ganga Ram in equal share. This shows that Gurbax Singh had not produced the said Will Ex.DW1/A before Revenue Authorities nor sought the attestation of mutation qua the suit land in his favour in exclusion to the daughters of Ganga Ram. It is not disputed that at the time of execution of Will dated 3.2.1986, Smt. Geeto Devi wife of Ganga Ram was alive and his four daughters were very much there. There is no iota of evidence or even suggestion if Ganga Ram had any ill-will or strained relations with his wife Geeto Devi and his four daughters. Ganga Ram had equal love and affection for his daughters and wife, therefore, it does not sound in the analyzing mind why said Ganga Ram had preferred to disinherit his wife and daughters from his property in preference to his two sons-in-law Gurbax Singh and Prittam Singh. Ganga Ram had no male child and had suffered a decree of `8,000/- from the learned Court below and had to pay rupees 6-7 thousands which he borrowed from money lender. Ganga Ram had executed the Will Ex.DW1/A in favour of his sons-in-law, is not convincing because of said fact which has not been mentioned by Gurbax Singh in his statement nor pleaded in the written statement. Gurbax Singh has taken an active part in the execution of the Will, which has confined a substantial benefit to him and the propounder himself has called the attesting witnesses. The propounder is required to remove the doubt by clear and satisfactory evidence. Onkar Chand Joshi, Registration Clerk, while appearing as DW-1, has testified the original Will Ex.DW1/A and has produced the copy of original Will. However, he has deposed that copy of Will is not in his hand and is unable to explain what has been written therein. According to him, the Will was scribed on 3.2.1986, but is unable to tell as to whether this Will was presented before the Sub Registrar. Even the witnesses will not personally know to him and he has not been able to identify the signature of the Sub Registrar over the Will, since he has never worked with him. DW-2 Gurbax Singh has deposed that plaintiffs and proforma defendants are real sisters. Prittam Singh was his real brother and was husband of defendant No.2 and all sisters are married. According to him, Ganga Ram was his father-in-law and was resident of Village Jhajar and had no male issue. He has stated that he alongwith Prittam Singh rendering services to his father-in-law and the plaintiffs were residing at the house of their husbands. The Will Ex.DW1/A was executed in favour of Gurbax Singh and his brother Prittam Singh. Accordingly, the Will was scribed at Bilaspur and got registered the same at Swarghat. After the death of Ganga Ram, his last rites were performed by Gurbax Singh and the suit land is stated to be in possession of Gurbax Singh. In his cross-examination, he has stated that at the time of execution of will, he alongwith Prittam Singh, Ram Singh, Hussan Singh and Ganga Ram, came to Bilaspur and has brought the attesting witnesses to Bilaspur, who belonged to his village. Prittam Singh has identified Ganga Ram and according to Will, half of the property was given to Prittam Singh. It was Gurbax Singh who paid expenses of the Will amounting to `500/-. At the time of registration of Will, both the attesting witnesses were also present and they appeared before the Sub Registrar where the Will was scribed. He has also admitted that the Will Ex.DW1/A was never produced before any Court. He has denied that a forged Will has been executed. At the same point of time, DW-3 Ram Singh attesting witness has admitted that Gurbax Singh and Prittam Singh are from his village. He has further stated that entire expenses of the execution of Will were borne out

by Ganga Ram. He has further stated that Will was presented for registration on second day, but the registration shows that it was presented for registration the third day. Statement of DW-2 also belies that when he says that Ram Singh and Hussan Singh were present alongwith Gurbax Singh, but PWs says that Ram Singh and Hussan Singh were not present nor Gurbax Singh was present at the time of registration of Will. Further, plaintiff Surti Devi, while appearing as PW-1, has stated that Ganga Ram was owner-in-possession of the suit land and after his death, all four sisters have come in possession of the disputed land and mutation has also been sanctioned in their favour. The defendant wanted to take forcible possession on the plea that Ganga Ram had executed a valid Will in his favour. She has further stated that Ganga Ram had equal love and affection for all four sisters and during his life time her father has never executed any document, but the defendant on the basis of forged document wanted to take forcible possession. She has further stated that Prittam Singh one of the beneficiary under the Will had expired 3-4 years prior to the death of Ganga Ram and she has also filed copy of jamabandi Ex.P1 and death certificate Ex.P2 to Ex.P4 of Geeto Devi, Ganga Ram and Prittam Singh. In her cross-examination, she has admitted that Kaushlya Devi, Surti Devi, Sikander Kaur and Sagar Kaur are real sisters and they had no brother. She has denied that Sikander Kaur and Sagar Kaur were residing with her father. She has also denied that the last rites of Ganga Ram were performed by prforma defendants No.2 and 3. However, she has admitted that the mutation was challenged before the Collector. PW-2 Shadi Lal, has reiterated the stand taken by the plaintiff and has deposed that all four sisters are in possession of the suit land according to their share and Ganga Ram had equal love and affection for all his four daughters. In his cross-examination, he has denied that plaintiffs never looked after the suit land and proforma defendants No.2 and 3 are in possession of the suit land. Both the attesting witnesses are from village of Gurbax Singh and who took them from Village Tikkari of Tehsil Nalagarh District Solan to Bilaspur, for the purpose of execution of Will and had paid the expenses for executing the Will, which fact has been admitted by the attesting witnesses Ram Singh that it was Gurbax Singh who brought the witnesses to Bilaspur. It is absolutely necessary that the testator must have signed the Will in presence of the attestator or a testator must have personal acknowledgement of his signature in the presence of the attestator as regards attestation of the Will. Clause (c) Section 63 of the Indian Succession Act, requires that the Will shall be attested by at least two witnesses. The requirement is that each of the attesting witness must have seen the testator signing or affixing his thumb mark in the Will has received from the testator a personal acknowledgement of his signature or thumb mark on the Will. There is also an additional requirement that each of the attesting witness shall also sign the Will in presence of the testator. The scribe of the Will has not been examined by the defendant and one of the attesting witness Ram Singh (DW-3), has only identified the signature of Ganga Ram. He has nowhere stated that the testator Ganga Ram affixed his signature and this witness has appended his signature in presence of the testator. Perusal of the Will shows that only one signature of Ganga Ram was obtained on the Will and not six times. The remaining five signatures on the Will were obtained at the time of registration of the Will, when admittedly this witness was not present. Though he has stated otherwise and the entire expenditure for execution of Will was borne out by Ganga Ram, which is contrary to the statement of Gurbax Singh. Similarly, this witness has nowhere stated that Ganga Ram had signed the Will in the presence of attesting witnesses. In his cross-examination, he has stated that he cannot recognize the signature at point Mark 'X' and Mark 'X-6'. The alleged signatures of Ganga Ram and his statement is further falsified that Ganga Ram was identified by him before the Sub Registrar. Admittedly, Smt. Geeto Devi wife of Ganga Ram and his four daughters i.e. plaintiffs and proforma defendants No.2 and 3, were entitled to succeed the entire property of said Ganga Ram as Class-I heirs in absence of any Will. Smt. Geeto Devi wife of Ganga Ram and his four daughters had also good relations with Ganga Ram and were residing happily with him and his daughters coming to his house frequently and Ganga Ram had equal love and affection for his wife and all daughters but no provision has been made for the daughters in Will Ex.DW1/A. The fact that the witnesses were called by Gurbax Singh son-in-law of Ganga Ram and he had taken an active part in the execution of Will, thereby other daughters of Ganga Ram have been disinherited from succession without any rhyme or reason. Since, it was a strong

suspicious circumstance surrounded in the execution of Will, which remained unexplained coupled with the fact that Gurbax Singh took an active part in the execution of Will Ex.DW1/A in favour of the plaintiff and Prittam Singh, who is his brother clearly shows that the Will is not valid showing actual wish of deceased, therefore, it is not to be acted upon and has been rightly held by the learned Court below not to be a genuine document. Therefore, in the absence of any Will, all four daughters of Ganga Ram, being Class-I heirs are entitled to succeed to the estate of Ganga Ram in equal share. The plaintiffs and proforma defendants No.2 and 3 are held to be owner-in-possession of the suit land in equal share and defendant No.1 Gurbax Singh has no right, title or interest over the suit land. The defendant has been rightly restrained from interfering with the suit land in any manner since the daughters of deceased Ganga Ram i.e. plaintiffs and proforma defendants No.2 and 3 are held to be owners in possession of the suit land. In these circumstances, mutation No.1771 is held to be valid and binding on the parties and the order of learned Collector is held to be void and illegal.

11. From the above discussion, it is clear that the learned Appellate Court below has committed no illegality and infirmity in appreciating the evidence and pleadings of parties are appreciated by the learned Courts below to its true perspective and the documents are interpreted correctly, as per law. So, substantial question of law No.1, is answered holding that learned Courts below has appreciated oral as well as documentary evidence to its true perspective and Ex.D-1 to Ex.D-3 are correctly appreciated. Substantial question of law No.2, is decided accordingly, as the Will could not be proved by the beneficiary, the learned Courts below has rightly rejected the Will and it was not proved on record in accordance with law and on contrary the plaintiff has proved the Will to be a forged document, as the parties are in exclusive possession of their shares on the basis of mutation attested after the death of Ganga Ram in favour of all his four daughters. The learned Courts below have rightly granted the relief of Permanent Prohibitory Injunction in the facts and circumstances of the case. The parties were knowingly their case while leading evidence, so substantial question of law No.3, is decided accordingly holding the findings of the learned Courts below are as per law.

12. With these observations, the appeal of the appellant is without merit and deserves dismissal. However, in the peculiar facts and circumstances of this case, parties are left to bear their own cost (s). Pending application (s), if any shall also stands disposed of.

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

Hitesh Bisht and others ....Petitioners

Versus

State of H.P. ....Respondent

Cr.MMO No. 339 of 2016

Decided on: 19th April, 2017

Code of Criminal Procedure, 1973- Section 169- An FIR was registered for the commission of offences punishable under Sections 419, 420, 467, 468 read with Section 34 of I.P.C – the police filed a cancellation report- notice was issued to the complainant but complainant had died prior to issuance of the notice- notice was issued to general power of attorney- held that a general power of attorney had expired on the death of the complainant and general power of attorney could not have represented the complainant during the proceedings – order set aside.

(Para- 2 to 5)

For the petitioners: Ms. Yogita Dutt Sharma, Advocate.

For the respondent: Mr. Pramod Thakur, Addl. A.G.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)

In this petition, an interesting legal question that after the death of complainant, whether her general power of attorney, through whom the complaint was filed, can be associated in pending proceedings to cancel the FIR, has been brought to this Court for consideration and adjudication.

2. Deceased Vidyawati has made an application under Section 156(3) of the Code of Criminal Procedure against the petitioners herein for registration of case under Sections 419, 420, 467, 468 read with Section 34 of the Indian Penal Code against them. On the direction of learned Judicial Magistrate, FIR No. 101/2008 came to be registered against them. The investigation was conducted by the police, however, without any result as nothing tangible could be collected against the accused-petitioners, connecting them with the commission of the offence they allegedly committed. The investigating agency, as such, had filed the cancellation report, Annexure P-1 with the submissions that no case under Sections 419, 420, 467, 468 read with Section 34 of the Indian Penal Code is made out against the accused-petitioners. The FIR, as such, was sought to be cancelled.

3. Notice was issued to the complainant but without any result as she had expired on 13.06.2011 i.e. well before the issuance of same. The death certification is Annexure P-3.

4. Subsequently, learned Judicial Magistrate proceeded to issue notice against the accused-petitioners. They have put in appearance through Sh. Rajesh Sharma, Advocate on 30th August, 2013. The zimini order dated 30.08.2013, Annexure P-5 (Colly.) makes it crystal clear that the death certificate qua the death of Smt. Vidyawati was produced in the Court and the same was taken on record. After that, the cancellation report remained listed from time to time for consideration till 7.7.2014, on which day, instead of considering the cancellation report, resorted to issue notice to the general power of attorney of the complainant. Now her general power of attorney has put in appearance and filed objections to the cancellation report. It is the objections so filed are presently at the stage of consideration before learned trial Court.

5. If not shocking, it is painful to point out that there was no occasion for learned Judicial Magistrate to have issued notice to the general power of attorney of the complainant for the reason that the general power of attorney executed by the deceased complainant had ceased to exist on her death and could have not been acted upon. It is here the trial Court has erred legally and as such an approach on the part of learned trial Court is not at all legally unsustainable. On the death of the complainant and the same disclosed to the trial Court on 30.08.2013, further course in accordance with law should have been resorted to in the matter. The entire proceedings, particularly after 7.7.2014 having taken in the matter are vitiated, hence legally unsustainable for the reason that on the death of complainant, the general power of attorney could have not been associated nor his objections invited or entertained. Therefore, I set aside all the orders passed in the matter by learned trial Magistrate after 7.7.2014 being perverse and relegate the parties to learned trial Magistrate with a direction to learned Magistrate to proceed afresh in the matter in accordance with law from the stage when the factum of death of complainant was disclosed and the death certificate qua her date of death was produced by the petitioners herein. In view of the cancellation report was filed long back in the month of September, 2008, there shall be a direction to learned Magistrate to decide the matter at the earliest preferably within three months from today.

6. The parties through learned counsel representing them are directed to appear in the trial Court on 5th May, 2017. The record of trial Court be sent back forthwith so as to reach there well before the date fixed.

7. With the above observations, this petition is allowed and stands disposed of. Copy ***dasti***.

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

Mukesh Kumar ….Petitioner.
Versus
M/s Ansysco through its MD … Respondent.

CWP No. 1951 of 2012
Decided on: 19.4.2017.

Constitution of India, 1950- Article 226- An application was filed for placing on record the identity card and other documents to show that the status of the petitioner was not of a trainee but of a workman – the Labour Court did not pass any order on the application but non suited the petitioner on the ground that he was unable to prove his status as a workman - held that the Labour Court should have passed an order on the application and should not have non-suited the petitioner without considering his application- writ petition allowed and award of the Labour Court set aside- matter remanded with a direction to decide the same afresh after passing an order on the application. (Para-4 and 5)

For the petitioner. : Mr. V.D. Khidtta, Advocate.
For respondent. : Mr. Dushyant Dadwal, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J *(Oral)*

Heard. The principal grievance which has been raised by Mr. Khidtta learned counsel for the petitioner qua the award under challenge is that the said award is not sustainable in the eyes of law, as the learned Labour Court while passing the said award has failed to appreciate that there was a miscellaneous application filed by the petitioner/workman dated 4.9.2010 along with which certain documents were sought to be placed on record before the learned Labour Court to demonstrate that the engagement of present petitioner with respondent was not as a trainee, but as a workman, however learned Labour Court has neither discussed the application i.e. Annexure P-3 in the impugned award nor any separate order has been passed on the said application and non consideration of the same has caused grave prejudice to the petitioner.

2. Mr. Dadwal learned counsel appearing for the respondent has argued that the petitioner cannot be permitted to take this ground at this stage because neither any plea in this regard has been made in the writ petition nor this fact was urged or argued before the learned Labor Court.

3. I have heard learned counsel for the parties and have also gone through the records of the case well as the award passed by learned Labour Court.

4. A perusal of the record of learned Labour Court demonstrates that there is in fact on record a miscellaneous application dated 4.9.2010 filed under Section 151 of the CPC along with which documents have also been appended by the workman with the prayer that documents appended with the same be taken on record to demonstrate that he was *inter alia* issued identity card by the respondent/employer from which it can be inferred that the status of the present petitioner was not of a trainee but a workman.

5. Be that as it may, the fact of the matter remains that neither there is any order passed on the said application by learned Labour Court as to whether said application was allowed or rejected by it nor the same has been taken into consideration while passing the impugned award by the learned Labour Court. In view of the fact that the present petitioner/workman has been non suited by learned Labour Court solely on the ground that he

has not been able to prove that he was in fact engaged as a workman and further learned Labor Court has agreed with the contention of respondent/employer that the status of present petitioner was only that of a trainee, the documents appended along with the application were of significance as far as the adjudication of the reference before the learned Labour Court was concerned. Further there is no merit in the contention of Mr. Dadwal that the said issue has not been raised in the writ petition because it is evident from the averments made in the writ petition that the petitioner has raised the grievance of learned Labour Court not considering application filed by him before it under Section 151 of the CPC to place on record certain documents to prove his case.

In this view of the matter, the present writ petition is allowed. Impugned award passed by learned Labour Court dated 4.1.2012 in Reference No. 38 of 2007 is quashed and set aside and the matter is remanded back to the learned Labour Court with a direction to decide the same afresh after passing appropriate order on the miscellaneous application so filed under Section 151 of Civil Procedure Code by affording opportunity to rebut the same to the employee. It is clarified that this Court has not made any observation on the merits of the case. The application so filed by petitioner shall be decided by learned Labour Court on its merit and after adjudication on the same, learned Labour Court shall proceed to decide the main reference on the basis of material on record. Parties through their learned counsel are directed to appear before learned Labour Court on 22.5.2017. As the reference petition pertains to the year 2007, this Court hopes and expects that the same shall be decided by learned Labour Court as expeditiously as possible and hopefully before **31.12.2017**.

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

M/s Isotech Electrical & Civil Projects (P) Ltd. and another …Appellants.
Versus
M/s Sturdy Industries Ltd. …Respondent.

OSA No. 5 of 2016
Date of order: 20.04.2017

Code of Civil Procedure, 1908- Order 43 Rule 1(d)- An ex-parte decree was passed against the appellant – they filed an application for setting aside ex-parte decree along with an application for condonation of delay – the application for condonation of delay was dismissed – aggrieved from the order, present appeal was filed – it was contended that appeal is not maintainable- held that an appeal lies against the order dismissing the application for condonation of delay- objection overruled and appeal ordered to be listed for arguments. (Para-3 to 8)

Cases referred:
Union of India versus Nek Ram Sharma, 2004 (1) JKJ 280
Shyam Sunder Sarma versus Pannalal Jaiswal and others, (2005) 1 Supreme Court Cases 436

For the appellants: Mr. R.K. Bawa, Senior Advocate, with Mr. Vijay Chaudhary, Advocate.
For the respondent: Mr. Dushyant Dadwal, Advocate.

The following judgment of the Court was delivered:

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

Mr. Dushyant Dadwal, learned counsel for the respondent, argued that the appeal is not maintainable for the reason that vide impugned judgment, limitation petition under

Section 5 of the Limitation Act came to be dismissed, is not appealable as per the mandate of Order XLIII of the Code of Civil Procedure (for short "CPC").

2. The argument, though attractive, is devoid of any force for the following reasons:

3. Appellants were facing a judgment/decree in ex-parte, constraining them to file an application under Order IX Rule 13 CPC alongwith an application for condonation of delay. The learned Single Judge dismissed the limitation petition and consequently, the application under Order IX Rule 13 CPC was also dismissed.

4. The appellants have remedy available with them in terms of Order XLIII Rule 1 (d) CPC.

5. The High Court of Jammu & Kashmir in a case titled as **Union of India versus Nek Ram Sharma,** reported in **2004 (1) JKJ 280,** has laid down the same principle. It is apt to reproduce paras 6 and 11 of the judgment herein:

> *" 6. Now the question that becomes important is where an application has been filed and rejected whether the consequence will be the same or different. Section 5 cannot be read in isolation. It has to be read conjunctively with Section 3. Where application under Section 5 is not filed or where application has been filed and rejected the natural consequence would be the dismissal of appeal or application as provided under Section 3 of the Limitation Act. If the final out-come of the rejection of application under Section 5 is dismissal of application under Order 9 Rule 13 of Code of Civil Procedure and the order of dismissal is appealable under Order 43 CPC, there is no reason why such an order will not become appealable, merely because the Court has only rejected application under Section 5 of the Limitation Act.*
>
> *...............*
>
> *11. After considering the ratio of the judgments referred to above, I am of the opinion that an order rejecting the application under Section 5 of the Limitation Act or for that matter condonation under any other law merges with the order that may be ultimately passed in application or the appeal. The consequence of dismissal of condonation application is rejection of an application or the appeal as the case may be. Therefore, the out-come of such rejection is up-holding an order subject matter of appeal or the application. In the present case, rejection of application for condonation of delay has culminated into rejection application under Order 9 Rule 13 CPC. Admittedly an order rejecting application under Order 9 Rule 12 CPC is appealable under Order 43 (d). Thus, I am of the considered opinion that the order under appeal is appealable under Order 43 (d) Code of Civil Procedure. The appeal is accordingly admitted to hearing."*

6. A three Judge Bench of the Apex Court in the case titled as **Shyam Sunder Sarma versus Pannalal Jaiswal and others,** reported in **(2005) 1 Supreme Court Cases 436,** has dealt with the issue and held as under:

> *"8. The first question to be considered is whether an appeal accompanied by an application for condoning the delay in filing the appeal is an appeal in the eye of law, when the application for condoning the delay in filing the appeal is dismissed and consequently the appeal is dismissed as being time barred by limitation, in view of section 3 of the Limitation Act. There was conflict of views on this question before the high Courts. But the Privy Council in nagendra Nath Dey v. Suresh Chandra Dey held : (AIR p. 167)*
>
> > *"There is no definition of appeal in the Civil procedure Code, but their Lordships have no doubt that any application by a party to an appellate Court, asking it to set aside or revise a decision of a subordinate court, is an appeal within the ordinary acceptation of the*

term and that it is no less an appeal because it is irregular or incompetent."

8.1. These observations were referred to with approval by this Court in Raja Kulkarni v. State of Bombay.

9. The specific question involved, came to be considered by this Court in Mela Ram and Sons v. CIT. This Court held that an appeal presented out of time is an appeal and an order dismissing it as time barred is one passed in an appeal. This court referred to and followed the view taken by the Privy Council and by this Court in the two respective decisions above referred to. This Court quoted with approval the observations of Chagla C. J. in K. K. Porbunderwalla v. CIT (ITA p. 66) to the following effect: (SCR p. 176)

"Although the Appellate Assistant commissioner did not hear the appeal on merits and held that the appeal was barred by limitation his order was under Section 31 and the effect of that order was to confirm the assessment which had been made by the Income- tax Officer."

9.1. In Sheodan Singh v. Daryao Kunwar rendered by four learned judges of this court, one of the questions that arose was whether the dismissal of an appeal from a decree on the ground that the appeal was barred by limitation was a decision in the appeal. This Court held: (SCR pp 308 H-309 B)

"We are therefore of opinion that where a decision is given on the merits by the trial court and the matter is taken in appeal and the appeal is dismissed on some preliminary ground like limitation or default in printing, it must be held that such dismissal when it confirms the decision of the trial court on the merits, itself amounts to the appeal being heard and finally decided on the merits whatever may be the ground for dismissal of the appeal."

9.2. In Board of Revenue v. Raj Bros. Agencies this Court approved the decision of the Madras High Court which had applied the principle stated in Mela Ram and sons (supra).

10. The question was considered in extenso by a full bench of the Kerala High court in Thambi v. Mathew. Therein, after referring to the relevant decisions on the question it was held that an appeal presented out of time was nevertheless an appeal in the eye of law for all purposes and an order dismissing the appeal was a decree that could be the subject of a second appeal. It was also held that Rule 3-A of Order 41 introduced by Amendment Act 104 of 1976 to the Code, did not in any way affect that principle. An appeal registered under Rule 9 of Order 41 of the Code had to be disposed of according to law and a dismissal of an appeal for the reason of delay in its presentation, after the dismissal of an application for condoning the delay, is in substance and effect a confirmation of the decree appealed against. Thus, the position that emerges on a survey of the authorities is that an appeal filed along with an application for condoning the delay in filing that appeal when dismissed on the refusal to condone the delay is nevertheless a decision in the appeal."

7. A learned Single Judge of this Court in **CMPMO No. 271 of 2015,** titled as **Jyotsna Industrial Training Central versus Delhi Press Prakashan Pvt. Ltd.,** decided on 8th January, 2016, has also laid down the same proposition of law.

8. Having said so, it is held that the appeal is maintainable.

9. The appeal stands already admitted on 28th September, 2016. List for final hearing on **5th July, 2017.**

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

CWP No.3330 of 2016 a/w CWPs No.21, 322 and 324 of 2017.
Judgment reserved on: 11.04.2017.
Date of decision: 22 April, 2017.

1. CWP No.3330 of 2016.

Himachal Road Transport Corporation and another …..Petitioners.
Versus
Bhupinder Singh and another …..Respondents.

For the Petitioners : Mr.Shrawan Dogra, Senior Advocate with Mr.Sunil Mohan Goel, Advocate, for petitioner No.1.
Mr.Shrawan Dogra, Advocate General with Mr.Anup Rattan, Mr.Romesh Verma, Additional Advocate Generals and Mr.J.K.Verma, Deputy Advocate General, for petitioner No.2.
For the Respondents : Mr.B.C.Negi, Senior Advocate with Mr.Balwant Singh Thakur, Advocate.

2. CWP No.21 of 2017.

Himachal Road Transport Corporation and another . ….Petitioners.
Versus
Chiranji Lal and others …..Respondents.

For the Petitioners : Mr.Shrawan Dogra, Senior Advocate with Mr.Sunil Mohan Goel, Advocate.
For the Respondents: Mr.Janesh Mahajan, Advocate, for respondents No.1 to 5, 7 to 9, 12 to 18, 20, 22 to 26 and 28 to 31.
Mr.R.L.Chaudhary, Advocate, for respondent No.19.
Nemo for other respondents.

3. CWP No.322 of 2017.

Himachal Road Transport Corporation and another ….Petitioners.
Versus
Balinder Singh …..Respondent.

For the Petitioners : Mr.Shrawan Dogra, Senior Advocate with Mr.Sunil Mohan Goel, Advocate.
For the Respondent : Ms.Komal Chaudhary, Advocate.

4. CWP No.324 of 2017.

Himachal Road Transport Corporation and another …..Petitioners.
Versus
Rakesh Kumar and others …..Respondents.

For the Petitioners : Mr.Shrawan Dogra, Senior Advocate with Mr.Sunil Mohan Goel, Advocate.
For the Respondents : Mr.Rakesh Kumar Dogra, Advocate.

Case referred:

Shashi Bhushan versus State of Himachal Pradesh and others, I L R 2015 (V) HP 1

Constitution of India, 1950- Article 226- A process for filling 500 temporary posts of Transport Multipurpose Assistantswas initiated – it was contended that notification and rules are in violation of Section 45 of Road Transport Corporation Act, 1950- the applications were allowed and the process was held to be bad – aggrieved from the order, the present writ petition has been filed – held that preliminary objections were raised, which went to the root of the case- the locus standi of the applicants was challenged – no discussion was made regarding the objection- the writ petition allowed, order of the Tribunal set aside and matter remanded to the Tribunal for disposal in accordance with law. (Para- 7 to 9)

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

Since common question of law and facts arise for consideration, therefore, all these petitions were taken up together and are being disposed of by a common judgment.

2. The respondents are the original applicants, who approached the Himachal Pradesh State Administrative Tribunal (for short "Tribunal") claiming themselves to be aggrieved by the process initiated by the respondents (petitioners herein) for filling up 500 temporary posts of 'Transport Multipurpose Assistants' which posts according to them were that of 'Conductors' and they having been imparted training under the Skilled Development Scheme under the aegis of the State Government, therefore, had a preferential right of appointment.

3. The main ground of challenge before the learned Tribunal was that firstly notification dated 30.08.2014 and thereafter the rules issued thereunder were in contravention of Section 45 of the Road Transport Corporation Act, 1950 (for short "Act") inasmuch as the same have been framed without previous sanction of the State Government and secondly that the rules also contravened the Himachal Road Transport Corporation Class-I, II, III and IV Services (Recruitment, Promotion and Certain Conditions of Service Regulations), 1996 vis-à-vis the posts of conductors and lastly the respondents claimed a preferential right of appointment on the basis of their having undergone the course of 'Passenger Service Delivery Skill Development Training' and on the strength of their having already performed duties as conductors.

4. The petitioners, who were respondents, before the learned Tribunal filed their reply wherein in the preliminary objections/submissions, it had been averred that the Board of Directors in its meeting dated 07.11.2015 had decided to recruit 500 Transport Multipurpose Assistants and 300 drivers and these posts were to be filled up in accordance with the notification issued by it on 30.08.2014 in exercise of powers conferred under Section 45 of the Act. The posts were to be filled up in accordance with the rules known as 'Himachal Road Transport Corporation (Appointment and Condition of Service of Transport Multipurpose Assistant) Rules, 2014'. It was further averred that the respondents had no locus standi to file and maintain the original applications that too after some of them had unsuccessfully participated in the selection process. It was also averred that the original applications were otherwise not maintainable as some of the original applicants had only sought quashing of the notification dated 30.05.2016 without challenging the notification dated 30.08.2014 and rules of recruitment and, therefore, the petitions ought to have been dismissed. Lastly, the petitioners raised an additional plea and questioned the locus standi of the respondents in the original applications on the ground that some of them were total strangers to the selection process as they had not participated in the said process and, therefore, the original applications which were infact in the nature of public interest litigation were not maintainable at their instance before the learned Tribunal.

5. The learned Tribunal allowed all the original applications by concluding that the impugned notification dated 30.08.2014 and the rules framed thereunder lacked previous sanction of the State Government as was mandatorily required under Section 45 of the Act and, therefore, could not be sustained especially in light of the judgment of this Bench in ***CWP***

No.9492 of 2014 titled ***Shashi Bhushan*** *versus* ***State of Himachal Pradesh and others***, decided on 02.09.2015.

6. The petitioners have assailed the judgment passed by the learned Tribunal on the ground that before proceeding to determine the original applications on merits, it was incumbent upon the learned Tribunal to have atleast considered the preliminary objections raised by it, more particularly, when the same went to the root of the case inasmuch as it questioned the very locus standi of the respondents to file the original applications. In addition to that the judgment has also been assailed on merits on number of grounds taken in the memo of petitions. Whereas, learned counsel for the respondents would contend that the issue in question as raised in these petitions is no longer *res integra* in view of the decision rendered by this Bench in ***Shashi Bhushan's case*** (supra).

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

7. It is not in dispute that the petitioners in addition to contesting the original applications on merits had raised certain preliminary objections/submissions which were fundamental in character and went to the root of the case. The petitioners had questioned the very locus standi of the respondents to file and maintain the original applications at the instance of those applicants, who had participated in the selection process, but had failed to make a grade, on the grounds like acquiescence, waiver etc. In addition thereto in cases where the respondents had not even participated in the selection process, the petitioners had specifically questioned their locus standi on the ground that the original applications filed by them were in the nature of public interest litigation in service matters which as per settled law were not maintainable.

8. Adverting to the judgment passed by the learned Tribunal, one would notice that though the preliminary objections raised by the petitioners have been quoted in para-6 thereof, but strangely enough, there is no discussion whatsoever on any one of these preliminary objections. Notably, it is not the case of the respondents herein that the petitioners had not pressed these objections or had given up the same. If that be so, then obviously, it was incumbent upon the learned Tribunal to have first considered these preliminary objections and only after coming to a firm conclusion that the original applications at the instance of the respondents were maintainable could it have proceeded to determine these applications on merits.

9. Therefore, in the given circumstances, the relative merits of the case need not be gone into as the judgment passed by the learned Tribunal cannot be sustained and is accordingly set aside. The matter is remanded back to the learned Tribunal for decision afresh. Since, the matter is with regard to recruitment, it is expected that the learned Tribunal shall proceed to dispose of the original applications as expeditiously as possible and preferably by **31st May, 2017**.

10. However, before parting, it is once again made clear that we have not expressed any opinion on the merits of the case, lest it causes prejudice to any of the parties.

11. Accordingly, the petitions are disposed of in the aforesaid terms, leaving the parties to bear their own costs. All pending applications stand disposed of. The Registry is directed to place a copy of this judgment on the files of connected matters.

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

M.C. Shimla. ....Appellant

Versus

Sh. Mathu Ram and Another. ...Respondents

RSA No. 59 of 2008
Reserved on : 18.4.2017
Date of Decision: 22.4.2017

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit for permanent prohibitory injunction for restraining the defendant from taking away timber or any other part of the deodar tree felled from his land – the suit was dismissed by the Trial Court- an appeal was preferred, which was allowed and the suit was decreed – held in second appeal that the trees were found to be standing on the land owned by the plaintiff in demarcation- plaintiff had filed an application for permission to fell the trees apprehending danger to his life and property- trees were felled by the defendant - however, this would not give ownership to the defendants - a notification was issued for handing over the trees to the Forest Corporation- however, this notification will apply to the trees owned by the defendant and not to the trees standing on the private land- the Appellate Court had rightly passed the judgment- appeal dismissed.(Para-9 to 22)

Cases referred:

Anvar P.V. Vs. P.K. Basheer and others (2014) 10 SCC 473
Manager, Reserve Bank of India, Bangalore Vs. S. Mani and others (2005) 5 SCC 100
Laxmibai and another versus Bhagwantbuva and others (2013) 4 Supreme Court Cases 97

For the Appellant: Mr.Harminder Chandel, Advocate.
For the Respondents: Mr.Y.P. Sood, Advocate, for respondent No. 1.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge

Respondent No. 1 in present appeal (herein after referred to be as plaintiff) has filed a civil suit against appellant Municipal Corporation, Shimla and proforma respondent No. 2 Divisional Forest Officer, Forest Division Shimla (herein after referred to be as defendants/defendants No. 1 and 2) seeking permanent prohibitory injunction restraining defendants from taking away timber or any part of converted from deodar tree felled illegally from his land comprised in Khasra No. 1164 situated in Mauja Khalini Shimla. The suit was dismissed by the trial Court however, in appeal, learned District Judge decreed the suit with costs by passing a decree for permanent prohibitory injunction restraining defendants from removing wood from the suit land either themselves or through their agents.

2. In present appeal, defendant No. 1, Municipal Corporation, Shimla assailed judgment and decree passed by learned District Judge (Forest), Shimla. Appeal was admitted on following substantial questions of law:-

> *"1. Whether after taking over the management of Divisional Forest Office of the Municipal Corporation by the H.P. State Govt. vide Notification dated18.4.2006, the impugned judgment and decree could legally be passed?*
>
> *2. Whether decree for permanent prohibitory injunction can be passed without there being positive finding regarding possession of the suit property?"*

3. Plaintiff is owner in possession of land comprised in Khasra No. 1164 situated in Mauja Khalini, District Shimla, H.P. as recorded in Intkhab Jamabandi Missal Haquit for the year 1999-2000 (Ex. PW-1/A). On 20.12.2000 he submitted an application (Ex. PW-1/B) to defendant No. 2 for felling permission of two dried deodar trees situated in his land which were endangering life and property of plaintiff and others. Defendant No. 2 vide letter dated 3.3.2001 (Ex. PW-1/C), informed plaintiff that trees in question were in forest No. 28 and had been duly marked by the department and plaintiff was directed to get the spot demarcated through revenue officers on any working day to clarify the position on spot. On application of plaintiff for demarcation, PW-2 Krishan Lal Kanungo carried out demarcation on the spot in presence of DW-1 Mela Ram, Deputy Ranger of Municipal Corporation, Shimla and found the trees in question in land comprised in Khasra No. 1164, owned and possessed by plaintiff. He submitted his demarcation report dated 27.3.2001 (Ex. PW-2/A). However, defendants did not accept the said report for the reason that PW-2 Krishan Lal Kanungo was not competent to demarcate the land in question, as there was a boundary dispute about land owned by Government.

4. Plaintiff was out of station from 1.8.2002 to 12.8.2002 and during that period defendants felled trees in question, which were noticed by plaintiff on 13.8.2002 on his return, whereupon plaintiff filed present suit for permanent prohibitory injunction against defendants for restraining them to remove the timber from the spot. On 19.8.2002, timber of trees was converted into logs in presence of plaintiff and list was prepared.

5. During pendency of appeal, on application dated 8.10.2003, submitted by defendants, demarcation of land in question was again carried out by Assistant Collector 1st Grade, Shimla in presence of plaintiff, Sh. Laiq Ram, Range Officer and DW-2 Sh. Mela Ram Deputy Ranger, representatives of defendants. Report of this demarcation is Ex. PX, according to which trees in question were found inside Khasra No. 1164 owned and possessed by plaintiff. Satisfaction of representatives of defendants and also that of plaintiff Mathu Ram was also recorded in the said report. This demarcation report was not questioned by parties at any point of time.

6. Defendants disputed ownership of trees by claiming those trees in forest area and disputing demarcation report Ex. PW-2/A for want of competence of PW-2 Krishan Lal Kanungo to demarcate the land abutting to Government land and contended that demarcation was required to be carried out by Tehsildar or Naib Tehsildar and it was also claimed in written statement that timber in question was in safe custody of Forest Corporation and on 19.8.2002 at the time of conversion of trees in question, a list of total converted timber was prepared in presence of plaintiff on the spot.

7. During pendency of appeal before learned District Judge, defendants produced a copy of notification dated 28.4.2006, whereby control of forest present within jurisdiction of Municipal Corporation, Shimla was resumed by the State of Himachal Pradesh. On the basis of this notification, defendants claimed that after taking over management of forests vide this notification learned District Judge would not have passed impugned judgment and decree against defendants.

8. Notification dated 28.4.2006 has not been proved on record in accordance with law. Even if judicial notice of this notification is taken, then also it relates to resumption of control of forests from Municipal Corporations to the Government of Himachal Pradesh, whereas in present case issue involved is that whether defendants are entitled for taking timber of the trees felled by Municipal Corporation after receiving application of plaintiff which were found in land owned and possessed by plaintiff.

9. Ownership of land and trees is concerned, that stands proved to be that of plaintiff, as in demarcation conducted by Assistant Collector 1st Grade, Shimla, on request of defendants, it has specifically reported that trees in question were found in the land belonging to plaintiff. From evidence on record, it stands proved that Khasra No. 1164 is owned and

possessed by plaintiff and trees in question were standing on the said land, which were felled by defendants in the month of August, 2002 and converted into timbers.

10. The suit of plaintiff is for restraining defendants from taking away timber from his land on the basis of ownership of trees belonging to his land. There is nothing on record to show that management of private land or trees standing thereon have also been resumed by Government. In present case no tree or land of forest is involved. Therefore, issuance of notification dated 18.4.2006 has no effect on the present lis. Consequently, substantial question No. 1 is decided accordingly.

11. Trees in question were in the land owned and possessed by plaintiff. Plaintiff had filed an application for permission of felling these trees apprehending danger for life and property from those trees. Those trees were felled by defendants, but claiming right over them by stating that these trees were standing in forest land. However, the stand of defendants was shattered by demarcation report Ex. PA, which was accepted and not assailed by defendants. DW-1 in his statement in the Court has admitted the said demarcation was conducted by competent authority and as per said demarcation trees in dispute were found belonging to plaintiff. Therefore, plaintiff's ownership and possession upon trees stands duly established on record.

12. After felling of trees converted timber was also lying in the land of plaintiff. In para 7 of plaint, plaintiff claimed that converted timber were lying on the spot. In written statement or in statement of DW-1, it was no where stated that converted timber was shifted from the spot. In reply to the said para, defendants have only stated that contents of para 7 were wrong and hence denied. In replication, corresponding para of the plaint was re-affirmed by plaintiff. In para 9 of plaint, plaintiff had stated that defendants were bent upon to take the timber for their own use and irreparable loss and injury was likely to be caused to plaintiff unless defendants are restrained. In para 9 of written statement, defendants replied that timbers were in safe custody of Forest Corporation and at the time of conversion of the said trees, defendants prepared a list of total converted timber in presence of plaintiff on the spot. In replication, plaintiff admitted the preparation of list on the spot, but claimed right on the extracted timber. In written statement, it was also not stated that converted timber was shifted or taken in possession by defendants or their agents. Defendants had examined only one witness DW-1 Sh. Mela Ram Deputy Ranger who remained completely silent on this issue. In cross-examination, he only stated that these trees were handed over to Forest Corporation in the year 2002. He is silent about physical possession of converted timber. Definitely, trees were handed over to Forest Department for felling on the spot, but they were removed and/or taken in possession from the spot after filing of the suit or at any point of time, has not come on record. There is no pleading, much less, evidence on record led by defendants to rebut the claim of plaintiff regarding possession of converted timber lying on spot.

13. Handing over tress by Municipal Corporation to Forest Corporation for felling on its behalf did not transfer ownership and possession of trees or timber in favour of Forest Corporation. Forest Corporation was acting on behalf of defendants and trees and land was belonging to plaintiff. Therefore, until extracted timber is removed from spot, the plaintiff had right to seek permanent prohibitory injunction against defendants and their agents. Forest Corporation was an agent of defendants, nothing more or nothing less.

14. Learned counsel for the defendants submits that in para 9 of written statement, it has been specifically stated that timber in question was in safe custody of Forest Corporation, which is sufficient to show that possession of timber is with the Forest Corporation. The claim of defendants was not admitted by plaintiff in replication, rather it was denied.

15. It is settled law that pleadings in absence of proof cannot be made basis for deciding an issue in favour of a party. Hon'ble Supreme Court in ***Anvar P.V. Vs. P.K. Basheer and others (2014) 10 SCC 473*** has held as under:-

"1. Construction by plaintiff, destruction by defendant. Construction by pleadings, proof by evidence; proof only by relevant and admissible evidence. Genuineness, veracity or reliability of the evidence is seen by the court only after the stage of relevancy and admissibility. These are some of the first principles of evidence. What is the nature and manner of admission of electronic records is one of the principal issues arising for consideration in this appeal."

16. In ***Manager, Reserve Bank of India, Bangalore Vs. S. Mani and others (2005) 5 SCC 100***, Hon'ble Supreme Court has observed as under:-

"19. Pleadings are no substitute for proof. No workman, thus, took an oath to state that they had worked for 240 days. No document in support of the said plea was produced. It is, therefore not correct to contend that the plea raised by the respondents herein that they had worked continuously for 240 days was deemed to have been admitted by applying the doctrine of non-traverse. In any event the contention of the respondents having been denied and disputed, it was obligatory on the part of the respondents to add new evidence. The contents raised in the letters of the union dated 30-5-1988 and 11-4-1990 containing statements to the effect that the workmen had been working continuously for 240 days might not have been replied to, but the same is of no effect as by reason thereof, the allegations made therein cannot be said to have been proved, particularly in view of the fact that the contents thereof were not proved by any witness. Only by reason of non-response to such letters, the contents thereof would not stand admitted. The Evidence Act does not say so."

17. In present case, plaintiff in his deposition in Court, specifically stated that timber, lying in his land, be handed over to him. In his cross-examination, no question has been put to him disputing his statement that timber was not laying in his land. Further DW-1 also remained silent about taking possession of converted timber from the spot. He only stated that trees, marked by Forest Corporation, were felled. What happened thereafter, he is silent. Nowhere, he denied possession of plaintiff or claimed possession of converted timber. Therefore, there is nothing on record to establish that possession of converted timber was handed over to Forest Corporation. Felling trees and conversion of timber on the spot, does not establish possession of timber in question with defendants particularly when trees and obviously timber thereof belonged to plaintiff and also lying on spot in the land owned and possessed by plaintiff. Therefore, averments made in para 9 of written statement, in absence of proof, are not sufficient to infer handing over of possession of timber to Forest Corporation.

18. On the contrary plaintiff, in his plaint claimed that timber was lying on the spot and also stated in his examination-in-chief in Court that he was entitled for timber lying in his land and the plaintiff was not questioned on this issue in cross-examination.

19. Dealing with effect of not cross-examining a witness on a particular point/circumstance, the Apex Court, after considering various judgments, in case ***Laxmibai and another versus Bhagwantbuva and others*** reported in ***(2013) 4 Supreme Court Cases 97***, has observed as under:

"40 Furthermore, there cannot be any dispute with respect to the settled legal proposition, that if a party wishes to raise any doubt as regards the correctness of the statement of a witness, the said witness must be given an opportunity to explain his statement by drawing his attention to that part of it, which has been objected to by the other party, as being untrue. Without this, it is not possible to impeach his credibility. Such a law has been advanced in view of the statutory provisions enshrined in Section 138 of the Evidence Act, 1872, which enable the opposite party to cross-examine a witness as regards information tendered in evidence by him during his initial examination in chief, and the scope of this provision stands enlarged by Section 146 of the Evidence Act, which permits a witness to be questioned, inter-alia, in order to test his veracity. Thereafter, the

unchallenged part of his evidence is to be relied upon, for the reason that it is impossible for the witness to explain or elaborate upon any doubts as regards the same, in the absence of questions put to him with respect to the circumstances which indicate that the version of events provided by him, is not fit to be believed, and the witness himself, is unworthy of credit. Thus, if a party intends to impeach a witness, he must provide adequate opportunity to the witness in the witness box, to give a full and proper explanation. The same is essential to ensure fair play and fairness in dealing with witnesses. (See: Khem Chand v. State of Himachal Pradesh, AIR 1994 SC 226; State of U.P. v. Nahar Singh (dead) & Ors., AIR 1998 SC 1328; Rajinder Pershad (Dead) by L.Rs. v. Darshana Devi (Smt.), AIR 2001 SC 3207; and Sunil Kumar & Anr. v. State of Rajasthan, AIR 2005 SC 1096)."

20. In instant case, pleading in plaint are duly supported by evidence in statement of plaintiff and not specifically denied in written statement and also not questioned in cross-examination. Therefore, possession of timber with plaintiff can safely be considered.

21. In view of above observation, plaintiff has proved his ownership and possession over the disputed timber and the defendants have failed to prove any right, title and interest thereupon. Ownership and possession of plaintiff over Khasra No. 1164 and trees standing there upon is undisputed, thus on the basis of evidence on record, converted timber of those trees lying on the spot in premises of plaintiff after felling of trees, unless contrary proved, is to be presumed in possession of plaintiff. Therefore, learned District Judge has not committed any mistake in passing impugned judgment and decree in favour of plaintiff.

22. In view of above discussion, present appeal fails and judgment and decree passed by learned District Judges for permanent prohibitory injunction restraining the defendants either themselves or through their agents from removing the timber in question from the land of the plaintiff is upheld and appeal is dismissed with costs.

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

State of Himachal Pradesh ….Appellant
Versus
Raj Kumar ….Respondent

Criminal Appeal No. 377 of 2015
Judgment reserved on: 29.03.2017
Date of Decision: 22.04.2017

Indian Penal Code, 1860- Section 498-A and 306- Deceased was married to the accused – the accused started harassing the deceased for not delivering a child and for not bringing sufficient dowry- a son was born but the harassment continued – the deceased committed suicide- the accused was tried and acquitted by the Trial Court- aggrieved from the order, present appeal has been filed- held in appeal that prosecution has to establishinstigation by the accused to commit suicide or conspiracy with others for the commission of the suicide- PW-2 and PW-3 did not support the prosecution version- testimonies of PW-1 and PW-8 are vague and there is no reference to the time, place and manner of harassment – the statements are not sufficient to prove the prosecution version- Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed.(Para-7 to 22)

Cases referred:

Raja and others Vs. State of Karnataka (2016) 10 SCC 506

Vipin Jaiswal Versus State of Andhra Pradesh, (2013) 3 SCC 684
Gurcharan Singh Versus State of Punjab, (2017) 1 SCC 433

For the appellant : Mr. V.S. Chauhan, Additional Advocate General, with Mr. Puneet Rajta, Deputy Advocate General.
For the accused : Mr. Yudhbir Singh Thakur, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge

Aggrieved by acquittal of respondent-accused vide judgment dated 23.04.2015, passed by the learned Additional Sessions Judge (1), Mandi District Mandi, H.P. Camp at Sunder Nagar in Sessions Trial No. 07 of 2012 in case FIR No. 64/2011 dated 13.05.2011, registered under Sections 498-A and 306 of the Indian Penal Code in Police Station Sundar Nagar Mandi, H.P., the State has preferred present appeal with prayer to set aside impugned judgment and to convict respondent-accused under aforesaid sections.

2. On 13.05.2011 at about 12.20 AM, police machinery was set in motion by PW-2 Lal Singh and PW Bansi Ram (not examined) through telephonic message to Police Station, Sunder Nagar, District Mandi informing that Meera Devi (deceased) wife of accused had expired in suspicious circumstances. The said information was recorded as rapat No. 5/A dated 13.05.2011 Ex.PW-6/A and PW-10 Inspector Amar Chand alongwith Police officials including PW-9 ASI Tarlok Chand rushed to the spot where PW-1 Lalman, brother of deceased, made a statement Ex. PW-1/A under Section 154 Cr.PC stating therein that his sister deceased Meera Devi was married to accused about 20 years back and accused had been maltreating his sister for not delivering a child and dowry. However, after about 18 years of marriage, deceased delivered a son but despite that accused continued beating his sister under influence of liquor and for want of gifts from parents of deceased and as and when, after interval of 6-8 months, deceased visited her parental house, she had disclosed to him that accused was not desisting from beating her. About 8-9 months ago, on knowing that accused had beaten deceased very badly, he had rushed to their house alongwith his relatives. On 12.05.2011, at about 11.19 PM, he was telephonically informed by Jeet Ram about death of deceased whereupon he alongwith his brother accompanying relatives reached village Challoni in a Jeep and found dead body of deceased lying in the courtyard. On inquiring about it, accused told him that deceased hanged herself with rope on door of newly under construction house and he had brought deceased from the spot to the courtyard. It is alleged by PW-1 Lalman in his statement that his sister was subjected to beating and harassment by accused after marriage and accused compelled deceased to die and she committed suicide because of harassment and beatings in the hands of accused.

3. Aforesaid statement Ex. PW-1/A was sent to Police Station as 'Ruka' and on receiving said ruka, PW-7 SI Madan Lal lodged FIR Ex. PW-7/A and recorded endorsement Ex. PW-7/B in this regard on the ruka Ex. PW-1/A. Dead Body of deceased was sent for postmortem to Government Hospital, Sunder Nagar. PW-4 Dr. Rafia Banu conducted postmortem of deceased and Viscera was also sent to State FSL, Junga. As per report from State FSL no alcohol/poison was detected in liver, spleen, stomach, kidney and large intestine of the deceased. As per postmortem report Ex. PW-4/A deceased died due to asphyxia as a result of hanging leading to cardio respiratory failure and death.

4. PW-9 ASI Trilok Chand recorded statements of some of witnesses, whereas, PW-10 Inspector Amar Chand conducted and completed rest of investigation.

5. On completion of investigation challan was presented in Court and the accused was charge-sheeted under Sections 498-A and 306 IPC. On completion of trial, accused stands acquitted.

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

7. Prosecution has examined 10 witnesses to prove its case. Out of them PW-1 Lalman brother of deceased, PW-2 Lal Singh Pradhan Gram Panchayat, PW-3 Banita Kumari, niece of the deceased and accused, PW-8 Gulaba Ram maternal uncle of deceased have been examined to prove harassment to deceased by accused leading her to commit suicide. Rest of witnesses is Doctor and police officials who remained associated in investigation to perform their respective formal duties.

8. PW-2 Lal Singh Pradhan, Gram Panchayat and PW-3 Banita Kumari were declared hostile for resiling from their earlier statements recorded under Section 161 Cr.PC and were subjected to cross-examination by learned Public Prosecutor. It is settled that statement of hostile witnesses is not to be brushed aside in toto and Court can consider evidence of hostile witness to corroborate other evidence on record. It is also clearly well settled that mere fact that a witness is declared hostile does not make him unreliable witness so as to exclude his evidence from consideration altogether but the said evidence remains admissible in the trial and there is no legal bar to base conviction or acquittal upon testimony of hostile witness if corroborated by other reliable evidence. The Hon'ble Supreme Court in case Raja and others Vs. **State of Karnataka (2016) 10 SCC 506** has held as under:-

> "32. *That the evidence of a hostile witness in all eventualities ought not stand effaced altogether and that the same can be accepted to the extent found dependable on a careful scrutiny was reiterated by this Court in Himanshu @ Chintu (supra) by drawing sustenance of the proposition amongst others from Khujii vs. State of M.P. (1991) 3 SCC 627 and Koli Lakhman Bhai Chanabhai vs. State of Gujarat (1999) 8 SCC 624. It was enounced that the evidence of a hostile witness remains admissible and is open for a Court to rely on the dependable part thereof as found acceptable and duly corroborated by other reliable evidence available on record."*

9. In examination-in-chief, PW-2 corroborated incident of suicide by deceased, telephonic information to police by him, investigation by police on the spot and taking rope in possession in his presence. Thereafter, he resiled from his statement recorded by police and during his cross-examination by Public Prosecutor he denied to have given any statement to the police stating therein that accused used to beat his wife after consuming liquor. Nothing with regard to harassing and beating deceased by accused could be extracted in his cross-examination.

10. PW-3 Banita Kumari in her cross-examination by Public Prosecutor, admitted making statement to police with regard to witnessing hanging body of the deceased with door of newly under construction house, lifting of dead body of deceased by accused. However she denied to have made statement regarding quarrel taken place between deceased and accused. She further stated that when they were staying with deceased and accused, no quarrel had taken place in their presence between couple and both of them used to live peacefully.

11. PW-1, Lalman in his deposition in Court, stated that accused used to beat his sister after consuming liquor and he was in habit of scolding her for dowry and whenever his sister used to visit his house after intervals of 6-8 months, she used to tell him that accused did not mend his ways and was in habit of beating her. He further stated that about 6 months prior to death of deceased, on receiving information that accused had beaten his sister, he and his brother alongwith his relatives went to accused's house to advise him whereupon accused admitted his fault of beating deceased under influence of liquor.

12. PW-8 Gulaba Ram who is maternal uncle of deceased, stated that both i.e. his niece (deceased) and accused usually quarrelled on the issue of dowry and accused was in habit of

beating deceased and deceased committed suicide on suffering maltreatment and harassment by accused.

13. On the basis of statements on record under Section 161 Cr.PC accused was charged under Sections 498-A and 306 IPC which 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 of either description for a term which may extend to ten years, and shall also be liable to fine".*

14. Section 306 IPC provides punishment /abetment to commit suicide. The abetment is defined under Section 107 IPC 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. Illustration A, a public officer, is authorized by a warrant from a Court of Justice to apprehend Z. B, knowing that fact and also that C is not Z, wilfully represents to A that C is Z, and thereby intentionally causes A to apprehend C. Here B abets by instigation the apprehension of C.*
>
> *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."*

15. To prove guilt under Section 498-A IPC, prosecution has to establish 'cruelty' on the part of accused for which deceased was subjected to, as defined in explanation (a) and (b) appended to this section, according to which there must be a willful conduct of accused of such a nature so as likely to drive the woman to commit suicide or to cause grave injury or endanger life or limb or health (whether mental or physical) of the woman and/or there must be harassment of woman for any unlawful demand from woman or any person related to her or on account of failure to meet such demand. General allegations of cruelty or harassment may not be sufficient to convict accused for want of specific particulars of such cruelty and harassment.

16. The Hon'ble Supreme Court in case Vipin Jaiswal Versus State of Andhra Pradesh, reported in **(2013) 3 SCC 684** has held as under:

"11. In any case, to hold an accused guilty of both the offences under Sections 304B and 498A, IPC, the prosecution is required to prove beyond reasonable doubt that the deceased was subjected to cruelty or harassment by the accused. From the evidence of the prosecution witnesses, and in particular PW1 and PW4, we find that they have made general allegations of harassment by the appellant towards the deceased and have not brought in evidence any specific acts of cruelty or harassment by the appellant on the deceased".

17. For conviction of accused under Section 306 IPC, it is to be established on record that accused instigated deceased to commit suicide or conspired by engaging with some one else for that purpose or intentionally aided deceased by illegal omission or commission to do that. To convict accused for abetment of suicide ingredients of Section 107 IPC are must to be proved against accused.

18. The Hon'ble Supreme Court in case Gurcharan Singh Versus State of Punjab, reported in **(2017) 1 SCC 433** has held as under**:**

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."

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 emphasized".*

19. In present case PW-2 and PW-3 desisted from supporting prosecution case and nothing incriminatory could be extracted in their evidence despite their cross examination by learned Public Prosecutor. Now statements of two witnesses i.e. PW-1 and PW-8 remains for consideration. Even if they are taken to be the gospel truth, there is only casual reference about beating of deceased and demand of dowry. They are not specific with respect to time, place and manner of harassment and demand of dowry by the accused. In their statement, there is no reference of willful conduct on the part of accused to drive deceased to commit suicide and also that of harassment for any unlawful demand or failure to fulfill such demand. There are only bald statements of PW-1 and PW-8 with regard to beatings and demand of dowry which are not sufficient to hold accused guilty for committing the offence under Sections 498-A and 306 IPC. There is nothing on record to say that accused instigated deceased to commit suicide or engaged with some one else for the said purpose or intentionally aided deceased to end her life.

20. It also emerges from statements of prosecution witnesses that marriage of deceased and accused had taken place about 23-24 years back and after 18 years of marriage, couple had begotten a son who was about 4 years old at the time of incident and the couple had celebrated birth of son which was also attended by PW-1 and PW-8 alongwith others. PW-1 alleged that accused was a contractor of apple orchard since last 20 years and he and accused were working together but on his refusal to work together, accused threatened to see him and that on account of behaviour of accused, deceased committed suicide. However, PW-8 also admitted that all expenses of hospital, during birth of child, were borne by accused. All these circumstances run counter to the allegations of harassment of deceased for want of dowry and render version of PW-1 and PW-8 doubtful.

21. On overall assessment of evidence on record, we are of considered opinion that prosecution has failed to prove essential ingredients for establishing guilt of accused under Sections 498-A as well as 306 IPC beyond reasonable doubt by leading a cogent, reliable and convincing evidence on record. It cannot be said that the learned trial court has not appreciated the evidence correctly and completely and acquittal of accused has resulted into travesty of justice or has caused mis-carriage of justice.

22. It is a settled principle of law that acquittal strengthens to presumption of innocence in favour of an accused. To dislodge the same, onus heavily lies upon the prosecution. Accused has advantage of being acquitted by the trial Court and appellant has not been able to make out a case for interference in acquittal of accused in present appeal.

23. In view of above discussion, the present appeal, being devoid of any merit, is dismissed, as also pending applications, if any. Bail bonds, if any, furnished by the accused are discharged. Records of the Court below be sent back immediately.

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

State of Himachal Pradesh ....Appellant

Versus

Subhkaran ....Respondent

Criminal Appeal No. 279 of 2014
Judgment reserved on :12.04.2017
Date of Decision : 22.04.2017

Indian Penal Code, 1860- Section 363, 366 and 376- Prosecutrix was returning from School – she was kidnapped by the accused with an intent to compel her to marry him- she was sexually assaulted against her will in the house of the uncle of the accused- police was informed- prosecutrix and accused were recovered – the accused was tried and acquitted by the Trial Court- aggrieved from the judgement, present appeal has been filed- held that prosecutrix was proved to be aged 16 years 11 months and 12 days on the date of incident – Medical Officer found the evidence of sexual intercourse – the prosecutrix had not complained to any person in the bus that she was being taken away forcibly– prosecutrix had a mobile phone but did not complain to any person – hence, her consent was proved – she had left the home voluntarily- the Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed.(Para-6 to 31)

Cases referred:

Laxmibai and another versus Bhagwantbuva and others, (2013) 4 SCC 97
Dehal Singh versus State of Himachal Pradesh, (2010) 9 SCC 85
Manu Sao versus State of Bihar, (2010) 12 SCC 310
Raja and others Vs. State of Karnataka (2016) 10 SCC 506

For the appellant	:	Mr. V.S. Chauhan, Additional Advocate General with Mr. Vikram Thakur and Mr. Puneet Rajta, Deputy Advocate Generals.
For the respondent	:	Mr. Sunny Dhatwalia, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge

State has preferred instant appeal against acquittal of respondent assailing judgment dated 22.04.2014, passed by the Additional Sessions Judge, Judge(II) Kangra at Dharamshala District Kangra, H.P. in Sessions trial in RBT S.C. No. 80J/VII/13/12 dated 22.04.2014, in FIR No. 171/11, registered at Police Station Jawali District Kangra, H.P. under Sections 363,366 and 376 IPC.

2. As per prosecution case on 15.07.2011 at about 12.00 (Noon), 17 years old prosecutrix, student of 10th class, while coming back from the school after taking her examination, was kidnapped by respondent from her lawful guardianship from a place Trilokpur with intent to compel her to marry with him and thereafter during succeeding night she was sexually assaulted by respondent against her will and consent in the house of his uncle in village Ghera/Seri.

3. On 15.07.2011, police machinery was set in motion by PW-5 Jagdish Chand, father of prosecutrix, by lodging missing Report in Police Post Kotla at about 9.00 PM with request to search his daughter as she had not returned home from school after her examination, which was over at about 12.30 PM.

4. It is the case of prosecution that during day time prosecutrix had made a mobile phone call to her friend PW-14 Usha Devi and PW-5 father of prosecutrix while present in Police Post Kotla was conveyed about this by parents of PW-14 Usha Devi and thereafter PW-1 Sonu Kumar wastraced at Mecleod Ganj through his mobile, used by prosecutrix to call PW-14 Usha Devi. He led police party, PW-2 Rajinder Singh Guleria Pradhan, PW-5 Jagdish Chand and others to the house of respondent wherefrom, on information of father of respondent, Police Party and others traced respondent and prosecutrix sleeping in the house of his uncle in village Seri. Prosecutrix was handed over to her father and respondent was arrested and also respondent and prosecutrix were medically examined. During investigation, towel, bed sheets and white chuni of prosecutrix and her date of birth certificate were also taken in possession. After completion of investigation finding prima facie, involvement of respondent in committing an offence under Sections 363,366 and 376 of the Indian Penal Code, challan was presented in the Court. On conclusion of trial, the trial Court has acquitted respondent.

5. We have heard learned counsel for parties and have also gone through record.

6. Prosecution has successfully proved on record, by producing date of birth certificate of prosecutrix Ex. P-5 issued under Section 12/17 of Birth and Death Registration Act, 1969 by Registrar Gram Panchayat Trilokpur, that date of birth of prosecutrix was 22.07.1994. PW-4 Kishan Kumar, Panchayat Sahayak Gram Panchayat Trilokpur proved contents of the said certificate by comparing with original record which was not disputed by or on behalf of respondent as this witness was not cross-examined despite granting opportunity. Dealing with effect of not cross-examining a witness on a particular point/circumstance, the Apex Court, after considering various judgments,in case Laxmibai and another versus Bhagwantbuva and others reported in **(2013) 4 SCC 97,** has observed as under:

> *"40 Furthermore, there cannot be any dispute with respect to the settled legal proposition, that if a party wishes to raise any doubt as regards the correctness of the statement of a witness, the said witness must be given an opportunity to explain his statement by drawing his attention to that part of it, which has been objected to by the other party, as being untrue. Without this, it is not possible to impeach his credibility. Such a law has been advanced in view of the statutory provisions enshrined in Section 138 of the Evidence Act, 1872, which enable the opposite party to cross-examine a witness as regards information tendered in evidence by him during his initial examination in chief, and the scope of this provision stands enlarged by Section 146 of the Evidence Act, which permits a witness to be questioned, inter-alia, in order to test his veracity. Thereafter, the unchallenged part of his evidence is to be relied upon, for the reason that it is impossible for the witness to explain or elaborate upon any doubts as regards the same, in the absence of questions put to him with respect to the circumstances which indicate that the version of events provided by him, is not fit to be believed, and the witness himself, is unworthy of credit. Thus, if a party intends to impeach a witness, he must provide adequate opportunity to the witness in the witness box, to give a full and proper explanation. The same is essential to ensure fair play and fairness in dealing with witnesses. (See: Khem Chand v. State of Himachal Pradesh, AIR 1994 SC 226; State of U.P. v. Nahar Singh (dead) & Ors., AIR 1998 SC 1328; Rajinder Pershad (Dead) by L.Rs. v. Darshana Devi (Smt.), AIR 2001 SC 3207; and Sunil Kumar & Anr. v. State of Rajasthan, AIR 2005 SC 1096)".*

7. As per medical evidence, age of prosecutrix is 17 to 18 years. However, when admissible conclusive un-rebutted evidence of exact date of birth is available on record, determination of age on the basis of medical evidence is neither necessary nor relevant. In present case, though not required, medical evidence corroborates age of prosecutrix as proved on the basis of date of birth certificate. Therefore, age of prosecutrix, on the date of incident stands proved as 16 years 11 months and 12 days.

8. PW-11 Dr. Pankaj Katoch proved MLC Ex. PW-11/B issued by him after medical examination of respondent on 16.07.2011 establishing that there was nothing to suggest that respondent was incapable of performing sexual intercourse.

9. PW-13 Dr. Surekha Gupta proved MLC Ex. PW-13/B with respect to medical examination of prosecutrix alongwith her opinion Ex. PW-13/C endorsed thereupon according to which there was evidence of sexual intercourse. PW-10 Dr. Arvind Kumar also medically examined prosecutrix on 20.07.2011 who, on the basis of such physical examination as also that of PW-13 Dr. Surekha Gupta, opined that sexual intercourse had occurred.

10. In fact, respondent had not disputed rather claimed acquaintance with prosecutrix and her family and also in his statement under Section 313 Cr.PC, he stated that on relevant date, prosecutrix made telephonic call for picking her from the school after examination and further that prosecutrix was in visiting terms with him and his family, and he had also stayed in the house of prosecutrix and mother of prosecutrix had borrowed Rs.10,000/- from him and was assuring his marriage with prosecutrix and when he did not fulfill further demand of money, he was falsely implicated at the instance of family of prosecutrix.

11. Statement under Section 313 Cr.PC is not a substantive piece of evidence and it is not equivalent to confession of accused. Conviction cannot be based solely on the basis of statement made under Section 313 Cr.PC where prosecution failed to discharge its onus to prove its case as onus to prove certain facts is on the party who asserts. Similarly, in case where prosecution discharges its burden to prove certain facts leading to some presumption or indicating guilt of accused resulting shift of onus upon accused to rebut the same then onus to prove facts contrary to prosecution case cannot be said to be discharged by accused only on the basis of statement given under Section 313 Cr.PC. In such a situation accused has also to lead substantive evidence either under Section 315 Cr.PC or to bring some substantive evidence on record during evidence of prosecution in statements of witnesses as statement under Section 313 Cr.PC can only be considered and referred to corroborate substantive evidence led by either party. Statement under Section 313 Cr.PC has corroborative value and it can also be taken into consideration to complete the chain of missing link. False or impossible plea in statement under Section 313 Cr.PC may also be taken as adverse circumstance against accused. Accused has a right to remain silent but at the same time when onus is upon him to explain certain facts and circumstances which are only in his exclusive knowledge (say under Section 106 of Evidence Act), silence can be fatal for him. The Hon'ble Supreme Court in case Dehal Singh versus State of Himachal Pradesh reported in **(2010) 9 SCC 85** has held as under:-

> "23" Statement under Section 313 of the Code of Criminal Procedure is taken into consideration to appreciate the truthfullness or otherwise of the case of prosecution and it is not an evidence. Statement of an accused under Section 313 of the Code of Criminal Procedure is recorded without administering oath and, therefore, said statement cannot be treated as evidence within the meaning of Section 3 of the Evidence Act............. There is reason not to treat the statement under Section 313 of the Code of Criminal Procedure as evidence as the accused cannot be cross-examined, with reference to those statements......................"

12. In another case Manu Sao versus State of Bihar, reported in **(2010) 12 SCC 310**, the Apex Court has elaborated evidentiary value of statement of accused under Section 313 Cr.PC as under:-

> *"12 Let us examine the essential features of this Section 313 Cr.P.C. and the principles of law as enunciated by judgments, which are the guiding factors for proper application and consequences which shall flow from the provisions of Section 313 of the Code.*
>
> *13. As already noticed, the object of recording the statement of the accused under Section 313 of the Code is to put all incriminating evidence against the*

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

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

13. PW-2 Rajinder Singh remained associated with PW-5 Jagdish Singh, father of prosecutrix and also in investigation since beginning till last. However, in the Court, he was declared hostile for resiling from his earlier statement recorded under Section 161 Cr.PC. It is settled position of law that statement of hostile witness is not to be brushed aside in toto but Court can consider evidence of hostile witness to corroborate other evidence on record. It is also well settled that mere fact that a witness is declared hostile does not make him unreliable witness so as to exclude his evidence from consideration altogether but the said evidence remains admissible in the trial and there is no legal bar to base conviction or acquittal upon testimony of hostile witness if corroborated by other reliable evidence. Hon'ble Supreme Court in case **Raja and others Vs. State of Karnataka (2016) 10 SCC 506** has held as under:-

"32. That the evidence of a hostile witness in all eventualities ought not stand effaced altogether and that the same can be accepted to the extent found dependable on a careful scrutiny was reiterated by this Court in Himanshu @ Chintu (supra) by drawing sustenance of the proposition amongst others from Khujii vs. State of M.P. (1991) 3 SCC 627 and Koli Lakhman Bhai Chanabhai vs. State of Gujarat (1999) 8 SCC 624. It was enounced that the evidence of a hostile witness remains admissible and is open for a Court to rely on the dependable part thereof as found acceptable and duly corroborated by other reliable evidence available on record."

14. In the aforesaid settled position and in the light of admitted and proved facts and circumstances, veracity of prosecution witnesses particularly that of prosecutrix is to be evaluated for determining the guilt of respondent on the basis of material on record.

15. PW-5 Jagdish Singh is father of PW-3, prosecutrix. When prosecutrix did not return home till late evening despite her examination was over about 12.30 PM, PW-5 approached PW-2 Rajinder Singh Guleria, Panchayat Pradhan whereafter both of them went to police post Kotla and filed an application Ex. PW-5/A about missing of prosecutrix. According to PW-5 during that period a telephonic call was received from father of PW-14 Usha Devi, a friend of prosecutrix, disclosing that PW-14 had received a telephonic call from prosecutrix from Mobile Phone No. 9805497823 and the said fact was brought in the notice of police.

16. On tracing PW-1 Sonu Kumar through his mobile used by prosecutrix to call Usha Devi, he took police party as well as PW-2 and PW-5 to the spot wherefrom Police party and others reached in the house of respondent and on the basis of information given by father of respondent, prosecutrix and respondent were traced in village Seri sleeping in a room in house of uncle of respondent. These facts stand proved on record being not disputed in cross-examination. From trend of cross-examination read with explanation given in statement of respondent recorded under Section 313 of the Code of Criminal Procedure, it can safely be inferred that it is admitted fact that in the night of 15.07.2011 prosecutrix was found sleeping with respondent in house of his uncle. There are positive suggestions put to prosecutrix, also admitted by her, that when she and respondent reached in the house in village Seri, an elderly couple was present there and room of that couple was opposite to the room in which she was and those persons had inquired respondent about her and respondent had told that she was his friend and those persons provided meal to them and she shared bed with respondent during night. In cross-examination of PW-15 Investigating Officer also, though denied by him, it was suggested that at place Ghera prosecutrix had told him that she had gone with respondent with her consent.

17. Replying to question No. 34, in statement under Section 313 of the Code of Criminal Procedure, respondent stated that prosecutrix was in visiting terms with him and his family and she invariably used his taxi and he had also stayed in the house of prosecutrix. In cross-examination to PW-5 Jagdish Singh, about which he expressed ignorance, it was suggested that respondent and prosecutrix were good friends, they loved each other and prosecutrix wanted to marry respondent. The facts that prosecutrix accompanied respondent to his house and stayed with him in the house of his uncle and was found sleeping in one room with respondent also have corroboration from trend of cross-examination.

These facts also stand proved on record beyond reasonable doubt.

18. In examination-in-chief, PW-3 categorically stated that respondent sexually assaulted her during night on 15.07.2011 and in cross-examination, she stated that she was sexually assaulted by respondent twice. The fact that she had not resisted at that time, was not disputed rather admitted by her. A suggestion put to prosecutrix, which she admitted, that she had shared bed with respondent during that night, also corroborates the prosecution story that during the night of 15.07.2010, prosecutrix was exposed to sexual intercourse by respondent. This fact also stands established with corroboration of scientific evidence on record.

19. Now, question as to whether prosecutrix was enticed or taken by the respondent out of lawful guardianship by taking her from school to his uncle's house and she was subjected to sexual intercourse without her consent, and in case there was consent of prosecutrix as to whether prosecutrix was competent to consent for the same, is to be decided.

20. Prosecutrix, in her statement Ex. PW-3/A recorded under Section 154 of the Code of Criminal Procedure as well as in Court, stated that after examination, at about 12.00 noon, she reached near gate of her school at Trilokpur near the van of respondent, where respondent allured her for marriage and on her refusal, forcibly put her in his van and took away. They left the said van on stopping for empty fuel tank at Bhali and therefrom travelled in a

bus to Banoi wherefrom respondent took her to his home at Jhikar in a long white car where father of respondent scolded him and directed to leave prosecutrix with her parents, and about half an hour thereafter, respondent arranged a Alto car and also clothes of his sister-in-law (Bhabi) and informed her that they had to go Ghera where after and they started to Ghera in Alto Car. On the way, her school dress was got changed by respondent and she also contacted her friend through mobile phone of PW-1 Sonu Kumar driver of car, and from Ghera they went to village Seri on foot where after taking meals, respondent took her in a room of his uncle and slept with her and ravished her.

21. Prosecutrix also admitted that the bus boarded by them was full of passengers and there were 3-4 other persons already sitting in the long white car in which they travelled from Banoi to Jhikar. She went with respondent from school to Bhali in his van in broad day light, travelled in public transport vehicle i.e. bus from Bhali to Banoi, therefrom to village of respondent in a car with 3-4 other passengers, from Jhikar to Ghera in car driven by PW-1 Sonu Kumar, walked together on foot for 3 Kms from Ghera to Seri but she did not complain and even tried to complain to anybody in the bus or in the car or to anybody at Bhali, Banoi, Jhikar, Ghera or Seri. She was allegedly taken away forcibly by respondent in his van during peak hours of school as it was time when examination was over and maximum students were bound to be present at the gate of the school. Prosecutrix herself stated that there were other vehicles also parked in front of the gate of the school but there is, not even murmur, in her statement either in Ex. PW-3/A or in the Court that she had even made slightest effort to raise alarm or to approach any persons on these public places against forcible act of respondent.

22. It is also noticeable that respondent was scolded by his father for bringing prosecutrix to his house and was asked to leave prosecutrix with her parents but at that time also prosecutrix conspicuously, not only remained silent but voluntarily accompanied respondent in car of PW-1 to go to Village Ghera, changed her clothes, made mobile call to PW-14 and thereafter walked with respondent for about 3 Kms to reach house of his uncle at Seri for staying. At Seri also, on claiming her to be his friend in reply by respondent to question raised by his uncle, she remained silent and continued to join respondent even in bed till both of them were traced by police and her father.

23. It is prosecution case that prosecutrix contacted PW-14 Usha Devi on mobile which helped police to trace her. PW-2 Rajinder Singh Guleria, PW-14 Usha Devi and PW-17 ASI Deepak Kumar corroborated the said fact. PW-1 Sonu Kumar also stated that respondent and girl accompanying him, while travelling in his car, used his mobile to call someone. It establishes that prosecutrix was free to call anybody when she was travelling with respondent which falsify the stand of prosecutrix that she was forcibly taken or enticed by respondent for getting married.

24. Admittedly location of prosecutrix and respondent was traced on the basis of her telephonic call to her friend PW-14 Usha Devi. Prosecutrix and PW-5 admitted that mother of prosecutrix was also having mobile phone. While travelling with respondent, prosecutrix having opportunity to make a call, made it to her friend but not to her mother. She did not try to inform her parents about forcible act allegedly being committed by respondent and taking her without her consent.

25. Age of prosecutrix in instant case stands proved more than 16 years and consent on her part in the episode is duly established on record. Therefore, for consent, no case under Section 375 punishable under Section 376 IPC is made out against respondent.

26. So far as charges under Sections 363 and 366 IPC are concerned, prosecutrix is below 18 years of age and for taking or enticing a minor female under 18 years of age from lawful guardianship respondent can be convicted as for age of prosecutrix, her consent will be immaterial for purpose of Section 361 IPC, in case it is found that she was taken or enticed by respondent. But before convicting a person under Section 363 and 366 IPC, evidence must

establish that there was an active role of that person in enticing or taking a minor out of lawful guardianship with intention to compel minor to marry.

27. In her statement Ex. PW-3/A, prosecutrix stated that respondent visited her house thrice. On the other hand in Court she deposed that she was not known to respondent prior to the incident. However, in her later part of statement, she stated that respondent had visited her house once, two years prior to the incident but was not seen by her and his visit was informed to her by her cousin. She also stated that her friend Neha used to talk with respondent on Mobile Phone and to tell her that a person from Dharamshala knew her. She also stated that her mother might have taken lift in vehicle of respondent many times. Father of prosecutrix, PW-5 Jagdish Singh admitted that vehicle of respondent was being plied regularly in village but he expressed his ignorance about taking lift in the said vehicle by prosecutrix or his wife and visits of respondent in his house on numerous occasions and also night stay in his and his wife's absence. He also denied knowledge about friendship and love affair of his daughter with respondent and desire of his daughter to marry respondent. He did not deny these facts specifically and gave evasive replies to the suggestions put to him with regard to relations of respondent and his family.

28. Though, respondent claiming visiting house of prosecutrix on various occasions as also stated in his statement under Section 313 Cr.PC, however, prosecutrix denied the same and her father expressed ignorance about the same. Therefore, statement under Section 313 Cr.PC, in isolation, can not be made basis for deriving inference of such intimacy for want of substantive evidence on record in this regard. Hence, there is nothing on record to establish that even prior to date of incident, respondent played some role at any stage to solicit or persuade prosecutrix to abandon her legal guardianship. No doubt, the part played by the accused could be regarded as facilitating the fulfillment of the intention of prosecutrix. That part, in our opinion, as held in S. Varadarajan vs. State of Madras AIR 1965 SC 942, falls short of an inducement to the minor to slip out of the keeping of her lawful guardianship and is, therefore, not tantamount to 'taking' or 'enticing'.

29. Prosecutrix was just about to reach majority and she herself left alongwith respondent. From evidence on record, it is duly proved that she boarded various vehicles including public transport and travelled with respondent at various places and also walked on foot about 3 Kms. She knowingly and voluntarily joined respondent. There is nothing on record to show any inducement by respondent or any active participation on his part by him in formation of intention of prosecutrix to accompany him. Active role on the part of respondent for inducing prosecutrix in taking or enticing prosecutrix out of the keeping of lawful guardianship of her parents cannot be said to have established. Intimacy of respondent with prosecutrix so as to entice or influence her is neither alleged nor admitted much less established on record. Therefore, respondent cannot be said to have 'taken' her out of her lawful guardianship. In present case, there is no enticing or taking as required to punish respondent under Sections 363 and 366 IPC.

30. From the above discussion, it is evident that the evidence adduced by the prosecution, cannot be treated as cogent, reliable, credible and trustworthy so as to prove offence alleged to be committed by respondent beyond reasonable doubt.

31. It is a settled principle of law that acquittal strengthens presumption of innocence in favour of an accused. To dislodge the same, onus heavily lies upon the prosecution. The respondent has been acquitted by the trial Court. It cannot be said that learned trial court has not appreciated evidence correctly and completely and acquittal of accused has resulted into travesty of justice or has caused mis-carriage of justice. In this appeal, prosecution has failed to make out a case for interference in impugned judgment.

32. The present appeal, devoid of any merit, is dismissed, so also pending applications, if any. Bail bonds, if any, furnished by the respondent are discharged. Records of the Court below be sent back forthwith.

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

State of Himachal Pradesh .....Petitioner
Versus
Sanjiv Kumar and others .....Respondents.

Cr. Appeal No. 622 of 2008
Decided on : 24/04/2017

Indian Penal Code, 1860- Section 498-A read with Section 34- Prosecutrix was married to accused- she was being tortured for not bringing sufficient dowry- dressing table, sewing machine, refrigerator etc. were given to the accused by the father of the prosecutrix, who is a labourer – the accused continued to harass her and demanded Rs. 2 lacs for enabling the husband of the prosecutrix to start a business –the accused was tried and convicted by the Trial Court- an appeal was preferred, which was allowed and the accused was acquitted- held in appeal that there was delay in recording of FIR, which was not properly explained – no specific time of making the demand was given – the evidence of the prosecutrix that accused attempted to assault her is not trustworthy- the Appellate Court had rightly acquitted the accused- appeal dismissed. (Para-9 to 12)

For the petitioner: Mr. Vivek Singh Attri, Dy. Advocate General.
For the Respondents: Mr. J.L.Bhardwaj, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The instant appeal stands directed against the judgement recorded by the learned Sessions Judge, Hamirpur, whereby he reversed the findings of conviction pronounced upon the accused by the learned Judicial Magistrate 1st Class, Nadaun, District Hamirpur.

2. The brief facts of the case are that prosecutrix submitted application against the accused persons in Police Station, Nadaun, making the allegations that she was married to accused Sanjeev Kumar and since then all the accused persons had been torturing her for not bringing dowry. She was married about eight months back. It is written by her that after three months of marriage, one dressing table, sewing machine and a refrigerator, etc. were given by her father, who is a labourer, to the accused persons on their demand. But still they were not satisfied. All of them continued torturing her and made her to write on a paper that the accused persons were not demanding any dowry and that her father was giving some articles of his own to her. Her mother-in-law started telling her that her father is an army retired personnel and that she should bring Rs.2,00,000/- from him so that her husband Sanjeev Kumar settled in a business, otherwise, she should not return to the matrimonial home. Then, she states that she tried to talk to her in-laws on telephone, but they would not talk to her. She reports that in case she goes to her house she would be killed because her father could not give them Rs.2,00,000/-. So a request was made to take action 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 498-A read with Section 34 IPC to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 8 witnesses. On closure of prosecution evidence, the statements of the accused under Section 313 of the C.P.C., were recorded in which they pleaded innocence and claimed false implication. They chose to lead evidence in defence.

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

6. The learned Deputy Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned Sessions Judge, standing not based on a proper appreciation of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation by it of the material on record. Hence, he contends qua the findings of acquittal warranting reversal by this Court, in the exercise of its appellate jurisdiction and theirs 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 Sessions 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 complainant, stayed at her matrimonial home from 28th November, 2002 uptill March, 2003. However, she, with respect to the purported penal misdemeanor(s), misdemeanor(s) whereof stood perpetrated upon her at her matrimonial home, during the period aforesaid, belatedly in August, 2003 lodged a report with the Police Station, concerned. The aforesaid belated lodging of the apposite F.I.R. by the complainant, with respect to the offences detailed therein, without any explanation being afforded by her, for the delay in the aforesaid lodging of the F.I.R, constrains this Court, to, conclude that prima facie the allegations constituted in the apposite F.I.R., hence spurring from proactive concoction besides premeditation. Consequently, the allegations constituted by the complainant, in the apposite F.I.R., cannot acquire any virtue of credibility.

10. Be that as it may, a perusal of the apposite F.I.R, makes a disclosure that the complainant, had initially satisfied the demands of the respondents/accused with respect to a refrigerator, sewing machine and a dressing table. However, subsequently, the accused/respondents herein made a demand upon her, for bringing to her matrimonial home, a sum of Rs.2 lacs, as financial assistance, for enabling the accused/respondent, to establish his business. Adduction of direct evidence, qua the aforesaid demand, cannot be insisted upon, as it is made within the precincts of the matrimonial home wherein the complainant resided, thereupon with secrecy gripping the making of the aforesaid demand besides its standing known only to the complainant, would also constrain this Court, to not insist qua the prosecution, projecting direct evidence in respect thereof. Nonetheless, the veracity of the aforesaid demand, has to be adjudged from the following aspects (a) the stay of the complainant at her matrimonial home being short lived. (b) there occurring no recital with specificity qua the time when the aforesaid demand was made by the accused upon the complainant. Since the complainant, has not in the aforesaid F.I.R., spelt with specificity the exact time of the making of the aforesaid demand by the accused upon her, despite her stay at her matrimonial home being short lived, limited stay whereof of the complainant, at her matrimonial home, though hence enjoined upon her, to with precision specify the timing of the making of the aforesaid demand upon her by the accused, yet when she omits to with specificity make any recital in the apposite F.I.R qua the aforesaid fact, does constrain this Court to make a conclusion qua the aforesaid allegation being construable to be a mere invention also an after thought. Consequently, imputation of credence thereon, is unwarranted.

11. No potent evidence, in display of the accused subjecting the complainant, to any incident of physical assault, is adduced by the prosecution. PW-1 in her cross-examination, has made a disclosure qua the accused never physically assaulting her yet she has qualified the aforesaid disclosure, by stating that the accused had once attempted to assault her. However, the statement of the complainant, that the accused once attempted to assault her, though does also constitute evidence, of the accused/respondents hence by attempting to assault her, his

hence besetting her with a mental trauma, nonetheless even the aforesaid evidence is rendered incredible, on account of hers, throughout her short stay at her matrimonial home, hers not rearing the aforesaid allegations against the accused, rather hers belatedly in August, 2003 rearing them. In aftermath, the belated rearing, of the aforesaid allegations by the complainant upon the accused respondents, renders it to acquire a stain of concoction or premeditation. In sequel thereof, it is not amenable to imputation of credence thereon.

12. For the reasons which have been recorded hereinabove, this Court holds that the learned 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 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.

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 SANDEEP SHARMA, J.

Govind Ram (Deceased) through LRs ....Appellant
Versus
Beli Ram and others ....Respondents

RSA No. 4339 of 2013
Reserved on: April 24, 2017
Decided on: April 25, 2017

Partition Act, 1893- Section 4- Plaintiff filed a civil suit for partition of the joint property – the suit was decreed by the Trial Court- an appeal was filed, which was dismissed – held in second appeal that jamabandi shows that parties are recorded to be the joint owners – oral evidence also proved the joint ownership – prior partition was not proved – the preliminary decree was rightly passed- appeal dismissed. (Para- 11 to 20)

Cases referred:

Laxmidevamma and Others vs. Ranganath and Others, (2015)4 SCC 264
Ambanna v. Ghanteappa, AIR 1999 Karnataka 421
Narinder Chand Mehra and another versus Surinder Chand Mehra and others, (1999-2) 122 P.L.R. 16
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. N.K. Thakur, Senior Advocate with Ms. Jamuna, Advocate.
For the respondents: Mr. G.R. Palsra, Advocate, for respondents No.1 to 3.
Nemo for respondent No.4.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:

Instant Regular Second Appeal under Section 100 of the Civil Procedure Code has been filed against judgment and decree dated 29.8.2013 passed by the learned Additional

District Judge-II, Mandi, HP in Civil Appeal No. 05/2013, affirming the judgment and decree dated 21.11.2012, passed by the learned Civil Judge (Senior Division), Court No.1, in Civil Suit No. 46/01/2011, whereby suit for partition having been filed by the respondents-plaintiffs ('plaintiffs', hereafter), came to be decreed.

2. Briefly stated the facts of the case as emerge from the record are that plaintiffs filed a suit for partition under Section 4 of the Indian Partition Act ('Act' for short), averring therein that the land bearing Khewat No. 70/68, Khatauni No. 78/76, Khasra No. 1165/887 and 1167/902, Kitas 2 measuring 0-9-18 Bigha situate in Mauja Sidhyani, Muhal Sadhera, Hadbast No. 134, Tehsil Sadar, District Mandi, HP ('suit property, hereafter), as recorded in joint ownership of the parties. Plaintiffs further averred that the suit land is jointly in ownership and possession of the parties. Suit property consists of two storied residential house having five rooms alongwith two verandas and some portion of the land is vacant, surrounding the residential house. Plaintiffs further claimed that whole of the suit land is joint and unpartitioned and they want to develop their shares according to their choice. Plaintiff further alleged that the defendant-appellants ('defendant', hereafter) is trying to grab whole share of the plaintiffs and as such they filed suit for partition. In the aforesaid background, plaintiffs sought decree of partition of suit property in their favour.

3. Defendant refuted foresaid claim of the plaintiffs by raising preliminary objections qua maintainability, estoppel, cause of action, locus standi and suit being not properly valued. On merits, defendant nowhere disputed revenue record adduced on record by the plaintiffs, however, he claimed that suit land is not jointly owned and possessed by the parties. Defendant specifically stated in the written statement that existing residential house was constructed by him by spending huge amount and plaintiffs never spent any money for the construction of residential house. Perusal of written statement suggests that the defendant admitted that there was an ancestral house over the suit property, which was demolished after it was gutted in fire. Defendant further stated that the plaintiff No.1-Beli Ram, was allowed to live in the lower story of the house till he constructs his own house. With the aforesaid submissions, the defendant claimed that the plaintiff No.1 has no right, title or interest over the suit property. As far as right of plaintiffs No.2, 3 and defendant No. 2, are concerned, defendant claimed that since they have been married and residing in their matrimonial houses, they have no interest in the property. Defendant, while admitting description of the land as given in para-1 of the plaint, stated that same is not in the joint ownership and possession as it has been partitioned by family partition/settlement/arrangement. In the aforesaid background, defendant prayed that suit for partition having been filed by the plaintiffs may be dismissed.

4. Learned trial Court, on the basis of pleadings of the parties, framed following issues:

"1. Whether the plaintiffs are entitled to the preliminary decree of partition of the suit land as prayed for? OPP

2. Whether the suit is not maintainable in the present form, as alleged? OPD

3. Whether the plaintiffs have no enforceable cause of action to file the present suit, as alleged? OPD

4. Whether the plaintiffs are estopped by their own act and conduct to file the present suit, as alleged? OPD

5. Whether the suit is not properly valued for the purpose of court fee and jurisdiction, as alleged? OPD

6. Whether the plaintiffs have no locus standi to file the present suit, as alleged? OPD

7. Relief.

5. Subsequently, learned trial Court, vide judgment and decree dated 21.11.2012, decreed the suit of the plaintiff and held the plaintiffs entitled to preliminary decree of partition. Learned trial Court also held the plaintiffs and defendant entitled to $1/5^{th}$ share each in the suit property.

6. Defendant, feeling aggrieved by the aforesaid judgment and decree, preferred an appeal under Section 96 CPC before the Additional District Judge-II, Mandi, which came to be registered as Civil Appeal No. 05/2013. However, the fact remains that the aforesaid appeal was dismissed by the first appellate Court vide judgment and decree dated 29.8.2013. Hence, this Regular Second Appeal.

7. The Regular Second Appeal was admitted by this Court on 26.4.2014, on the following substantial question of law:

> "Whether the findings of the learned trial Court as well as first Appellate Court are result of complete misreading and misinterpretation of the evidence and material on record and against the settled position of law?

8. Mr. N.K. Thakur, learned Senior Advocate duly assisted by Ms. Jamuna, Advocate, vehemently argued that that the impugned judgments and decrees passed by learned Courts below are not sustainable in the eye of law as the same are not based upon correct appreciation of evidence adduced on record by the respective parties and as such deserve to be set aside. Mr. Thakur while inviting attention of this Court to the impugned judgments and decrees passed by learned Courts below argued that the learned Courts below have gravely erred in passing the impugned judgments and decrees, especially in the absence of any site plan, specifically giving therein description, if any, of the suit property sought to be partitioned by the plaintiffs. Mr. Thakur contended that no decree, if any, could be passed by the learned Courts below in the absence of specific details/ identification of property as such judgment, which is unexecutable, deserves to be set aside. Mr. Thakur, while inviting attention of this Court to the pleadings as well as evidence on record adduced by the defendant, stated that it is duly established on record that house over land is sole property of the defendant No.1 and plaintiff has no right, whatsoever in the house. Mr. Thakur, further contended that the civil court had no jurisdiction in partitioning the land, which is assessed to land revenue and same could only be partitioned by revenue court. Mr. Thakur, further contended that bare perusal of Ext. PW-1/B suggests that there are other co-owners in the land in dispute but they were not made party and no decree as such could be passed by the court below, without impleading them as party, because no effective decree of partition could be passed in their absence. Mr. Thakur, further contended that in view of established position as stands reflected in the revenue record, impugned judgments and decrees are unexecutable. Moreover, no evidence worth the name has been led by the plaintiffs to prove that house is joint between the parties, whereas, defendant has proved beyond reasonable doubt that house was constructed by him alone and he is sole proprietor of the same. In the aforesaid background, Mr. Thakur contended that suit having been filed by the plaintiffs for partition deserves to be dismissed, after setting aside the impugned judgments and decrees passed by the learned Courts below.

9. Mr. G.R. Palsra, learned counsel representing respondents No.1 to 3-plaintiffs ('plaintiffs', hereafter), supported the impugned judgments and decrees passed by the learned Courts below. Mr. Palsra while refuting the contentions having been made by the learned counsel representing the defendant No.1, vehemently argued that there is no illegality or infirmity in the impugned judgments and decrees passed by the learned Courts below, as such same are required to be upheld by this Hon'ble Court. While inviting attention of this Court to the impugned judgments and decrees passed by the learned Courts below, Mr. Palsra contended that both the Courts have dealt with each and every aspect of evidence in its right perspective and by no stretch of imagination, it can be said that the Courts below misappreciated or misconstrued the evidence, be it ocular or documentary, led on record by the respective parties. With a view to substantiate his aforesaid arguments, he invited attention of this Court to the evidence led on record by the respective parties to demonstrate that the plaintiffs successfully proved on record

that suit land is jointly owned and possessed by the plaintiffs as well as defendant No.1 to the extent of 1/5th share each and as such there is no illegality committed by the learned Courts below, while decreeing the suit for partition. While specifically inviting attention of this Court to the Ext. PW-1/B, Mr. Palsra contended that the revenue record place on record alongwith plaint, prove beyond doubt that suit land is jointly owned and possessed by the parties and defendant No.1 is not the sole proprietor of same as claimed by him. Mr. Palsra further contended that the defendant No.1 has nowhere proved on record by leading cogent and convincing evidence that he is sole proprietor of the suit land. While concluding his arguments, Mr. Palsra contended that keeping in view the reasoning assigned by the learned Courts below, after appreciating evidence on record, there is no occasion for this Court to interfere, especially in view of the concurrent findings of facts and law recorded by the learned Courts below. In this regard, he placed reliance upon the judgment passed by the Hon'ble Supreme Court of India in ***Laxmidevamma and Others vs. Ranganath and Others,*** **(2015)4 SCC 264**.

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

11. With a view to explore answer to the substantial question of law as well as submissions having been made by the learned counsel representing the parties, this Court carefully examined the pleadings as well as evidence adduced on record by the respective parties, which admittedly does not suggest that learned Courts below have misappreciated or misconstrued the evidence available on record, rather a careful perusal of the pleadings as well as evidence on record suggests that the learned Courts below have dealt with each and every aspect of the matter meticulously and there is no misappreciation of evidence as alleged by the learned counsel representing the defendant No.1. Perusal of para-1 of the plaint clearly suggests that plaintiffs while seeking partition under Section 4 of the Act, have given specific details of suit property. Plaintiffs have categorically stated in plaint that land is in joint ownership and possession of the parties and in this regard, he placed reliance upon Jamabandi for the year 2006-07, Ext. PW-1/B, perusal whereof suggests that parties i.e. plaintiffs and defendants are in joint ownership and possession of the suit property measuring 00-09-18. Similarly, perusal of para-2 of the plaint further suggests that the plaintiffs have given specific details with regard to residential house existing over the suit land as described herein above. Plaintiffs have specifically stated that two story residential house consisting of five rooms and two verandas is existing on suit land and vacant space is also surrounding the residential house. Plaintiffs have further stated that whole of the suit land is joint and unpartitioned one and has not been divided by metes and bounds. In view of the specific pleadings made by the plaintiffs in the plaint, this Court sees no force in the argument having been made by the learned counsel for defendant Nno.1 that since there was no specific detail with regard to property, no decree of partition could be passed by the courts below. Perusal of the averments as contained in the plaint as referred herein above, clearly suggests that prayer for partition made by the plaintiffs by way of suit as referred above, is not with regard to house existing over suit land, rather plaintiffs have specifically claimed themselves to be in joint ownership and possession of the land as well as house. Moreover, plaintiffs, by way of suit, sought preliminary decree of partition qua suit land, comprising of Khewat No. 70/68, Khatauni No. 78/76, Khasra Nos. 1165/887 and 1167/902, Kita 2, measuring 0-9-18 Bigha situate in Mauja Sidhyani, Mohal Sadhera, Hadbast No. 134, Tehsil Sadar, District Mandi, HP. Hence, arguments of the learned counsel representing the defendant No.1 can not be accepted that no decree, if any, could be passed by the learned Courts below, in the absence of site plan giving therein identification and description of the house, which is sought to be partitioned. Since entire suit land, as referred to herein above, is/was sought to be partitioned, there is/was no requirement, as such, for the plaintiffs to give site plan as alleged by the learned counsel representing defendant No.1. Perusal of Jamabandi, Ext. PW-1/B, placed on record by the plaintiffs, clearly proves on record that property is jointly recorded in the ownership and possession of the parties. Similarly, Ext. PW-1/B further suggests that the plaintiffs and defendants are joint owners in possession with respect to suit land, which consists of *Gair Mumkin Makaan* (Rihayashi) measuring 00-03-10 Bigha and *Jaye Safed* measuring 00-06-

08 Bigha. If the description as given in the aforesaid document i.e. Ext. PW-1/B is taken into consideration, plea of defendant can not be accepted that he is the sole proprietor of the suit land. Though presumption of truth is attached to the record of right, but the same is rebuttable. But, interestingly, in the instant case, defendant No.1 has not been able to rebut the presumption attached to aforesaid document i.e. Ext. PW-1/B, because no evidence has been led on record by defendant No.1, suggestive of the fact that that he is the sole proprietor /owner of suit land. Apart from above, defendant has nowhere disputed the correctness of Ext PW-1/B, as clearly emerges from written statement. In the written statement having been filed by defendant No.1 itself, though he claimed that suit property was partitioned in family arrangement and he had built the house on suit land from his own resources, but there is no evidence available on record to prove aforesaid contentions having been made in the written statement, while disputing the claim of the plaintiffs.

12. PW-1 Beli Ram categorically stated before the Court that suit property is joint and unpartitioned, which further consists of two storied residential house existing over the suit land, which is surrounded by vacant space. It has also come in his statement that the property was joint and unpartitioned, as such, same is liable to be partitioned. In support of his aforesaid contention, PW-1 i.e. plaintiff No.1 Beli Ram placed reliance upon document, Ext. PW-1/B, as has been discussed above. Plaintiffs also examined PW-2 Tulsi Devi, PW-3 Roshan Lal and PW-4 Ranjeet Singh, who stated on oath that the suit property is joint between the parties and two storied residential house exists over the suit land. Careful perusal of the cross-examination conducted upon these witnesses, nowhere suggests that defendant No.1 was able to extract anything contrary to what was stated in their examination-in-chief.

13. PW-1, Beli Ram, in this cross-examination admitted that old house had fallen but he specifically denied that all the responsibility was taken by defendant No. 1 with regard to family. Similarly, he denied that house was built from his own resources by defendant No.1. Though, DW-2 Govind Ram and DW-3 Khima Ram, while making their statements on oath, stated that plaintiff N0.1 and defendant No.1 were living separately and cultivating the lands separately, but admitted that they used to reside separately in the ancestral house. Aforesaid witnesses also admitted that ancestral house had fallen and some of the land was vacant at the spot. DW-1 Govind Ram stated that house existed over suit land, belonged to him as he had exclusively contributed for the construction of the house, but in his statement, it has come that he had given lower story to plaintiff No.1, for living till the time, he constructed his own house. He further contended that plaintiff No. 1 had no right, title or interest over the residential house. DW-1 further stated that plaintiff No.1 was serving as a Conductor in HRTC. However, the cross-examination conducted upon DW-1, if is perused carefully, he categorically admitted that at the time, when the house was built, they were living jointly and their father was alive. He also admitted that all the responsibility of family was taken by their father. Most importantly, in his cross-examination, he admitted that house was joint and they have equal shares. DW-1 further stated in his examination-in-chief that house was given by defendant No.1 to plaintiff No.1 Beli Ram for living. Similarly, he feigned ignorance that separate land was given to plaintiff No.1 for the construction of house. While answering the suggestion put to the defendant that plaintiff shared residential house existing over suit land with him, he feigned his ignorance and admitted that new house was constructed about 40 years ago, and at that time, parents of parties were alive. He also admitted that parents of the parties were alive and they have been looking after affairs of the family. Defendant Govind Ram, in his cross-examination stated that suit property has been partitioned but he was unable to produce any document with regard to the partition or any particulars thereof. He also admitted that suit property is shown to be in joint ownership and possession of all the brothers and sisters, but he could not produce any document to show that house was exclusively constructed by him. Defendant No.1 also examined DW-3 Khima Ram, who worked as a Mason during the construction of the house over the property. DW-3 stated that expenses of construction were borne by Govind Ram. In his cross-examination, he admitted that house was constructed about 40-50 years ago, when parents of parties were alive. He also

admitted that at that time, family was joint and Naradu was head of family and all the expenses were made jointly in the family at the instance of Naradu.

14. Careful perusal of statements having been made by the defendant's witnesses before the Court, clearly proves on record that suit property is jointly owned and possessed by the parties. Though defendant No.1 Govind Ram, made an attempt to prove on record that after collapse of house, he constructed new house after spending from his own pocket, but there is no evidence led on record in this regard and otherwise also, if, for the sake of arguments, it is accepted that reconstruction of house was done at the expenses of defendant No. 1, even in that eventuality, rights of the plaintiffs can not be defeated, because, admittedly, property is jointly owned and possessed by the parties.

15. Apart from above, defendant's own witnesses have admitted in their cross-examination that house was reconstructed during the life time of their father and all the expenses were borne jointly in the family, at the instance of head of family i.e. Naradu. Defendant No.1 himself admitted that the house was construction about 40-50 years ago, when his father was alive.

16. Similarly, though defendant No.1 asserted that plaintiffs No.2 and 3 and proforma defendant No.2, are living separately in their families, but denied that they have any interest in the suit property. But interestingly, there is no evidence worth the name, adduced on record by defendant No.1 to prove that plaintiffs No.2 and 3 and proforma defendant No. 2, have no right in the suit property, after marriage, because, it clearly emerges from the revenue record described hereinabove that parties are joint owners of the suit property i.e. house and vacant space.

17. Hence, no illegality or infirmity can be found in the findings of learned Courts below that since rights of plaintiffs No. 2 and 3 and proforma defendant No.2 have not been denied by the plaintiff No.1 and defendant No.1, they are also entitled to share in the suit property, in accordance with revenue record. Similarly, though it is claimed in the written statement that suit property stands partitioned inter se parties, in terms of a family arrangement/ settlement, but there is no evidence led on record in support of this claim and as such rightly the courts below, while accepting the plea of the plaintiffs for partition of suit property, held that suit property is jointly owned and possessed by the parties.

18. Mr. Thakur, learned Senior Advocate, specifically invited attention of this Court to the statement of PW-1 to demonstrate that he had admitted factum of partition /family arrangement in his statement, but perusal of statement of PW-1 nowhere supports the claim of the defendant, because, while answering suggestion put to him, plaintiff(PW-1) stated that the family partition was forged.

19. This Court also examined the judgments relied upon by the learned counsel representing defendant No.1 i.e. **Ambanna** v. **Ghanteappa**, AIR 1999 Karnataka 421 and **Narinder Chand Mehra and another** versus **Surinder Chand Mehra and others**, (1999-2) 122 P.L.R. 16, to demonstrate that no decree of partition can be passed by court merely on the basis of pleadings and site plan is necessary for identification and description of house, which is sought to be partitioned. There can be no quarrel with regard to the proposition of law that as per Order 7 Rule 3 CPC, particulars of property, sought to be partitioned, are required to be given in the plaint, but in the instant case, as has been discussed in detail, plaintiffs have given details of property sought to be partitioned and as such judgments referred to hereinabove had no applicability to the facts and circumstances of the case at hand.

20. Needless to say that learned trial Court has only passed preliminary decree of partition inter se parties qua suit property and final decree shall be drawn after report of revenue official, who shall identify the property and put the owners into possession as per their shares. Hence, in view of specific details given in the plaint, there was no requirement as such of site plan, in the present case.

21. Consequently, in view of the evidence led on record by plaintiffs, which is further corroborated by the defendant's witnesses, this Court sees no illegality or infirmity in the impugned judgments and decrees passed by the learned Courts below and same deserve to be upheld.

22. Substantial question of law is answered accordingly.

23. Hon'ble Apex Court in ***Laxmidevamma and Others vs. Ranganath and Others,* (2015)4 SCC 264,** has held as under:

> "16. Based on oral and documentary evidence, both the courts below have recorded concurrent findings of fact that the plaintiffs have established their right in A schedule property. In the light of the concurrent findings of fact, no substantial questions of law arose in the High Court and there was no substantial ground for reappreciation of evidence. While so, the High Court proceeded to observe that the first plaintiff has earmarked the A schedule property for road and that she could not have full-fledged right and on that premise proceeded to hold that declaration to the plaintiffs' right cannot be granted. In exercise of jurisdiction under Section 100 CPC, concurrent findings of fact cannot be upset by the High Court unless the findings so recorded are shown to be perverse. In our considered view, the High Court did not keep in view that the concurrent findings recorded by the courts below, are based on oral and documentary evidence and the judgment of the High Court cannot be sustained." (p.269)

24. 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.

25. 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)***

26. Accordingly, the appeal lacks merits and is dismissed. Judgments and decrees passed by the learned Courts below are upheld. Pending applications, are disposed of. Interim orders, if any, are vacated.

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

Varun Bhardwaj ....Petitioner.

Versus

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

Cr. Revision No. 268 of 2016
Reserved on 07.04.2017
Date of Decision: 25.04.2017

Code of Criminal Procedure, 1973- Section 228- Police filed a charge sheet for the commission of offence punishable under Section 307 of I.P.C- the Court framed the charge- aggrieved from the order, present revision has been filed- held that the Court is not required to make a formal opinion that accused is certainly guilty of the commission of offence– the Court had not properly appreciated the material on record- revision allowed- order of the Trial Court set aside.

(Para- 6 to 23)

Cases referred:

State of Karnataka v. L. Muniswamy and Ors, AIR 1977 SC 1489

Niranjan Singh Karam Singh Punjabi, Advocate, v. Jitendera Bhimraj Bijja and Ors. with State of Maharashtra v. Jintendra Bhimraj Bijjaya and Ors., with Jitendra Bhimraj Bijje and Ors v. State of Maharashtra, 1990 CRI.L. J. 1869

Nahar Singh v. The State, AIR (39) 1952 Allahabad 231, Abani Chowdhury v. The State, 1980 Cri.L. J. 614

Sham Sunder v. State of Himachal Pradesh 1993 (2) SLJ 2106.

Supdt. & Remembrancer of Legal Affairs, West Bengal v. Anil Kumar Bhunja and Ors, AIR 1980, SCC 52, 1979 CRI. L. J. 1390

Krishnan and another Versus Krishnaveni and another, (1997) 4 Supreme Court Case 241

Amit Kapoor v. Ramesh Chander and Anr, (2012) 9 SCC 460

Chitresh Kumar Chopra v. State (Government of NCT of Delhi), (2009) 16 SCC 605,

Satish Mehra v. State (NCT of Delhi) and Anr, (2012) 13 SCC 614
Sheoraj Singh Ahlawat and Ors v. State of Uttar Pradesh and Anr.,(2013) 11 SCC 476,
Vinay Tyagi. v. Irshad Ali alias Deepak and Ors., (2013) 5 SCC 762,
L. Krishna Reddy v. State by Station House Officer and Ors, (2014) 14 SCC 401
State of Haryana and others vs. Bhajan Lal and others, 1992 Supp (1) SCC 335
Prashant Bharti v. State (NCT of Delhi), (2013) 9 SCC 309

For the petitioner: Mr. N.K. Thakur, Senior Advocate, with Mr. Divya Raj Singh, Advocate.
For the respondent: Mr. P.M. Negi, Additional Advocate General, with Mr. Ramesh Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

The instant criminal revision petition filed under Section 397 read with Section 401 of the Cr.PC, is directed against the order dated 24.6.2016, (in short 'the impugned order') passed by the learned Additional Sessions Judge-I, Una, District Una, HP, in Session Trial No.67/2015, whereby charge under Section 307 of the IPC has been framed against the petitioner-accused.

2. Briefly stated facts as emerge from the record are that police of Police Station Haroli, District Una, HP, on the basis of statement having been made by one Sh. Amanjot Singh, S/o Shri Ranjeet Singh (hereinafter referred to as the complainant) under Section 154 of the Cr.PC, registered an FIR No. 110 of 2015 on 4.5.2015, against the petitioner-accused under Section 307 of the IPC. Police on the basis of registration of aforesaid FIR conducted investigation and submitted report under Section 173 of the Cr.PC, alleging therein commission of offence punishable under Section 307 of the IPC by the petitioner-accused. Learned Additional Sessions Judge vide order dated 24.6.2016, framed charge under Section 307 of the IPC against the petitioner-accused. In the aforesaid background, present petitioner-accused has approached this Court by way of instant proceedings praying therein quashing of impugned order dated 24.6.2016, passed by the learned Additional Sessions Judge, Una.

3. Mr. N.K. Thakur, learned Senior Advocate, duly assisted by Mr. Divya Raj Singh, Advocate, representing the petitioner vehemently argued that the impugned order (Annexure P-2) is not sustainable in the eye of law as the same is not based upon the correct appreciation of material made available on record by the police along with challan filed by it under Section 173 of the Cr.PC, and as such, same deserves to be quashed and set-aside. Mr. Thakur, while specifically referring to the impugned order strenuously argued that there is/was no application of mind by the court below while framing charge under Section 307 of the IPC against the petitioner-accused and as such, great prejudice has been caused to the petitioner-accused, who by no stretch of imagination, could be charged with Section 307 of the IPC, especially in view of the material placed on record by the Investigating Agency, along with charge sheet. Mr. Thakur, while specifically inviting attention of this Court to the impugned order dated 24.6.2016 contended that there is no discussion, if any, with regard to the material, on the basis of which, learned Additional Sessions Judge, came to the conclusion that the petitioner-accused is required to be charged under Section 307 of the IPC and as such, impugned order being cryptic in nature deserves to be quashed and set-aside. Mr. Thakur, specifically invited attention of this Court to the MLC No. 466/15 and report of Regional Forensic Science Laboratory (RFSL), Dharamshala, placed on record by the police along with charge-sheet to demonstrate that no prima-facie case, if any, is made out against the petitioner and as such, there was no occasion for the court below to charge the present petitioner accused under Section 307 of the IPC. While specifically inviting attention of this Court to the aforesaid MLC/opinion given by the medical expert, Mr. Thakur stated that no injury, if any, has been found on the neck of the victim/complainant namely

Amanjot Singh. He further contended that medical expert has specifically opined that injury is superficial and simple in nature. Mr. Thakur, also invited attention of this Court to the report submitted by the RFSL Dharamshala to demonstrate that even alleged weapon i.e. (Sickle) "Darat" does not contain any human blood. Mr. Thakur contended that there is/was no prima-facie case made out by the prosecution to implicate the petitioner-accused under Section 307 of the IPC and as such, impugned order cannot be allowed to sustain. He also stated that aforesaid opinion was given on 6.5.2015, by the Surgeon of Regional Hospital, Una, and thereafter, x-ray and C.T. Scan, were conducted and fresh opinion was rendered on 29.6.2015, wherein injury allegedly sustained by the complainant/victim was termed to be simple in nature. Mr. Thakur, forcefully contended that the aforesaid material aspect has been totally ignored by the learned court below while framing the charge under Section 307 of the IPC deliberately to make it a Session case. As per Mr. Thakur, had the court below perused the report of the police juxtaposing the MLC, there would have been no occasion for it to frame charge under Section 307 of the IPC against the petitioner-accused. While concluding his arguments, Mr. Thakur, further contended that bare perusal of evidence so collected by the prosecution even without any rebuttal from the side of the petitioner suggests that no conviction can ever be passed for an offence under Section 307 of the IPC and as such, impugned order being contrary to the provisions of law as well as facts deserves to be quashed and set-aside. Lastly, Mr. Thakur, contended that no case much less under Section 307 of the IPC is even prima-facie made out for framing the charge. In the aforesaid background, Mr. Thakur, prayed that impugned order may be quashed and set-aside. In the regard aforesaid, Mr. Thakur, also placed reliance on judgments titled as ***State of Karnataka v. L. Muniswamy and Ors,*** **AIR 1977 SC 1489*****, Niranjan Singh Karam Singh Punjabi, Advocate, v. Jitendera Bhimraj Bijja and Ors. with State of Maharashtra v. Jintendra Bhimraj Bijjaya and Ors., with Jitendra Bhimraj Bijje and Ors v. State of Maharashtra,*** **1990 CRI.L. J. 1869*****, Nahar Singh v. The State, AIR (39) 1952 Allahabad 231, Abani Chowdhury v. The State, 1980 Cri.L. J. 614 and Sham Sunder v. State of Himachal Pradesh 1993 (2) SLJ 2106.***

4. Per contra, Mr. P.M. Negi, learned Additional Advocate General, duly assisted by Mr. Ramesh Thakur, learned Deputy Advocate General, representing the respondent-State supported the impugned order passed by the court below. He vehemently argued that there is no illegality and infirmity in the impugned order and same is based upon the correct appreciation of the material made available on record by the police along with charge sheet filed under Section 173 and as such, same deserves to be upheld. Mr. Negi, strenuously argued that there is no merit in the contention of Mr. Thakur, learned senior counsel for the petitioner that there has been misappreciation of material adduced on record by the police along with charge sheet because it is well settled that at the time of framing of charge, learned court below is not expected to sift the entire evidence, rather it is required to be seen whether prima-facie case exists against the accused or not? As per Mr. Negi, in the instant case, there is ample evidence adduced on record by the Investigating Agency suggestive of the fact that the petitioner accused made a serious attempt of causing injury on the neck of the complainant with 'darat' as a result of, which he suffered injury on his neck. Mr. Negi further argued that had the complainant not taken side, he would have either died or have received serious injury on his neck, hence, there is no illegality and infirmity in the impugned order, whereby the petitioner accused has been charged rightly under Section 307 of the IPC. Mr. Negi invited attention of this Court to the provision contained in Section 307 IPC to demonstrate that any injury caused with an intention or knowledge on person of other person is punishable under Section 307 of the IPC. While refuting the contention of Mr. Thakur, learned counsel representing the petitioner that there is nothing much in the medical opinion renderd by the doctor, who examined the victim for the first instance as well as report submitted by RFSL Dharamshala, Mr. Negi forcefully contended that learned court below is/was not required to examine the same in detail while framing the charge, rather, the same were required to be considered and analyzed at the stage of trial. While concluding his arguments, Mr. Negi forcefully contended that court below at the stage of framing charge is/was only required to see prima-facie evidence, if any against the petitioner accused and as such, this Court has no occasion, whatsoever, to interfere with the well reasoned order passed by the

learned court below, which otherwise appears to be based upon proper appreciation of material made available on record by the Investigating Agency. Mr. Negi placed reliance on judgment passed by the Hon'ble Apex Court titled ***Supdt. & Remembrancer of Legal Affairs, West Bengal v. Anil Kumar Bhunja and Ors, AIR 1980, SCC 52, 1979 CRI. L. J. 1390*** as well as ***State of Kerala Vs. Puttumana Illath Jathavedan Namboodiri*** (1999)2 Supreme Court Cases 452, to suggest that court has limited jurisdiction under Section 397 of the Cr.PC.

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

6. 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."*

7. Before adverting to ascertain the genuineness and correctness of the submissions having been made by the learned counsel representing the respective parties, this Court deems it fit to reproduce impugned order as well as Charge sheet dated 24.6.2016, whereby present petitioner-accused has been charged for the commission of offence under Section 307 of the IPC.

> *Order dated 24.6.2016.*
>
> *"Heard and perused the Challan. From the careful perusal of Challan and documents on record, I am satisfied that there is enough material on record to charge accused Varun Bhardwaj for the commission of offence punishable under Section 307 IPC and if the evidence as brought is accepted the same shall be sufficient to connect him with the crime. The accused is charged accordingly for the aforesaid offence to which he pleaded not guilty and claimed trial. Now put up on 12.8.2016 for fixation of date for prosecution evidence."*
>
> *"Charge Sheet dated 24.6.2016*
>
> *I,………….do hereby charge you accused Varun bhardwaj as under:-*
>
> *That you accused on 3.5.2015 at about 10.00 PM at place Jatpur (Santoshgarh), PS Haroli, District Una, caused injuries to complainant Amanjot Singh on his neck with sharp edged weapon i.e. Darat with such intention and knowledge and under such circumstances, that if by that act you have caused death of said Amanjot Singh, you would have been guilty of murder and you thereby committed an offence punishable under Section 307 IPC and within the cognizance of this Court.*
>
> *And I hereby direct that you accused be tried on the aforesaid charge by this Court."*

Though, learned court below in its order supra, has stated that from the careful perusal of challan and documents on record, he is satisfied that there is enough material on record to charge the accused for the commission of offence punishable under Section 307 of the IPC and if evidence is accepted, the same shall be sufficient to connect him with the crime, but this Court really finds it difficult to accept aforesaid satisfaction as recorded by the court, especially after having glance of the record. This Court is fully conscious about the fact that the present petition has been filed under Section 397 of the Cr.PC, which empowers this court with power to call for and examine the record of any proceeding before any inferior court for the purpose of satisfying itself or himself as to the legality or regularity of any proceedings or order made by it. This Court certainly cannot find any quarrel with the arguments having been made by Sh. P.M. Negi, learned Additional Advocate General representing the State that for the purpose of satisfying as to the legality and regularity of any proceedings or order made by inferior court, this Court needs to see whether there is well founded error and it may not be proper for this Court to scrutinize the orders which on the face of it, appears to be taken in accordance with law. Similarly, this Court cannot loose sight of the fact that in various judgments of Hon'ble Apex Court as well as this Court, it has been held that revisional jurisdiction can be invoked, where the decisions under challenge are grossly erroneous, and there is no compliance of the provisions of law, the finding recorded is based on no evidence, material evidence is ignored or judicial discretion is exercised arbitrarily or perversely. This Court also agrees with the contention of Mr. Negi that revisional jurisdiction of higher Court is very limited one and it cannot be exercised in a routine manner because admittedly exercise of this jurisdiction should not lead to injustice ex-facie. Exposition of law till date as laid down by the Hon'ble Apex Court certainly suggests that where court is dealing with question as to whether the charge has been framed properly and in accordance with law in a given case, it may be reluctant to exercise its revisional jurisdiction unless the case substantially falls within the category mentioned herein above. It is well settled that while framing the charge, the court is required to evaluate the material and documents on record with a view to find out that if the facts emerging therefrom, taken on their face value, discloses the existence of all the ingredients, constituting the alleged offence or not and for the limited purpose, court may sift the evidence. Hon'ble Apex Court in case titled ***Amit Kapoor v. Ramesh Chander and Anr, (2012) 9 SCC 460*** held that framing of a charge is an exercise of jurisdiction by the trial Court in terms of Section 228 of the Cr.PC unless the accused is discharged under Section 227 Cr.PC. The Hon'ble Apex Court has further held that under the sections 227 and 228 Cr.PC, the Court is required to consider the 'record of the case' and the documents submitted therewith and, after hearing the parties, may either discharge the accused or where it appears to the Court and in its opinion there is ground for presuming that the accused has committed an offence, it shall proceed to frame the charge. The Hon'ble Apex Court has further held that once the facts and ingredients of the Section concerned exists, then the Court would be right in presuming that there is ground to proceed against the accused and frame the charge accordingly. Most importantly, the Hon'ble Apex Court in the aforesaid judgment has concluded that the satisfaction of the Court in relation to the existence of constituents of an offence and the facts leading to that offence is a sine qua non for exercise of such jurisdiction. At this stage, this court deems it fit to reproduce the following paras of aforesaid judgment having been passed by the Hon'ble Apex Court as follows:-

> *"17. Framing of a charge is an exercise of jurisdiction by the trial court in terms of Section 228 of the Code, unless the accused is discharged under Section 227 of the Code. Under both these provisions, the court is required to consider the 'record of the case' and documents submitted therewith and, after hearing the parties, may either discharge the accused or where it appears to the court and in its opinion there is ground for presuming that the accused has committed an offence, it shall frame the charge. Once the facts and ingredients of the Section exists, then the Court would be right in presuming that there is ground to proceed against the accused and frame the charge accordingly. This presumption is not a presumption of law as such. The satisfaction of the court in relation to the existence of constituents of an offence and the facts leading to that offence is a sine qua non for*

exercise of such jurisdiction. It may even be weaker than a prima facie case. There is a fine distinction between the language of Sections 227 and 228 of the Code. Section 227 is expression of a definite opinion and judgment of the Court while Section 228 is tentative. Thus, to say that at the stage of framing of charge, the Court should form an opinion that the accused is certainly guilty of committing an offence, is an approach which is impermissible in terms of Section 228 of the Code.

18. It may also be noticed that the revisional jurisdiction exercised by the High Court is in a way final and no inter court remedy is available in such cases. Of course, it may be subject to jurisdiction of this court under Article 136 of the Constitution of India. Normally, a revisional jurisdiction should be exercised on a question of law. However, when factual appreciation is involved, then it must find place in the class of cases resulting in a perverse finding. Basically, the power is required to be exercised so that justice is done and there is no abuse of power by the court. Merely an apprehension or suspicion of the same would not be a sufficient ground for interference in such cases.

19. At the initial stage of framing of a charge, the court is concerned not with proof but with a strong suspicion that the accused has committed an offence, which, if put to trial, could prove him guilty. All that the court has to see is that the material on record and the facts would be compatible with the innocence of the accused or not. The final test of guilt is not to be applied at that stage. We may refer to the well settled law laid down by this Court in the case of State of Bihar v. Ramesh Singh (1977) 4 SCC 39:

> *"4. Under Section 226 of the Code while opening the case for the prosecution the Prosecutor has got to describe the charge against the accused and state by what evidence he proposes to prove the guilt of the accused. Thereafter comes at the initial stage the duty of the Court to consider the record of the case and the documents submitted therewith and to hear the submissions of the accused and the prosecution in that behalf. The Judge has to pass thereafter an order either under Section 227 or Section 228 of the Code. If "the Judge considers that there is no sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing", as enjoined by Section 227. If, on the other hand, "the Judge is of opinion that there is ground for presuming that the accused has committed an offence which— … (b) is exclusively triable by the Court, he shall frame in writing a charge against the accused", as provided in Section 228. Reading the two provisions together in juxtaposition, as they have got to be, it would be clear that at the beginning and the initial stage of the trial the truth, veracity and effect of the evidence which the Prosecutor proposes to adduce are not to be meticulously judged. Nor is any weight to be attached to the probable defence of the accused. It is not obligatory for the Judge at that stage of the trial to consider in any detail and weigh in a sensitive balance whether the facts, if proved, would be incompatible with the innocence of the accused or not. The standard of test and judgment which is to be finally applied before recording a finding regarding the guilt or otherwise of the accused is not exactly to be applied at the stage of deciding the matter under Section 227 or Section 228 of the Code. At that stage the Court is not to see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction. Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence*

> *then it is not open to the Court to say that there is no sufficient ground for proceeding against the accused. The presumption of the guilt of the accused which is to be drawn at the initial stage is not in the sense of the law governing the trial of criminal cases in France where the accused is presumed to be guilty unless the contrary is proved. But it is only for the purpose of deciding prima facie whether the Court should proceed with the trial or not. It the evidence which the Prosecutor proposes to adduce to prove the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial. An exhaustive list of the circumstances to indicate as to what will lead to one conclusion or the other is neither possible nor advisable. We may just illustrate the difference of the law by one more example. If the scales of pan as to the guilt or innocence of the accused are something like even, at the conclusion of the trial, then, on the theory of benefit of doubt the case is to end in his acquittal. But if, on the other hand, it is so at the initial stage of making an order under Section 227 or Section 228, then in such a situation ordinarily and generally the order which will have to be made will be one under Section 228 and not under Section 227."*

20. The jurisdiction of the Court under Section 397 can be exercised so as to examine the correctness, legality or proprietary of an order passed by the trial court or the inferior court, as the case may be. Though the section does not specifically use the expression 'prevent abuse of process of any court or otherwise to secure the ends of justice', the jurisdiction under Section 397 is a very limited one. The legality, proprietary or correctness of an order passed by a court is the very foundation of exercise of jurisdiction under Section 397 but ultimately it also requires justice to be done. The jurisdiction could be exercised where there is palpable error, non-compliance with the provisions of law, the decision is completely erroneous or where the judicial discretion is exercised arbitrarily. On the other hand, Section 482 is based upon the maxim quando lex liquid alicuiconcedit, conceder videtur id quo res ipsa esse non protest, i.e., when the law gives anything to anyone, it also gives all those things without which the thing itself would be unavoidable. The Section confers very wide power on the Court to do justice and to ensure that the process of the Court is not permitted to be abused.

21. It may be somewhat necessary to have a comparative examination of the powers exercisable by the Court under these two provisions. There may be some overlapping between these two powers because both are aimed at securing the ends of justice and both have an element of discretion. But, at the same time, inherent power under Section 482 of the Code being an extraordinary and residuary power, it is inapplicable in regard to matters which are specifically provided for under other provisions of the Code. To put it simply, normally the court may not invoke its power under Section 482 of the Code where a party could have availed of the remedy available under Section 397 of the Code itself. The inherent powers under Section 482 of the Code are of a wide magnitude and are not as limited as the power under Section 397. Section 482 can be invoked where the order in question is neither an interlocutory order within the meaning of Section 397(2) nor a final order in the strict sense. Reference in this regard can be made to Raj Kapoor & Ors. v. State of Punjab & Ors. [AIR 1980 SC 258 : (1980) 1 SCC 43]}. In this very case, this Court has observed that inherent power under Section 482 may not be exercised if the bar under Sections 397(2) and 397(3) applies, except in extraordinary situations, to prevent abuse of the process of the Court. This itself shows the fine distinction between the powers exercisable by the Court under

these two provisions. In this very case, the Court also considered as to whether the inherent powers of the High Court under Section 482 stand repelled when the revisional power under Section 397 overlaps. Rejecting the argument, the Court said that the opening words of Section 482 contradict this contention because nothing in the Code, not even Section 397, can affect the amplitude of the inherent powers preserved in so many terms by the language of Section 482. There is no total ban on the exercise of inherent powers where abuse of the process of the Court or any other extraordinary situation invites the court's jurisdiction. The limitation is self-restraint, nothing more. The distinction between a final and interlocutory order is well known in law. The orders which will be free from the bar of Section 397(2) would be the orders which are not purely interlocutory but, at the same time, are less than a final disposal. They should be the orders which do determine some right and still are not finally rendering the Court functus officio of the lis. The provisions of Section 482 are pervasive. It should not subvert legal interdicts written into the same Code but, however, inherent powers of the Court unquestionably have to be read and construed as free of restriction.

22. In Dinesh Dutt Joshi v. State of Rajasthan & Anr. [(2001) 8 SCC 570], the Court held that

"6. … [Section 482] does not confer any power but only declares that the High Court possesses inherent powers for the purposes specified in the Section. As lacunae are sometimes found in procedural law, the Section has been embodied to cover such lacunae wherever they are discovered. The use of extraordinary powers conferred upon the High Court under this section are, however, required to be reserved as far as possible for extraordinary cases."

23. In Janata Dal v. H.S. Chowdhary & Ors. [(1992) 4 SCC 305], the Court, while referring to the inherent powers to make orders as may be necessary for the ends of justice, clarified that such power has to be exercise in appropriate cases ex debito justitiae, i.e. to do real and substantial justice for administration of which alone, the courts exist. The powers possessed by the High Court under Section 482 of the Code are very wide and the very plenitude of the powers requires a great caution in its exercise. The High Court, as the highest court exercising criminal jurisdiction in a State, has inherent powers to make any order for the purposes of securing the ends of justice. Being an extra ordinary power, it will, however, not be pressed in aid except for remedying a flagrant abuse by a subordinate court of its powers.

24. If one looks at the development of law in relation to exercise of inherent powers under the Code, it will be useful to refer to the following details :

As far back as in 1926, a Division bench of this Court In Re: Llewelyn Evans, took the view that the provisions of Section 561A (equivalent to present Section 482) extend to cases not only of a person accused of an offence in a criminal court, but to the cases of any person against whom proceedings are instituted under the Code in any Court. Explaining the word "process", the Court said that it was a general word, meaning in effect anything done by the Court. Explaining the limitations and scope of Section 561A, the Court referred to "inherent jurisdiction", "to prevent abuse of process" and "to secure the ends of justice" which are terms incapable of having a precise definition or enumeration, and capable, at the most, of test, according to well-established principles of criminal jurisprudence. The ends of justice are to be understood by ascertainment of the truth as to the facts on balance of evidence on each side. With reference to the facts of the case, the Court held that in the absence of any other method, it has no choice left in the application of the Section except, such tests subject to the caution to be exercised in the use of inherent jurisdiction and the avoidance of interference in details and directed providing of a legal practitioner.

25. Having examined the inter-relationship of these two very significant provisions of the Code, let us now examine the scope of interference under any of these provisions in relation to quashing the charge. We have already indicated above that framing of charge is the first major step in a criminal trial where the Court is expected to apply its mind to the entire record and documents placed therewith before the Court. Taking cognizance of an offence has been stated to necessitate an application of mind by the Court but framing of charge is a major event where the Court considers the possibility of discharging the accused of the offence with which he is charged or requiring the accused to face trial. There are different categories of cases where the Court may not proceed with the trial and may discharge the accused or pass such other orders as may be necessary keeping in view the facts of a given case. In a case where, upon considering the record of the case and documents submitted before it, the Court finds that no offence is made out or there is a legal bar to such prosecution under the provisions of the Code or any other law for the time being in force and there is a bar and there exists no ground to proceed against the accused, the Court may discharge the accused. There can be cases where such record reveals the matter to be so predominantly of a civil nature that it neither leaves any scope for an element of criminality nor does it satisfy the ingredients of a criminal offence with which the accused is charged. In such cases, the Court may discharge him or quash the proceedings in exercise of its powers under these two provisions.

26. This further raises a question as to the wrongs which become actionable in accordance with law. It may be purely a civil wrong or purely a criminal offence or a civil wrong as also a criminal offence constituting both on the same set of facts. But if the records disclose commission of a criminal offence and the ingredients of the offence are satisfied, then such criminal proceedings cannot be quashed merely because a civil wrong has also been committed. The power cannot be invoked to stifle or scuttle a legitimate prosecution. The factual foundation and ingredients of an offence being satisfied, the Court will not either dismiss a complaint or quash such proceedings in exercise of its inherent or original jurisdiction. In the case of Indian Oil Corporation v. NEPC India Ltd. & Ors. [(2006) 6 SCC 736], this Court took the similar view and upheld the order of the High Court declining to quash the criminal proceedings because a civil contract between the parties was pending.

27. Having discussed the scope of jurisdiction under these two provisions, i.e., Section 397 and Section 482 of the Code and the fine line of jurisdictional distinction, now it will be appropriate for us to enlist the principles with reference to which the courts should exercise such jurisdiction. However, it is not only difficult but is inherently impossible to state with precision such principles. At best and upon objective analysis of various judgments of this Court, we are able to cull out some of the principles to be considered for proper exercise of jurisdiction, particularly, with regard to quashing of charge either in exercise of jurisdiction under Section 397 or Section 482 of the Code or together, as the case may be :

> *27.1. Though there are no limits of the powers of the Court under Section 482 of the Code but the more the power, the more due care and caution is to be exercised in invoking these powers. The power of quashing criminal proceedings, particularly, the charge framed in terms of Section 228 of the Code should be exercised very sparingly and with circumspection and that too in the rarest of rare cases.*
>
> *27.2. The Court should apply the test as to whether the uncontroverted allegations as made from the record of the case and the documents submitted therewith prima facie establish the offence or not. If the allegations are so patently absurd and inherently improbable that no prudent person can ever reach such a conclusion and where the basic*

ingredients of a criminal offence are not satisfied then the Court may interfere.

27.3. The High Court should not unduly interfere. No meticulous examination of the evidence is needed for considering whether the case would end in conviction or not at the stage of framing of charge or quashing of charge.

27.4. Where the exercise of such power is absolutely essential to prevent patent miscarriage of justice and for correcting some grave error that might be committed by the subordinate courts even in such cases, the High Court should be loathe to interfere, at the threshold, to throttle the prosecution in exercise of its inherent powers.

27.5. Where there is an express legal bar enacted in any of the provisions of the Code or any specific law in force to the very initiation or institution and continuance of such criminal proceedings, such a bar is intended to provide specific protection to an accused.

27.6. The Court has a duty to balance the freedom of a person and the right of the complainant or prosecution to investigate and prosecute the offender.

27.7. The process of the Court cannot be permitted to be used for an oblique or ultimate/ulterior purpose.

27.8. Where the allegations made and as they appeared from the record and documents annexed therewith to predominantly give rise and constitute a 'civil wrong' with no 'element of criminality' and does not satisfy the basic ingredients of a criminal offence, the Court may be justified in quashing the charge. Even in such cases, the Court would not embark upon the critical analysis of the evidence.

27.9. Another very significant caution that the courts have to observe is that it cannot examine the facts, evidence and materials on record to determine whether there is sufficient material on the basis of which the case would end in a conviction, the Court is concerned primarily with the allegations taken as a whole whether they will constitute an offence and, if so, is it an abuse of the process of court leading to injustice.

27.10. It is neither necessary nor is the court called upon to hold a full-fledged enquiry or to appreciate evidence collected by the investigating agencies to find out whether it is a case of acquittal or conviction.

27.11. Where allegations give rise to a civil claim and also amount to an offence, merely because a civil claim is maintainable, does not mean that a criminal complaint cannot be maintained.

27.12. In exercise of its jurisdiction under Section 228 and/or under Section 482, the Court cannot take into consideration external materials given by an accused for reaching the conclusion that no offence was disclosed or that there was possibility of his acquittal. The Court has to consider the record and documents annexed with by the prosecution.

27.13. Quashing of a charge is an exception to the rule of continuous prosecution. Where the offence is even broadly satisfied, the Court should be more inclined to permit continuation of prosecution rather than its quashing at that initial stage. The Court is not expected to marshal the records with a view to decide admissibility and reliability of the documents or records but is an opinion formed prima facie.

27.14. Where the charge-sheet, report under Section 173(2) of the Code, suffers from fundamental legal defects, the Court may be well within its jurisdiction to frame a charge.

27.15. Coupled with any or all of the above, where the Court finds that it would amount to abuse of process of the Code or that interest of justice favours, otherwise it may quash the charge. The power is to be exercised ex debito justitiae, i.e. to do real and substantial justice for administration of which alone, the courts exist.

{Ref. State of West Bengal & Ors. v. Swapan Kumar Guha & Ors. [AIR 1982 SC 949]; Madhavrao Jiwaji Rao Scindia & Anr. v. Sambhajirao Chandrojirao Angre & Ors. [AIR 1988 SC 709]; Janata Dal v. H.S. Chowdhary & Ors. [AIR 1993 SC 892]; Mrs. Rupan Deol Bajaj & Anr. v. Kanwar Pal Singh Gill & Ors. [AIR 1996 SC 309; G. Sagar Suri & Anr. v. State of U.P. & Ors. [AIR 2000 SC 754]; Ajay Mitra v. State of M.P. [AIR 2003 SC 1069]; M/s. Pepsi Foods Ltd. & Anr. v. Special Judicial Magistrate & Ors. [AIR 1988 SC 128]; State of U.P. v. O.P. Sharma [(1996) 7 SCC 705]; Ganesh Narayan Hegde v. s. Bangarappa & Ors. [(1995) 4 SCC 41]; Zundu Pharmaceutical Works Ltd. v. Mohd. Sharaful Haque & Ors. [AIR 2005 SC 9]; M/s. Medchl Chemicals & Pharma (P) Ltd. v. M/s. Biological E. Ltd. & Ors. [AIR 2000 SC 1869]; Shakson Belthissor v. State of Kerala & Anr. [(2009) 14 SCC 466]; V.V.S. Rama Sharma & Ors. v. State of U.P. & Ors. [(2009) 7 SCC 234]; Chunduru Siva Ram Krishna & Anr. v. Peddi Ravindra Babu & Anr. [(2009) 11 SCC 203]; Sheo Nandan Paswan v. State of Bihar & Ors. [AIR 1987 SC 877]; State of Bihar & Anr. v. P.P. Sharma & Anr. [AIR 1991 SC 1260]; Lalmuni Devi (Smt.) v. State of Bihar & Ors. [(2001) 2 SCC 17]; M. Krishnan v. Vijay Singh & Anr. [(2001) 8 SCC 645]; Savita v. State of Rajasthan [(2005) 12 SCC 338]; and S.M. Datta v. State of Gujarat & Anr. [(2001) 7 SCC 659]}.

27.16. These are the principles which individually and preferably cumulatively (one or more) be taken into consideration as precepts to exercise of extraordinary and wide plenitude and jurisdiction under Section 482 of the Code by the High Court. Where the factual foundation for an offence has been laid down, the courts should be reluctant and should not hasten to quash the proceedings even on the premise that one or two ingredients have not been stated or do not appear to be satisfied if there is substantial compliance to the requirements of the offence.

28. At this stage, we may also notice that the principle stated by this Court in the case of Madhavrao Jiwaji Rao Scindia (supra) was reconsidered and explained in two subsequent judgments of this Court in the cases of State of Bihar & Anr. v. Shri P.P. Sharma & Anr. [AIR 1991 SC 1260] and M.N. Damani v. S.K. Sinha & Ors. [AIR 2001 SC 2037]. In the subsequent judgment, the Court held that, that judgment did not declare a law of universal application and what was the principle relating to disputes involving cases of a predominantly civil nature with or without criminal intent."

Close reading of the judgment supra suggests that normally court at the stage of framing of charge, is not required to make formal opinion that the accused is certainly guilty of having committed offence, rather, courts are required to see whether prima facie case exists against the accused or not? At this stage, this Court also takes assistance from the law laid down by the Hon'ble Apex Court in case titled ***Chitresh Kumar Chopra v. State (Government of NCT of Delhi), (2009) 16 SCC 605***, wherein the Hon'ble Apex Court has held that at the stage of framing of charge, the Court is required to evaluate the material and documents on record with a view to find out if the facts emerging therefrom taken at their face value disclose the existence of all the

ingredients constituting the alleged offence. But at the same time, Hon'ble Apex Court has cautioned the courts below to sift evidence for the limited purpose as it is not expected even at the initial stage to accept the same as a gospel truth all that the prosecution states. In nutshell ratio of aforesaid judgment is that at the time of stage of framing of charge, probative value of material on record cannot be gone into rather material of the prosecution has to be accepted as true at that stage.

8. The Hon'ble Apex Court in case titled ***Satish Mehra v. State (NCT of Delhi) and Anr, (2012) 13 SCC 614***, while deliberating on the issue of power of higher Court to quash proceedings after framing of charge, has held that power of High Court to interdict a proceeding either at the threshold or at an intermediate stage of trial is inherent in a High Court on the broad principle that in case allegations made in the FIR or the criminal complaint, as may be, prima facie do not disclose a triable offence there can be reason as to why the accused should be made to suffer the agony of legal proceedings that more often than not gets protracted. The relevant paras of the judgment referred supra are reproduced herein below:-

> *"14. The power to interdict a proceeding either at the threshold or at an intermediate stage of the trial is inherent in a High Court on the broad principle that in case the allegations made in the FIR or the criminal complaint, as may be, prima facie do not disclose a triable offence there can be reason as to why the accused should be made to suffer the agony of a legal proceeding that more often than not gets protracted. A prosecution which is bound to become lame or a sham ought to interdicted in the interest of justice as continuance thereof will amount to an abuse of the process of the law. This is the core basis on which the power to interfere with a pending criminal proceeding has been recognized to be inherent in every High Court. The power, though available, being extra ordinary in nature has to be exercised sparingly and only if the attending facts and circumstances satisfies the narrow test indicated above, namely, that even accepting all the allegations levelled by the prosecution, no offence is disclosed. However, if so warranted, such power would be available for exercise not only at the threshold of a criminal proceeding but also at a relatively advanced stage thereof, namely, after framing of the charge against the accused. In fact the power to quash a proceeding after framing of charge would appear to be somewhat wider as, at that stage, the materials revealed by the investigation carried out usually comes on record and such materials can be looked into, not for the purpose of determining the guilt or innocence of the accused but for the purpose of drawing satisfaction that such materials, even if accepted in its entirety, do not, in any manner, disclose the commission of the offence alleged against the accused.*
>
> > *15. The above nature and extent of the power finds an exhaustive enumeration in a judgment of this court in State of Karnataka vs. L. Muniswamy and others[2] which may be usefully extracted below : (SCC pp. 702-03, para 7)*
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> > *" 7. The second limb of Mr Mookerjee's argument is that in any event the High Court could not take upon itself the task of assessing or appreciating the weight of material on the record in order to find whether any charges could be legitimately framed against the respondents. So long as there is some material on the record to connect the accused with the crime, says the learned counsel, the case must go on and the High Court has no jurisdiction to put a precipitate or premature end to the proceedings on the belief that the prosecution is not likely to succeed. This, in our opinion, is too broad a proposition to accept. Section 227 of the Code of Criminal Procedure, 2 of 1974, provides that:*
> >
> > *. . . . .*

> *This section is contained in Chapter XVIII called "Trial Before a Court of Session". It is clear from the provision that the Sessions Court has the power to discharge an accused if after perusing the record and hearing the parties he comes to the conclusion, for reasons to be recorded, that there is not sufficient ground for proceeding against the accused. The object of the provision which requires the Sessions Judge to record his reasons is to enable the superior court to examine the correctness of the reasons for which the Sessions Judge has held that there is or is not sufficient ground for proceeding against the accused. The High Court therefore is entitled to go into the reasons given by the Sessions Judge in support of his order and to determine for itself whether the order is justified by the facts and circumstances of the case. Section 482 of the New Code, which corresponds to Section 561-A of the Code of 1898, provides that: . . . . .*
>
> *In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed. The saving of the High Court's inherent powers, both in civil and criminal matters, is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding in the interest of justice. The ends of justice are higher than the ends of mere law though justice has got to be administered according to laws made by the legislature. The compelling necessity for making these observations is that without a proper realisation of the object and purpose of the provision which seeks to save the inherent powers of the High Court to do justice, between the State and its subjects, it would be impossible to appreciate the width and contours of that salient jurisdiction."*

16. It would also be worthwhile to recapitulate an earlier decision of this court in Century Spinning & Manufacturing Co. vs. State of Maharashtra noticed in L. Muniswamy's case holding that: (SCC p. 704, para 10)

> *"10……..the order framing a charge affects a person's liberty substantially and therefore it is the duty of the court to consider judicially whether the materials warrant the framing of the charge."*

It was also held that the court ought not to blindly accept the decision of the prosecution that the accused be asked to face a trial.

17. While dealing with contours of the inherent power under Section 482 Cr.P.C. to quash a criminal proceeding, another decision of this court in Padal Venkata Rama Reddy alias Ramu vs. Kovvuri Satyanarayana Reddy and others reported in (2011) 12 SCC 437 to which one of us (Justice P.Sathasivam) was a party may be usefully noticed. In the said decision after an exhaustive consideration of the principles governing the exercise of the said power as laid down in several earlier decisions this court held that:

> *31. . . . . When exercising jurisdiction under Section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on reasonable appreciation of it accusation would not be sustained. That is the function of the trial Judge. The scope of exercise of power under Section 482 and the categories of cases where the High Court may exercise its power under it relating to cognizable offences to prevent abuse of process of any court or*

> *otherwise to secure the ends of justice were set out in detail in Bhajan Lal[4]. The powers possessed by the High Court under Section 482 are very wide and at the same time the power requires great caution in its exercise. The Court must be careful to see that its decision in exercise of this power is based on sound principles. The inherent power should not be exercised to stifle a legitimate prosecution."*

18. In an earlier part of this order the allegations made in the FIR and the facts disclosed upon investigation of the same have already been noticed. The conclusions of the High Court in the petitions filed by the accused for quashing of the charges framed against them have also been taken note of along with the fact that in the present appeals only a part of said conclusions of the High Court is under challenge and therefore, would be required to be gone into.

19. The view expressed by this Court in Century Spinning's case (supra) and in L. Muniswamy's case (supra) to the effect that the framing of a charge against an accused substantially affects the person's liberty would require a reiteration at this stage. The apparent and close proximity between the framing of a charge in a criminal proceeding and the paramount rights of a person arrayed as an accused under Article 21 of the Constitution can be ignored only with peril. Any examination of the validity of a criminal charge framed against an accused cannot overlook the fundamental requirement laid down in the decisions rendered in Century Spinning and Muniswamy (supra). It is from the aforesaid perspective that we must proceed in the matter bearing in mind the cardinal principles of law that have developed over the years as fundamental to any examination of the issue as to whether the charges framed are justified or not."

The Hon'ble Apex Court in ***Sheoraj Singh Ahlawat and Ors v. State of Uttar Pradesh and Anr., (2013) 11 SCC 476***, also reiterated that while framing charges, court is required to evaluate the material and documents on the record with a view to find out if the facts emerging thereform, taken at their face value, discloses the existence of all the ingredients constituting the alleged offence. Though Court in the aforesaid judgment has held that court is not required to go deep into the probative value of material on record but held that what needs to be evaluated is whether there is a ground for presuming that the offence has been committed or not. The relevant paras are reproduced herein below:-

"15. This Court partly allowed the appeal qua the parents-in-law while dismissing the same qua the husband. This Court explained the legal position and the approach to be adopted by the Court at the stage of framing of charges or directing discharge in the following words:

> *"11. It is trite that at the stage of framing of charge the court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom, taken at their face value, disclosed the existence of all the ingredients constituting the alleged offence. At that stage, the court is not expected to go deep into the probative value of the material on record. What needs to be considered is whether there is a ground for presuming that the offence has been committed and not a ground for convicting the accused has been made out. At that stage, even strong suspicion founded on material which leads the court to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged would justify the framing of charge against the accused in respect of the commission of that offence." (emphasis supplied)*

16. Support for the above view was drawn by this Court from earlier decisions rendered in State of Karnataka v. L. Muniswamy 1977 Cri.LJ 1125, State of Maharashtra & Ors. v. Som Nath Thapa and Ors. 1996 Cri.LJ 2448 and State of

M.P. v. Mohanlal Soni 2000 Cri.LJ 3504. In Som Nath's case (supra) the legal position was summed up as under: (scc P.671, para 32)

> *"32. … if on the basis of materials on record, a court could come to the conclusion that commission of the offence is a probable consequence, a case for framing of charge exists. To put it differently, if the court were to think that the accused might have committed the offence it can frame the charge, though for conviction the conclusion is required to be that the accused has committed the offence. It is apparent that at the stage of framing of a charge, probative value of the materials on record cannot be gone into; the materials brought on record by the prosecution has to be accepted as true at that stage." (emphasis supplied)*

17. So also in Mohanlal's case (supra) this Court referred to several previous decisions and held that the judicial opinion regarding the approach to be adopted for framing of charge is that such charges should be framed if the Court prima facie finds that there is sufficient ground for proceeding against the accused. The Court is not required to appreciate evidence as if to determine whether the material produced was sufficient to convict the accused. The following passage from the decision in Mohanlal's case (supra) is in this regard apposite: (SCC p. 342, para7)

> *"7. The crystallized judicial view is that at the stage of framing charge, the court has to prima facie consider whether there is sufficient ground for proceeding against the accused. The court is not required to appreciate evidence to conclude whether the materials produced are sufficient or not for convicting the accused."*

18. In State of Orissa v. Debendra Nath Pandhi (2005) 1 SCC 568, this Court was considering whether the trial Court can at the time of framing of charges consider material filed by the accused. The question was answered in the negative by this Court in the following words: (SCC pp. 577 & 579, paras 18 &23)

> *"18. We are unable to accept the aforesaid contention. The reliance on Articles 14 and 21 is misplaced...Further, at the stage of framing of charge roving and fishing inquiry is impermissible. If the contention of the accused is accepted, there would be a mini trial at the stage of framing of charge. That would defeat the object of the Code. It is well-settled that at the stage of framing of charge the defence of the accused cannot be put forth. The acceptance of the contention of the learned counsel for the accused would mean permitting the accused to adduce his defence at the stage of framing of charge and for examination thereof at that stage which is against the criminal jurisprudence. By way of illustration, it may be noted that the plea of alibi taken by the accused may have to be examined at the stage of framing of charge if the contention of the accused is accepted despite the well settled proposition that it is for the accused to lead evidence at the trial to sustain such a plea. The accused would be entitled to produce materials and documents in proof of such a plea at the stage of framing of the charge, in case we accept the contention put forth on behalf of the accused. That has never been the intention of the law well settled for over one hundred years now. It is in this light that the provision about hearing the submissions of the accused as postulated by Section 227 is to be understood. It only means hearing the submissions of the accused on the record of the case as filed by the prosecution and documents submitted therewith and nothing more. The expression 'hearing the submissions of the accused' cannot mean opportunity to file material to be granted to the accused and thereby changing the settled law. At the state of framing of charge hearing the submissions of the accused has to be confined to the material produced by the police...*

xx xx xx xx

23. As a result of aforesaid discussion, in our view, clearly the law is that at the time of framing charge or taking cognizance the accused has no right to produce any material..." (emphasis supplied)

19. Even in Smt. Rumi Dhar v. State of West Bengal & Anr. (2009) 6 SCC 364, reliance whereupon was placed by counsel for the appellants the tests to be applied at the stage of discharge of the accused person under Section 239 of the Cr.P.C., were found to be no different. Far from readily encouraging discharge, the Court held that even a strong suspicion in regard to the commission of the offence would be sufficient to justify framing of charges. The Court observed: (SCC p. 369, para 17)

"17....While considering an application for discharge filed in terms of Section 239 of the Code, it was for the learned Judge to go into the details of the allegations made against each of the accused persons so as to form an opinion as to whether any case at all has been made out or not as a strong suspicion in regard thereto shall subserve the requirements of law...

20. To the same effect is the decision of this Court in Union of India v. Prafulla Kumar Samal and Anr. v. (1979) 3 SCC 4, where this Court was examining a similar question in the context of Section 227 of the Code of Criminal Procedure. The legal position was summed up as under: (SCC p. 9, para 10)

"10. Thus, on a consideration of the authorities mentioned above, the following principles emerge:

(1) That the Judge while considering the question of framing the charges under Section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out:

(2) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be fully justified in framing a charge and proceeding with the trial.

(3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.

(4) That in exercising his jurisdiction under Section 227 of the Code the Judge which under the present Code is a senior and experienced Judge cannot act merely as a Post Office or a mouth- piece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial."

9. The Hon'ble Apex Court in case titled ***Vinay Tyagi. v. Irshad Ali alias Deepak and Ors., (2013) 5 SCC 762***, has held that opinion for presuming that the accused has committed an offence, is to be formed by the Court on basis of the record of the case, documents submitted therewith and to a limited extent, plea of defence, in order to be satisfied that ingredients of offence substantially exist. However, the Hon'ble Apex Court while making

aforesaid observation has also observed that prosecution case at this stage requires to be examined on the plea of demur i.e. presumption is of very weak and mild nature. Relevant paras of the judgment are being reproduced herein below:-

> *"16. Once the Court examines the records, applies its mind, duly complies with the requisite formalities of summoning the accused and, if present in court, upon ensuring that the copies of the requisite documents, as contemplated under Section 173(7), have been furnished to the accused, it would proceed to hear the case.*
>
> *17. After taking cognizance, the next step of definite significance is the duty of the Court to frame charge in terms of Section 228 of the Code unless the Court finds, upon consideration of the record of the case and the documents submitted therewith, that there exists no sufficient ground to proceed against the accused, in which case it shall discharge him for reasons to be recorded in terms of Section 227 of the Code.*
>
> *17.1. It may be noticed that the language of Section 228 opens with the words, 'if after such consideration and hearing as aforesaid, the Judge is of the opinion that there is ground for presuming that the accused has committed an offence', he may frame a charge and try him in terms of Section 228(1)(a) and if exclusively triable by the Court of Sessions, commit the same to the Court of Sessions in terms of Section 228(1)(b). Why the legislature has used the word 'presuming' is a matter which requires serious deliberation. It is a settled rule of interpretation that the legislature does not use any expression purposelessly and without any object. Furthermore, in terms of doctrine of plain interpretation, every word should be given its ordinary meaning unless context to the contrary is specifically stipulated in the relevant provision.*
>
> *17.2. Framing of charge is certainly a matter of earnestness. It is not merely a formal step in the process of criminal inquiry and trial. On the contrary, it is a serious step as it is determinative to some extent, in the sense that either the accused is acquitted giving right to challenge to the complainant party, or the State itself, and if the charge is framed, the accused is called upon to face the complete trial which may prove prejudicial to him, if finally acquitted. These are the courses open to the Court at that stage.*
>
> *17.3. Thus, the word 'presuming' must be read ejusdem generis to the opinion that there is a ground. The ground must exist for forming the opinion that the accused had committed an offence. Such opinion has to be formed on the basis of the record of the case and the documents submitted therewith. To a limited extent, the plea of defence also has to be considered by the Court at this stage. For instance, if a plea of proceedings being barred under any other law is raised, upon such consideration, the Court has to form its opinion which in a way is tentative. The expression 'presuming' cannot be said to be superfluous in the language and ambit of Section 228 of the Code. This is to emphasize that the Court may believe that the accused had committed an offence, if its ingredients are satisfied with reference to the record before the Court.*
>
> *18. At this stage, we may refer to the judgment of this Court in the case of Amit Kapur v. Ramesh Chander & Anr. [JT 2012 (9) SC 329] wherein, the Court held as under : (SCC pp. 476-77,paras 16-18)*
>
> > *"16. The above-stated principles clearly show that inherent as well as revisional jurisdiction should be exercised cautiously. If the jurisdiction under Section 482 of the Code in relation to quashing of an FIR is circumscribed by the factum and caution afore-noticed, in that event, the revisional jurisdiction, particularly while dealing with framing of a charge, has to be even more limited.*

17. Framing of a charge is an exercise of jurisdiction by the trial court in terms of Section 228 of the Code, unless the accused is discharged under Section 227 of the Code. Under both these provisions, the court is required to consider the 'record of the case' and documents submitted therewith and, after hearing the parties, may either discharge the accused or where it appears to the court and in its opinion there is ground for presuming that the accused has committed an offence, it shall frame the charge. Once the facts and ingredients of the Section exists, then the Court would be right in presuming that there is ground to proceed against the accused and frame the charge accordingly. This presumption is not a presumption of law as such. The satisfaction of the court in relation to the existence of constituents of an offence and the facts leading to that offence is a sine qua non for exercise of such jurisdiction. It may even be weaker than a prima facie case. There is a fine distinction between the language of Sections 227 and 228 of the Code. Section 227 is expression of a definite opinion and judgment of the Court while Section 228 is tentative. Thus, to say that at the stage of framing of charge, the Court should form an opinion that the accused is certainly guilty of committing an offence, is an approach which is impermissible in terms of Section 228 of the Code.

18. It may also be noticed that the revisional jurisdiction exercised by the High Court is in a way final and no inter court remedy is available in such cases. Of course, it may be subject to jurisdiction of this court under Article 136 of the Constitution of India. Normally, a revisional jurisdiction should be exercised on a question of law. However, when factual appreciation is involved, then it must find place in the class of cases resulting in a perverse finding. Basically, the power is required to be exercised so that justice is done and there is no abuse of power by the court. Merely an apprehension or suspicion of the same would not be a sufficient ground for interference in such cases." (emphasis in original)

19. On analysis of the above discussion, it can safely be concluded that 'presuming' is an expression of relevancy and places some weightage on the consideration of the record before the Court. The prosecution's record, at this stage, has to be examined on the plea of demur. Presumption is of a very weak and mild nature. It would cover the cases where some lacuna has been left out and is capable of being supplied and proved during the course of the trial. For instance, it is not necessary that at that stage each ingredient of an offence should be linguistically reproduced in the report and backed with meticulous facts. Suffice would be substantial compliance to the requirements of the provisions.

10. The Hon'ble Apex Court in judgment titled ***L. Krishna Reddy v. State by Station House Officer and Ors, (2014) 14 SCC 401***, has held that Court is neither substitute nor an adjunct of the prosecution, rather once a case is presented to it by the prosecution its bounden duty is to sift through the material to ascertain whether prima-facie case has been established, which would justify and merit the prosecution of a person. The relevant paras are as follows:-

"10. Our attention has been drawn to Stree Atyachar Virodhi Parishad v. Dilip Nathumal Chordia as well as K. Narayana Rao but we are unable to appreciate any manner in which they would persuade a court to continue the prosecution of the parents of the deceased. After considering Union of India v. Prafulla Kumar Samal, this Court has expounded the law in these words: (Stree Atyachar Virodhi Parishad case, SCC p. 721, para 14)

"14. … In fact, Section 227 itself contains enough guidelines as to the scope of enquiry for the purpose of discharging an accused. It provides

that "the Judge shall discharge when he considers that there is no sufficient ground for proceeding against the accused". The 'ground' in the context is not a ground for conviction, but a ground for putting the accused on trial. It is in the trial, the guilt or the innocence of the accused will be determined and not at the time of framing of charge. The Court, therefore, need not undertake an elaborate enquiry in sifting and weighing the material. Nor it is necessary to delve deep into various aspects. All that the Court has to consider is whether the evidenciary material on record if generally accepted, would reasonably connect the accused with the crime. No more need be enquired into"

11. The court is neither a substitute nor an adjunct of the prosecution. On the contrary, once a case is presented to it by the prosecution, its bounden duty is to sift through the material to ascertain whether a prima facie case has been established which would justify and merit the prosecution of a person. The interest of a person arraigned as an accused must also be kept in perspective lest, on the basis of flippant or vague or vindictive accusations, bereft of probative evidence, the ordeals of a trial have to be needlessly suffered and endured. We hasten to clarify that we think the statements of the complainant are those of an anguished father who has lost his daughter due to the greed and cruelty of his son-in-law. As we have already noted, the husband has taken his own life possibly in remorse and repentance. The death of a child even to avaricious parents is the worst conceivable punishment."

11. In the recent judgment, Hon'ble Apex Court in case bearing Criminal Appeal No.577 of 2017 (arising out of SLP (CrL.) No. 287 of 2017) titled ***Vineet Kumar and Ors. v. State of U.P. and Anr.,*** while considering the scope of interference under Section 397 Cr.PC and 482 Cr.PC, by the High Courts, has held that High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceedings ought to quashed. The Hon'ble Apex Court has further held that the saving of the High Court's inherent powers, both in civil and criminal matters, is designed to achieve a salutary public purpose i.e. a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In the aforesaid case, the Hon'ble Apex Court taking note of seven categories, where power can be exercised under Section 482 of the Cr.PC, as enumerated in the judgment titled as ***State of Haryana and others vs. Bhajan Lal and others***, 1992 Supp (1) SCC 335, i.e. where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge, quashed the proceedings:-

"19. We have considered the submissions made by the parties and perused the records.

20. Before we enter into the facts of the present case it is necessary to consider the ambit and scope of jurisdiction under Section 482 Cr.P.C. vested in the High Court. Section 482 Cr.P.C. saves the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

21. This Court time and again has examined scope of jurisdiction of High Court under Section 482 Cr.P.C. and laid down several principles which govern the exercise of jurisdiction of High Court under Section 482 Cr.P.C. A three-Judge Bench of this Court in State of Karnataka vs. L. Muniswamy and others, 1977 (2) SCC 699,held that the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the

process of the Court or that the ends of justice require that the proceeding ought to be quashed. In paragraph 7 of the judgment following has been stated:

> *"7....In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed. The saving of the High Court's inherent powers, both in civil and criminal matters, is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding in the interest of justice. The ends of justice are higher than the ends of mere law though justice has got to be administered according to laws made by the legislature. The compelling necessity for making these observations is that without a proper realisation of the object and purpose of the provision which seeks to save the inherent powers of the High Court to do justice, between the State and its subjects, it would be impossible to appreciate the width and contours of that salient jurisdiction."*

22. The judgment of this Court in State of Haryana and others vs. Bhajan Lal and others, 1992 Supp (1) SCC 335, has elaborately considered the scope and ambit of Section 482 Cr.P.C. Although in the above case this Court was considering the power of the High Court to quash the entire criminal proceeding including the FIR, the case arose out of an FIR registered under Section 161, 165 IPC and Section 5(2) of the Prevention of Corruption Act, 1947. This Court elaborately considered the scope of Section 482 CR.P.C./ Article 226 in the context of quashing the proceedings in criminal investigation. After noticing various earlier pronouncements of this Court, this Court enumerated certain Categories of cases by way of illustration where power under 482 Cr.P.C. can be exercised to prevent abuse of the process of the Court or secure ends of justice. Paragraph 102 which enumerates 7 categories of cases where power can be exercised under Section 482 Cr.P.C. are extracted as follows:

> *"102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.*
>
> > *(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.*
> >
> > *(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.*

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

23. A three-Judge Bench in State of Karnataka vs. M. Devenderappa and another, 2002 (3) SCC 89, had occasion to consider the ambit of Section 482 Cr.P.C. By analysing the scope of Section 482 Cr.P.C., this Court laid down that authority of the Court exists for advancement of justice and if any attempt is made to abuse that authority so as to produce injustice the Court has power to prevent abuse. It further held that Court would be justified to quash any proceeding if it finds that initiation/continuance of it amounts to abuse of the process of Court or quashing of these proceedings would otherwise serve the ends of justice. Following was laid down in paragraph 6:

"6......All courts, whether civil or criminal possess, in the absence of any express provision, as inherent in their constitution, all such powers as are necessary to do the right and to undo a wrong in course of administration of justice on the principle quando lex aliquid alicui concedit, concedere videtur et id sine quo res ipsae esse non potest (when the law gives a person anything it gives him that without which it cannot exist). While exercising powers under the section, the court does not function as a court of appeal or revision. Inherent jurisdiction under the section though wide has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself. It is to be exercised ex debito justitiae to do real and substantial justice for the administration of which alone courts exist. Authority of the court exists for advancement of justice and if any attempt is made to abuse that authority so as to produce injustice, the court has power to prevent abuse. It would be an abuse of process of the court to allow any action which would result in injustice and prevent promotion of justice. In exercise of the powers court would be justified to quash any proceeding if it finds that initiation/continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice. When no offence is disclosed by the complaint, the court may examine the question of fact. When a complaint is sought to be quashed, it

is permissible to look into the materials to assess what the complainant has alleged and whether any offence is made out even if the allegations are accepted in toto." Further in paragraph 8 following was stated:

"8.....Judicial process should not be an instrument of oppression, or, needless harassment. Court should be circumspect and judicious in exercising discretion and should take all relevant facts and circumstances into consideration before issuing process, lest it would be an instrument in the hands of a private complainant to unleash vendetta to harass any person needlessly. At the same time the section is not an instrument handed over to an accused to short-circuit a prosecution and bring about its sudden death. The scope of exercise of power under Section 482 of the Code and the categories of cases where the High Court may exercise its power under it relating to cognizable offences to prevent abuse of process of any court or otherwise to secure the ends of justice were set out in some detail by this Court in State of Haryana v. Bhajan Lal."

24. In Sunder Babu and others vs. State of Tamil Nadu, 2009 (14) SCC 244, this Court was considering the challenge to the order of the Madras High Court where Application was under Section 482 Cr.P.C. to quash criminal proceedings under Section 498A IPC and Section 4 of Dowry Prohibition Act, 1961. It was contended before this Court that the complaint filed was nothing but an abuse of the process of law and allegations were unfounded. The prosecuting agency contested the petition filed under Section 482 Cr.P.C. taking the stand that a bare perusal of the complaint discloses commission of alleged offences and, therefore, it is not a case which needed to be allowed. The High Court accepted the case of the prosecution and dismissed the application. This Court referred to the judgment in Bhajan Lal case (supra) and held that the case fell within Category 7. Apex Court relying on Category 7 has held that Application under Section 482 deserved to be allowed and it quashed the proceedings."

12. The Hon'ble Apex Court in its judgment ***L. Krishna Reddy*** referred supra has categorically held that Court is neither substitute nor an adjunct of the prosecution, rather once a case is presented to it by the prosecution, its bounden duty is to sift through the material to ascertain whether prima-facie case has been established which would justify and merit the prosecution of a person. The Hon'ble Apex Court, while making aforesaid observation has also held that while carrying out aforesaid exercise, interest of a person arraigned as an accused, must be taken into consideration lest he/she may have to suffer the ordeals of a trial based on flippant or vague or vindictive accusations, bereft of probative evidence. In recent judgment titled ***Prashant Bharti v. State (NCT of Delhi)***, (2013) 9 SCC 309, the Hon'ble Apex Court has held as under:-

"22. The proposition of law, pertaining to quashing of criminal proceedings, initiated against an accused by a High Court under Section 482 of the Code of Criminal Procedure (hereinafter referred to as "the Cr.P.C.") has been dealt with by this Court in Rajiv Thapar & Ors. vs. Madan Lal Kapoor wherein this Court inter alia held as under: (SCC pp.347-49, paras 29-30)

29. The issue being examined in the instant case is the jurisdiction of the High Court under Section 482 of the Cr.P.C., if it chooses to quash the initiation of the prosecution against an accused, at the stage of issuing process, or at the stage of committal, or even at the stage of framing of charges. These are all stages before the commencement of the actual trial. The same parameters would naturally be available for later stages as well. The power vested in the High Court under Section 482 of the Cr.P.C., at the stages referred to hereinabove, would have far reaching consequences, inasmuch as, it would negate the

prosecution's/complainant's case without allowing the prosecution/complainant to lead evidence. Such a determination must always be rendered with caution, care and circumspection. To invoke its inherent jurisdiction under Section - 482 of the Cr.P.C. the High Court has to be fully satisfied, that the material produced by the accused is such, that would lead to the conclusion, that his/their defence is based on sound, reasonable, and indubitable facts; the material produced is such, as would rule out and displace the assertions contained in the charges levelled against the accused; and the material produced is such, as would clearly reject and overrule the veracity of the allegations contained in the accusations levelled by the prosecution/complainant. It should be sufficient to rule out, reject and discard the accusations levelled by the prosecution/complainant, without the necessity of recording any evidence. For this the material relied upon by the defence should not have been refuted, or alternatively, cannot be justifiably refuted, being material of sterling and impeccable quality. The material relied upon by the accused should be such, as would persuade a reasonable person to dismiss and condemn the actual basis of the accusations as false. In such a situation, the judicial conscience of the High Court would persuade it to exercise its power under Section 482 of the Cr.P.C. to quash such criminal proceedings, for that would prevent abuse of process of the court, and secure the ends of justice.

30. Based on the factors canvassed in the foregoing paragraphs, we would delineate the following steps to determine the veracity of a prayer for quashing, raised by an accused by invoking the power vested in the High Court under Section 482 of the Cr.P.C.:-

> *30.1 Step one, whether the material relied upon by the accused is sound, reasonable, and indubitable, i.e., the material is of sterling and impeccable quality?*
>
> *30.2 Step two, whether the material relied upon by the accused, would rule out the assertions contained in the charges levelled against the accused, i.e., the material is sufficient to reject and overrule the factual assertions contained in the complaint, i.e., the material is such, as would persuade a reasonable person to dismiss and condemn the factual basis of the accusations as false.*
>
> *30.3 Step three, whether the material relied upon by the accused, has not been refuted by the prosecution/complainant; and/or the material is such, that it cannot be justifiably refuted by the prosecution/complainant?*
>
> *30.4 Step four, whether proceeding with the trial would result in an abuse of process of the court, and would not serve the ends of justice?*
>
> *30.5 If the answer to all the steps is in the affirmative, judicial conscience of the High Court should persuade it to quash such criminal - proceedings, in exercise of power vested in it under Section 482 of the Cr.P.C. Such exercise of power, besides doing justice to the accused, would save precious court time, which would otherwise be wasted in holding such a trial (as well as, proceedings arising therefrom) specially when, it is clear that the same would not conclude in the conviction of the accused."*

23. The details in respect of each aspect of the matter, arising out of the complaints made by Priya on 16.2.2007 and 21.2.2007 have been examined in extensive detail in the foregoing paragraphs. We shall now determine whether the steps noticed by this Court in the judgment extracted hereinabove can be stated to have been satisfied. In so far as the instant aspect of the matter is concerned, the factual details referred to in the foregoing paragraphs are being summarized hereafter.

> *23.1. Firstly, the appellant-accused was in Sector 37, Noida in the State of Uttar Pradesh on 15.2.2007. He was at Noida before 7.55 pm. He, thereafter, remained at different places within Noida and then at Shakarpur, Ghaziabad, Patparganj, Jorbagh etc. From 9.15 pm to 11.30 pm on 15.2.2007, he remained present at a marriage anniversary function celebrated at Rangoli Lawns at Ghaziabad, Uttar Pradesh. An affidavit to the aforesaid effect filed by the appellant- accused was found to be correct by the investigating officer on the basis of his mobile phone call details. The accused was therefore not at the place of occurrence, as alleged in the complaint dated 16.2.2007.*
>
> *23.2. Secondly, verification of the mobile phone call details of the complainant/prosecuterix Priya revealed, that on 15.2.2007, no calls were made by the appellant-accused to the complainant/prosecuterix, and that, it was the complainant/prosecuterix who had made calls to him.*
>
> *23.3. Thirdly, the complainant/prosecuterix, on and around the time referred to in the - complaint dated 16.2.2007, was at different places of New Delhi i.e., in Defence Colony, Greater Kailash, Andrews Ganj and finally at Tughlakabad Extension, as per the verification of the investigating officer on the basis of her mobile phone call details. The complainant was also not at the place of occurrence, as she herself alleged in the complaint dated 16.2.2007.*
>
> *23.4. Fourthly, at the time when the complainant/prosecuterix alleged, that the appellant-accused had misbehaved with her and had outraged her modesty on 15.2.2007 (as per her complaint dated 16.2.2007), she was actually in conversation with her friends (as per the verification made by the investigating officer on the basis of her mobile phone call details).*
>
> *23.5. Fifthly, even though the complainant/prosecuterix had merely alleged in her complaint dated 16.2.2007, that the accused had outraged her modesty by touching her breasts, she had subsequently through a supplementary statement (on 21.2.2007), levelled allegations against the accused for offence of rape.*
>
> *23.6. Sixthly, even though the complainant/prosecuterix was married to one Manoj Kumar Soni, s/o Seeta Ram Soni (as indicated in an affidavit appended to the Delhi police format for information of tenants and duly verified by the investigating officer, wherein she had described herself as married), in the complaint made to the police (on 16.2.2007 and 21.2.2007), she had suggested that she was unmarried.*
>
> *23.7. Seventhly, as per the judgment and decree of the Civil Judge (Senior Division), Kanpur (Rural) dated 23.9.2008, the complainant was married to Lalji Porva on 14.6.2003. The aforesaid marriage subsisted till 23.9.2008. The allegations made by the complainant dated 16.2.2007 and 21.2.2007 pertain to occurrences of 23.12.2006, 25.12.2006, 1.1.2007 and - 15.2.2007, i.e., positively during the subsistence of her marriage with Lalji Porwal. Thereafter, the complainant Priya married another man Manoj on 30.9.2008. This is evidenced by a "certificate of marriage" dated*

30.9.2008. In view of the aforesaid, it is apparent that the complainant could not have been induced into a physical relationship, based on an assurance of marriage.

23.8. Eighthly, the physical relationship between the complainant and the accused was admittedly consensual. In her complaints Priya had however asserted, that her consent was based on a false assurance of marriage by the accused. Since the aspect of assurance stands falsified, the acknowledged consensual physical relationship between the parties would not constitute an offence under Section 376 IPC. Especially because the complainant was a major on the date of occurrences, which fact emerges from the "certificate of marriage" dated 30.9.2008, indicating her date of birth as 17.7.1986.

23.9. Ninthly, as per the medical report recorded by the AIIMS dated 16.2.2007, the examination of the complainant did not evidence her having been poisoned. The instant allegation made by the complainant cannot now be established because even in the medical report dated 16.2.2007 it was observed that blood samples could not be sent for examination because of the intervening delay. For the same reason even the allegations levelled by the accused of having been administered some intoxicant in a cold drink (Pepsi) cannot now be established by cogent evidence.

23.10. Tenthly, The factual position indicated in the charge-sheet dated 28.6.2007, that despite best efforts made by the investigating officer, the police could not recover the container of the cold drink (Pepsi) or the glass from which the - complainant had consumed the same. The allegations made by the complainant could not be verified even by the police from any direct or scientific evidence, is apparent from a perusal of the charge-sheet dated 28.6.2007.

23.11. Eleventhly, as per the medical report recorded by the AIIMS dated 21.2.2007 the assertions made by the complainant that the accused had physical relations with her on 23.12.2006, 25.12.2006 and 1.1.2007, cannot likewise be verified as opined in the medical report, on account of delay between the dates of occurrences and her eventual medical examination on 21.2.2007. It was for this reason, that neither the vaginal smear was taken, nor her clothes were sent for forensic examination."

13. From the careful perusal of the aforesaid judgments, it clearly emerge that Courts below, at the stage of framing charge in exercise of jurisdiction under Sections 227 and 228 of the Cr.PC, are required to consider the record of the case and the documents submitted therewith and thereafter, may either discharge the accused or where it appears to the court that there is a ground for presuming that the accused has committed offence, it shall frame the charge. It clearly emerges from the reading of the aforesaid judgments that the satisfaction of the Court in relation to the existence of constituents of an offence and the facts leading to that offence is a sine qua non for exercise of such jurisdiction.

14. True it is, at the initial stage of framing of charge, the court is concerned not with proof but with the strong suspicion whether the accused has committed an offence, which if put to trial, could prove him guilty. In all the judgments, referred supra, the Hon'ble Apex Court has held that at the time of framing of charge, Court should come to conclusion that prima-facie case, if any, exists to the satisfaction of the Court against the accused. The Hon'ble Apex Court in ***L. Krishna Reddy's*** case supra, taking note of judgments passed by the Hon'ble Apex Court in cases titled "***Stree Atyachar Virodhi Parishad v. Dilip Nathumal Chordia"*** *as well as "**K. Narayana Rao"***, wherein the Hon'ble Supreme Court held that though Courts need not undertake an elaborate enquiry while sifting and weighing the material but court needs to consider whether evidenciary material on record, if generally accepted would reasonably connect

the accused with the crime or not, it has held that once a case is presented to the Court by the prosecution, it is the duty of the Court to sift through the material to ascertain whether prima-facie case has been established against the accused or not?

15. Now on the basis of aforesaid principles as have been laid down in the judgments supra, this Court would proceed to examine whether, learned trial court while exercising power under Section 228 of the Cr.PC, actually perused material made available on record by the prosecution, to ascertain whether prima-facie case exists against the accused or not?

16. At the very outset, it may be stated that at the time of issuance of notice, this Court had called for the records of the court below, which was duly received by this Court, careful perusal whereof suggests that victim/complainant got his statement recorded under Section154 of the Cr.PC on 4.5.2015 stating therein that he has given examination of 10th Class and is the only brother and his house is situated in Jatpura on the bank of the road. He further stated that at about 7:00 pm, when there was some noise on the main road, he came out to see what is happening and found that many people had gathered there. He also stated that some of the people gathered were Jasveer, Avinash, Rakesh, Harjab Singh and his uncle Amarjeet Singh. He further reported that after the dispute was over and when they were coming back to the houses, a motorcyclist i.e. the petitioner accused namely Varun came from his back side and gave a blow of a sickle (darat) on his neck with an intention to kill him. He further stated that he took side, as result of which, blow of darat landed on his left shoulder. He also reported that had he not taken the side, the blow would have landed on his neck and he would have died. The complainant victim also stated in his statement that after giving the blow of darat, motorcyclist fled towards Una throwing the weapon of offence on the spot. On the basis of aforesaid statement under Section 154 of the Cr.PC, having been got recorded by the complainant/victim, on 4.5.2015, police registered formal FIR No. 110 of 295 against the petitioner accused under Section 307 of the IPC. Perusal of document available on record further suggests that police got complainant/victim examined from medical officer, Regional Hospital Una on 4.5.2015. Perusal of medical opinion rendered by the Medical Officer, Regional Hospital Una suggests that victim complainant was brought for medical examination at around 12.45 am on 4.5.2015, whereas perusal of initial communication sent by the Incharge, police station Haroli, suggests that request was made for medical examination on 3.5.2015. Even MLC placed on record suggests that the police made request vide police docket SPL-3 dated 3.5.2015. It is not understood that when incident took place on 4.5.2015, that too at 12.05 a.m., how police could make communication to Medical Officer, Regional Hospital, Una on 3.5.2015, requesting therein for medical examination of the complainant/victim. Similarly, perusal of statement of the complainant recorded under Section 154 of the Cr.PC suggests that initially matter was reported by the complainant/victim to the police on 4.5.2015 at 12.05am, pursuant to which FIR bearing No. 110 of 2015 came to be registered. Perusal of FIR made available on record suggests that FIR was registered on 4.5.2015 at 1:30 hours, whereas copy of rapat No.25 (Rojnamcha) suggests that it was entered on 3.5.2015 at 11:30pm and when, FIR was registered on 4.5.015 that too at 1:30 pm, it is not understood how police could make request vide communication dated 3.5.2015, to the Medical Officer, Regional Hospital requesting therein for medical examination of the complainant victim. Perusal of Medical opinion/MLC suggests that victim complainant was brought for medical examination at 12:45 am on 4.5.2015 on the basis of police SPL-3 dated 3.5.20115, whereas as per the own version of the Investigating Agency, initial statement of the complainant victim was recorded under Section 154 of the Cr.PC at 12:05 am. If the aforesaid version of the Investigating Agency is accepted to be true, this court has reason to infer that they must have consumed some time to lodge formal FIR against the petitioner accused.

17. Leaving everything aside, perusal of medical opinion rendered by the medical officer nowhere suggests that at the time of examination, injury, if any, much less grievous was witnessed/seen on the body of the complainant/victim with the alleged blow of sickle (darat). Medical Officer has reported no injury on the neck of the victim. The Medical Officer concerned has also reported that there is no bleeding and movement of left shoulder was normal. Further doctor i.e. surgical specialist vide its opinion on 6.5.2015, termed the injury to be simple in

nature. The Surgical Specialist has further concluded that there is no mark on the scalper region and neck and injury on the person concerned is superficial injury. There is a specific finding of doctor that there is no injury on the neck and the injury explained at Sr. No. 2 is simple in nature. Apart from above, this court had an occasion to peruse report submitted by the RFSL, Dharamshala, H.P, which is reproduced herein below:-

> *"Three sealed parcels were received for examination in Biology and Serology Division on 14.05.15. The seals on the parcels were seen intact and tallied with the specimen seals sent with the docket. The parcels were signed, cut and opened. The description of the exhibits in the parcels was as under:*
>
> *Parcel-I:- Sealed with eight seals of 'V'. It contained exhibit-1.*
>
> *Exhibit-1:- One metallic rusty darat/dagger measured about 55 cm.*
>
> *Parcel-II:- Sealed with eight seals of 'S'. It contained exhibit-2.*
>
> *Exhibit-2:-One white colour "JOCKEY' make, sleeveless vest having some brown stains on the back of left shoulder region. The exhibit was mentioned as vest of Amanjot Singh.*
>
> *Parcel-III:- Sealed with one seal of 'MORTUARY UNA'. It contained exhibit-3.*
>
> *Exhibit-3:- One glass vial having about 4.5 ml of red colour liquid. The exhibit was mentioned as blood sample of Amanjot Singh.*
>
> *Results*
>
> *The exhibits/cuttings were subjected to biological and serological analyses in the laboratory. Benzidine test was performed to detect the presence of blood. The species of origin was determined by using gel-diffusion technique. On the basis of aforesaid examinations, results were as under:-*
>
> 1. *Blood was not detected in exhibit-1 (darat/dagger).*
> 2. *Human blood was detected in exhibit-2 (vest, Amanjot Singh), but was insufficient for blood grouping.*
> 3. *Human Blood was detected in exhibit-3 (blood sample, Amanjot Singh)."*

Aforesaid RFSL report further suggests that blood was not detected on Ext.1 i.e. darat/dagger, allegedly used by the petitioner accused while causing injury on the body of the victim/complainant. Similarly report suggests that human blood was found on Ext.2, i.e. vest of complainant but the same was insufficient for blood grouping.

18. This Court also carefully perused the statements recorded by the Investigating Agency under Section 161 Cr.PC of the complainant/victim as well as other persons, who were allegedly with the complainant at the time of alleged occurrence, perusal whereof suggests that around 10:00pm on 4.5.2015, victim had gone out of his house along with his uncle Amarjit Singh on the main road, where there was noise with regard to traffic jam. All the witnesses have stated that at that time, the petitioner accused Varun, who is indulged in smuggling of sand was also there. Apart from above, all the witnesses have stated that since petitioner accused had suspicion that the victim complainant is an informer of police, he attempted to cause injury on the neck of the complainant with sickle.

19. Careful perusal of statements made by the aforesaid witnesses suggests that on 6.5.2015, when their statements under Sections 161 Cr.PC, were recorded, they introduced altogether different story with regard to involvement of the petitioner accused in smuggling of sand. It emerges from the statements as referred above that petitioner accused had been stealing/smuggling sand from the land of Sh. Amarjeet Singh, who happened to be uncle of Amanjot Singh/complainant and in this regard, Sh. Amarjit Singh had repeatedly warned him not to indulge himself in illegal smuggling of sand. Though, there is mention qua the lodging of

report by the aforesaid witnesses against the petitioner but there is nothing on record suggestive of the fact that there was some dispute inter-se them over illegal smuggling of sand by the petitioner accused that too with the persons, who got their statements recorded under Section 161 Cr.PC. Similarly, this Court was unable to find any evidence on record that pursuant to the aforesaid statements having been made by the witnesses under Section 161 Cr.PC, police made an attempt to bring on record evidence suggestive of the fact that petitioner was actually indulged/involved in illegal smuggling of sand. Similarly, there is no evidence led on record by the Investigating Agency to substantiate the claim of the claimant-victim that attempt to kill him was made by the petitioner accused on having doubt that he is a police informer.

20. This Court after carefully examining the document made available on record by the Investigating Agency sees substantial force in the argument having been made by the learned counsel for the petitioner that there is/was no material much less substantial available on record to frame charge under Section 307 of the IPC. Similarly, perusal of impugned order passed by the Court below reproduced herein above, nowhere suggests that court below before proceeding to frame charge under Section 228 of the Cr.PC against the accused carefully sifted/perused the material made available on record to ensure/ascertain whether prima-facie case exists against the accused or not? The Hon'ble Apex Court in *L.* ***Krishna Reddy's*** case supra, has specifically held that while framing charge under Section 228 Cr.PC, court must keep in mind the interest of the person arraigned as an accused, who may be put to the ordeals of trial on the basis of flippant and vague evidence. In the instant case, perusal of impugned order nowhere suggests that learned trial Court while proceeding to frame charge made an endeavor to sift/peruse the material adduced on record by the Investigating Agency. There appears to be no application of mind by the learned court below while charging under Section 307 Cr.PC. The Hon'ble Apex Court further held that once a case is presented to it by the prosecution, it is bounden duty of Court to sift through the material to ascertain whether a prima-facie case has been established or not. But even if otherwise, ratio as laid down by the Hon'ble Apex Court in other cases cited above are also taken into consideration, it clearly emerge from the same that in all probabilities, learned court below while framing charge is required to ascertain whether prima-facie case exists or not. Needles to say exercise, if any, carried out by the Court while ascertaining whether prima-facie case, if any, exists against the accused or not, must reflect in order, whereby charge is proposed to be framed. But in the instant case, as has been discussed in detail, there appears to be no attempt, if any, made by the learned trial Court to ascertain whether prima-facie case exists against the accused at the time of framing of charge or not and as such, impugned order is not sustainable being totally contrary to the law laid down by the Hon'ble Apex Court in the judgment referred herein above.

21. True, it is jurisdiction of this Court under Section 397 of the Cr.PC is very limited but same can be exercised so as to examine the correctness, illegality or proprietary of order passed by the trial Court or inferior court as the case may be. The legality, proprietary or correctness of an order passed by an inferior court is the very foundation of exercise of jurisdiction under Section 397 but ultimately it also requires justice to be done. In the judgments referred herein above, the Hon'ble Apex Court has held that jurisdiction vested in this Court in terms of Section 397 Cr.PC can be exercised to the fact that there is a palpable error, non-compliance with the provision of law or where decision is completely erroneous or where the judicial discretion is exercised arbitrarily.

22. Hence, in the instant case, for the reasons stated above, this Court sees substantial reason to exercise its revisionary power to correct impugned order, which on the face of it is not based upon the principles as have been laid down in the judgments recorded by the Apex Court while discussing scope of power of Court to frame charge under Section 228 of the Cr.PC. In the ***Vineet Kumar's*** case supra, the Hon'ble Supreme Court has held that Court cannot permit prosecution to go on if the case falls in one of the categories as enumerated in the case titled *State of Haryana and others vs. Bhajan Lal and others*, because judicial process is a solemn proceeding and same should not be an instrument of oppression or, needless harassment. This court has no hesitation to conclude after carefully examining the impugned order vis-à-vis ,

material available on record that learned court below merely acted as a post office, who accepted the charge sheet under Section 173 of the Cr.PC as verbatim without making on effort to ascertain whether prima-facie case exists against the accused or not? Impugned order nowhere reveals that learned court below while passing impugned order made an effort to sift through the material produced before it to conclude whether prima-facie case is made out against the petitioner. Hence, this Court has reason to conclude that great prejudice has been caused to the petitioner.

23. Consequently, in view of the detailed discussion made herein above as well as law laid down by the Hon'ble Apex Court, the present revision petition is allowed and impugned order dated 24.6.2016 passed by the court below is quashed and set-aside. However, the matter is remanded back to the learned court below to consider the matter afresh in light of the findings/observations returned/made in the instant judgment passed by this Court. Parties are directed to remain present before the learned Court below on **22.5.2017**, to enable it to consider the matter as directed above. Records of the case along with copy of judgment be also sent forthwith. Pending applications, if any, are disposed of.

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

HPSEB and others .....Petitioners.
Versus
Agro Industrial Packaging India Ltd. .....Respondent.

CWP No. 5056 of 2011
Date of decision: 26/04/2017

Constitution of India, 1950- Article 226- Respondent is a consumer of electricity supplied by the petitioner and had agreed to pay the tariff levied upon it in accordance with the prevalent rules – the petitioner sought demand and energy charges from the respondent- a dispute was raised before Forum for Rederessal for Grievances of HPSEB Consumers, who decided that the final claim raised by the petitioners is not based upon actual figures and facts - aggrieved from the order, present writ petition has been filed – held that respondent had agreed to pay the electricity tariff as per the prevalent rules - it had sought assured contract demand of 754.08 KVA– demand and energy charges were in accordance with the prevalent rates – there is no infirmity in the demand of charges from the respondent- petition allowed.(Para-2 to 4)

For the petitioners: Mr. Satyen Vaidya, Sr. Advocate with Mr. Vivek Sharma, Advocate.
For the respondent: Mr. Hamender Chandel, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge, (oral):

The respondent is an industrial Unit. It receives power supply from the petitioners. The petitioners are aggrieved by the orders comprised in Annexures P-16, whereby the Forum for Redressal of Grievances of HPSEB Consumers pronounced that a final claim of Rs.15,06,396/- raised by the HPSEB, is not based on actual figures and facts. The petitioners pray for the annexure aforesaid being quashed and set aside. The petitioners also pray for a further direction being rendered upon the respondent, to pay the demand raised by the petitioners with respect to Rs. 2349352/- including 1% surcharge together with interest @ 18% per annum, from the date it was due and payable, till its actual realization.

2. The respondent resists and repudiates the contentions of the petitioners. The controversy inter-se the parties at contest before this Court, is qua, the tenability of raising of tariff by the petitioner with respect to electrical energy consumed by the respondent-unit. Admittedly, the respondent, is, a consumer of electricity under the petitioners. In an agreement concluded inter-se the parties, agreement whereof exists on the paper book, the respondent-unit, had, agreed/accepted, to pay to the petitioner with respect to electricity consumed by it, the apposite commensurate tarrif, as would come to be levied upon it, in accordance with the prevalent rules in force. The respondent, too, does not controvert or contest the fact, that, it was under an enjoined legal obligation, to defray to the petitioner/suppliers of electricity to its unit at Gumma, tariff at the prevalent rates. In face thereof, now it is imperative to determine, as, to whether the petitioners, had levied tariff with respect to electrical energy consumed by the respondent-unit, in, accordance with the prevalent rates. The tariff, as, demanded by the petitioners from the respondent-unit, with respect to consumption of electricity by it, is, on the strength, of, Annexure-P-1. A perusal of the aforesaid annexure, divulges that the annexure aforesaid ordains levy, of, electricity tariff by the petitioner upon the respondent-Unit, on a two way basis, in as much, as, the respondent-unit was obliged to pay both demand charges and energy charges. Demand charges stand conveyed, in, Annexure-P-1, to, imply that they would be levied, on, the actual maximum recorded demand, in, a month in any 30 minutes interval, in, a month or 80% of the contract demand whichever, is, higher.

3. The respondent-Unit does not contest the fact that it was legally obliged to in consonance with the terms of the concluded contract interse the parties, to defray electricity tariff to the petitioners at the prevalent rates, however, it, contests the fact of it being under a duty under law, to, defray to the petitioners, the relevant demand charges at the rate contemplated in, Annexure-P-1. For clinching the contest qua the facet aforesaid, it is imperative to determine whether the respondent-unit, had agreed or contracted to defray to the petitioners, electricity tariff, as ordained in Annexure-P-1. Moreover, prevalence of Annexure-P-1, at the apposite stage, has, to be determined, on, the strength of the fact of its being in vogue or in-force during the disputed period, in as much, as, from 1-11-2001 till 31-08-2003. A perusal of the contract entered inter-se the parties, comprised, at, page 23 of the writ book, discloses that the assured contracted demand made by the respondent-Unit for supply of electricity to it by the petitioner, being comprised in 754.08 KVA besides the said agreement remaining, in force, as well, as, in operation during the disputed period.

4. On a consideration of the above material on record this Court is of the firm and confident view that given the evident acceptance by the respondent-Unit, to defray to the petitioners, electricity tariff, at the prevalent rules, acceptance whereof is comprised, in, the operable contract qua the disputed period, whereby, the respondent-unit had sought assured contract demand of supply of electricity to the tune of 754.08 KVA. Hence, given the relevant acceptance by the respondent-unit under a concluded contract inter-se the parties besides it hence accepting the applicability of the relevant contractual tariff rates with respect to electrical energy consumed, at its industrial unit. In sequel when Annexure P-2 also portrays the mode(s) of raising or levying of tariff by the petitioners qua electrical energy consumed by the respondent-unit, hence the effect of the respondent agreeing to or abide by the prevalent rates of levying of electricity tariff, is of its also conveying its acquiescence to accept the rates of electricity tariff postulated, in Annexure P-2. The petitioners by applying the two way mode, of levying of electricity tariff, in as much, as, by raising demand, both, qua the energy charges, as well, as qua demand charges, its, comprising the prevalent rates/modes of levy of tariff, modes of levy of tariff stand accepted by the respondent under a concluded contract executed inter-se the parties at contest hence did not transgress the domains thereof. Therefore, the respondent-unit is estopped from contending that the levy of electricity tariff by the petitioner on anvil of the prevalent rates comprised in Annexure P-1 is either arbitrary or capricious, rather the raising of electricity tariff by the petitioners with respect to the electricity consumed, by the respondent-unit is to be considered to be anvilled upon firm and formidable material existing on record. Obviously the

relevant tariff, as raised by the petitioners, is to be defrayed by the respondent-unit. Consequently, I find merit in the petition, which is accordingly allowed. No costs.

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

Jai Chand ……Petitioner.
Versus
Jagdish Chand …….Respondent.

CMPMO No. 89 of 2017.
Decided on: 26th April, 2017

Code of Civil Procedure, 1908- Order 26 Rule 9- An application for demarcation was filed pleading that the defendant had encroached upon suit land by raising construction during the pendency of suit – he had also cut a Biuhal tree- application was filed to determine the extent of encroachment – demarcation was conducted by the Field Kanungo after filing the application- the demarcation report was affirmed by the Competent Authority – Trial Court dismissed the application on the ground that there was no necessity of demarcation by the Court in view of the demarcation having been conducted by the Revenue Authorities, - aggrieved from the order, present petition has been filed- held that once the demarcation has been conducted, no permission to demarcate the land afresh can be granted – Trial Court had rightly dismissed the application – petition dismissed.(Para-4 and 5)

For the petitioners : Mr. Rajesh Kumar, Advocate.
For the Respondent : Mr. K.S. Banyal, Senior Advocate with Ms. Sarswati, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. (oral).

Order Annexure A-3 dated 19.8.2016 passed in an application filed under Order 26 Rule 9 CPC by learned Civil Judge (Junior Division), Barsar, District Hamirpur is under challenge in this petition.

2. The Court below has dismissed the application with the observations that the demarcation of the suit land is got conducted by the petitioner-plaintiff during the pendency of the suit and the demarcation report has been affirmed by the competent authority. Also that till the previous demarcation report is in existence and not set aside, no fresh prayer for demarcation of the suit land can be entertained.

3. Interestingly enough, the application Annexure P-1 has been filed for demarcation of the suit land on the ground that the respondent-defendant during the pendency of the suit had encroached upon the suit land for raising construction thereon and also cut a '*Biuhal*' tree therefrom. The demarcation, therefore, is required to find out the extent of the alleged encroachment made by him.

4. Admittedly, the demarcation of the land was conducted by the Field Kanoongo on 15.6.2010 i.e. after filing of the application Annexure P-1. The demarcation report even has been affirmed also by the competent authority on 14.7.2010. Meaning thereby that in view of the demarcation report in existence has been submitted by the Field Kanoongo, after demarcation of the land on the spot at the instance of the petitioner-plaintiff, no permission to demarcate the land afresh could have been granted. Learned trial Judge, therefore, has not committed any illegality or irregularity in dismissing the application.

5. The contentions raised on behalf of the petitioner-plaintiff that in the demarcation conducted on 15.6.2010, the nature and extent of the encroachment has not been pointed out, can be raised in the trial Court during the course of the proceedings in the suit, however, in the given facts and circumstances and for all the reasons recorded hereinabove, the present is not a case where fresh demarcation of the suit land could be ordered. Learned trial Judge has, therefore, rightly dismissed the petition. Being so, the impugned order Annexure A-3 calls for no interference and is hereby affirmed. The petition is dismissed with the above observations. Pending application(s), if any, shall also stand disposed of.

Copy Dasti.

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

Jiwa Nand .....Petitioner.

Versus

State of Himachal Pradesh ......Respondent.

Cr. Revision No. 207 of 2011
Reserved on : 19.04.2017
Date of decision: 26.04.2017

Indian Penal Code, 1860- Section 279 and 338- Accused was driving HRTC Bus in a rash and negligent manner – he struck driver side of the bus with a wall due to which minor R sustained injury on his arm – the accused was tried and convicted by the trial Court- an appeal was preferred, which was dismissed- held in revision that photographs show that there was sufficient space for driving the bus after keeping sufficient distance from the wall – there are scratches on the back side of the bus starting from the rear tyre of the bus – scratches were also visible on the wall against which the driver side of the bus was struck – this shows that the bus was taken to the extreme right side of the Road due to which child sustained injuries – it was the duty of the accused driving the bus to keep in mind the possibility of the passengers having some part of their body outside of the bus – rashness and negligence of the accused was duly proved- revision dismissed. (Para-10 to 14)

Cases referred:

Gujarat State Road Transport Vs. Keshavlal Somnath Panchal, AIR 1981 Guj. 205
Sushma Mitra Vs. M.P. State Road Transport Co., 1974 ACJ 8

For the petitioner: Mr. G.R. Palsra, Advocate.
For the respondent: Mr. Vikram Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge:

By way of this revision petition, the petitioner/accused has challenged the judgment passed by the Court of learned Additional Sessions Judge, Mandi in Criminal Appeal No. 01 of 2009, dated 15.09.2011, vide which learned appellate Court while dismissing the appeal filed by the present petitioner, upheld the judgment of conviction passed by the Court of learned Additional Chief Judicial Magistrate, Court No. 1, Mandi in Criminal Case No.271-II/2005, dated 15.10.2009, whereby learned trial Court had convicted the present petitioner for commission of offence punishable under Sections 279 and 338 of the Indian Penal Code and sentenced him to undergo simple imprisonment for a period of three months and to pay a fine of Rs.1000/- and in

default of payment of fine, to further undergo simple imprisonment for a period of one month under Section 279 of the Indian Penal Code and had further sentenced him to undergo simple imprisonment for a period of six months and to pay a fine of Rs.1000/- and in default of payment of fine, to further undergo simple imprisonment for a period of one month under Section 338 of the Indian Penal Code and had ordered both the sentences to run concurrently.

2. The case of the prosecution was that on 26.09.2005 at around 2:20 p.m., accused was driving HRTC bus bearing registration No. HP-33-5420 in a rash and negligent manner so as to endanger human life and personal safety of others, near Ayurvedic Office, Zonal Hospital, Mandi and had struck the driver side of the bus with a wall, as a result of which, one of the occupant of the bus, namely Rahul, son of Pushap Raj, a minor boy aged about 4 years received grievous injury on his arm, which was dangerous to his life. As per the prosecution, the accident was the result of rash and negligent driving of the accused on a public road, as a result of which, Rahul had received grievous injuries on his person. On the basis of a statement recorded under Section 154 of the Code of Criminal Procedure (Ex. PW8/A) of Lala Ram, FIR Ex. PW11/A was registered at Police Station Sadar, Mandi. On the basis of the said FIR, investigation was carried out. In the course of investigation, site plan of the spot of occurrence of the incident was prepared, the offending bus was taken into possession alongwith its documents. The Investigating Officer took into possession the driving licence of the accused. Shirt of the injured boy was also taken into possession. Investigating Officer also obtained M.L.C. of Rahul and mechanical report of the offending bus was also obtained. Photographs of the site were also obtained by the Investigating Officer and statements of witnesses were also duly recorded under Section 161 of the Code of Criminal Procedure.

3. After completion of investigation, challan was filed against the accused under Sections 279,336, 337 and 338 of the Indian Penal Code. Accordingly, notice of accusation was put to him, to which he pleaded not guilty and claimed trial.

4. Learned trial Court on the basis of evidence placed on record by the prosecution both ocular as well as documentary, held that the prosecution had succeeded in proving the charge against the accused. It was held by the learned trial Court that the prosecution had succeeded in proving on record beyond reasonable doubt that at the time of accident, bus bearing registration No. HP-33-5420 was being driven by the accused in a rash and negligent manner so as to endanger human life and personal safety of others, on account of which, Rahul received fracture injury grievous in nature on his arm due to the rash and negligent driving of the accused, who had struck the driver side of the bus in issue with a wall because of his rash and negligent driving. Learned trial Court held that there was sufficient space on the spot for the accused to have had driven the bus in a proper manner and there was no occasion with the accused to drive the bus in issue in such a manner that it would have struck against the wall on the side of the road from the driver side. Learned trial Court held that the accused was found driving the bus in such a manner that no space was left on his own side between the bus and the wall, which reflected that the accused was driving the bus totally on the wrong side without leaving any space, which resulted the bus striking against the wall and causing grievous injury in the arm of a minor boy. Learned trial Court did not found any merit with the contention of the defence that it was the victim who had put his arm all of a sudden outside the bus. It was held by the learned trial Court that even if said argument was to be believed that the arm of Rahul was outside the bus in question, then also there was no occasion for the accused to have driven the bus in such a manner so as to have struck the same against the wall which was situated on one side of the road and that too with the driver side of the bus. It was further held by the learned trial Court that the factum of the injury having been received by Rahul being grievous injury stood proved by MLC Ex. PW7/A. On these bases, it was held by the learned trial Court that the prosecution had successfully proved its case against the accused for having committed offences punishable under Sections 279 and 338 of the Indian Penal Code.

5. In appeal, the findings so returned by the leaned trial Court were upheld by the learned appellate Court. While confirming the findings of the learned trial Court, it was held by

the learned appellate Court that the statements of PW-1 Mohan Singh, PW-4 Dharma Devi and PW-6 Naresh Kumar clearly and categorically proved that the injuries were received by the child on account of bus which was being driven by the accused having struck against the wall, as a result of which, the arm of the child was fractured. It was further held by the learned appellate Court that the said prosecution witnesses had denied the defence of the accused that the child had extended his arm outside the bus and that the accident occurred on account of the negligence of the child or that the accident occurred as the road was too narrow. Learned appellate Court also held that the testimonies of the said witnesses were also corroborated by the statement of Dr. Virender Singh, who conducted the medical examination of the child. Learned appellate Court also held that photograph Ex. PW8/H demonstrated that there was scratch on the body of the bus, which proved that the side of the bus had hit the wall. It was further held by the learned appellate Court that in fact driver was under obligation to drive the vehicle carefully so as not to hit the objects outside the bus and also had to keep this possibility in mind that the passengers do extend their arms and body parts outside the bus. While relying upon the judgment of the High Court of Gujarat in **Gujarat State Road Transport** Vs. **Keshavlal Somnath Panchal**, AIR 1981 Guj. 205, it was held by the learned appellate Court that the driver has to keep the fact in mind that passengers keep their arms on the window sill and he has to drive the vehicle in such a manner so as not to cause any harm to them. Learned appellate Court has also placed reliance upon the judgment reported in **Sushma Mitra** Vs. **M.P. State Road Transport Co.**, 1974 ACJ 8. On these bases, it was held by the learned appellate Court that the accused had not taken the said precaution and the same thus clearly demonstrated that the accused was negligent. Learned appellate Court concluded that learned trial Court had rightly held accused to be negligent in driving the bus, as a result of which, the bus had hit its side with the wall. It further held that the factum of the child having suffered grievous injury on his arm on account of the accident stood duly proved and corroborated by the prosecution witnesses as well as the testimony of Dr. Virender Singh and the photographs on record. Thus, learned appellate Court while upholding the judgment of conviction passed by the learned trial Court, dismissed the appeal so filed by the present petitioner.

6. Feeling aggrieved, the petitioner has filed this appeal.

7. Petitioner has primarily assailed the judgment passed by both the learned Courts below on the ground that both the learned Courts below erred in not appreciating that the accident in fact had taken place on account of the negligence of the child and not on account of the negligence of the driver, as had been concluded by both the learned Courts below. This as per the petitioner was the perversity with the findings so recorded by both the learned Courts below against him and on these bases, it was prayed on behalf of the petitioner that the judgment of conviction passed against him by both the learned Courts below be set aside. No other point was urged.

8. On the other hand, Mr. Vikram Thakur, learned Deputy Advocate General submitted that there was neither any perversity nor any illegality with the findings of conviction so returned against the petitioner by both the learned Courts below, as it stood proved on record beyond doubt that the accident in fact had taken place on account of rash and negligent driving of the bus by the present petitioner and the accident had not taken place due to the alleged negligence of the child, who was injured in the accident. Accordingly, it was prayed on behalf of the State that as there was no merit in the case, the same be dismissed.

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

10. In order to satisfy the judicial conscious of the Court as to whether the accident had taken place due to rash and negligent driving of the present petitioner or on account of the negligence of the child, who had suffered injuries in the accident, this Court perused the statements of prosecution witnesses as well as the evidence on record to find out as to whether there was any perversity in the finding of conviction recorded against the petitioner by both the learned Courts below or not.

11. Photographs of the site of accident are on record as Ex. PW8/C, Ex. PW8/D, Ex. PW8/E, PW8/F, PW8/G and Ex. PW8/H. A perusal of these photographs demonstrates that though the road at the place where the bus had struck against the wall is not very wide, but there was adequate space for the said bus to be driven by keeping sufficient distance from the wall. Besides this, a perusal of these photographs demonstrate that it is not as if the child suffered injury because his arm was extended outside the window which struck against the wall despite there being adequate distance between the bus and the wall. Photographs also demonstrate that there are scratches on the back side of the bus starting from the rear tyre of the bus as well as on the wall against which the driver side of the bus was struck. This proves that the bus in fact was driven by the driver in such a manner that rather than keeping the same towards the left side of the road, the driver drove the same to extremely right side of the road, which resulted in the driver side of the bus striking against the wall which was on the right side of the road, as a result of which, the minor child travelling in the bus suffered grievous injuries.

12. A perusal of the site map which is Ex. PW8/B also demonstrates that there was sufficient road available at the site for the accused driver to have had driven the bus without brushing against the wall which was on the driver side of the bus had the bus been driven by him in a prudent manner. Besides this, statement of Dharma Devi (PW-4), mother of the minor child who had received injuries on account of rash and negligent driving of the accused, also categorically deposed in the Court that her son suffered injuries on account of the bus having struck against a wall, which was on the driver side of the bus. Though this witness was subjected to lengthy cross-examination by the defence, however, her credibility could not be impeached by the defence and from her cross-examination, nothing could be elicited by the defence so as to establish that that the accident in fact took place on account of the negligence on the part of the child or on account of mother of the child, i.e. PW-4. PW-6 Naresh Kumar deposed that the accused had struck the bus against the wall on the driver side of the bus, as a result of which the child who was passenger in the bus had suffered injuries. In his cross-examination, this witness denied the suggestion that there was no negligence of the driver in the accident. PW-7 Dr. Virender Singh has stated in the Court that he had medically examined the child and that the injuries suffered by him were grievous in nature.

13. In my considered view, the findings of conviction returned against the present petitioner by the learned trial Court and affirmed by the learned appellate Court can neither be said to be perverse nor it can be said that the findings so returned by both the learned Courts below are not borne out from the records of the case. As is evident even from the above discussion, the evidence placed on record by the prosecution both ocular as well as documentary clearly demonstrates that the accident in fact took place due to rash and negligent driving of the accused, because it was the duty of the accused who was driving the bus to have had driven the bus in such a manner so as to keep in mind the factum of its passengers having some part of their body outside the bus. It is apparent and evident from the evidence on record that it is not as if there was some reasonable gap between the bus and the wall which was on the driver side of the bus. Had that been the case and had the child suffered injuries in such a situation, then probably this Court could have given benefit of doubt to the driver. However, as is evident from the evidence on record, in the present case, the bus was driven by the present petitioner in such a manner that he struck the driver side of the same with a wall which was on the driver side of the bus despite there being enough space on the road for having had driven the bus in such a manner that there was adequate space between the driver side of the bus and the wall on the said side of the bus. Therefore, in the present case, it is evident that the accident in fact took place due to rash and negligent driving of the bus and the same cannot be attributed to the minor child who suffered grievous injury on account of the said accident. It is pertinent to mention here that this Court is also not oblivious to the fact that in exercise of its revisional jurisdiction, this Court is not to re-appreciate the evidence *per se* and all that this Court has to see is that as to whether there is any perversity in the findings recorded by the learned Courts below or not and whether the view taken by learned Courts below was a possible view in light of evidence on record.

14. In my considered view, as I have already mentioned above, a perusal of the records demonstrate that the findings returned by both the learned Courts below are duly borne out from the records of the case and the same thus cannot be said to be perverse.

15. Hence, in view of my discussion held above, as there is no merit in the present revision, the same is accordingly dismissed.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, ACTING CHIEF JUSTICE AND HON'BLE MR. JUSTICE, SANDEEP SHARMA, JUDGE.

Om Prakash … Petitioner

Versus

State Election Commission Himachal Pradesh & others …Respondents

CWP No. 815 of 2017-B
Date of Decision : April 27, 2017

Constitution of India, 1950- Article 226-The Notification providing calendar for preparation of electoral roll has been issued- any aggrieved person can approach the authority for inclusion/exclusion of the names from the rolls – parties can file their claims/objections, which would be considered by the authority concerned – petition disposed of. (Para-2 to 6)

For the petitioner : Mr. Rajnish Maniktala, Advocate, for the petitioner.
For the respondent : Ms. Nishi Goel, Advocate, for respondent No. 1.
Mr. Shrawan Dogra, Advocate General with Mr. Anup Rattan and Mr. Romesh Verma, Addl. Advocate Generals and Mr. J. K. Verma, Dy. A.G. for respondent No. 2.
Mr. Hamender Chandel, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Sanjay Karol, ACJ. (Oral)

Learned Advocate General invites attention of this Court to the notification dated 11th April, 2017, providing the following calendar for preparation of electoral rolls:

1.	Draft publication of electoral rolls	11.04.2017
2.	Period for filing claims and objections before the Revising Authority	12.04.2017 to 21.04.2017.
3.	Period for deciding claims and objections by the Revising Authority	Within five days from the filing of claims and objections.
4.	Period for filing appeals before the Electoral Roll Registration Officer	Within three days from the order passed by the Revising Authority
5.	Period for deciding appeals by the Electoral Roll Registration Officer	Within three days from filing of appeal
6.	Final publication of electoral rolls	On or before 4th May, 2017.

2. He further states that by virtue of the statutory provisions, every person aggrieved, including the petitioner, can approach the authorities concerned for inclusion/exclusion of their names from the electoral rolls in respect of various wards of Municipal Corporation, Shimla.

3. For whatever reason, if names of eligible voters stand excluded or erroneously included, we find that there is a statutory remedy. Prior to the publication of the final electoral roll, parties can file claims/objections which mandatorily are required to be dealt with in accordance with law. Every eligible voter has a right for inclusion of his name in the electoral rolls. As such, we are of the considered view that this fact requires to be widely publicized. The voters are required to be informed and educated of their valuable rights. As such, in the given facts and circumstances, we direct respondents No. 1 and 3 to give wide publication, both in electronic and print media, informing the voters of such rights and passing of this order.

4. We further direct that the Deputy Commissioner, Shimla (Respondent No. 2) as also Election Commissioner (Respondent No. 1), for the purposes of receiving objections/applications would not only keep their offices open on 30.4.2017 and 1.5.2017 but would also ensure and make adequate arrangements of opening up of at least five centers, with respect to 35 wards for which elections to the Municipal Corporation, Shimla are scheduled to be held. This would only facilitate the voters in filing appropriate applications, to be decided in accordance with law.

5. We further direct that such of those applications which are received by the authorities, both in their offices and at such centers, shall be considered and decided by the competent authority, strictly in accordance with law.

6. We find that petition under Section 24 of the Himachal Pradesh Municipal Corporation Election Rules, 2012 (Annexure P-40) is yet pending against respondent No. 1. Ms. Nishi Goel, learned counsel for respondent No. 1 states that the same shall be considered and decided in accordance with law, well before 4th May, 2017. Petitioner undertakes to fully cooperate in adjudication thereof.

7. In the aforesaid terms, present petition is disposed of , as also pending application(s), if any.

Authenticated copy of the order be supplied to the learned counsel for the parties today itself.

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